

Selection, Eligibility and Exemption of Jurors

FINAL REPORT

Project No 99

April 2010

Law Reform
Commission of
Western Australia

The Law Reform Commission of Western Australia

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ISBN: 978-1-74035-072-3

Printed by Quality Press, Western Australia

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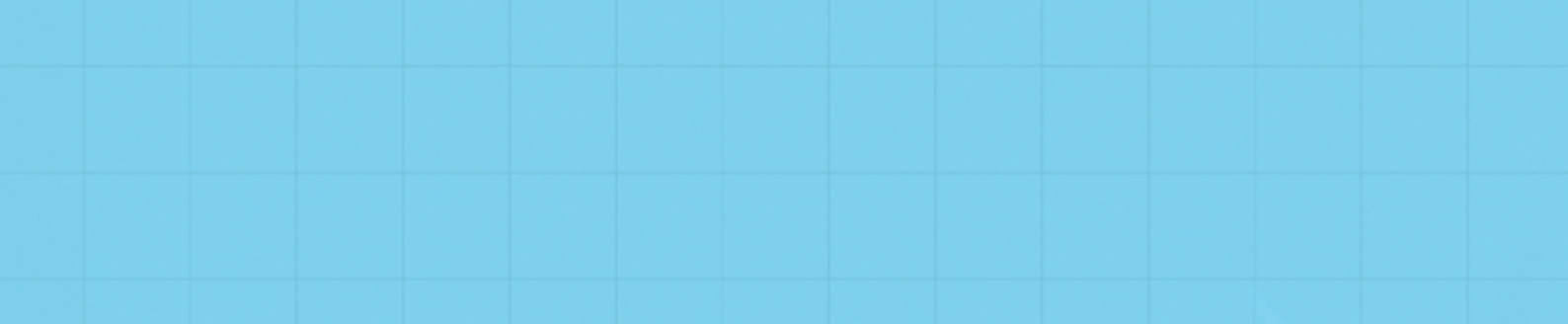
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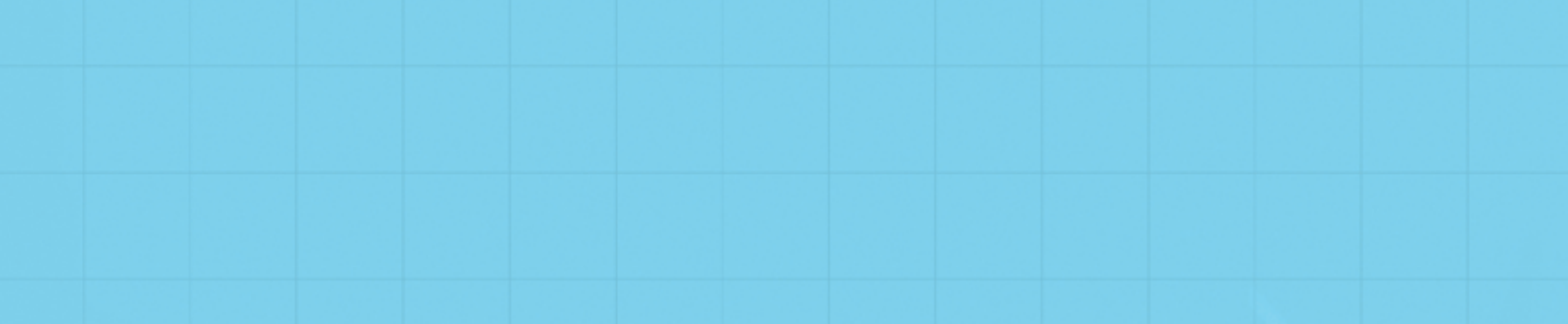
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The Commission wishes to thank Western Australia's Jury Manager, Mr Carl Campagnoli, for his invaluable assistance in providing relevant data and information for this Final Report.



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A Consultation Paper was released in September 2009 to seek the views of the public and, in particular, from those involved with the selection of juries in Western Australia. The Commission made 51 proposals for reform and posed 13 consultation questions on a range of issues in relation to existing jury selection processes.

The Commission received 44 submissions and consulted with other individuals and organisations listed in Appendices B and C of this Report. The Commission carefully appraised all the submissions received before arriving at 68 final recommendations to Parliament for reform to improve the current process of juror selection. In making these recommendations the Commission was guided by seven key principles which included community representation and broad participation of competent, impartial members of the community.

Research by the Commission established the incidence of excuse from jury service and failure to attend in response to a juror summons was unacceptably high. The Commission recommends abolishing excuse ‘as of right’ for certain professions and other groups in the community; reducing the categories of occupational ineligibility; tightening the grounds for excuse for cause; and introducing a system of deferral of jury service. Although the Commission recommends that a number of occupational groups and others will no longer have an automatic right to be excused, the Commission has also made a recommendation that will enable such people to apply to be excused before the court summons date if a summoning officer rejects their excuse.

An interesting debate arose in the media during this reference as to whether police should be eligible to serve on juries. The Commission recommends that the current ineligible status of police officers during their term of employment and for five years thereafter should be retained. The Commission’s view is that police are intimately involved in the criminal investigation and prosecution process. While a particular police officer included in a jury panel may not have a demonstrable or actual bias in relation to the accused, it is the Commission’s view that the perception of bias would be enough to unduly threaten public confidence in the impartiality and fairness of the criminal justice system.

In relation to the grounds for excuse for cause, the Commission recommends that in order to be excused from jury service the person summoned must establish that jury service would cause substantial inconvenience to the public or undue hardship or extreme inconvenience to a person. The Commission also recommends clarification of the power to excuse individuals from jury service where the summoning officer or the court is of the view that the person should not undertake jury service in particular circumstances.

One aspect of the jury selection process that has been subject to controversy is the process of peremptory challenge. Submissions received for this reference indicate that there is substantial support for the retention of peremptory challenges in Western Australia. The Commission agrees that they should be retained but also recommends that in trials involving multiple co-accused the state should have an equal number of peremptory challenges as the total available to all co-accused.

I would like to thank, in particular, my fellow Commissioner Rob Mitchell SC who has been part of this reference from the Consultation Paper to the Final Report. This reference was started under the previous Chair of the Commission, Gillian Braddock SC, and Commissioner Ilse Peterson. I would like to acknowledge their initial input into the scope of this reference. Joe McGrath made important contributions to the Consultation Paper before being appointed as Director of Public Prosecutions in February 2010. We wish him well in his new role. Commissioner Richard Douglas has recently been appointed to the Commission and thus came to this reference at the eleventh hour and graciously gave his input into this Report.

I would like to recognise the patient and supportive cooperation from Western Australia’s Jury Manager, Mr Carl Campagnoli. The Commission also extends its gratitude to the Sheriff’s office, court personnel and others involved with jury selection within Western Australia who voluntarily provided their time and expertise. I would also like to acknowledge and thank all those who made submissions to the Commission.

Finally, my fellow Commissioners and I would like to especially thank the authors of this report, Dr Tatum Hands and Victoria Williams. Their skills in research

and writing continue to set an excellent standard for the Commission. We thank them for their hard work under significant time pressures. The Final Report was prepared as early as March 2010; however, publication was delayed because Commissioner Joe McGrath had been appointed DPP and the Commission did not have a quorum for a number of months.

Executive Officer Heather Kay and Project Manager Sharne Cranston administered the project and provided excellent support to the Commissioners. Thanks also to our technical editor Cheryl MacFarlane for designing the layout of this publication. We were fortunate to have such a talented and dedicated team working on this important reference.

Mary Anne Kenny
Chair

May 2010

Introduction

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TERMS OF REFERENCE

In late 2007 the Law Reform Commission of Western Australia ('the Commission') was given 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 matter was referred to the Commission by former Attorney General, the Hon Jim McGinty MLA, 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 reiterated by the current Attorney General, the Hon Christian Porter MLA¹ for whom this Final Report has been prepared.

THE DISCUSSION PAPER

In September 2009 the Commission released a Discussion Paper examining relevant aspects of juror selection. The Discussion Paper set out the history of jury trials in Western Australia, examined the objectives of juror selection, and provided an overview of the current law and practice in this area. Importantly, the Discussion Paper set out the Commission's six guiding principles for reform,² which reflect the objectives of community representation and broad participation of competent, impartial members of the community in

jury service. Each of these objectives seeks to enhance public confidence in the criminal justice system.

Proposals for reform

Applying its guiding principles, the Commission presented 51 proposals for reform of law and policy in relation to the selection, eligibility and exemption of jurors. The proposals were formulated after examination of available research and data from all Australian jurisdictions, New Zealand and the United Kingdom. The Commission also consulted widely with those involved in the jury selection process in Western Australia and in other jurisdictions.

The Commission's proposals covered such matters as who should be eligible for jury service; the process for selecting and empanelling jurors; the age at which people should no longer be considered liable for jury service; the concepts of eligibility and qualification for jury service; the criteria upon which people may be excused from jury service; issues specific to regional areas; the participation of Aboriginal people and people from culturally and linguistically diverse backgrounds in jury service; protection of juror employment; and the enforcement of juror obligations. A further 13 issues, on which the Commission did not have a firmly held opinion, were presented as 'invitations to submit'. These included questions such as whether the current jury districts should be extended in certain regional areas and whether the number of peremptory challenges available to co-accused in a trial should be reduced.

ABOUT THIS FINAL REPORT

The Commission received 44 submissions in response to its Discussion Paper.³ Submissions were received from a cross-section of interested parties including individuals, government agencies, courts and community organisations. These submissions have been carefully considered by the Commission in arriving at its final recommendations to Parliament in respect of this reference. In some cases the Commission has undertaken further consultation with stakeholders on matters arising from submissions to the Discussion Paper.

1. Porter CC, 'Juries in Western Australia' (2009) 7 *Western Australian Bar Association Review* 2; 'Jury Duty Crackdown', *The West Australian* (1 March 2009) 3.
2. See Chapter One, 'Guiding Principles for Reform'.

3. See Appendix B for a list of individuals, agencies and organisations that made submissions to this reference.

This Final Report is presented in seven chapters as follows:

Chapter One provides some background to the reference, highlights the objectives of juror selection and discusses the Commission's approach to reform of the law in this area.

Chapter Two details the Commission's recommendations to improve the processes of summoning, selecting and empanelling jurors, and addressing issues of jury representativeness in regional Western Australia.

Chapter Three sets out the Commission's recommendations regarding who should be liable to serve as a juror in Western Australia.

Chapter Four refers to the detailed discussion of the categories of occupational ineligibility for jury service in the Commission's Discussion Paper. It sets out the recommendations for reform of the law in this area with a focus on achieving broadly representative, independent and impartial juries.

Chapter Five refers to the detailed discussion in the Discussion Paper about the factors that will render a person not qualified for jury service. It contains the Commission's final recommendations on reform of s 5(b) of the *Juries Act* to address the qualification of jurors who have criminal histories or who are physically or mentally incapacitated.

Chapter Six sets out changes to the *Juries Act* to address the high level of excuse currently permitted under this Act. Recommendations are made to remove the current construction of excuse 'as of right' and improve the process for excuse for cause. This chapter also sets out the Commission's recommendation to introduce deferral of jury service as a potential means of dealing with valid but temporary excuses.

Chapter Seven addresses issues with allowances for jury duty, protection of employment and enforcement of juror obligations, and sets out the Commission's recommendations in each of these areas.

This report is intended to be read in conjunction with the Commission's Discussion Paper, which contains more-detailed descriptions of the history of juries and the juror selection process, as well as presenting the research and analysis that supported the Commission's proposals and is similarly relevant to the Commission's final recommendations set out in this report. The Commission has made a total of 68 recommendations in this Final Report. For ease of reference, a list of recommendations is set out in Appendix A.

Chapter One

The Commission's Approach

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Juries in Western Australia

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.¹ Indeed, public confidence in the criminal justice system has been shown to be enhanced by the public's participation as jurors.²

The *Juries Act 1957* (WA) sets out the current 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, in Perth alone, the incidence of pre-attendance excuse (approximately 50%) and failure to attend (14%)³ pursuant to a jury summons is unacceptably high and

it is this that triggered the Commission's review of the provisions that govern juror selection, eligibility and excuse in the *Juries Act*.

DISPELLING POPULAR MYTHS ABOUT JURY SERVICE

Juries are a popular media topic. A number of cases in recent years have inspired vigorous public debate in Western Australia about the continuing viability and value of the jury system.⁴ While the Commission was not mandated to inquire into the continuing role of the jury system in Western Australia,⁵ it did consider popular criticisms of juries impacting upon the laws governing juror selection.

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 'housewives' and the unemployed.⁶ 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.⁷ Again, data analysed by the Commission showed that this criticism could not be sustained. Of the 1,985 people who responded to the juror survey in 2008–2009, 25% were employed in the public sector with 3% self-funded retirees and 2% students.⁸ The majority (57%) of respondents were employed

(WA), *Jury Information System Statistic Report: Breakdown of Juror Excusals – Perth Jury District 2009* (2010).

1. *Brown* (1986) 160 CLR 171, 197 (Brennan J).

2. Research in several Australian jurisdictions, including Western Australia, supports this proposition: see discussion of research and data below under 'Objectives of Juror Selection: Participation'. In its submission to the Commission's Discussion Paper, Legal Aid argued that 'juries play an important role and are inextricably linked to the level of public confidence in our [criminal justice] system': Legal Aid Western Australia, Submission No 18 (4 January 2010) 2.

3. Of the 53,000 people summoned for Perth in the 2009 calendar year, 26,264 were excused prior to summons and 7,316 failed to attend pursuant to summons. A further 3,434 people summoned were not eligible or not qualified for jury service (whether by virtue of their criminal history, physical or mental incapacity, lack of understanding of English or ineligible occupations) and 2,213 people were not served or had their summons withdrawn prior to attendance. Sheriff's Office

4. 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).

5. For further discussion on this point, see LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 3.

6. 'DPP Backs Overhaul of Jury Selection System', *The West Australian* (24 March 2009).

7. 'Porter Flags Switch to "Expensive" Jurors', *The West Australian* (19 March 2009).

8. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire Perth 2008–2009* (2009).

in the private sector representing an extremely diverse occupational cross-section of the community including professionals (eg, architects, engineers, accountants and scientists); managers, supervisors and administrators; tradespersons; technicians (eg, laboratory technicians, surveyors, IT and software engineers, graphic designers and geo-technicians) and salespersons.⁹ Further, recent research undertaken by the Jury Research Unit at the University of Western Australia shows that more than half the respondents in the Jury Experience Project were educated to post-secondary level.¹⁰

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 found that Western Australia has the most generous system of juror loss of income reimbursement in Australia, covering actual loss of earnings for self-employed jurors and actual wages for employed jurors.¹¹

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.¹² In the Commission's view, jury service is an important civic responsibility that should be shared, as far as possible, by the whole community.

OBJECTIVES OF JUROR SELECTION

The Commission's Discussion Paper outlines five interrelated goals of the juror selection process: representation, independence (supported by random selection), participation, competence and impartiality.¹³ Each of these goals ensures that the parties in a

criminal trial and the public at large have confidence in the trial process and the final verdict. This in turn promotes public confidence in the justice system. From these objectives, the Commission distilled six guiding principles for reform of the jury selection process.¹⁴ In order to understand how the Commission arrived at its guiding principles and how they have influenced the Commission's final recommendations in this Report, it is worth revisiting the objectives of juror selection.

Representation

Representation is generally considered to be the principal concept guiding juror selection¹⁵ and this objective gained significant support among those who provided submissions in response to the Commission's Discussion Paper.¹⁶ The notion of 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 have been 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) combine

9. Sheriff's Office (WA), *Juror Reimbursement Claims Occupation Breakdown: January–March 2009* (2009).

10. Being completion of a university undergraduate or postgraduate degree or TAFE certificate or diploma: Jury Research Unit, University of Western Australia, *Jury Experience Project Interim Report* (2009) 32–3.

11. See LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 126.

12. In four jury districts—Kununurra, Broome, Derby and Carnarvon—all enrolled voters between the ages of 18 and 70 years are automatically listed as prospective jurors each year.

13. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Project No 99, Discussion Paper (September 2009) 14–16. See also NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 55 and NSWLRC, *Jury Service*, Issues Paper No 28 (2006) 13–14.

14. See below, 'Guiding Principles for Reform'.

15. *Cheatle v The Queen* (1993) 177 CLR 541, 560. 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. For example, representation was considered to be a primary concern of the submissions of the Department of the Attorney General, Legal Aid WA, Law Society of Western Australia, District Court and Supreme Court of Western Australia, and the Office of Multicultural Interests.

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.

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 In order to maximise the representative nature of juries in Western Australia the Commission has recommended that ‘as of right’ excuses be abolished.²⁵ In addition, the Commission has sought to limit, as far as practicable, the categories of persons who are ineligible for jury service without compromising the integrity of the jury. Other recommendations designed to enhance the representative nature of juries include a recommendation to raise the age of liability for jury service to 75 years; recommendations to facilitate jury service by people with disabilities; and various recommendations made to improve the juror selection process in regional areas so that more Western Australians can participate in jury service.²⁶

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.²⁷ Importantly, it provides protection for an accused against the potential for a jury to be chosen by the prosecution or the state.²⁸

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 Chapter Two, Recommendations 10–13.
23. Such as people with 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 physical incapacity that prohibits them from discharging the duties of a juror.
24. See *Juries Act 1957* (WA) Sch 2, Pt II.
25. Instead, applications to be excused from jury service will be assessed on a case-by-case basis (see Recommendation 60).
26. See, respectively, Recommendations 16, 56, 57, 12 & 13.
27. *Cheatle v The Queen* (1993) 177 CLR 541, 560–61.
28. *Ibid*.

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.²⁹ In Western Australia, as in all other Australian jurisdictions, exempt occupations include judges, serving police officers, lawyers and members of Parliament.

All Australian jurisdictions have an express statutory provision requiring that the process of selection of prospective jurors be done randomly.³⁰ As explained in the Commission’s Discussion Paper,³¹ 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. Random selection is somewhat compromised by the concepts of excuse, qualification and eligibility, as well as the right of peremptory challenge.³² However, these ‘compromises’ are minor overall and are essential for the fair operation of the jury system to allow those who—by reason of perceived partiality, undue hardship or connection with the criminal justice system—cannot or should not serve on a jury to be excluded.

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.³³ 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.³⁴ In Western Australia, a survey of jurors undertaken by the Sheriff’s Office for the 12 months

29. See *Juries Act 1957* (WA) Sch 2, Pt I.
30. *Juries Act 1957* (WA) ss 14(2) & 32C; *Jury Act 1967* (ACT) s 24; *Juries Act 2000* (Vic) s 4; *Jury Act 1995* (Qld) ss 16 & 26; *Jury Act 1977* (NSW) s 12; *Juries Act 2003* (Tas) s 4; *Juries Act 1927* (SA) ss 23 & 29; *Juries Act* (NT) s 27. The only truly 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.
31. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Project No 99, Discussion Paper (September 2009) Ch 2.
32. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (September 2001) 137; NSWLRC, *Jury Service*, Issues Paper No 28 (2006) 13. Although it is important to note that, despite the exclusion of some people from jury service, those who ultimately serve as jurors have still been randomly selected.
33. 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.
34. Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 148–50.

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.³⁵

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.³⁶ Indeed, civic responsibility is the reason most consistently cited by Western Australian jurors for wanting to perform jury duty.³⁷ 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.³⁸ 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.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 in England 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 has been 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 and recommendations to this effect are made in this Report.

Competence

It is perhaps self-evident that individual jurors should be 'competent in the sense that they are ... 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' or is unable to understand the English language.⁴³ These qualifications on eligibility to serve as a juror are crucial to protect the interests of the accused, as well as the jury system as a whole. However, the Commission has determined that 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 *competence* to discharge the duties of a juror; although it may—for reasons of inadequate facilities, the particular circumstances of the trial, or inconvenience or hardship to the individual—be sufficient to excuse a person from serving as a juror.⁴⁴

Competence can also refer to the effectiveness of the jury as a fact-finding tribunal. The New South Wales Law Reform Commission 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 The Commission agrees with this view.

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 Victorian Parliamentary Law Reform Committee 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 Matters that might affect a juror's impartiality include acquaintance with the accused, a witness or a legal practitioner engaged in the

35. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (June 2009). Seven per cent of respondents provided no response to this question.

36. LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 13.

37. 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: Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009).

38. Horan J & Tait D, 'Do Juries Adequately Represent the Community?' (2007) 16 *Journal of Judicial Administration* 179, 184.

39. See NSWLRC, *Jury Selection*, Report No 117 (2007) 14–15.

40. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (September 2001) 140.

41. These districts are Kununurra, Carnarvon and Derby: Carl Campagnoli, Jury Services Manager, email (15 February 2008).

42. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 55.

43. *Juries Act 1957* (WA) ss 5(b)(iii) & 5(b)(iv).

44. See 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 No 32 (1998) 56.

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 may be the basis for exercising the right to challenge a prospective juror. The process of challenging jurors and the issue of jury vetting are discussed in more detail in the following chapter.

Significantly, the Commission emphasises that a perception of bias may well be just as damaging to public confidence in the justice system as the presence of actual bias. It has been observed that:

[I]t is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done.⁴⁹

The need to reduce any perception of bias underpins many of the Commission's recommendations in this Report.⁵⁰

GUIDING PRINCIPLES FOR REFORM

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. With reference to the above objectives, the Commission has devised six guiding principles for reform to encourage wide participation on juries and to preserve the fundamental characteristics of juries as independent, impartial, competent and broadly representative lay tribunals.

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.⁵¹

48. *Juries Act 1957* (WA) Sch 4.

49. *Webb & Hay v R* [1994] HCA 30, [9] (Mason CJ & McHugh JJ).

50. For example, the Commission's recommendations that judicial officers, police officers and Corruption and Crime Commission officers should be ineligible for jury service and the Commission's recommendation that peremptory challenges should be retained: Recommendations 3, 20, 34 & 35.

51. 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

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
- (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.⁵²

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.

shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.

52. 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 recommended reforms to the *Juries Act 1957* (WA) sch 3. For discussion of these reforms and the recommended re-formulation of the Third Schedule, see Chapter Six.

Submissions to the Commission's Discussion Paper showed broad support for these six principles. However, a joint submission from the District and Supreme Courts of Western Australia argued that there should be a seventh principle: that 'the process of jury selection should be manifestly fair'.⁵³ Although the Commission understood this fundamental sentiment to be assumed in the guiding principles, it agrees that it is appropriate to expressly identify this as a principle guiding the Commission's recommendations for reform.

7 Principle 7 – the process of jury selection should be manifestly fair

All aspects of the jury selection process should be, and be seen to be, fair. While it is obviously important for both the accused and the state to perceive that the jury has been selected in a fair manner, it is also important that the jury selection process is fair for members of the community who are called upon to perform this important civic duty.⁵⁴

A principled approach

The Commission has applied the above principles in its examination of the parts of the *Juries Act* that deal with juror selection. These principles, together with the submissions received by the Commission in response to its Discussion Paper, have guided the final recommendations that are contained in this Report.

For example, ineligibility 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 may not be perceived as, properly independent of the state or the administration of justice. This category reflects both Principles 1 and 2. In its Discussion Paper, the Commission examined each type of occupational ineligibility with regard to the underlying rationales expressed in these principles. The Commission approached its proposed reforms 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 bulk of submissions to the Commission's Discussion Paper concerned one or more of these categories of occupational eligibility and overall these submissions were extremely supportive of the Commission's proposals. The submissions and final recommendations in respect of each occupational category are detailed in Chapter Four of this Final Report.

Presently the *Juries Act* includes age in the category of eligibility. In its Discussion Paper, the Commission expressed its opinion that age would be better understood as a characteristic rendering a person liable to serve as a juror. There were no dissenting submissions to treatment of age as a factor influencing liability to serve as a juror and, in recognition of Principles 2 and 3, the overwhelming majority of submissions favoured increasing the age for jury service. These submissions and the Commission's final recommendations are discussed in Chapter Three.

As the Discussion Paper made clear, in the Commission's view the concept of qualification for jury duty is properly based in the concepts of competence and impartiality. It is therefore an expression of Principle 1. Qualification is the concept that currently excludes people who have a permanent incapacity of body or mind or who do not understand English (competence) and those with certain criminal convictions (impartiality). This category of exclusion is another which received a large number of submissions and the Commission's conclusions in this regard are set out 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 specific 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 makes recommendations to simplify the category of excuse by abolishing excuse as of right and introducing a process of deferral of jury service. The proposed reforms in this chapter primarily reflect Principle 3.

Principles 4, 5, 6 and 7 are applicable to all categories of exemption. These principles impact strongly in the Commission's recommendations in relation to compilation of jury lists and regional issues in Chapter Two, and juror allowances, protections for employment and enforcement of juror obligation in Chapter Seven.

53. District and Supreme Courts of Western Australia, Submission No 19 (24 December 2009).

54. Consistent with this principle, the Commission recommends that people who have been summoned for jury service should be permitted to make an application to be excused from jury service before the jury summons date in order to minimise potential inconvenience and to ensure that a potential juror who has unsuccessfully applied to the sheriff's office to be excused can seek a determination before the trial date: see Chapter Six, Recommendation 62.

Chapter Two

The Juror Selection Process

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Selecting and summoning jurors

CHAPTER Two of the Commission's Discussion Paper provided a detailed account of the juror selection process in Western Australia. This included descriptions of the method used for compiling the lists of potential jurors, the pre-court summoning and selection process, and the final in-court empanelment and challenge process. Proposals for reform were made in relation to issues from accommodating withdrawal of juror summonses to the amount of information about jurors that should be available to parties in a criminal trial.

The Commission does not intend to repeat the detailed description of the juror selection process in this Report. Instead, a very brief description of the current selection process is recited below. This is followed by a detailed consideration of submissions received in response to the reforms proposed in the Commission's Discussion Paper and presentation of the Commission's final recommendations.

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 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 Commonwealth territories of Cocos Islands and Christmas Island and are rarely used.²

The sheriff provides the Electoral Commissioner with an estimated number of jurors required for each jury district³ and a corresponding number of electors who are liable⁴ for jury duty are selected by a computerised process from the current electoral roll. Once the jury 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.⁵

Each week the required number of potential jurors for impending trials is randomly selected from the jurors' book by computer. At this point a process is undertaken by the sheriff's office to check each prospective juror's name against the state criminal record database for relevant criminal convictions that would 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.⁶ Those prospective jurors who appear qualified to serve are sent a summons to attend court on a specified date for jury service. Bearing in mind that there is a delay between the time that a summons is sent and the time that prospective jurors attend court for jury service, the summons requires jurors to advise the sheriff's office if they think they might be disqualified from jury service by reason of their criminal record. It also requires potential jurors to advise the sheriff's office if they think they suffer from a physical or mental incapacity that may impact on their ability to do jury service or because they do not

1. A jury district comprises one or more electoral districts of the Legislative Assembly: *Juries Act 1957* (WA) s 10(2).
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 a jurors' book is created from the Commonwealth electoral roll for Lingiari.

3. 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. 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.
4. Liability for jury service is discussed in greater detail in Chapter Three.
5. 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).
6. Approximately 6–10 in every 1000 prospective jurors are disqualified for relevant criminal convictions. For further discussion of disqualification on the basis of criminal history, see Chapter Five.

understand English⁷ or if they believe they are ineligible for jury service by reason of their age⁸ or occupation.⁹

A potential juror can apply to be excused from jury service if he or she has a right of excuse expressed under the *Juries Act*. A person can be excused as of right¹⁰ if he or she is a specified practising health professional or an emergency services staff member or a person who has taken holy orders.¹¹ A person also has the right to be excused if he or she is 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.¹² 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.¹³

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.¹⁴ The sheriff's officer may excuse the person from further attendance at that time. A computerised ballot is then undertaken to determine the jury panels 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 people¹⁵ are randomly selected from the jury panel 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 seeks to be excused.¹⁶ 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 from further attendance by the judge or may otherwise be challenged¹⁷ by counsel for the prosecution or the defence before being sworn as a juror.

REFORMS TO THE PRE-COURT SELECTION PROCESS

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.¹⁸ 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 proposed 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). Submissions received by the Commission in respect of this proposal showed unanimous support¹⁹ and the Commission makes the following recommendation.

7. *Juries Act 1957* (WA) s 5(b). For further discussion, see Chapter Five.
8. Although the computerised process that generates jury lists from the electoral roll only returns people between the ages of 18 and 70, occasionally a person who was 69 at the time the jury list was generated has reached the age of 70 by the time he or she is summoned to serve. Persons aged 70 and above are not eligible to serve as a juror under the *Juries Act 1957* (WA) s 5(a)(ii). The Commission recommends raising the age limit for jury service and this is discussed in Chapter Three.
9. Ineligible occupations currently include judges, police officers, lawyers, prison officers, members of Parliament and other occupations that are generally connected to the administration of justice. The Commission makes recommendations about what occupations should continue to be ineligible for jury service in Chapter Four.
10. That is, people who fall into the categories listed in schedule 2, part II of the *Juries Act 1957* (WA) have the choice whether or not to do jury service when summonsed.
11. *Juries Act 1957* (WA) sch 2, pt II. For further discussion, see Chapter Six.
12. *Juries Act 1957* (WA) sch 2, pt II. For further discussion, see Chapter Six.
13. *Juries Act 1957* (WA) sch 3. For further discussion, see Chapter Six.
14. *Juries Act 1957* (WA) ss 32FA & 34B.

15. Often, in practice, one or more 'reserve' jurors will be selected to hear the evidence in case a juror is discharged (eg, because of illness) during the trial. If they are not required, reserve jurors are discharged prior to the jury retiring to consider its verdict.
16. 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, consultation (7 December 2008). For further discussion of this process, see Chapter Six, 'The Application Process'.
17. For discussion of challenges and the empanelment process, see below, 'Jury Empanelment'.
18. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, telephone consultation (29 June 2008).
19. Submissions received from the Western Australian Electoral Commission; Jury Research Unit (UWA); Department of the Attorney General (WA); Law Society of Western Australia;

RECOMMENDATION 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.

RECOMMENDATION 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 purpose of reducing the number of persons required to attend the jury pool.

Withdrawal of juror summons

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. In its initial consultations the Commission was 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. In the interests of saving time and money, the Commission proposed in its Discussion Paper that this process be computerised. Submissions received by the Commission in respect of this proposal showed unanimous support²¹ and the Commission makes the following recommendation.

Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Anne Bailey; Office of the Director of Public Prosecutions (WA); Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC.

20. *Juries Act 1957* (WA) s 32E.

21. Submissions received from the Jury Research Unit (UWA); Department of the Attorney General (WA); Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Anne Bailey; Carl Campagnoli, Manager Jury Services (WA); Gillian Braddock SC.

Jury empanelment

THE empanelment of a jury commences with an in-court ballot to select the required number of jurors for a particular trial. When a prospective juror's identification number is called by the Clerk of Arraignment, that person is required to proceed to the jury box. Prospective jurors may be excused from further attendance at this stage by the presiding judge or they may be challenged (either for cause or peremptorily) by the prosecution or the defence. Where prospective jurors are challenged or excused, additional juror numbers are randomly called until the required number of jurors is seated and sworn.¹

The objective of the jury selection process is to select a jury which is, and is seen to be independent, impartial and competent, and which is broadly representative of the community. These features ensure that the accused, the state and the public at large perceive the trial to be fair, and this promotes public confidence in the justice system. However, the pre-court stage of the jury selection process (described earlier in this chapter) does not guarantee a jury with these features. A particular jury panel is comprised of people who have been randomly selected from a list of liable, eligible and qualified jurors.² The random selection of jurors is an essential first step in ensuring that jurors are independent from the state and impartial (because it means that jurors are not chosen directly by the state or by the accused). However, a randomly selected jury may include jurors who are—or who may be seen to be—biased against one party or not competent to discharge their duties. Furthermore, a randomly selected jury may not be broadly representative of the community.³ It is for this reason that the right to challenge jurors is fundamental.

There are two types of challenges available to parties in a jury trial in Western Australia: challenge for cause and peremptory challenge.⁴ A challenge for cause requires the party to communicate a justification for challenging the particular juror, while a peremptory challenge can be made without the need to provide any reason. As a consequence, peremptory challenges have been subject to extensive criticism. In its Discussion Paper the Commission examined both forms of challenge and made a number of proposals for reform to this stage of the jury selection process.

CHALLENGES FOR CAUSE

In order to challenge a juror for cause the party making the challenge must provide some evidence to show why the juror is not qualified or why the juror is not indifferent as between the accused and the state. The provision of these grounds in legislation⁵ is a clear acknowledgment that a randomly selected jury may not be impartial or competent.

However, in practice the right to challenge for cause is problematic and, as confirmed by submissions, challenges for cause appear to be extremely rare.⁶ The difficulty stems from the requirement to establish a factual basis for the challenge rather than simply alleging that a juror is indifferent as between the accused and the state or claiming that a juror is not qualified to serve.⁷ In Western Australia the parties have limited information available about prospective jurors: only jurors' names and addresses and sometimes occupations are provided.⁸ Thus, it is extremely difficult to present sufficient

1. Challenges must be made before the juror has been sworn: *Criminal Procedure Act 2004* (WA) s 104(2).
2. This list has in turn been randomly selected from a list of potential jurors who have attended court in response to a juror summons. Generally, questions concerning the eligibility and qualification of those selected have been dealt with before empanelment. However, it is still possible that a member of a jury panel could be ineligible or not qualified because the process for removing ineligible and unqualified people relies in part on self-reporting (eg, a person may not disclose a lack of understanding of English or recent conviction for a disqualifying offence).
3. A randomly selected jury could result in a jury of 12 men or 12 women; or 12 people aged less than 20 years or 12 people aged over 60 years. In its submission to this reference the Jury

- Research Unit at the University of Western Australia agreed that a 'randomly selected jury is not necessarily equivalent to a representative jury': Jury Research Unit (UWA), Submission No 15 (16 December 2009).
4. For a detailed discussion of the procedure and rules applicable to challenges for cause and peremptory challenges, see LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 25–9.
5. See *Criminal Procedure Act 2004* (WA) s 104(5).
6. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009); Jury Research Unit (UWA), Submission No 15 (16 December 2009).
7. See *R v Manson* [1974] Qd R 191, 193.
8. Occupations are included in the jury list if originally recorded on the electoral roll but these occupations (where recorded) will often be out of date. Also, in the past, the Office of the Director

evidence to the presiding judge to establish a factual basis for a challenge for cause.⁹

Furthermore, the challenge for cause process requires that the party making the challenge must openly voice its concerns about the particular juror. In many instances this could be highly embarrassing for the juror or potentially prejudicial to the party's case. For example:

- Counsel might recognise a juror as a victim of a sexual assault from a previous trial.
- An accused might recognise an unusual name on the jury list and believe that this person is a relative of a victim of a previous offence committed by the accused.
- A prosecutor might be informed by a police witness that a member of the jury panel is closely related to a notorious criminal.
- Counsel might believe that a juror is a previous disgruntled client.

Another difficulty with the challenge for cause process is that even if a sufficient factual basis for the challenge can be established, a challenged juror may claim during questioning that he or she is able to objectively consider the evidence and deliver a true verdict.¹⁰ It is important to note that jurors may not always consciously recognise their own biases and therefore claim to be impartial even when they are not.¹¹ And, even though a juror claims to be impartial, the perception of bias is likely to remain and undermine confidence in the final verdict. In this regard, it has been observed (in the context of an irregular incident involving a serving juror) that:

In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice

has not only been done but that it has been seen to be done.¹²

Hence, the process of challenge for cause is an important tool but it is not, on its own, adequate to ensure that a jury is, and is seen to be, independent, impartial and competent. As observed by the Queensland Criminal Justice Commission, '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'.¹³

PEREMPTORY CHALLENGES

Currently in Western Australia the accused and the prosecution are each entitled to five peremptory challenges.¹⁴ If there is more than one accused, each accused remains entitled to five challenges but the number available to the prosecution does not increase.¹⁵

As mentioned above, peremptory challenges are made without the need to articulate a reason. But that does not necessarily mean that a reason does not exist. Potential reasons for exercising a peremptory challenge include that:

- A juror is perceived to be biased against the party's case (eg, the accused recognises a juror's name as someone with whom the accused had a negative association in the past; the accused thinks that a juror was a victim of similar offence in the past; the prosecutor or a police officer recognises the juror as someone who was charged with (but acquitted of) a similar offence in the past; or a juror has made negative gestures or facial expressions towards accused).
- A juror appears to be very disinterested (eg, yawning or dozing in the back of the court).

of Public Prosecutions has accessed the criminal records of all prospective jurors: see further discussion below, 'Jury Vetting'.

9. This is in stark contrast to the procedure for empanelling jurors in the United States where jurors are subjected to pre-trial background checks and undergo extensive questioning about their backgrounds and beliefs before challenges are made. This type of process provides the parties with a substantial amount of information and evidence about prospective jurors.

10. Unlike the position in the United States, it is not possible to question a juror until a sufficient factual basis for the challenge has been established: Enright S, 'Reviving the Challenge for Cause' (1989) 139 *New Law Journal* 9, 10.

11. Rose V & Ogloff J, 'Challenge for Cause in Canadian Criminal Jury Trials: Legal and psychological perspectives' (2002) 46 *Criminal Law Quarterly* 210, 239.

12. *Webb & Hay v R* [1994] HCA 30, [9] (Mason CJ & McHugh JJ). In this case, a serving juror had given the victim's mother some flowers.

13. Queensland Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, An Issues Paper (1991) 18. See also *The Queen v Greening* [1957] NZLR 906, 914 where it was observed that challenge for cause 'was, at best' an imperfect instrument to secure a fair trial'.

14. *Criminal Procedure Act 2004* (WA) s 104(3). The number of peremptory challenges available to the accused and the prosecution varies from three each in New South Wales and South Australia to eight each in Queensland and the Australian Capital Territory. With five peremptory challenges each, Western Australia is in the middle of this range: LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 28. In 2000 the number of peremptory challenges available to each party in Western Australia was reduced from eight to five.

15. *Criminal Procedure Act 2004* (WA) s 104(4).

- A juror appears to be incapable of discharging duties (eg, does not appear to understand English sufficiently; appears to be mentally unstable; or appears to be intoxicated or under influence of drugs).
- A juror may appear to be resentful if a party has unsuccessfully challenged that juror for cause or if the juror has unsuccessfully applied to be excused from jury service.
- A prospective juror's occupation might suggest potential for bias in the circumstances of a particular case (eg, a bank manager-juror in a bank robbery trial¹⁶; teacher-juror in a case involving allegations that a teacher has sexually abused a student; a tax office employee-juror in a tax fraud trial; or a railway security officer-juror in a case involving allegations that a railway security officer has been assaulted).

In a number of jurisdictions, there has been a general trend of reducing the number of peremptory challenges over time.¹⁷ More recently, there have been calls for the abolition of peremptory challenges in Western Australia.¹⁸ As a result, in its Discussion Paper the Commission closely examined the arguments for and against peremptory challenges.¹⁹ These arguments (both those in favour and those against) fit into a number of broad categories which are summarised below.

Randomness: A common criticism of peremptory challenges is that they interfere with the randomness of jury selection. In fact, the submission from the Department of the Attorney General emphasised this issue as the primary argument for abolishing peremptory challenges. It stated that 'peremptory challenges interfere with and have the potential to alter the outcome of the random jury selection process'.²⁰ Similarly, in response to the Commission's examination of this topic, the Chief Justice of Western Australia stated that he would personally 'give greater weight to the detrimental effect which the availability of peremptory challenges has upon the principle of random juror selection'.²¹

Although the Commission acknowledges that peremptory challenges give the accused and the state some limited input into the composition of a jury, it is vital to remember that the parties cannot choose which of the panel of jurors seated at the back of the court will be called – this, of course, is done by random ballot. At various stages of the jury selection process, prospective jurors are excluded from jury service by non-random methods (eg, pre-court and in-court excuse applications, and exclusion by virtue of disqualifying criteria).²² However, the final jury remains comprised of jurors who have been randomly selected.

Furthermore, although random selection is necessary to ensure that juries are independent and impartial, randomness is not an end in itself. If it is considered acceptable to alter the outcome of the random jury selection process in order to ensure that prospective jurors do not suffer undue hardship or that juries are not comprised of citizens with serious criminal records, then it must be asked why it is not equally acceptable to alter the random jury selection process to ensure that the parties to the trial perceive the jury to be fair and impartial?

Impartiality: It is often claimed that peremptory challenges undermine impartiality because one side can 'stack' the jury in its favour. This argument was the primary rationale for the abolition of peremptory challenges in England in 1989. In particular, it has been noted that abolition in England was prompted by a series of highly publicised cases where it was reported that co-accused had 'pooled' their peremptory challenges.²³ However, as one commentator observed:

[A]lthough the efficacy of the 'packing' theory attained popular credence that view is difficult to sustain as a matter of common sense. It suggested that once a juror was challenged, defence counsel could somehow influence the choice of replacement juror who is of course also chosen by ballot.²⁴

Significantly, the available empirical evidence at the time does not appear to have supported the abolition of peremptory challenges in England. It has been reported

16. This example was noted in a submission received from the Criminal Lawyers Association.

17. For example, at one stage an accused had 35 peremptory challenges at common law in England. See further LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 27.

18. See, eg, Cardy T, 'Lawyers Face Ban: Stop dumping of jurors: DPP', *The Sunday Times*, 14 June 2009, 17; Banks A, 'Juror Challenge Limits Planned', *The West Australian*, 13 May 2009, 13.

19. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 29–34.

20. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

21. The Hon Wayne Martin, Chief Justice of Western Australia, Submission No 24 (12 January 2010).

22. Such as a prospective juror's criminal history, insufficient understanding of English or mental incapacity.

23. Hoffman M, 'Peremptory Challenges Should be Abolished: A trial judge's perspective' (1997) 64 *University of Chicago Law Review* 809, 822. See also Heinz J, 'Peremptory Challenges in Criminal Cases: A comparison of regulation in the United States, England and Canada' (1993–1994) 16 *Loyola of Los Angeles International and Comparative Law Journal* 201, 218–19; Wilson A, 'The End of Peremptory Challenges: A call for change through comparative analysis' (2009) 32 *Hastings International and Comparative Law Review* 363, 373.

24. Enright S, 'Reviving the Challenge for Cause' (1989) 139 *New Law Journal* 9, 9.

that a study conducted by the Crown Prosecution Service did not find any evidence that the use of peremptory challenges increased an accused's chance of acquittal.²⁵ Nonetheless, as the Commission acknowledged in its Discussion Paper, the potential to 'stack' a jury with 'favourable' jurors is greater in cases involving multiple accused because co-accused can join forces in an attempt to obtain a jury of a particular composition.²⁶

However, when examining the affect of peremptory challenges on jury impartiality the argument runs both ways. Just as peremptory challenges can be exercised in an attempt to obtain a favourable jury they can equally be used to exclude jurors who are biased. Hence, it has been claimed that peremptory challenges are 'one of the principal safeguards of an impartial jury'.²⁷

Representativeness: Because peremptory challenges can alter the composition of a randomly selected jury, it is argued that they undermine the principle of representativeness. In his submission, the Chief Justice of Western Australia expressed the view that it is common for peremptory challenges to be used to 'distort the balance of a jury because of a perceived forensic advantage arising from that distortion'.²⁸ On the other hand, the joint submission from the District Court and the Supreme Court of Western Australia observed that the current empanelment processes

strike a good balance between a truly random selection process and allowing the parties some input into the final composition of juries, without there being any danger of distorting jury composition so that they would not truly represent the nature of the community from which they are drawn. We note that neither here, nor in Victoria, where the matter has been investigated, is there any statistical support for the proposition that juries are not representative of the community. Anecdotal impressions to the contrary would seem to be flawed.²⁹

25. Ibid. See also Heinz J, 'Peremptory Challenges in Criminal Cases: A comparison of regulation in the United States, England and Canada' (1993–1994) 16 *Loyola of Los Angeles International and Comparative Law Journal* 201, 219.

26. During its consultations for this reference the Commission was told of an example in Western Australia where peremptory challenges were exercised in order to obtain an all-male jury: Judge Mazza, consultation (19 December 2007). Because of the potential for multiple accused to influence the composition of a jury the Commission proposed in its Discussion Paper that the prosecution be given the same number of peremptory challenges as the total available to all co-accused (Proposal 3). This is discussed further below.

27. Gobert J, 'The Peremptory Challenge – An Obituary [1989] *Criminal Law Review* 528.

28. The Hon Wayne Martin, Chief Justice of Western Australia, Submission No 24 (12 January 2010).

29. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

The Commission agrees and notes that the available evidence in Western Australia supports the view that juries are, overall, broadly representative of the general community.³⁰

Though it is clearly possible for parties to use their available challenges to alter the representative nature of the jury, it is equally possible to exercise challenges to *enhance* representativeness.³¹ As the Commission observed in its Discussion Paper, if the first 10 jurors sworn in a jury were all female then it would be quite reasonable for a party to peremptorily challenge the next female juror called to achieve some representation of males on the jury.³² Likewise, if the first eight jurors randomly called and sworn all appeared to be younger than 25 years it would be appropriate to challenge the next juror called if that juror also appeared to be in a similar age bracket with the hope that some of the remaining four jurors might represent a different age group.

Assumptions and stereotypes: It has been asserted that the exercise of peremptory challenges is sometimes based on stereotypical views about different groups in the community (eg, age, gender and race).³³

Yet, as the Commission emphasised in its Discussion Paper, it is difficult to know why a party has peremptorily challenged a particular juror. One might guess that a juror has been challenged because of their gender, race, age or occupation; however, that juror may have been challenged because of their behaviour in court or because of information known about the juror. The Commission maintains its view that it is unsafe to rely on assumptions about why peremptory challenges are made because the parties do not rely solely on the age, gender and physical appearance of jurors; other significant information relied on includes jurors' names, addresses, occupations and behaviour in court.³⁴

The impact on jurors: While in the jury assembly room potential jurors are informed about the process of peremptory challenges and told that if they are challenged they should not take it personally. However, it appears that many jurors complain about³⁵ and are 'upset with

30. See Chapter One, 'Dispelling Popular Myths about Jury Service'.

31. Indeed, the Western Australian Office of the Director of Public Prosecutions (DPP) provides in its guidelines that 'it is reasonable to challenge in order to ensure that the jury is properly representative of the community': DPP, *Statement of Prosecution Policy and Guidelines* (Perth, 2005).

32. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 30.

33. See *ibid* 32.

34. Having said that, the less information available about prospective jurors, the more likely it is that peremptory challenges will be exercised for illogical and stereotypical reasons.

35. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).

the challenge process'.³⁶ It is understandable that jurors express frustration at the process: they have complied with the jury summons and been willing to serve yet they are 'rejected' for no apparent reason.

The only other available means to eliminate jurors who are perceived to be biased or incompetent is via the challenge for cause process. As the Commission has explained both here and in its Discussion Paper, the challenge for cause process is potentially far more embarrassing and difficult for jurors because it is necessary for counsel to raise concerns about the juror in open court. Further, it is worth remembering that a number of jury trials take place in regional Western Australia. In regional locations (with smaller populations) it is even more likely that the parties may know embarrassing or personal information about members of the jury panel. If peremptory challenges were not available it is quite possible that the parties would exercise their right to challenge for cause in such circumstances.³⁷

Resources: It has been argued that peremptory challenges waste resources because additional jurors must be summoned to ensure that the jury panel is large enough to accommodate the maximum number of peremptory challenges available in a particular trial. The Department of the Attorney General stated in its submission that 'increasing peremptory challenges will mean summoning more potential jurors which will result in more people unnecessarily inconvenienced when they are not selected to serve'.³⁸ Prospective jurors who attend court but are not required to serve must still be paid an attendance fee and any lost income must be reimbursed (either directly to a self-employed juror or to the juror's employer).³⁹ In addition, the length of the empanelment process is extended because for each peremptory challenge a replacement juror must be selected and sworn.

On the other hand, it is important to note that the process of challenge for cause (if used as an alternative to peremptory challenges) is a far more time consuming and resource-intensive exercise. A challenge for cause may involve submissions and arguments from both sides, the questioning of jurors, and a determination by the presiding judge.

Further, although the provision for peremptory challenges requires resources, it is important to view this issue in its overall context. Pursuant to s 32G of the *Juries Act*

the number of jurors required for a jury panel is (unless otherwise ordered) 20 plus the number of peremptory challenges available to the accused.⁴⁰ Hence, if there is only one accused the number of jurors in a typical panel should be 25. However, it appears that the number of jurors required in a trial involving a single accused is often increased.⁴¹ For example, the Commission observed the jury empanelment process in two trials in mid-2009. In one of these trials (which was listed for three days and involved a single accused) 37 jurors were selected from the ballot to form the jury panel and 14 jurors (including two reserve jurors) were sworn. In the other trial (which also involved a single accused) a jury panel of 80 jurors was assembled in the courtroom. It seems that approximately 50 extra jurors were required to form the panel because it was anticipated that a large number of jurors would seek to be excused by reason of the likely duration of the trial (five weeks). The number of extra jurors required to accommodate an unknown number of potential excuse applications was far greater than the number of jurors required to accommodate a maximum of 10 peremptory challenges.⁴²

Consequences of abolition

In its Discussion Paper, the Commission noted that if peremptory challenges were to be abolished in Western Australia it is possible that challenges for cause will increase. In its submission, the Jury Research Unit at the University of Western Australia agreed.⁴³ The DPP also submitted that peremptory challenges 'offer a more efficient and less time consuming option than challenges for cause, which can potentially be more controversial and more embarrassing for potential jurors'.⁴⁴ Likewise, the Aboriginal Legal Service submitted that the 'right of peremptory challenge enables a juror to participate in removing any perceived bias (to a limited extent) without the need to embarrass the prospective juror'.⁴⁵

Having said that, the Commission acknowledges that while applications to challenge a juror for cause are likely to increase if peremptory challenges are abolished,

36. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

37. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 31.

38. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

39. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 125–126.

40. This figure takes into account the fact that there must be at least 12 jurors and that the prosecution has the right to exercise five peremptory challenges.

41. The Commission has been advised that *at least* 26 jurors are generally required for a standard trial lasting one to three days that involves only one accused: Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).

42. In fact, in this trial defence counsel made four peremptory challenges and the prosecutor made three. There were 20 excuse applications and 12 jurors were ultimately excused.

43. Jury Research Unit (UWA), Submission No 15 (16 December 2009).

44. Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

45. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).

these applications may not necessarily be successful. The difficulty in establishing a factual basis for a challenge for cause would remain. In addition to an increase in the number of challenges for cause being made, there is also likely to be calls for reform of the challenge for cause process. Without the right to peremptorily challenge jurors who are perceived to be biased (or incompetent), it is likely and understandable that members of the legal profession will advocate for an expanded challenge for cause process. Such an expanded process might involve the provision of additional information about prospective jurors and the questioning of jurors before a challenge is made. While this option may appear to be a more rational foundation for the exercise of challenges, a jury voir dire process would be extremely time consuming and expensive, and may seriously impinge upon a juror's right to privacy and security. For these reasons the Commission does not consider that such an option would be sensible or desirable in Western Australia.

The most concerning likely outcome of the abolition of peremptory challenges is the loss of confidence in the jury system. Individuals involved in cases where there has been a perception of bias or incompetence will be disgruntled with an unfavourable verdict. While there may also be practical implications (such as an increase in appeals) the most important issue is the likely loss to public confidence in the justice system.

For example, in the empanelment of a jury for a sexual assault trial the prosecutor might believe that a member of the jury panel was recently acquitted of a very similar offence. Even if this is true, it would probably be insufficient to ground a challenge for cause because there must be a factual basis to suggest that the person would be biased one way or another. However, the victim of the offence might reasonably believe that this juror would be strongly predisposed to the accused's case. If acquitted it is possible that the victim and informed members of the public may believe that the jury's verdict was tainted. Similarly, if the accused believed that a member of the jury panel was had been a victim of a similar offence in the past, a conviction would be viewed with suspicion.

The Commission is of the view that in the absence of peremptory challenges, it is likely that these types of scenarios would not necessarily be uncommon. Significantly, if people who are closely connected with the criminal justice system are made eligible for jury service (as currently proposed by the Department of the Attorney General⁴⁶) these types of problems may be frequent. Consider, for example, an accused on trial charged with assaulting a police officer. If the jury included a serving police officer it would be doubtful that the accused would believe that he or she has had a fair trial.

46. See Chapter Four, 'Police Officers'.

In considering the merits of retaining peremptory challenges in Western Australia it is also important to emphasise that the available evidence does not suggest that peremptory challenges are being abused or overused. In its Discussion Paper the Commission noted that statistics provided by the sheriff's office indicate that between 1 January and 17 July 2009 there were 837 challenges (including challenges for cause and peremptory challenges) in a total of 212 jury trials in Perth. This equates to an average of 3.9 challenges per trial (and the minimum number of available peremptory challenges per trial is 10).⁴⁷ Figures for the second half of 2009 show a very similar result.⁴⁸

Submissions received for this Reference indicate that there is substantial support for the retention of peremptory challenges in Western Australia. Those in support include the DPP, the Law Society, Legal Aid, the Western Australia Police, the Criminal Lawyers Association, the Aboriginal Legal Service and the District Court and Supreme Court of Western Australia.⁴⁹ However, as noted above, the Department of the Attorney General and the Chief Justice were the only two submissions to the Commission's Discussion Paper that suggested peremptory challenges should be abolished. In his submission, the Chief Justice stated that '[r]etention of the entitlement to challenge for cause provides, in my view, sufficient safeguard against the selection of a juror whose service would be contrary to the interests of justice'.⁵⁰ Having regard to all of the matters discussed above, the Commission does not share this view. For the reasons explained, the current process of challenge for cause is not sufficient to exclude jurors who are suspected of bias or incompetence. In many cases establishing an adequate factual basis for a challenge may prove difficult. As noted, the 'suspicion or the appearance of bias is as undesirable as actual bias'.⁵¹

Although in its Discussion Paper the Commission did not make a specific proposal in relation to the retention

47. Carl Campagnoli, Jury Manager (WA), correspondence (28 July 2009). In its submission the Aboriginal Legal Service noted that from its experience the full number of available peremptory challenges is rarely used: Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).

48. From 1 July 2009 until 31 December 2009 there were 190 jury trials in Perth and in these trials a total of 766 challenges were made. The Commission was advised that a small number of excusals may have been incorrectly recorded as challenges so the average figure of 4.03 challenges per trial may be even less: Carl Campagnoli, Jury Manager (WA), correspondence (12 February 2010).

49. Other submissions that indicated support were submissions received from the Jury Research Unit (UWA), Office of Multicultural Interests, Gillian Braddock SC and Judith Bailey.

50. The Hon Wayne Martin, Chief Justice of Western Australia, Submission No 24 (12 January 2010).

51. Enright S, 'Reviving the Challenge for Cause' (1989) 139 *New Law Journal* 9, 9.

of peremptory challenges, it is now of the view that it is appropriate to do so. The Commission strongly believes that peremptory challenges should be retained to make sure that accused persons believe that they have had a fair trial and that the accused, the state and the public at large have confidence in the jury system.

Furthermore, the Commission believes that the appropriate response to any public unease about the process of peremptory challenge is further research and improved data collection. The right of peremptory challenge is widely supported and, in the Commission's view, it should not be abolished in the absence of accurate and up-to-date evidence that the process is being used inappropriately. In its submission the DPP expressed 'support for any initiatives by the Sheriff's Office or the courts to collect further statistical information about the background of jurors and the types of challenges that are made'.⁵² Also, the Office for Multicultural Interests suggested that further research should be undertaken to determine if people from culturally and linguistically diverse backgrounds are excluded from jury service by the challenge process.⁵³ The Commission recommends that the sheriff's office record the number of peremptory challenges made in each trial, including the number made by the prosecution and the number made by the accused. Furthermore, consideration should be given to undertaking a research project to examine the characteristics of those challenged (eg, gender, age, occupation) and the reasons why challenges are made.⁵⁴ Such a project would require observation of and research about challenges in a number of jury trials in Western Australia (including in both metropolitan and regional areas).

RECOMMENDATION 3

Peremptory challenges

1. That the current entitlement to peremptory challenges be retained.
2. That the sheriff's office records the total number of peremptory challenges made per trial and the breakdown of peremptory challenges made by the prosecution and the accused.
3. That the Western Australian government consider undertaking research to examine the characteristics of prospective jurors who have been challenged and to determine the reasons why challenges are made.

52. Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

53. Office of Multicultural Interests (WA), Submission No 21 (8 January 2010).

54. The latter would require questioning counsel to determine their reasons for challenging particular jurors.

Reform of the peremptory challenge process

Having concluded that peremptory challenges should be retained, the Commission has considered whether there are any reforms that may improve the practice or reduce the potential for distortion of the jury selection process. While it submitted that the number of peremptory challenges available to each party should remain at five, the Law Society suggested that if reform to the peremptory challenge process is inevitable it may be worth considering reducing the number of peremptory challenges available to each party.⁵⁵ Although decreasing the number of peremptory challenges available to each party may reduce the number of people required for each jury panel, the Commission is convinced that the number of peremptory challenges generally available to each party should not be reduced. In this regard it is noted that the number of peremptory challenges available to each party in Western Australia was reduced from eight to five relatively recently.⁵⁶ Only New South Wales and South Australia have a lesser number of challenges than Western Australia, and in New South Wales the prosecution and the accused can consent to additional peremptory challenges.⁵⁷

Another significant factor in the Commission's view is that extra peremptory challenges are not available in Western Australian trials where reserve jurors are empanelled. This differs from a number of other Australian jurisdictions where one or more additional peremptory challenges are permitted if reserve jurors are required.⁵⁸ For example, in Queensland each party generally has the right to eight peremptory challenges. But, if one or two reserve jurors are selected each party has the right to an additional challenge and if three reserve jurors are selected each party has an additional two challenges.⁵⁹ The Commission is aware that reserve jurors are frequently empanelled in Western Australia, including in trials lasting only two to three days.⁶⁰ The Jury Manager advised that for the six months from July to December 2009 reserve jurors were empanelled in approximately 73% of jury trials.⁶¹ The Commission is persuaded that any reduction to the number of peremptory challenges available to each party would be likely to have a detrimental impact upon the

55. Law Society of Western Australia, Submission No 17 (4 January 2010).

56. *Jury Amendment Act 2000* (WA) s 9.

57. *Juries Act 1977* (NSW) s 42.

58. *Juries Act 1977* (NSW) s 42; *Jury Act 1995* (Qld) s 42; *Juries Act 2003* (Tas) s 35; *Juries Act 1967* (ACT) s 34.

59. *Jury Act 1995* (Qld) s 42.

60. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009). The empanelment of reserve jurors is not limited to exceptionally lengthy trials. In 2009 the Commission observed the empanelment of a 14-person jury for a three-day trial.

61. Carl Campagnoli, Jury Manager (WA), email correspondence (24 February 2010). The average number of jurors empanelled per trial over this six-month period was 13.26 jurors.

parties' perception of fairness and public confidence in the jury system.

In its Discussion Paper the Commission proposed that in cases involving multiple accused the state should be entitled to peremptorily challenge the same number of jurors as the total available to all co-accused.⁶² This proposal was designed to ensure that multiple accused could not 'join forces' in an attempt to 'stack' the jury with jurors perceived to be favourable to the defence case. Because the state would have an equal number of challenges, it would be possible for the state to counteract such tactics.

In its Discussion Paper, the Commission recognised that this proposal would increase the number of jurors required to be summoned. Hence, submissions were sought about whether the number of peremptory challenges available to each accused should be reduced in trials involving more than one accused (so that the total number of challenges available would be increased but to a lesser extent than if the current number of five challenges per accused remained).⁶³

Submissions in response to this issue were mixed. The Department of the Attorney General did not support this proposal for the reason that more jurors would need to be summoned.⁶⁴ The Commission is not persuaded by this argument because the number of additional jurors required to be summoned appears to be relatively small. The Commission has been advised that in 2009 approximately 50 out of a total of 449 trials in the District Court involved more than one accused.⁶⁵ Using these figures and assuming that the number of peremptory challenges available to each accused remains at five, the following observations can be made:

- if each of the 50 trials involved two accused, an additional five jurors would be required for each trial (ie, 250 people);
- if each of the 50 trials involved three accused, an additional 10 jurors would be required for each trial (ie, 500 people).

In its submission the DPP noted that 'it is rare for three or more accused to be tried together'.⁶⁶ Hence it would be reasonable to guess that the total number of extra

jurors required each year would be somewhere between 250 and 500. In this regard, it is worth emphasising that in 2009 a total of 53,000 jurors were summoned for jury service in Perth.⁶⁷ Taking into consideration other recommendations in this Report (eg, deferral of jury service, elimination of excuses 'as of right') it is expected that there will, overall, be a significant reduction in the number of citizens who will need to be summoned in any given year.

Also in opposition to the Commission's proposal, the Chief Justice of Western Australia suggested that by providing an equal number of challenges to the state, further distortion of the jury selection process may occur. He stated that distortion of the balance of a jury would

become greater if the Commission's proposal to increase the number of peremptory challenges available to the State in cases involving multiple accused were adopted.⁶⁸

However, the Commission emphasises that according to the DPP guidelines, prosecuting counsel should not attempt to 'select a jury that is unrepresentative as to race, age or sex'.⁶⁹ The Commission is not aware of any evidence to suggest that prosecutors intentionally challenge prospective jurors in order to distort the representative nature of the jury. Furthermore, the DPP advised that prosecutors do not typically utilise all of their available peremptory challenges.⁷⁰ The Commission is of the view that by providing the state with an equal number of challenges as the total available to all accused, the potential for abuse of peremptory challenges is minimised.

Two other submissions did not support the Commission's proposal but (in contrast to the abovementioned submissions) neither of these submissions expressed opposition to the right to peremptory challenge per se. In a joint submission, the District Court and Supreme Court of Western Australia submitted that the right to peremptorily challenge is 'an individual right' and therefore the number of challenges available to each accused in a joint trial should not be reduced and nor 'should the prosecution have any increased number of challenges available to it, so that its capacity in that regard equates with that of the accused persons, however many of them there may be'.⁷¹ A similar submission was

62. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 3.

63. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Invitation to Submit A.

64. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

65. Jennifer Endersbee, Acting Manager, Business Services, District Court of Western Australia, email correspondence (4 February 2010).

66. Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

67. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2009* (2010).

68. The Hon Wayne Martin, Chief Justice of Western Australia, Submission No 24 (12 January 2010).

69. Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (Perth, 2005) 19.

70. Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

71. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

received by the Law Society. The Law Society also stated that the Commission's proposal

assumes that co-accused work co-operatively in jury selection. This is very rarely the case as accused usually have personal reasons for the exercise of a peremptory challenge.⁷²

The Commission does not suggest that co-accused routinely join forces to manipulate the composition of the jury or work together to challenge particular types of jurors. As the Commission has explained above, there are many valid reasons why a party might challenge a particular juror. However, the potential for abuse is much greater in cases involving multiple accused. The Commission does not believe that the prosecution would often use all of its additional challenges but the provision would be available to redress any apparent imbalance in the composition of the jury if necessary. Likewise, if the prosecution did attempt to distort the balance of the jury, the co-accused would be in a position to attempt to restore the balance. In addition, as submitted by the DPP:

By providing the prosecution with the same number of peremptory challenges as the accused, this proposal would operate as if each accused were tried separately, providing equality and fairness in the trial process.⁷³

Overall, the Commission maintains its view that the state should have an equal number of peremptory challenges as the total available to all co-accused. In reaching this view the Commission has been persuaded by the strong support for its proposal from a substantial majority of submissions including the DPP, Western Australia Police, the Criminal Lawyers Association, Legal Aid and the Aboriginal Legal Service.⁷⁴

Nonetheless, the Commission accepts that the right to peremptorily challenge is an individual right and the number available to each accused in a trial with multiple accused should not be reduced below what is available to a single accused. While some submissions suggested that it may be appropriate to reduce the number of challenges available to each co-accused,⁷⁵ the majority supported the retention of five peremptory challenges

for each co-accused.⁷⁶ As explained above, the increase in the number of jurors that will need to be summoned is not substantial. In the Commission's view, the expense and inconvenience involved must be secondary to the requirement to ensure fairness to both the accused and the state.

RECOMMENDATION 4

Peremptory challenges – trials involving multiple accused

That s 104 of the *Criminal Procedure Act 2004* (WA) be amended to provide that in trials involving more than one accused, each accused is entitled to five peremptory challenges and the state is entitled to the total number of peremptory challenges that are available to all of the co-accused.

Information provided to prospective jurors

The Commission acknowledges that jurors who are challenged peremptorily may be offended or confused. An informational video played to prospective jurors in the Jury Assembly Room informs jurors that they may be challenged without explanation by defence counsel or the prosecutor. They are further informed that if they are challenged they should not be concerned – it just means that they are not required for that particular trial.⁷⁷ The Commission is of the view that prospective jurors and public confidence in the justice system would be better served if jurors were provided with a more detailed explanation of the peremptory challenge process and its overriding purpose. Jurors are told not to worry about the procedure, yet all they know is that one of the parties took objection to them as a juror.

In this regard, the Commission notes that in Victoria, the juror handbook provides that:

The parties involved in the trial have the right to challenge jurors. Questioning of prospective jurors is rarely allowed. There is no need to feel embarrassed or offended if you are challenged. Sometimes challenges are made simply on the basis of the person's age,

72. Law Society of Western Australia, Submission No 17 (4 January 2010).

73. Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

74. Submissions in favour of the Commission's proposal were received from the Criminal Lawyers Association; Jury Research Unit (UWA), Legal Aid Western Australia; Western Australia Police; Office of Multicultural Interests; Judith Bailey, Office of the Director of Public Prosecutions; Gillian Braddock SC; and Aboriginal Legal Service (WA).

75. Submissions received from the Jury Research Unit (UWA); Western Australia Police; and Judith Anne Bailey.

76. Submissions received from the Law Society of Western Australia; Legal Aid Western Australia; Office of the Director of Public Prosecutions (WA); Gillian Braddock SC; and Aboriginal Legal Service (WA).

77. Similarly, in a Jury Duty pamphlet available on the Department of the Attorney General's website (<http://www.courts.dotag.wa.gov.au/_files/jury_duty.pdf>) it is stated that '[d]uring the process of selection, the prosecution lawyer or the defence lawyer can challenge your participation in the jury. If you are challenged you must leave the jury box and return to your seat in the courtroom. No reason will be given for the challenge and you should not be alarmed or upset'.

gender or occupation. For example, a bank teller may be challenged if the accused is charged with bank robbery.⁷⁸

The Commission believes that if more information is provided at the outset, jurors are less likely to be embarrassed or worried if challenged. For example, prospective jurors should be advised that peremptory challenges represent a quick and simple way for both parties to object to jurors whom they believe may be unsuitable as jurors in the particular trial. Reasons might include that the accused, defence counsel or the prosecutor thinks that they might know the juror; that the nature of the juror's occupation could suggest possible bias; that the juror resides in the same street as the accused, a witness or counsel; or that one of the parties is attempting to ensure that there is a reasonable gender or age balance on the jury. Jurors should also be advised that the system of peremptory challenges is designed to ensure that the parties have confidence in the jury and believe that the trial has been fair.

RECOMMENDATION 5

Information for jurors – challenges

That, in order to reduce any disquiet experienced by members of the public who have been randomly selected as part of a jury panel, prospective jurors should be informed (during induction) about the process for and purpose of peremptory challenges including examples of reasons why a prospective juror might be challenged in a particular trial.

POWER TO DISCHARGE THE JURY

Currently, a trial judge has the power to discharge the entire jury if 'satisfied that it is in the interests of justice to do so'.⁷⁹ In its Discussion Paper the Commission considered whether there should be an additional and specific power to discharge the whole jury if the composition of the jury is or appears to be unfair as a consequence of the exercise of peremptory challenges.⁸⁰ Such provisions exist in New South Wales and Queensland but it does not appear that they have been used often.⁸¹ The Commission's preliminary view was that such a power would be unnecessary in Western Australia; it was considered that the provision for an equal number of peremptory challenges to the state as the total available to all co-accused would significantly

reduce the potential for distortion of the composition of the jury. Further, the Commission took into account that a broad power to discharge the jury already exists. Nonetheless, the Commission sought submissions about this issue to determine if there was a need for reform.

Only a few submissions were received that indicated support for a specific power to discharge the jury in circumstances where the exercise of peremptory challenges appears to have resulted in an unrepresentative jury.⁸² The Office of Multicultural Interests submitted that such a power should be available as a 'mechanism of last resort that may be used where people from particular ethnic backgrounds, including Indigenous, may otherwise be unfairly disadvantaged'.⁸³ In this regard, the Commission notes that the available evidence does not suggest that Aboriginal people are significantly underrepresented as jurors in this state.⁸⁴ Likewise, the available evidence shows that jurors who were born overseas are well represented on juries, but it is acknowledged that this evidence does not distinguish between overseas-born jurors who come from culturally and linguistically diverse backgrounds and those who do not.⁸⁵

While advocating for their abolition, the Department of the Attorney General also suggested that if peremptory challenges are to remain, the trial judge should have the power to discharge the jury if it appears that because of peremptory challenges the composition of the jury is unfair.⁸⁶ Yet it was also argued that the discharge of an entire jury in these circumstances would waste considerable time and resources.

The overwhelming majority of submissions responding to this issue emphasised that any decision by the presiding judge that the jury was unrepresentative or unfair would

78. Juries Commissioner Office (Victoria), *Juror's Handbook* (2005) 10.

79. *Criminal Procedure Act 2004* (WA) s 116.

80. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 35 (Invitation to Submit B).

81. *Jury Act 1995* (Qld) s 48; *Juries Act 1977* (NSW) s 47A.

82. Office of Multicultural Interests (WA), Submission No 21 (8 January 2010); Department of the Attorney General (WA), Submission No 16 (12 December 2009); Judith Anne Bailey, Submission No 23 (12 January 2010).

83. Office of Multicultural Interests (WA), Submission No 21 (8 January 2010).

84. However, there is no accurate and up-to-date recording of Aboriginal status of jurors on a statewide basis. An exit survey conducted by the sheriff's office in 2009 indicates that approximately 1% of jurors self-identified as Aboriginal and according to the 2006 census, Aboriginal and Torres Strait Islander people make up approximately 1.5% of the metropolitan population: see ABS, *2006 QuickStats: Perth* (2007). Also anecdotal evidence suggests that in regional locations where the proportion of Aboriginal people is much higher (eg, Derby and Kununurra) there appears to be a similar proportion of Aboriginal jurors.

85. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 51–52. See also Recommendation 41.

86. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

be very subjective.⁸⁷ For example, a joint submission from the District Court and the Supreme Court of Western Australia stated that ‘such a discretionary power is so subjective as to be, in practice, unworkable’.⁸⁸ Also a number of submissions maintained that a specific power to discharge the jury is unnecessary given the existing broad power under the *Criminal Procedure Act 2004* (WA).⁸⁹ The Commission agrees with the majority of submissions that there is no need to reform the law in this area.

JURY VETTING

The process for challenging jurors (both for cause and peremptorily) is linked to the degree of information that is available about prospective jurors. If no information about the jury panel is available, then, in the absence of physical recognition of a juror or physical observations of their behaviour, it is unlikely that there will be a valid or rational basis for exercising the right to challenge. Thus, the less information provided the more likely it will be that challenges will be based on stereotypical views and assumptions about different groups in the community. However, the alternative—extensive background checks and questioning of prospective jurors—would undermine jurors’ sense of security and privacy. Thus, a balance must be struck between providing enough information to make sure that the parties and the public at large have confidence in the impartiality of the jury, and ensuring that individual jurors feel safe and their privacy is respected.

Information currently available about prospective jurors

Currently in Western Australia, the parties in a criminal trial are provided with a jury list containing the full names and addresses of each potential juror. If an occupation was recorded by that person on the electoral roll, it will also be provided. A copy of the jury list is available to the parties four clear days before the trial.⁹⁰ Prosecutors are entitled to copy the list and to disclose the contents of the list to staff within the DPP, to other lawyers instructed by the DPP and to the Western Australia Police for the purpose of determining if any person included in the list has a criminal record. In contrast, defence counsel

are not permitted to copy the list and are only entitled to divulge the contents of the jury list to the accused or to other lawyers acting for the accused.⁹¹ Although the DPP is legally authorised to check the criminal history of all prospective jurors,⁹² it does not currently engage in this practice.⁹³

Should jury vetting be permitted?

Broadly speaking, jury vetting is the screening of prospective jurors before the trial. Jury vetting can include a variety of practices such as engaging private investigators to check the background of prospective jurors and undertaking public database searches. The main concerns about jury vetting are the potential threat to jurors’ safety; the infringement of juror privacy; and the fact that jurors may *feel* intimidated by the process and may therefore approach their deliberations less objectively.

The present law in Western Australia does not generally promote jury vetting; the jury list cannot be copied by defence counsel and the contents of the list cannot be widely distributed. For example, provision of a copy of the list to a private investigator is not permitted. Nevertheless, the availability of the jury list four days before the trial could potentially encourage wider jury vetting practices. As 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’.⁹⁴

The most common form of jury vetting in Australia is that which is undertaken by the state and which involves the vetting of jurors’ criminal records.⁹⁵ Recently, the practice has been the subject of public debate in Western Australia. During a trial in 2009 it was revealed that one of the jurors had a criminal record and it was noted that the prosecutor did not have access to the juror’s criminal record.⁹⁶ The past practice of vetting criminal records had ceased at the time of this trial and the former DPP (Robert Cock QC) reportedly stated that the practice of jury vetting should not be restored.⁹⁷

87. Submissions received from the Criminal Lawyers Association; Jury Research Unit (UWA); Law Society of Western Australia; District and Supreme Court of Western Australia; and Office of the Director of Public Prosecutions.

88. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

89. Submissions received from the Criminal Lawyers Association; District and Supreme Court of Western Australia; Western Australia Police; Office of the Director of Public Prosecutions; Gillian Braddock SC and Aboriginal Legal Service (WA).

90. *Juries Act 1957* (WA) s 30.

91. Rule 57 of the *Criminal Procedure Rules 2005* (WA).

92. See *Hunt v The State of Western Australia* [2008] WASCA 210.

93. Up until October 2007 the sheriff’s office provided the DPP with copies of the criminal records.

94. Queensland Criminal Justice Commission, *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.

95. The extent of the practice varies throughout Australia. See further LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 36–37.

96. Western Australia, *Parliamentary Debates*, Legislative Council, 19 March 2009, 2141 (Simon O’Brien).

97. Banks A, ‘Juror Challenge Limits Planned’, *The West Australian*, 13 May 2009, 13.

Although recognising that the practice of jury vetting in Western Australia has lapsed, the Commission proposed in its Discussion Paper that the *Criminal Procedure Rules 2005* (WA) should be amended to ensure that the practice could not be reinstated in the future.⁹⁸ The main justification for this proposal was one of fairness – both parties in a criminal trial should have a ‘level-playing field’. The Commission received 10 submissions responding to this issue and only one, the DPP, opposed the proposal.⁹⁹

The DPP argued that it is

uniquely placed to make judgments from the State’s point of view about the potential impact on the fairness of the trial of allowing persons with particular criminal histories, both in terms of the extent and type of offending, to preside as jurors in criminal trials.¹⁰⁰

The DPP referred to examples in its submission. It argued, for example, that it may be appropriate to challenge a juror with a prior sexual assault conviction in a sexual assault trial or a juror with a prior drug conviction in a drug trafficking trial. In support of its position, the DPP maintained that ‘there is a very real risk that people with a criminal history will not bring an impartial mind to bear on the evidence presented in court’.¹⁰¹

The Commission does not disagree with that sentiment but highlights that it is precisely why a large number of people with past criminal convictions are already automatically excluded from jury service.¹⁰² As the Commission explained in its Discussion Paper, it is difficult to know whether a person with a criminal record will in fact be biased against the state (or in favour of the accused).¹⁰³ However, the presence of jurors with serious and/or recent criminal histories would undermine public confidence in the justice system because of the belief that such persons may be biased. For this reason the Commission is of the opinion that it is vital that the

legislative disqualification criteria are sufficiently broad to cover those convictions that are serious or recent enough to give rise to a reasonable perception of bias. And, as the Commission concluded in its Discussion Paper, the ambit of disqualifying criteria should be determined openly by Parliament rather than secretly by individual prosecutors.

Bearing in mind that under the Commission’s recommendations¹⁰⁴ a large number of people with serious criminal convictions will be excluded from jury service, the Commission does not consider that the state should have the right to systematically screen every prospective juror for less serious non-disqualifying convictions, especially as the accused is not afforded a similar right. If it is considered acceptable for such vetting to take place, then an accused should be entitled to screen all jurors for their victim status; however, this option is neither viable nor appropriate.

While it could be argued that in the absence of prosecution jury vetting there is no rational basis for a prosecutor to exercise a peremptory challenge, the Commission highlights that there are a variety of reasons why a prosecutor might reasonably decide to challenge a juror (eg, the prosecutor recognises a juror as a past victim, past accused or past witness; a juror appears disinterested; a juror is resentful because of an unsuccessful challenge for cause or unsuccessful excuse application; a juror appears incompetent; a juror resides in the same street as the prosecutor, accused, victim or witness; or the juror’s occupation suggests possible bias in the circumstances of the particular case). The Commission believes that a prohibition on prosecution jury vetting puts both the prosecution and the accused on an equal standing – both are entitled to challenge jurors on the basis of their own knowledge about or observations of prospective jurors. Therefore, the Commission makes a recommendation in terms of its original proposal.

RECOMMENDATION 6

Prosecution vetting of jurors’ criminal records

That Rule 57 of 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).

The DPP also stressed that if the right to check jurors’ criminal records is removed it is essential that there

98. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 4.

99. The Commission received submissions in support of its proposal from the Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Gillian Braddock SC; and Aboriginal Legal Service (WA). The Commission notes that the joint submission from the District and Supreme Courts indicated their support for the proposal in principle noting that the decision was a ‘policy’ issue. The Western Australia Police stated that their support for this proposal was dependent upon the Commission’s proposals in regard to disqualification from jury service on the basis of criminal history being implemented.

100. Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

101. *Ibid.*

102. See Chapter Five, ‘Criminal History’.

103. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 36.

104. See Recommendations 40, 41, 43, 44, 45 & 46.

are ‘clear criteria and stringent practices in place for disqualifying people from jury service on the basis of criminal history at the point of summoning people for duty’.¹⁰⁵ The Commission agrees. In Chapter Five the Commission makes various recommendations that will increase the number of people excluded from jury service as a consequence of their criminal histories. The Commission also makes recommendations to ensure that the most up-to-date information is available to the sheriff’s officers to determine whether prospective jurors are qualified to serve.¹⁰⁶ Nevertheless, because of the delay between the time that a person is summoned for jury service and the time the person attends court it is possible that some unqualified jurors may still be part of a jury panel. For example, a person could have been sentenced for a disqualifying offence the week prior to the trial date or recently charged with an offence. The DPP notes this problem as one justification for jury vetting by the prosecution. However, the Commission considers that it is preferable that prospective jurors are informed of the requirement to disclose any recent convictions or charges to the sheriff’s office and that any deliberate failure to do so is an offence.¹⁰⁷

In order to discourage general jury vetting and to protect juror security, the Commission proposed that the jury list should only be available to both parties from 8:00 am on the day of the trial.¹⁰⁸ The majority of submissions in response to this proposal were supportive.¹⁰⁹ However, the Jury Research Unit at the University of Western Australia argued that the jury list should be available the day before the trial because it is sometimes difficult to have sufficient time to discuss the list with an accused who is in custody. It was also suggested that the list should be provided electronically subject to an undertaking to destroy the list after empanelment. The Commission does not agree that jury lists should be provided electronically to counsel – it would be impossible to monitor the distribution of lists before the trial or the destruction of lists after the trial.

The Commission also maintains its view that the list should only be available from 8:00 am on the day of the trial; no objection was received about this proposal from

the Law Society, Legal Aid, the Aboriginal Legal Service nor the Criminal Lawyers Association. Furthermore, advice from the sheriff’s office suggests that defence lawyers often collect the lists on the morning of the trial in any event.¹¹⁰ The Commission was also told that prosecutors tend to collect the list on the Friday morning (for all trials listed in the following week). Although the DPP explained that the proposal to restrict access to the jury list to the morning of the trial would ‘not be workable if the [DPP] is to retain the authority to check jurors’ criminal histories’ there did not appear to be any objection to the proposal if such authority was revoked.¹¹¹

However, the DPP did suggest that if access to the jury list is to be restricted to 8:00 am on the morning of the trial it would be useful for a copy to be available at the Supreme Court (because currently a copy is only available from the sheriff’s office at the District Court building). Currently the distribution of the jury list is controlled by the sheriff’s office and the Jury Manager suggested to the Commission that it would be preferable for the sheriff’s office to maintain control over the distribution of jury lists to counsel.¹¹² Having said that, the Commission recognises that restricting access to the jury lists may cause difficulties for counsel appearing in the Supreme Court because of the limited time available in the morning to obtain a copy of the jury list. The Commission suggests that if its recommendation is implemented, the sheriff’s office should investigate options for facilitating the provision of jury lists to counsel appearing in Supreme Court trials.

RECOMMENDATION 7

Availability and access to jury lists

1. 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.
2. That the sheriff’s office investigate options to facilitate the provision of jury lists to counsel appearing in Supreme Court trials.

105. Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

106. See Chapter Five, Recommendation 47.

107. The Commission has made such a recommendation in Chapter Five: see Recommendation 48. It is recommended that the requirement to disclose disqualifying charges and convictions should be included in the written notices provided to potential jurors when they are summoned and reiterated verbally during the juror indication process.

108. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 4.

109. Submissions received from the Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; Western Australia Police; Judith Bailey; Gillian Braddock SC; and Aboriginal Legal Service (WA).

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

111. Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

112. Carl Campagnoli, Jury Manager (WA), consultation (19 February 2010).

What information should be available about prospective jurors?

Currently in Western Australia the jury lists contain the full names and addresses of all prospective jurors. Thus, although jurors are referred to in court by number, jurors are not anonymous. In its Discussion Paper the Commission discussed the issue of juror security and considered whether it is appropriate to continue to provide identifying information about jurors to the accused and to the prosecution.¹¹³

The Commission is not aware of any recent examples in Western Australia where jurors have been directly contacted or threatened by the parties (or their associates) in a criminal trial.¹¹⁴ The issue for the Commission is the extent to which the provision of names and addresses to the parties undermines juror security and whether there is any particular need for the parties to access personal information about jurors.

Before considering this issue, the Commission highlights that s 43A of the *Juries Act* presently empowers a court to restrict (either fully or partly) the information provided to the parties. If the judge is of the view that it is necessary to protect the security of prospective jurors the judge may, for example, order that the parties are not entitled to access the jury list at all or order that the parties or their lawyers may only have access to the jury list in open court just prior to empanelment. It appears that this power has only been used in a handful of cases.¹¹⁵

In its Discussion Paper the Commission expressed the view that the provision of full street addresses was inappropriate because that information is not essential to the exercise of the right to challenge. The Commission proposed that the jury list should not contain the street address but instead list the suburb or town for each person included in the list.¹¹⁶ A majority

of the submissions received in response to this issue fully supported the Commission's proposal.¹¹⁷

Those who opposed the proposal differed in their responses. The Western Australia Police submitted that all identifying information should be removed from the jury lists, including the street address and suburb.¹¹⁸ On the other hand, Legal Aid contended that street addresses are important for the exercise of peremptory challenges.¹¹⁹ The DPP submitted that if the practice of prosecution jury vetting is to be re-established, it would be necessary for jury lists to contain the full street address in order to enable prosecutors to conduct criminal background checks.¹²⁰ As discussed above, the Commission has recommended that prosecution jury vetting should be prohibited under the *Criminal Procedure Rules*.¹²¹ Hence, the Commission has approached this topic on the basis that prosecution jury vetting will not take place.

The DPP also submitted that it may be useful or important to have access to the street name in order to enable counsel to challenge a juror who lives in the same street as the accused or counsel or where the alleged offence took place. The same observation could apply in respect to the address of a victim or witness. The DPP acknowledged that the chance that a juror would reside in the same street as someone involved in the trial would be low. The Commission agrees and also notes that if such an event did occur, it would also be possible that the juror would be recognised and challenged on that basis.¹²² Moreover, the fact that a juror resides in the same street as someone involved in the trial does not of itself provide a logical basis for challenge. It would only be necessary to challenge such a juror if the juror was known to one of the parties (or someone else involved in the trial). Any concern that counsel, the accused or a witness may come face-to-face with a juror after court is no different to the possibility that any one of these people could see a juror outside court on any day during

113. The Commission noted that the degree of information provided varies across jurisdictions. For example, in New South Wales no information is provided to the parties but in some jurisdictions (eg, Queensland, Tasmania and Australian Capital Territory) jurors' names are read out in open court: see further LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 38–40.

114. See LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 38. It has recently been 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 extent and nature of this intimidation had not been publicly disclosed at the time of writing: Fordham J, 'Bad Press: Does the jury deserve it?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 7.

115. Carl Campagnoli, Jury Manager (WA), correspondence (3 August 2009).

116. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 5.

117. Submissions received from Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; District Court and Supreme Court of Western Australia; Judith Bailey; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC; and Aboriginal Legal Service (WA).

118. Western Australia Police, Submission No 20 (31 December 2009).

119. Legal Aid Western Australia, Submission No 18 (4 January 2010).

120. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

121. Recommendation 6 above.

122. The DPP submitted that the issue of whether any prospective jurors might live near the offence location could be accommodated by the presiding judge informing the jury panel of the offence location before empanelment and asking prospective jurors who reside in or near that location to seek to be excused: Office of the Director of Public Prosecutions, Submission No 25 (20 January 2010).

the trial or at any other location if they lived in close proximity.

Obviously, it is vital that jurors are safe from actual intimidation and threatening behaviour. The Commission is also mindful of the need to ensure that jurors *feel* safe when discharging this important civic duty because fear or concern about the possibility of threatening behaviour may potentially impact on the integrity of jury deliberations. Having said that, the Commission is not aware of any evidence to suggest that juror safety has been undermined by the provision of street addresses in Western Australia. Further, the Jury Research Unit has indicated that it appears to be rare for juror intimidation to 'result in a juror voting a way different from that which their dispassionate consideration of the evidence would dictate'.¹²³ However, the Jury Research Unit's report on jury intimidation has yet to be made public. Hence, the Commission is unaware of the precise form of juror intimidation that has been considered by this research. Overall, the Commission has concluded that the utility of providing street addresses does not outweigh the need to protect juror safety and the integrity of the jury system.

However, the provision of jurors' names is in a different category. There is a much sounder basis for providing the parties with jurors' names in order to ensure that the parties can effectively exercise the right of peremptory challenge. A party may recognise the name of a juror but may not recognise that juror in person. In response to its invitation to submit about this issue,¹²⁴ the majority of submissions supported the retention of names on the jury list.¹²⁵ It was considered by most to be necessary in order to exercise the right to challenge. For example, the Aboriginal Legal Service explained that the full name of jurors should be provided to the parties so that it is possible to identify any familial or cultural bias, especially in regional areas where the jury pool is smaller.¹²⁶ Gillian Braddock SC stated that:

Often, it is the name on the list which informs counsel for the accused or the prosecution that the person may be known to them. It may be that the combination of surname and suburb is required to trigger their

recollection or indeed to exclude concern about a juror who is visually familiar.¹²⁷

Legal Aid stressed in its submission the importance of early identification of jurors who may be acquainted with those involved in the trial.¹²⁸ If such information comes to light after the trial has commenced the impact may be very significant – a trial may have to be aborted or a verdict subsequently overturned.

The Commission has concluded that the jury list provided to both parties should continue to include the full name of each prospective juror but it should not include the juror's street address. The Commission is of the view that its recommendations to restrict access to the list to the morning of the trial and to remove street addresses coupled with the existing power to further restrict access in individual cases represents a reasonable balance between promoting jurors sense of security and ensuring that the trial process is, and is perceived to be, fair.

RECOMMENDATION 8

Provision of personal information about jurors

That the *Juries Act 1957* (WA) be amended to provide that the jury panel or pool list made available to the parties in a criminal trial (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.

Currently, during induction jurors are informed that they will be referred to by their identification number in order to protect their anonymity; however, they are not informed that the parties have access to lists containing their full names and addresses. In its submission the Jury Research Unit (UWA) advised that it does not appear that jurors are aware that their details have been provided to the prosecution and the accused. It stated that:

In our study, the overwhelming majority of Jurors welcomed being referred to by an identification number. It heightened their sense of security. We have had no indication that jurors are aware that prosecution and defence, including the accused, have initially been advised of their names and addresses.¹²⁹

123. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

124. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Invitation to Submit C.

125. Submissions in support were received from the Criminal Lawyers Association, Jury Research Unit (UWA); Law Society, of Western Australia; Legal Aid Western Australia; Office of the Director of Public Prosecutions; Gillian Braddock SC; and Aboriginal Legal Service (WA). Submissions against retention of names were received from the Department of the Attorney General; Western Australia Police; and Judith Bailey.

126. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).

127. Gillian Braddock SC, Submission No 39 (4 February 2010).

128. Legal Aid Western Australia, Submission No 18 (4 January 2010).

129. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

Further, the Western Australia Police did not consider that it was appropriate to disclose personal information about jurors when they are ‘kept under the impression by the Sheriff’s office and the procedure in court that they are anonymous and that they are only known by their respective juror numbers’.¹³⁰ In contrast, the Department of the Attorney General stated that, following empanelment, ‘many jurors are aware that counsel has access to a list which contains their personal information’.¹³¹

In its submission the Jury Research Unit (UWA) suggested that jurors should be informed of the correct position; they should be told what information is contained in the jury list and the circumstances in which that list is provided to the prosecution and to the accused. The Law Society made a similar submission. The Commission agrees that jurors should be fully informed and that they should be reassured (via an accurate description of the procedure) that access to the jury list is limited.¹³²

RECOMMENDATION 9

Information for jurors – security issues and personal information

1. That during induction, the sheriff’s office should inform prospective jurors that the prosecutor, defence counsel and the accused are permitted access to a copy of the jury list and that this list contains the juror’s full name, the suburb or town in which the juror resides and the juror’s occupation (if recorded on the electoral roll).
2. That prospective jurors should also be informed that the prosecutor and the defence are only entitled to access this list if they sign an undertaking that they will not copy the list or divulge its contents to any person other than the accused or another lawyer acting for the accused, and that they must return the list to the jury officer immediately following empanelment.

130. Western Australia Police, Submission No 20 (31 December 2009).

131. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

132. The Commission has also recommended that prospective jurors should be informed (during induction) about the process for and purpose of peremptory challenges including examples of reasons why a prospective juror might be challenged in a particular trial: see above, Recommendation 5.

Problems with the jury selection process

IN its Discussion Paper the Commission considered two important issues concerning the process of jury selection in Western Australia: the unequal burden of jury service in regional areas and the apparent underrepresentation of Aboriginal people as jurors. The Commission made a number of proposals to reform and improve the jury selection process in Western Australia in order to address these issues.¹

ABORIGINAL PARTICIPATION IN JURY SERVICE

The Commission has examined the available evidence in regard to the level of participation in jury service by Aboriginal people. In the metropolitan area it appears that Aboriginal people may be slightly underrepresented as jurors. An exit survey conducted by the sheriff's office in 2009 indicates that approximately 1% of jurors self-identified as Aboriginal and according to the 2006 census, Aboriginal and Torres Strait Islander people make up approximately 1.5% of the metropolitan population.² No statistics are available for regional areas, although anecdotal evidence suggests that in some regional locations Aboriginal people appear to be reasonably well represented on juries.³

Although it is often claimed that Aboriginal people are underrepresented as jurors there is no accurate and up-to-date statewide data to confirm this view. A variety of reasons have been suggested to explain the apparent low participation levels. These include low and inaccurate enrolments; difficulties with the summoning process in regional areas; and cultural issues and community ties.⁴

In relation to barriers to participation caused by cultural and community ties, the Commission reiterates its view that 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 a witness would lead to actual or perceived bias.

In its submission, the Jury Research Unit at the University of Western Australia stated that:

It is likely that aboriginal persons are underrepresented in the jury pool, perhaps due to transport difficulties, not being on the electoral roll, not living at their last recorded address, or for any other reason not receiving or not acting upon a jury summons. These factors are applicable to other potential jurors, in particular transient seasonal workers.⁵

The Commission agrees that issues concerning the accuracy of electoral data and problems with the summoning process are not limited to Aboriginal people; these issues are potentially relevant to all people in regional locations and are therefore considered more generally below.

REGIONAL ISSUES

There are four jury districts in Western Australia—Kununurra, Broome, Derby and Carnarvon—for which the required annual juror quota is higher than the number of eligible persons on the electoral roll in that jury district.⁶ In these districts, the annual jurors' books are comprised of all enrolled voters between the ages of 18 and 70. Unlike people who reside in the metropolitan area, people who reside in these regional locations can be required to serve on a jury more than once a year. A

1. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 41–47.

2. ABS, *2006 QuickStats: Perth* (2007).

3. The Commission was told that in Kununurra approximately 20% of people who attend for jury service are Aboriginal (and Aboriginal people make up about 26% of the population in Kununurra). Also, the Commission was advised that in Derby approximately half of those people who attend in response to a juror summons are Aboriginal and usually about four or five Aboriginal people are selected as jurors per trial. Aboriginal people constitute 45% of the Derby population: LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 45.

4. Also, some Aboriginal people may not be qualified for jury service because of difficulties in understanding the English language.

5. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

6. 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).

number of recommendations in this Report will assist in reducing the additional burden experienced by jurors in these jury districts. For example, deferral of jury service⁷ will enable seasonal workers (and others) to postpone their jury service to a more convenient time. Further, increasing the age of liability for jury service to 75 years⁸ will also enlarge the available jury pool.⁹

Accuracy of electoral rolls

In its Discussion Paper the Commission made a proposal aimed at increasing the number and accuracy of electoral enrolments by encouraging people to update their electoral details.¹⁰ This proposal was made in order to increase the number of potential jurors in those regional districts with insufficient numbers to meet the annual jury quota. But, of course, increasing the number and accuracy of electoral enrolments will potentially increase the available jury pool across the state. The Commission recognised that people who reside in regional locations are often transient because of seasonal work and high staff turnover and, therefore, their current electoral status may not be accurate. For example, in order to be liable for jury service in the jury district of Kununurra, a person must be registered on the roll of electors and the roll must show that the person resides in the Kununurra jury district. A person may have recently moved to Kununurra to work for six months but this person may not have changed their electoral details.

The Commission proposed that the Department of Transport ‘Change of Personal Details’ form include notification of the requirement to update electoral details and that Electoral Enrolment forms be available at licensing centres.¹¹ Further, it was proposed that the

Western Australian Electoral Commission continue to develop strategies to encourage Western Australians to update their electoral details including the possibility of a dual notification form that would enable people to notify a change of address to the Electoral Commission at the same time as notifying the Department of Transport for the purpose of updating licensing details.¹²

The Commission received unanimous support for this proposal.¹³ The Western Australian Electoral Commission advised that the Australian Electoral Commission has ‘arranged for electoral enrolment forms to be placed in licensing centres and included in the Department of Transport change of address correspondence’.¹⁴ As far as the Commission is aware electoral enrolment forms have not yet been placed at state licensing centres and the Department of Transport ‘Change of Personal Details’ form does not refer to the requirement to separately update enrolment details. Nonetheless, it appears that processes designed to increase the number of electoral enrolments and the accuracy of enrolment information are currently being considered. In a submission to the recent Australian Government’s Electoral Reform Green Paper, the Australian Electoral Commission indicated its support for direct updating of enrolment details from ‘approved sources’.¹⁵

The Western Australian Electoral Commission also suggested that, in order to enable all potential options to be considered, strategies to encourage Western Australians to update their electoral details should not focus on initiatives involving the Department of Transport. The Commission notes that its proposal referred to the possibility of a form to simultaneously update licensing and enrolment details because people are arguably more willing to update their drivers licence details than they are to update electoral details (especially if there is no election immediately pending). Having said that, the Commission agrees that the possibility of automatic updating of electoral details sourced from other government agencies should also be considered.

7. Recommendation 63.

8. Recommendation 16.

9. In Chapter Four the Commission notes that the Western Australian Electoral Commission currently removes (from the annual jury lists) people who appear to be ineligible on the basis of their occupation as recorded on the electoral roll. This practice is problematic because it relies on occupational information that may be out-of-date and because most categories of occupational ineligibility are only excluded from jury service for a specified time (rather than permanently). In order to ensure that eligible persons are not incorrectly removed from the jury lists the Commission recommends amendments to ss 14(2) and 14(3a) of the *Juries Act 1957* (WA): see Recommendation 19. In those regional areas where there are not enough eligible persons to meet the juror quota, this recommendation will assist in increasing the number of persons who are included in the annual jury list.

10. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 6.

11. The online ‘LifeEvents’ link on the Department of Transport website enables a person to notify multiple government departments of a change of address and it clearly advises of the requirement to update electoral details. However, the Department of Transport form (which can be filled in online or in person) does not refer to electoral details.

12. Such a dual notification form would require the stipulated timeframes to be changed because currently a person must notify the Department of Transport within 21 days of moving address, whereas a person must have resided at a new address for one month before updating his or her enrolment details.

13. Submissions received from the Western Australian Electoral Commission; Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Carl Campagnoli, Jury Manager (WA); and Gillian Braddock SC.

14. Western Australian Electoral Commission, Submission No 12 (11 December 2009).

15. Australian Electoral Commission, *Submission to the Government’s Electoral Reform Green Paper – Strengthening Australia’s Democracy* (27 November 2009). This option would require reform of Commonwealth legislation because it is currently a requirement that electoral forms must be signed.

Accordingly, the Commission makes the following recommendation.

RECOMMENDATION 10

Updating electoral details

1. That the Western Australian Department of Transport 'Change of Personal Details' form include advice that people are required to separately update their details with the Electoral Commission 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) the viability of 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 purpose of updating licensing details; and
 - (b) the investigation of options for automatic updates sourced from other government agencies.

Accuracy of jurors' books

Because jurors' books are only produced annually, it is important to ensure that updated electoral details can be transferred to the jurors' books. Otherwise, strategies to encourage people to maintain the accuracy of the electoral roll will be ineffective for the purpose of enlarging the available jury pool. Currently, jurors' books can be amended by changing the person's current address or by deleting a person from a juror book if he or she no longer resides in that jury district. However, under the legislation it is not possible to add a person to a different jurors' book if it becomes known that the person has moved from one jury district to another. The Commission received full support for its proposal to address this problem¹⁶ and therefore it makes a recommendation in the same terms as its original proposal.

16. See LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 7. Submissions were received from the Western Australian Electoral Commission; Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Carl Campagnoli, Jury Manager (WA); and Gillian Braddock SC.

RECOMMENDATION 11

Updating jury lists and jurors' books

1. That s 14(9) of the *Juries Act 1957* (WA) be inserted to provide that if a person 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.

Jury service awareness raising

Measures designed to increase the number and accuracy of electoral enrolments are necessary to assist in reducing the inequitable burden of jury service on people who reside in those jury districts where there is an insufficient number of eligible jurors to satisfy the required juror quota. However, it is also important to ensure that those who are enrolled correctly in these areas are willing to undertake jury service. In its Discussion Paper the Commission referred to previous jury service awareness raising campaigns that have been conducted in the Pilbara, Mid-West and the Goldfields.¹⁷ These campaigns improved juror participation rates; however, the improvements do not appear to have been sustained over time.¹⁸

Accordingly, the Commission proposed that the government provide resources to the sheriff's office to undertake *regular* jury service awareness campaigns throughout regional areas.¹⁹ The Commission also proposed, more generally, that resources should be provided for jury service awareness raising strategies targeted to people from culturally and linguistically diverse backgrounds and to dispel any misconceptions that performing jury service will impose a financial burden on the juror or the juror's employer.²⁰ Any jury service awareness raising campaigns undertaken in regional Western Australia should simultaneously

17. See LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 43.

18. Indigenous Justice Taskforce, *A Review of the Indigenous Justice Taskforce* (2009) 21.

19. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 8.

20. Ibid, Proposals 39 & 49.

address these broader issues. The Commission received unanimous support for all of its proposals in relation to jury service awareness raising.²¹ In its submission, the Jury Research Unit stated that:

Both Sheriff's Office statistics and our studies support the fact that generally jury service is a positive experience, and this information ought to be conveyed to potential jurors.²²

The Commission agrees that jury service awareness raising campaigns should focus on informing the community about the importance of jury service and that it is, on the whole, considered to be a very worthwhile experience. Furthermore, members of the community should be informed about the process and their obligations and rights in relation to jury service.

RECOMMENDATION 12

Jury service awareness raising – regional areas

That the Western Australia government provide resources to the sheriff's office to undertake regular jury service awareness raising campaigns throughout regional Western Australia.

The summoning process in regional areas

Postal arrangements in regional locations can create a practical barrier to jury participation because in some places there is no postal delivery service (thus, in order to access mail it is necessary to collect mail from the nearest post office). Community members may reside some distance from the local post office (eg, Aboriginal people who reside in remote communities, farmers and

station owners). These people are likely to collect their mail sporadically and therefore they may not receive the jury summons in time. In her submission, Mary Chape (a lawyer who has worked in the Kimberley) observed that juror summonses for regional trials are not usually distributed until about two weeks before the trial. She suggested that juror summonses should be issued at least six weeks before the District Court circuit sittings; that the Electoral Commission should be encouraged to seek post office box addresses; and that the local bailiff should be required to deliver any juror summonses that are not addressed to a post office box.²³ The Commission notes that even if post office box addresses are provided this will not alleviate the problem identified above – that some people do not or cannot collect their mail regularly. Furthermore, personal service of juror summons would be extremely expensive, time consuming and possibly unproductive because many regional residents are transient. In regard to the suggestion that juror summonses should be issued earlier, the Commission has been informed that presently juror summons are sent out four weeks before the trial.²⁴ It appears that the practice in this regard has improved. The Commission suggests that the sheriff's office continue to monitor the time period between the date of issue for regional juror summonses and the date of the trial to ensure that barriers to juror participation based on the late receipt of summonses are reduced.

Expanding jury districts

The Commission considered whether it would be viable to expand the current jury districts in order to widen the available jury pool and thereby reduce the burden on those who currently participate in jury service.²⁵ In examining this issue the Commission took into account the fact that some Western Australians are presently denied the right to participate in jury service on the basis of their residential location. For example, the jury districts of Broome, Carnarvon, Derby and Kununurra are defined as those parts of the applicable Legislative Assembly electoral districts that are within an 80km radius of the courthouse.²⁶ Therefore, a person who resides 81 km from the courthouse will be excluded from participating in jury service (unless he or she falls within another jury district).

In 1986 the New South Wales Law Reform Commission concluded that all adult citizens should be 'equally liable'

21. In relation to Proposal 8, the Commission received submissions in support from the Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Carl Campagnoli, Jury Manager (WA); and Gillian Braddock SC. The Commission also received a submission from Brian Tennant who commented that many jurors are not keen to undertake jury service and that the government should try to change the community's attitude to jury service: Brian Tennant, Submission No 6 (13 October 2009).
22. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009). The research undertaken by the Jury Research Unit showed that approximately 75% of jurors found the experience positive with about 33% finding the experience very positive. Similarly, a survey of jurors undertaken by the sheriff's office showed that 70% of jurors who responded to the survey found that their confidence in the justice system was enhanced by their experience as a juror: Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009).

23. Mary Chape, Submission No 2 (1 October 2009).

24. Carl Campagnoli, Jury Manager (WA), consultation (17 February 2010).

25. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 44 (Invitation to Submit D).

26. *Government Gazette*, No 71 of 2009 (24 April 2009) 1384.

to serve on a jury'.²⁷ This is the current practice in South Australia where the entire state is divided into three jury districts and therefore no one is 'disenfranchised' from jury service.²⁸ However, people who are included in the annual jury list and reside more than 150 km from the courthouse are given notice that they will be removed from the relevant jury lists unless they advise that they are willing to serve as a juror if summoned. In its submission for this reference Legal Aid supported the South Australian approach.²⁹ Other submissions also supported the expansion of jury districts,³⁰ with some submissions favouring the expansion of jury districts to cover the entire state.³¹ The DPP submitted that the expansion of jury districts may potentially increase Aboriginal representation on juries and guidelines for determining excuse applications should deal with excessive travel requirements.³² Most submissions that responded to this issue argued that excessive travel requirements could appropriately be dealt with via the excuse process.

On the other hand, the Western Australian Electoral Commission noted that extending the jury district boundaries will not have a significant impact on the size of the available jury pool because most regional residents live close to town.³³ The Department of the Attorney General did not support any expansion of jury districts because of the travel difficulties.³⁴ Judith Bailey argued that if jury districts were to be expanded accommodation expenses should be reimbursed. The Commission appreciates that the travel and accommodation expenses incurred by government may be quite high but of course it is not possible to know how many people who reside outside the current boundaries would be willing to undertake jury service. The Commission supports, at least in theory, the expansion of jury districts to cover the entire state so that all citizens have an equal opportunity to be selected to perform jury service. However, it accepts that it may be more practical to impose a distance limit.

For this reason, the Commission recommends that the Western Australian Electoral Commission undertake a review of the current jury districts to consider whether the expansion of those jury districts is viable and useful.³⁵ In undertaking this review, the Commission stresses that jury service should be viewed as both a right and an obligation and it would be beneficial if the Electoral Commission sought the views of people residing in regional locations.³⁶

RECOMMENDATION 13

Review of current jury districts

That the Western Australia Electoral Commission undertake a review of the current jury districts to determine if there is any merit in expanding the jury districts to cover more of, or all of, the state of Western Australia.

27. NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.12].

28. *Juries Act 1927* (SA) s 8; Neil Iversen, Jury Manager (SA), telephone consultation (17 June 2009).

29. Legal Aid Western Australia, Submission No 18 (4 January 2010).

30. Law Society of Western Australia, Submission No 17 (4 January 2010); Western Australia Police, Submission No 20 (31 December 2009); Judith Anne Bailey, Submission No 23 (12 January 2010).

31. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009); Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

32. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

33. Western Australian Electoral Commission, Submission No 12 (11 December 2009).

34. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

35. Pursuant to s 12(1) of the *Juries Act 1957* (WA) the Governor may from time to time vary the area of any jury district.

36. The Commission notes that conducting field trips to remote Aboriginal communities is one strategy proposed to increase Aboriginal electoral enrolments: see Western Australian Electoral Commission, *Reconciliation Action Plan 2008–2010*, 8 & 11. During any such field trips to regional and/or remote Western Australia, the Electoral Commission should endeavour to seek the view of local residents about their willingness and ability to undertake jury service.

Chapter Three

Liability for Jury Service

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Liability to serve as a juror

SECTION 4 of the *Juries Act 1957* (WA) 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. The Commission's Discussion Paper examined the potential for non-citizen permanent residents to be considered as potential jurors, both to increase the size of the potential pool of jurors and to enhance representation of people from culturally and linguistically diverse backgrounds. However, like other reviews before it,³ the Commission found that the practical difficulties with obtaining an officially verifiable point-in-time list of non-citizen permanent residents to augment the electoral roll were such that this concept was unable to be further developed.

Although there has been speculation in other jurisdictions about the possibility of establishing a procedure whereby non-citizen permanent residents could apply to be enrolled for jury service, this has been rejected as unduly expensive and unlikely to be successful.⁴ But more importantly, the concept of voluntary registration for jury service has been criticised as seriously undermining the

principle of random selection.⁵ 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.⁶ In view of these concerns, the Commission determined that the requirement of citizenship for jury service should remain, and opportunities for culturally and linguistically diverse groups to participate in jury service should be maximised by awareness raising strategies.⁷

ITINERANT AND OVERSEAS ELECTORS

In its Discussion Paper, the Commission noted that from 1 October 2009 electors enrolled and registered under the *Electoral Act 1918* (Cth) as having no fixed address (known as itinerant electors)⁸ will be recognised as enrolled on the state electoral roll under the *Electoral Act 1907* (WA).⁹ Overseas electors (ie, those who have notified the Commonwealth Electoral Commission that they are resident outside of Australia)¹⁰ have been recognised as eligible to be enrolled on the state electoral roll since 2006.¹¹

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

1. That is, the person must be 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. ALRC, *Multiculturalism: Criminal law*, Discussion Paper No 48 (1991) 63; ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992); NSWLRC, *Jury Selection*, Report No 117 (2007); VPLRC, *Jury Service in Victoria*, Final Report (1996).
4. Based on experience in jurisdictions overseas, in particular, the United States: VPLRC, *Jury Service in Victoria*, Final Report (vol 1, 1996) 29.

5. NSWLRC, *Jury Selection*, Report No 117 (2007) 29.
6. See Chapter One, Guiding Principle 2.
7. See Chapter Five, Recommendation 51.
8. 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 enrolment as an itinerant elector for so long as they remain itinerant (ie, they do not reside in any place for longer than one month). Should they fail to vote at the next general election, their enrolment as an itinerant elector will lapse. See *Electoral Act 1918* (Cth) s 96(9)(a).
9. *Electoral Amendment (Miscellaneous) Act 2009* (WA) s 6, inserting s 17B into the *Electoral Act 1907* (WA).
10. 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 (9), an eligible overseas elector can theoretically obtain an indefinite number of one-year extensions so long as he or she intends to resume residence in Australia. Should they fail to vote at a general election, their status as an eligible overseas elector will be cancelled.
11. See *Electoral Act 1907* (WA) s 17A.

s 4 of the *Juries Act* they remain liable for jury service as if they did reside in the jury district. After consultation with the Western Australian Electoral Commission, it was proposed that itinerant and overseas electors should be expressly identified as not being liable for jury service under s 4 of the *Juries Act*. All submissions responding to this proposal showed support. The Commission therefore recommends that s 4 of the *Juries Act* be amended 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.

RECOMMENDATION 14

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).

SILENT ELECTORS

In its submission to the Commission's Discussion Paper, the Western Australian Electoral Commission suggested that consideration be given to treatment of 'silent electors' in respect of the *Juries Act*.¹² A silent elector is a person who has applied to the Electoral Commissioner under s 51B of the *Electoral Act 1907* (WA) to have their address suppressed on the publicly available electoral rolls of the state and the Commonwealth. Silent elector status is not granted simply on the basis that the elector wishes to keep his or her personal details out of the public realm. To become a silent elector a person must sign a statutory declaration giving particulars as to how the personal safety of the elector or his or her family would be at risk if the elector's address were shown on the electoral roll. Examples of silent electors would include protected witnesses, domestic violence victims and people whose occupations have exposed them to general or specific threats of harm (eg, judges, police officers, prison officers and debt collectors). As at 30 June 2009, there were 12,448 silent electors in Western Australia.¹³

Electors who have been granted silent status are, as a matter of practice, excluded from the roll from which

the jury lists for each district are compiled. This is in recognition of the fact that if a silent elector was included in a jury list, it would require disclosure of the elector's address to the Sheriff's Office and to the external contractor who prepares the summons for jurors. Yet, under the *Juries Act* silent electors remain liable for jury service. Given that a determination has already been made by the Electoral Commission that the elector's personal safety may be threatened by exposure of his or her address, exclusion of silent electors from liability for jury service would appear to the Commission to be both prudent and logical. The Commission therefore makes the following recommendation.

RECOMMENDATION 15

Silent 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 have been granted silent elector status under s 51B of the *Electoral Act 1907* (WA).

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.¹⁴ 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.¹⁵ Though most Australian jurisdictions refer to an upper age limit at which a person can voluntarily opt out of jury duty,¹⁶ 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. The table opposite summarises the position in the various Australian jurisdictions.

As can be seen from the table, New South Wales, the Australian Capital Territory, the Northern Territory and Tasmania allow persons over a certain age to claim an exemption from jury service 'as of right' if summoned.¹⁷ In each of these jurisdictions the exemption must be

12. Western Australian Electoral Commission, Submission No 12 (11 December 2009).

13. Warren Richardson, Western Australian Electoral Commission, email (2 February 2010).

14. *Juries Act 1957* (WA) s 4.

15. *Electoral Act 1907* (WA) s 17(4b).

16. 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).

17. *Jury Act 1977* (NSW) s 7; *Juries Act 1967* (ACT) s 11(2); *Juries Act* (NT) s 11(2); *Juries Act 2003* (Tas) s 11.

	Age (years)	Juror status
WA	65 to 69 70 or more	May serve as a juror or claim an excuse as of right if summoned Ineligible (not permitted) to serve as a juror
QLD	70 or more	Can voluntarily elect to serve as a juror
NSW	70 or more	May serve as a juror or claim an exemption as of right if summoned
ACT	60 or more	May serve as a juror or claim an exemption as of right if summoned
NT	65 or more	May serve as a juror or claim an exemption as of right if summoned
SA	70 or more	Not liable (not permitted) to serve as a juror
VIC	Advanced age (undefined)	Must provide good reason to support an application to be excused from jury service if summoned to serve as a juror
TAS	70 or more	May serve as a juror or claim an excuse as of right if summoned

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.¹⁸ Victoria permits jury service at any age but allows an excuse for a person of an undefined ‘advanced age’ if good reason is given.¹⁹ In South Australia a person aged 70 years or more is not liable to serve as a juror²⁰ (and so, like Western Australia, will not be summoned) and in Queensland a person aged 70 years or more is not eligible to serve as a juror, unless they elect in writing to be eligible for jury service.²¹

Western Australia is the only jurisdiction with a two-stage system of age exemption. Under the current law in this state, a person aged 65–69 years may claim an excuse as of right to jury service on the basis of age alone, while those aged 70 years and above are not eligible to serve.²² In the Commission’s opinion there is no good reason for retaining an excuse as of right for people aged between 65 and 69 years. Indeed, the Commission recommends that there should be no excuses as of right

on any basis.²³ This reflects the Commission’s guiding principle supporting wide participation in jury service (Principle 3) and is discussed in more detail in Chapter Six.

The appropriate upper age limit for jury service

Considering the position in other jurisdictions and taking into account the various arguments for and against raising the age for jury service, the Commission proposed in its Discussion Paper that 75 years was an appropriate upper age limit for jury duty.²⁴ The Commission received a large number of submissions specifically directed to this proposal. Of the 22 submissions received on this subject, 19 supported increasing the age limit for jury service to 75 years or above²⁵ and the remaining 3 submissions favoured removing the excuse as of right for people aged over 65 years, but argued that the upper age limit should be maintained at 69 years.²⁶

There are good arguments for the proposition that people over 69 years of age 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

18. 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’.

19. 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: *Juries Act 2000* (Vic) s 8(3)(i).

20. *Juries Act 1927* (SA) s 11(b).

21. *Jury Act 1995* (Qld) ss 4(3)(j) and 4(4).

22. *Juries Act 1957* (WA) ss 5(a)(ii) and 5(c)(i). 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.

23. See Chapter Six, Recommendation 59.

24. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Project No 99, Discussion Paper (2009) Proposal 10.

25. Submissions received from the Council on the Ageing; Department for Communities; Law Society of Western Australia; Legal Aid Western Australia; Office of the Director of Public Prosecutions; Margaret Thomas; Nita Sadler; Bettine Heathcote; Gillian Braddock SC; Western Australia Police; Supreme Court and District Court of Western Australia; John Slattery; Judith Bailey; Western Australian Electoral Commission; Jury Research Unit (UWA); Tom Rollo; Ruth Kershaw; June MacDonald; and June Dunstan.

26. Department of the Attorney General (WA); Professor Michael Gillooly; Carl Campagnoli, Jury Manager (WA).

available time to commit to jury duty. In its submission supporting the increase in maximum age for jury service, the Department for Communities argued that ‘generally older people are remaining in the workforce and are active in the community to a later age and, as we have an ageing population, raising the upper age limit will potentially ensure that juries are more representative of the general community’.²⁷ Another benefit recognised by the Commission’s Discussion Paper is that people of an advanced age bring a wealth of life experience to the task of a juror. This point was emphasised by the Council on the Ageing, which argued in support of raising the age that jury service was ‘an important aspect of citizenship [and that] the experience and knowledge of seniors will enhance the work of the courts’.²⁸

However, as the Commission’s Discussion Paper noted, there are also good reasons for retaining reasonable age limits on jury service. These include the decline of physical health and mobility that can accompany old age and which may make it difficult for some older people to sit for protracted periods or travel to and from the court.²⁹ In its submission to the Discussion Paper, the Department of the Attorney General suggested that there would be an increase in applications for excuse based on ‘age related ailments and unwillingness to use public transport’ in support of its position that the age cap on jury service should remain at 69 years.³⁰ Another reason noted in the Discussion Paper and also advanced by Professor Michael Gillooly³¹ is that people aged 70 years and above have already contributed to the community and should be entitled to the freedom that comes with retirement.

Professor Gillooly submitted that the age limit should be 70 years because, among other things, ‘no other Australian jurisdiction sets the eligibility age as high as 75 years’.³² However, as explained in the Commission’s Discussion Paper, only Western Australia and South Australia limit eligibility for jury service to less than 70 years; all other Australian jurisdictions permit service at any age.³³ Professor Gillooly also argued that 70 years

is the age of ‘statutory senility’ at which most judicial officers are required to retire. He noted that ‘it is difficult to see why judges of the facts [that is, juries] should be assumed to be more capable than the judges of the law [that is, judicial officers]’.³⁴ The Commission appreciates this argument, but points out that the law in Western Australia, as well as in the Northern Territory, South Australia and Tasmania already permits appointment of former judges of *any age* as acting or auxiliary judges.³⁵ Further, the laws in New South Wales and Victoria permit acting judicial appointments to 77 and 75 years of age respectively.³⁶ The Commission does not therefore accept this as a sufficiently persuasive argument to limit liability for jury service to 70 years.

Five submissions argued—on the basis of removing age barriers and limiting age discrimination in all areas of life—that there should be no upper age limit to jury service at all.³⁷ The Commission sympathises with these submissions and, in principle, supports the removal of age barriers in civic life. However, while the Commission is of the opinion that the present age cap at 69 years is too low, it is persuaded—primarily by practical arguments—that Western Australia should retain an upper age limit for jury service.³⁸ The Commission is not convinced that

Exemption of Jurors, Project No 99, Discussion Paper (2009) 53–54.

34. Professor Michael Gillooly, University of Western Australia, Submission No 5 (9 October 2009).

35. See *District Court of Western Australia Act 1969* (WA) s 18A and *Supreme Court Act 1935* (WA) s 11AA; *Supreme Court Act* (NT) s 32; *Supreme Court Act 1935* (SA) s 11; *Supreme Court Act 1887* (Tas) s 3 (stating that the compulsory retirement age of 70 years in s 6A does not apply to the office of acting judge).

36. *Judicial Officers Act 1986* (NSW) s 37; *Constitution Act 1975* (Vic) s 80D.

37. Jury Research Unit (UWA); Tom Rollo; Ruth Kershaw; June MacDonald; and June Dunstan. Margaret Thomas submitted that the upper age of 70 was ‘insulting’ and though she accepted that an upper age limit was appropriate, she thought there was a case for this being higher than 75 years: Margaret Thomas, Submission No 34 (3 February 2010).

38. Professor Gillooly pointed out in his submission against raising the age limit for jury service that ‘one’s abilities decline with age’; in particular, the ability to concentrate in court and participate ‘in a meaningful way in jury room discussions’: Professor Michael Gillooly, University of Western Australia, Submission No 5 (9 October 2009). While the Commission does not agree to capping the age limit for jury service to 69 years, it does accept that this is a valid argument against having no upper age limit to jury service. The Commission notes that a recent study in the United Kingdom has shown that the younger the juror, the better the recall and understanding of oral instructions on law given by a trial judge, with jurors aged between 18 and 29 having the highest recall and understanding of oral instructions (49%), declining to 28% by age 30 and to 21% by age 50. However, this was not attributed to any decline in mental faculties, but rather to more recent experience of formal education where oral learning is routine. See Thomas C, *Are Juries Fair?*, Ministry of Justice Research Series 1/10 (February 2010) 37–38.

27. Department for Communities, Submission No 28 (28 January 2010).

28. Council on the Ageing, Submission No 32 (3 February 2010). See also Nita Sadler, Submission No 37 (29 January 2010).

29. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Project No 99, Discussion Paper (2009) 54.

30. The Commission notes that there are no available statistics or evidence to support this claim. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

31. Professor Michael Gillooly, University of Western Australia, Submission No 5 (9 October 2009).

32. *Ibid.*

33. Subject to voluntary election in Queensland. Excuse as of right is available to persons above 70 years of age in the remaining jurisdictions, except Victoria where good cause must be shown for excusal at any age: see LRCWA, *Selection, Eligibility and*

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 form³⁹ and who may face an automatic penalty if they fail to attend in the absence of such a claim.⁴⁰ 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.⁴¹ 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.⁴² Because potential jurors are selected randomly by computer, the number of elderly people called for jury service at any one time cannot be foreseen.

Because many people retire outside the metropolitan area, the raise in age of liability for jury service from 69 to 75 years has the potential to expand the jury pool significantly in some regional areas.⁴³ 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.⁴⁴ 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.⁴⁵

39. 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.

40. Under the Commission's recommendations, an automatic infringement notice will be issued for failure to respond to a jury summons: see Chapter Seven, Recommendation 67.

41. The Western Australian Electoral Commission advised that this requires only a 'minor programming change' to the computer compilation process and is 'readily achievable': Western Australian Electoral Commission, Submission No 12 (11 December 2009).

42. NSWLRC, *Jury Service*, Issues Paper 28 (November 2006) 92.

43. The movement of retirees from metropolitan areas to regional areas is a key theme of the latest Statistician's Report. See Australian Bureau of Statistics (ABS), CAT No 2070.0, *A Picture of the Nation* (January 2009).

44. See *Juries Act 19757* (WA) sch 2, pt 1, 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.

45. See ABS, CAT No 3201.0, Table 5, *Estimated Resident Population by Single Year of Age, Western Australia*, as at 30 June 2008. Statistical estimate by ABS based on the last census of population and housing in 2006.

Though this may seem a relatively small number now, as recognised by submissions, this expansion in the jury pool will 'be of great benefit to the system as our ageing population will have an impact on the amount of eligible jurors in the future if the system remains unchanged'.⁴⁶ Of course, under the Commission's recommendations those people who are unable to perform jury duty because of sickness, infirmity or disability (whether mental, physical or intellectual and including mobility, hearing or vision impairment), undue hardship or extreme inconvenience may still apply to be excused for good cause.⁴⁷

RECOMMENDATION 16

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 in Part II of the Second Schedule of the *Juries Act 1957* (WA) be abolished.⁴⁸
2. That the maximum age for liability for jury service be raised to 75 years.

Age as a liability factor

As foreshadowed in its Discussion Paper, 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 matter that 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 Western Australian Electoral Commission submitted that its computer program can be easily adjusted to raise the upper age limit to 75 years.⁴⁹ All submissions that

46. Tom Rollo, Submission No 31 (31 January 2010).

47. See Chapter Six, Recommendation 60.

48. The Commission has recommended that the entire Part II of the Second Schedule to the *Juries Act 1957* (WA) be abolished. See Chapter Six, Recommendation 59.

49. Western Australian Electoral Commission, Submission No 12 (11 December 2009).

commented on this proposal were in support of treating age as a matter of liability rather than eligibility. The Commission therefore formalises its recommendation (which includes all juror liability factors discussed in this chapter) for amendment of s 4 of the *Juries Act*.⁵⁰

RECOMMENDATION 17

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 section 17A of the *Electoral Act 1907* or a person who is an elector with no fixed address and who is enrolled pursuant to section 17B of the *Electoral Act 1907* is not liable to serve as a juror.
3. A person who has been granted silent elector status pursuant to section 51B of the *Electoral Act 1907* is not liable to serve as a juror.

50. Jury Research Unit (UWA); Judith Bailey; Gillian Braddock SC; Western Australia Police; Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia.

Chapter Four

Eligibility for Jury Service

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Eligibility for jury service

UNDER the Commission's recommendations a person's current or former occupation is the only characteristic that can render that person ineligible for jury service.¹ Part I of the Second Schedule to the *Juries Act 1957* (WA) contains a list of persons who are currently ineligible for jury service based on their occupational status. It 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.² The primary rationale underlying these exemptions is to protect the accused against the potential of a jury 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,³ it is also a requirement of a fair trial recognised by international law.⁴ 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.⁵

1. The previous chapter discussed the concept of liability for jury service; and recommended that age—which is a personal characteristic that currently 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.
2. See *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 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 specified positions.
3. 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.
4. 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.
5. See Chapter One, 'Guiding Principles for Reform'. Indeed the notion of an independent and impartial lay tribunal is what underpinned the insertion of the schedule in 1984 following

In its Discussion Paper, the Commission examined each currently excluded occupational category 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 criminal justice] and to those who perform special or personal duties to the state'.⁶

In its Discussion Paper the Commission applied this approach to the current categories of occupational ineligibility for jury service in Western Australia, taking special account of additional rationales for exclusion that were specific to particular occupations. Submissions on the Commission's proposals and its final recommendations in respect of each ineligible occupation are set out below. However, before dealing with each individual occupational category, it is important to discuss the concept of permanence of occupational ineligibility in Western Australia.

PERMANENCE OF INELIGIBILITY

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 jury service. In New South Wales the exclusion extends beyond judicial officers and police to encompass coroners, public prosecutors and public defenders. In Western

the Commission's 1980 report on exemption from jury service: LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 16.

6. NSWLRC, *Jury Selection*, Report No 117 (2007) 62.

Australia judicial officers, registrars, members of the Industrial Relations Commission, the Ombudsman, the Corruption and Crime Commissioner⁷ 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.

In its Discussion Paper the Commission noted that, 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—there was no justification for permanent occupational ineligibility. The Commission drew support for this view from the fact that only three of the nine Australian jurisdictions (including the Commonwealth) feature permanent ineligibility. It also noted that the most recently enacted ‘jury service’ legislation⁸ and the most recent review of legislation⁹ in this area had rejected the concept of permanent ineligibility. The Commission proposed therefore that no occupation or office should render a person permanently ineligible for jury service.

The Commission received 13 submissions commenting on permanence of ineligibility. Ten submissions expressed support for the Commission’s proposal that no occupation should be permanently ineligible.¹⁰ Only three submissions advanced the view that certain occupations should be permanently ineligible for jury service. The District Court and Supreme Court of Western Australia submitted that judicial officers should remain permanently ineligible for jury service because ‘the perception would be that there would be a tendency for [a former judge-juror] to second-guess the trial Judge’.¹¹ Arguing that it will enhance the lay nature of juries, the Western Australia Police went slightly further

submitting that permanent ineligibility should extend to registrars, associates and ushers of the Supreme Court and District Court, the Commissioner and Parliamentary Inspector of the Crime and Corruption Commission, and any ‘person who holds a legal qualification’ whether a practising lawyer or not.¹² As well as these occupations, the Aboriginal Legal Service included police, prison officers and members of Parliament in the list of occupations that should, in its opinion, be permanently ineligible for jury service.¹³

Although the Commission is not persuaded by these submissions that permanent ineligibility should be retained,¹⁴ it considers that, 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, some occupations should nonetheless be ineligible for jury service for a period of time following employment. In the Commission’s opinion five years is sufficient time to ameliorate any perception that the person is not independent from the criminal justice system. In its Discussion Paper the Commission examined each relevant occupation in some detail and provided justification for extended exclusion from jury service where it felt a period following employment was necessary to preserve the independence of the jury. On the basis of submissions, the Commission has added certain occupations to the list of those who should remain ineligible for a period of five years following employment in the relevant occupation. Each of these occupational categories is discussed below, but for present purposes it may be noted that the Commission recommends that the following occupations should have a period of exclusion from jury service for five years following employment:

- judges, masters and magistrates of the state’s courts (including acting judges or magistrates, auxiliary judges and commissioners of courts);
- the State Coroner;
- registrars of the Supreme Court and District Court;
- practising lawyers;
- 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

7. And the Parliamentary Inspector of the Corruption and Crime Commission.

8. *Juries Act 2003* (Tas); *Juries Act 2000* (Vic).

9. NSWLRC, *Jury Selection*, Report No 117 (2007).

10. Jury Research Unit (UWA); Department of the Attorney General (WA); Law Society of Western Australia; Legal Aid Western Australia; Acting Registrar Danielle Davies; Judith Bailey; Office of the Director of Public Prosecutions; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC. The Commission has also noted Chief Justice Wayne Martin’s comments that he disagrees with the District Court and Supreme Court submission regarding permanence of ineligibility for judicial officers as inferred support for its proposal.

11. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009). It should be noted that the Chief Justice of Western Australia disagreed with this view, submitting that a five-year period of ineligibility following employment was sufficient to remove any perception that a person who previously held judicial office would distort the process of jury deliberation if selected to serve: The Hon Wayne Martin, Chief Justice of Western Australia, Submission No 24 (12 January 2010).

12. Western Australia Police, Submission No 20 (31 December 2009).

13. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).

14. These submissions are discussed in more detail under each relevant occupational category below.

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;
- 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 supervision and management of offenders or the administration of criminal justice; and
- officers of the Department of Child Protection who are authorised under s 25 of the *Children and Community Services Act 2004* (WA).

As noted above, the Commission remains of the view that no occupation or office should render a person *permanently* ineligible for jury service and makes the following recommendation.

RECOMMENDATION 18

Permanence of occupational eligibility

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

DETERMINING OCCUPATIONAL INELIGIBILITY

During the course of consultations for this Report it became apparent that following the random computer generation of jury lists by the Western Australian Electoral Commission, a manual examination of the lists is performed by the Electoral Commission to remove people in ineligible occupations.¹⁵ The Commission is informed that the manual removal of ineligible jurors had been undertaken by the Electoral Commission as a matter of course for at least the past 25 years¹⁶ and is apparently being performed by the Electoral Commission under the power contained in s 14(2)(b) of the *Juries Act*. That section reads:

15. Prospective jurors who have been removed from the jury list by this manual process are replaced by other jurors randomly selected by computer: Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, email (23 February 2010).
16. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, email (22 February 2010).

14. Electoral Commissioner to prepare jury lists

...

- (2) Before 30 April in each year the Electoral Commissioner shall by ballot in accordance with the provisions of subsection 2(a) select jurors to the number so notified to him by the sheriff for each jury district from all the electors who —
 - (a) are shown on the electoral rolls for the Assembly district or districts which, or parts of which, comprise the jury district; and
 - (b) subject to section 5, appear to be liable to serve as jurors.

Section 5 of the *Juries Act* sets out who is ineligible, disqualified or excused from serving as a juror. This includes people in certain occupations, people with certain criminal histories, people with an incapacity by reason of a 'disease or infirmity of mind or body' and people who are excused 'as of right' upon application. Of these people, the Electoral Commission only removes those who appear to hold occupations that are declared ineligible by Part I of the Second Schedule to the *Juries Act*.¹⁷ Further, the Commission is advised that all people with ineligible occupations listed on their electoral enrolment forms are removed, regardless of whether the occupation is permanently ineligible (eg, judges, lawyers) or ineligible only for the term of employment and a period of five years thereafter (eg, police officers, prison officers, members of Parliament).¹⁸ The Commission is informed that the majority of people removed from the 'prospective jurors list' in 2009 were from those occupations where the exemption is not permanent.¹⁹

A number of problems can arise where reliance is placed on the occupation stored on the electoral roll. First, there is no requirement for electors to update their occupation on the electoral roll and it is typical that this is only done if a person completes a new enrolment form when moving address. Thus, the occupation listed on the electoral roll from which prospective jurors are drawn may be significantly out of date. Secondly, if the occupation is more than five years out of date, then, under the Electoral Commission's current practice, people who may be eligible for jury service are being unnecessarily removed from the jurors list. And thirdly, the Electoral Commission accepts 'whatever occupation the elector chooses without any verification that it is correct'.²⁰

17. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, email (19 February 2010).

18. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, email (22 February 2010).

19. Ibid. The Western Australian Electoral Commission estimates that approximately 1,200 people were removed from the 'prospective jurors list' in 2009.

20. Ibid.

In the Commission's opinion, it is not appropriate for the Electoral Commission to remove from the list of prospective jurors people who are not eligible—as opposed to not liable—for jury service. It is, as noted above, unsafe to rely on electoral roll details for occupational eligibility and the incidence of unnecessary removal of eligible jurors is likely to increase if the Commission's recommended amendments to the Second Schedule are implemented.²¹ In the Commission's view, eligibility for jury service is, like qualification and excuse, more appropriately dealt with by the sheriff's office. The sheriff's office is trained in handling such claims and is in a position to seek verification or clarification of a prospective juror's occupation where required to assess a claim of occupational ineligibility.²² The Electoral Commission's role should therefore be confined to producing a list of prospective jurors who are liable for jury service under s 4 of the *Juries Act*. Under the Commission's recommendations for reform, liability for jury service includes such matters as age and elector status (ie, whether the person is a silent elector, an itinerant elector or an overseas elector).²³ These matters are appropriately and easily attended to by the Western Australian Electoral Commission.²⁴

RECOMMENDATION 19

Determination of occupational eligibility

1. That removal of a person's name from the jurors list on the basis of occupational ineligibility for jury service be exclusively determined by the sheriff's office or summoning officer.
2. That s 14(2) of the *Juries Act 1957* (WA) be amended to read:

Before 30 April in each year the Electoral Commissioner shall by ballot in accordance with the provisions of subsection 2(a) select jurors to the number so notified to him by the sheriff for each jury district from all the electors who are shown in the electoral rolls for the Assembly district or districts which, or parts of which, comprise the jury district and who appear to be liable to serve as jurors under section 4.
3. That consequential amendments be made to s 14(3a)(b) of the *Juries Act 1957* (WA).

21. In particular Recommendation 18 which removes the concept of permanent occupational ineligibility from the *Juries Act 1957* (WA).
22. The fact that a prospective juror must sign a statutory declaration declaring his or her occupation to claim ineligibility makes the need for verification unlikely. However, with the Commission's recommended reforms to exclude only certain staff of the Department for Corrective Services and the Department of the Attorney General, there may be a heightened need to clarify the nature of a prospective juror's occupation in order to assess whether he or she is ineligible for jury service.

COMMONWEALTH EXEMPTIONS

It is important to note that 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;²⁵ 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 the Commission's recommendations must be considered.

23. See Chapter Three, Recommendation 17.

24. The Commission has consulted with Warren Richardson (Manager Enrolment Group, Western Australian Electoral Commission) and Carl Campagnoli (Jury Manager, WA) in relation to this recommendation. Both support the vesting of the determination of occupational ineligibility solely in the sheriff's office or summoning officer.

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

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.² 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. For example, 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’.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 There are also practical difficulties that attend making serving 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.⁶ In a jurisdiction like Western Australia, which has a relatively small legal profession, it would be unusual that a serving judge-juror would be unknown to all parties to a case.

Taking into account these arguments and the fact that judicial officers have an ‘integral and substantially current connection with the administration of justice, most particularly criminal justice’,⁷ the Commission proposed⁸ that they should remain ineligible for jury service.⁹ All submissions received on this proposal supported retaining ineligibility for *serving* judicial officers¹⁰ in all state courts.¹¹

While agreeing with the Commission’s proposal, the Office of the Director of Public Prosecutions (DPP) noted that judicial officers may have ‘personal knowledge of counsel which could affect the perception of the jury’s impartiality’.¹² In its Discussion Paper the Commission acknowledged this as a potential concern in a jurisdiction as small as Western Australia. In order to address this (and general concerns about impartiality) the Commission

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. Relevant arguments are canvassed in greater detail in the Commission’s Discussion Paper and for present purposes will only be mentioned in brief: see LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 64–65.
3. 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.
4. Lord Justice Auld, *ibid*; 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: *ibid* 148.
5. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 50.

6. 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.
7. NSWLRC, *ibid* 62.
8. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 13.
9. 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.
10. Criminal Lawyers Association (WA); Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; the Hon Wayne Martin, Chief Justice of Western Australia; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA).
11. The Commission notes that serving 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).
12. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

proposed that the Third Schedule be amended to provide that a person may be excused by the trial judge from further attendance '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'. This proposal is discussed and confirmed as a recommendation in Chapter Six of this Report.¹³

The DPP further noted that persons who have held judicial office 'may be regarded as having fulfilled their civic duty in relation to the criminal justice system'. They submitted that having regard to this, a person should be 'entitled to be excused from jury service if he/she has previously held such office'.¹⁴ The Commission does not agree with this. While being of obvious service to the criminal justice system during their professional career, judicial officers cannot be said to have fulfilled a 'civic duty' in this regard. Judges are well paid and often well recognised for their service and the Commission sees judicial office as no different, in this regard, to any other public position. Furthermore, the Commission proposed in its Discussion Paper that all excuses 'as of right' be abolished and has received overwhelming support for this proposal.¹⁵

As discussed earlier, it is the Commission's view that no occupation should render a person permanently ineligible for jury service. The Commission therefore proposed in its Discussion Paper 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. On this point, the Commission received mixed submissions. While the majority of submissions supported the Commission's proposal, three submissions argued that judicial officers should remain permanently ineligible¹⁶ and one submission argued that they should become eligible for jury service immediately upon leaving office.¹⁷

The Commission has carefully considered these submissions and the arguments they raise. The most prevalent concerns of the submissions advocating permanent ineligibility were that a former judicial officer would compromise the lay nature of a jury or bring undue influence to bear on the other members of a jury. The Western Australia Police submitted that these concerns produced an 'unacceptable risk' of compromise

to the jury and that no amount of time could abrogate that risk. This was rejected by the Chief Justice who submitted that, in his opinion, 'a judicial officer who has ceased to serve more than five years prior to jury selection would not either be, or be seen to be, distorting the process of jury selection if selected to serve'.¹⁸

While the Commission believes that a period of exclusion should be placed on former judicial officers' eligibility to serve on a jury, it is not persuaded that such exclusion should be permanent.¹⁹ The Commission remains of the view that a period of five years is enough to enable judges and magistrates to be sufficiently removed from their direct role in the administration of justice such that their presence on a jury will not threaten public confidence in the impartiality of the criminal justice system. This is a position with which the majority of submissions agreed.²⁰

RECOMMENDATION 20

Ineligibility for jury service – judicial officers

1. That judges and magistrates of any of the state's courts 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

13. See Chapter Six, Recommendation 60.

14. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

15. See Chapter Six, Recommendation 59.

16. District Court and Supreme Court of Western Australia; Western Australia Police; Aboriginal Legal Service (WA). It should be noted that the Chief Justice of Western Australia made a separate submission supporting the Commission's proposal.

17. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

18. The Hon Wayne Martin, Chief Justice of Western Australia, Submission No 24 (12 January 2010).

19. Although the Commission has rejected the concept of permanent ineligibility, it is nonetheless emphasised that the opportunity for former judicial officers to serve on a jury will be limited. As noted in the Discussion Paper, 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.

20. The Office of the Director of Public Prosecutions submitted that 'if peremptory challenges are abolished, the five-year period of ineligibility should be extended to ten years, so as not to compromise the perception of the jury as an impartial body'. The Commission notes this submission but highlights that it has recommended in Chapter Two that peremptory challenges be retained: see Recommendation 3.

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.²¹ In its Discussion Paper the Commission proposed 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.²²

All submissions on this point supported the Commission's proposal;²³ however, the Commission received a small number of submissions that sought permanent ineligibility for jury service using the same arguments discussed above for judges and magistrates.²⁴ Another submission argued that there should be no exclusion period and masters should be eligible immediately upon leaving office.²⁵ As stated earlier, the Commission has rejected the concept of permanent ineligibility. The Commission remains persuaded that a five-year exclusion period before the possibility of selection for jury service is appropriate for former masters and it makes the following recommendation.

RECOMMENDATION 21

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.

21. In the Commission's view, there is an extremely high likelihood that a serving master would be excused from jury service 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.
22. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 14. Given the high likelihood that a master would be excused from jury service if called and the fact that there is currently only one master (and rarely more than two), the Commission saw no benefit in making masters eligible for jury service.
23. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA).
24. Western Australia Police, Submission No 20 (31 December 2009); Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).
25. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

State coroner

The state coroner does not hold office as a judge or magistrate²⁶ and is therefore not covered by the Commission's recommendations for judicial officers.²⁷ Currently the state coroner is permanently ineligible to serve on the basis that he has been admitted as a lawyer; however, the Commission recommends below that this exclusion be confined to practising lawyers. In its Discussion Paper the Commission discussed the relevant functions of the state coroner and determined that the position was 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.²⁸

The Commission received 10 submissions in response to this proposal, all of which agreed that a serving state coroner should be ineligible for jury service.²⁹ Again, two submissions argued for permanent ineligibility³⁰ while one submission argued for immediate eligibility for jury service upon leaving office.³¹ For the reasons cited above in relation to Recommendation 18, the Commission has rejected the concept of permanent ineligibility and it now confirms its recommendation that the state coroner be made ineligible for jury service while holding office and for a further exclusion period of five years.

RECOMMENDATION 22

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.

26. 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.
27. Though the deputy state coroner (who is a magistrate) would remain ineligible.
28. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 15.
29. Criminal Lawyers Association (WA); Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA).
30. Western Australia Police, Submission No 20 (31 December 2009); Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).
31. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

President and commissioners of the Industrial Relations Commission

The *Juries Act* permanently excludes from jury service the president and commissioners 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.³²

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 Commission³³ 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 jurisdiction.

Given the exclusive nature of the industrial relations jurisdiction and its very limited role in the administration of criminal justice, the Commission expressed the preliminary view that ineligible status should not apply to the president and commissioners of the Industrial Relations Commission. In particular, the Commission could not see how the independence of a jury might be comprised by the presence of an industrial relations commissioner among its number. However, because there may have been functions in this unique jurisdiction of which the Commission was not aware, submissions were sought about whether or not the president and

commissioners of the Industrial Relations Commission should remain ineligible for jury service.³⁴

The Commission received 10 submissions with responses evenly split.³⁵ The District Court and Supreme Court of Western Australia and the DPP submitted that the president and commissioners of the Industrial Relations Commission should be treated in the same way as judicial officers and therefore be ineligible for jury service.³⁶ The Western Australian Industrial Relations Commission submitted that members of the Commission should be treated in the same way as lawyers because they are required to hold legal qualifications and must have practised as a barrister or solicitor for at least five years before appointment.³⁷ Further, it submitted that legal practitioners who regularly appear in both the industrial relations and criminal jurisdictions may be known to commissioners and therefore the position of a commissioner on a jury may be compromised.³⁸ As noted in the Commission's Discussion Paper, if a person selected for jury service in a particular trial has knowledge of any party or witness they should disclose that fact and seek to be excused from service in that trial.

The Commission has considered all submissions in relation to this invitation to submit and is of the view that the case for ineligibility of industrial relations commissioners is not sufficiently persuasive for the Commission to recommend its retention. Submissions received by the Commission did not suggest any connection to the administration of criminal justice that would impact upon the impartiality or independence of a jury should a member of the Industrial Relations Commission be empanelled.³⁹ The Commission acknowledges that members of the Industrial Relations

34. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Invitation to Submit E.

35. The Western Australian Industrial Relations Commission, District Court and Supreme Court, Western Australia Police Judith Bailey and the Office of the Director of Public Prosecutions submitted that industrial relations commissioners should remain ineligible for jury service. On the other hand, the Criminal Lawyers Association, Department of the Attorney General, Carl Campagnoli (Jury Manager, WA), Law Society of Western Australia and Gillian Braddock SC argued that industrial relations commissioners should be eligible for jury service.

36. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009); Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

37. *Industrial Relations Act 1979* (WA) s 9.

38. Western Australian Industrial Relations Commission, Submission No 9 (11 December 2009).

39. The Western Australian Industrial Relations Commission submitted that certain enforcement proceedings in that jurisdiction 'could be said to be in the nature of proceedings for contempt', although only the president of the Commission had the power to punish for contempt: *Industrial Relations Act 1979* (WA) s 92(4).

32. *Industrial Relations Act 1979* (WA) s 7.

33. *Industrial Relations Act 1979* (WA) s 84(2). The full bench is constituted by at least two commissioners and the President: s 15(1).

Commission must have, before appointment, been practising lawyers and notes that they will be ineligible under the Commission's Recommendation 25 for a period of five years after they have ceased to practice as a lawyer.⁴⁰ However, in the Commission's view the exclusive nature of the industrial relations jurisdiction is not such as would compromise the lay nature of a jury once the five-year exclusion period for practising lawyers has been served.⁴¹

The president and commissioners of the Industrial Relations Commission are not judicial officers and, in the Commission's opinion, would be viewed in the same way as members of other tribunals, such as the State Administrative Tribunal. It is noted that none of the other state's tribunals or commissions is given ineligible status under the *Juries Act*. Therefore, the Commission recommends that the president and commissioners of the Industrial Relations Commission should be eligible for jury service

RECOMMENDATION 23

Ineligibility for jury service – industrial relations commissioners

That the president and commissioners of the Industrial Relations Commission be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 1(c) of the *Juries Act 1957* (WA).

Justices of the peace

The *Juries Act* provides that justices of the peace are excluded from jury service and remain so for a period of five years after termination of their commission.⁴² 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 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. While justices of the peace do have authority to preside in the Magistrates Court,⁴³ the Commission is advised that less than 10% of justices of the peace perform court duties.⁴⁴ The Commission understands that approximately 100 justices of the peace are called upon to perform court duties in the metropolitan area,⁴⁵ while regional areas may rely on justices of the peace for these duties more regularly.⁴⁶

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'.⁴⁷ After consideration of the duties of justices of the peace the Commission took the view in its Discussion Paper that the presence of a justice of the peace on a jury would not 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 considered there was 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. The Commission received 12 submissions in respect of this proposal, with nine submissions giving the proposal full support.⁴⁸ Submissions in full support included the Justice of the Peace Branch of the Department of the Attorney General, the District Court and Supreme Court of Western Australia, the Law Society of Western Australia, the Office of the Director of Public Prosecutions and Legal Aid Western Australia.

40. And, therefore, may be ineligible for jury service for the first five years of their commission as an industrial relations commissioner.

41. In this regard the Commission refers to the arguments discussed below in relation to Family Court registrars.

42. *Juries Act 1957* (WA) sch 2, pt I, cl 2(d).

43. Generally justices of the peace will preside over very minor matters such as bail applications (where police bail cannot be given), restraining order applications and minor traffic offences. Justices of the peace may also act as 'visiting justices' determining offences by prisoners against prison regulations.

44. Peter Scotchmer, Acting Manager, Justices of the Peace Branch, Department of the Attorney General, telephone consultation (May 2009).

45. 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.

46. 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.

47. *Juries Act 1927* (SA) sch 3, cl 2.

48. Jury Research Unit (UWA); Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Justice of the Peace Branch (WA); Gillian Braddock SC.

Of the three submissions that did not support the proposal there were, again, mixed views. The Department of the Attorney General argued that in order to ‘increase the size and representation of the pool of potential jurors’ all justices of the peace should be eligible.⁴⁹ In contrast the Aboriginal Legal Service (ALS) submitted that all justices of the peace should be permanently ineligible. In support of its submission the ALS argued that, particularly in regional areas, justices of the peace had ‘a close association with the police’ through performance of the criminal justice-related administrative duties mentioned above.⁵⁰ The ALS emphasised that a justice of the peace may have performed these duties without having exercised the jurisdiction of the Magistrates Court.⁵¹ The Commission also received a submission from Nicholas Agocs JP detailing the extent of such duties and expressing concern that a justice of the peace may be involved in a trial of an individual for whom he or she has signed an arrest warrant or has acted as responsible adult in an interview when the individual concerned was a juvenile.⁵²

The Commission notes that the above scenarios are more likely to occur in regional areas where many justices of the peace are likely to be well enough known to be recognised and challenged by counsel or excused by the court if they were thought to threaten the impartiality of the jury. In cases such as those referred to by Mr Agocs where a current or former justice of the peace selected for jury service in a particular trial has knowledge of any party or witness he or she should, like any prospective juror, seek to be excused from service in that trial.

While accepting this, Mr Agocs expressed concern that a justice of the peace may not recall an association or knowledge of an accused until some time into the trial and that declaring the conflict may result in the trial being aborted.⁵³ The Commission acknowledges this, but notes that there is always a risk that jurors will recall information that will affect their ability to impartially discharge their duties as a juror in a particular trial. For example, a juror may not appreciate that one of the witnesses is known to them until that witness gives evidence.

As noted in the Discussion Paper, there have been certain changes to the jury selection process to improve the odds of a trial being able to proceed in these situations. For example, reserve jurors are empanelled in the overwhelming majority of cases to enable trials

to continue if a juror recognises a witness, realises a conflict of interest, or cannot discharge his or her duties impartially for some other reason.⁵⁴ Further, the jury panel is given a broad description of the crime prior to empanelment so that individual jurors have the opportunity to seek to be excused if they hold strong views about the subject matter of the trial. In addition, and of particular relevance to justices of the peace, the names of all prosecution witnesses are read out prior to empanelment and jurors are asked to notify the court if they are known to them.⁵⁵

In all the circumstances, the Commission maintains its view that, excepting those justices of the peace who are or have been involved in court work in the five years before being summoned as a juror, the connection to the administration of criminal justice is not sufficient to exclude all justices of the peace from jury service.

RECOMMENDATION 24

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 (or former 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.

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,⁵⁶ some extend the exclusion for a 10-year period beyond practice⁵⁷ and others render lawyers permanently ineligible for jury service.⁵⁸ Western Australia falls into

49. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

50. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).

51. Ibid.

52. Nicholas Agocs JP, Submission No 11 (12 December 2009).

53. Ibid.

54. In such cases it is usual that the juror will raise the issue with the jury officer and that the trial judge will inform counsel. In these cases there may be an opportunity to question the juror as to whether any conflict or opinions had been communicated to the jury as a whole. If the jury is considered tainted, then the entire jury may be discharged and a new trial ordered.

55. Prosecution witnesses who are police officers are specified as such.

56. *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.

57. *Juries Act 2000* (Vic) sch 2.

58. *Jury Act 1977* (NSW) sch 2; *Juries Act 1957* (WA) sch 2. New South Wales expressly permanently excludes lawyers in particular positions, such as 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

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'.⁵⁹

In its Discussion Paper, the Commission examined the experiences of jurisdictions that permit practising lawyers to serve as jurors. It was noted that in England difficulties had been experienced in empanelling lawyers, usually because the lawyer is known to one or other of the parties or the trial judge.⁶⁰ The Commission observed that such difficulties would be amplified in a small jurisdiction such as Western Australia. Significantly, it was noted that an appeal against conviction had succeeded for perception of bias in a situation where a prosecutor was empanelled on an English jury.⁶¹

The Commission also discussed the system in some US states where lawyers are permitted to serve on juries; however, the fundamental difference in US jurisdictions is the ability, through the jury voir dire, for lawyers to question prospective jurors to ensure that they are as independent and impartial as possible.⁶² Such jury vetting practices do not exist in Australia and in the Commission's opinion they are not desirable; however, it has been observed that these 'ancillary checks and balances' are what make having judges and lawyers on juries a viable option in the US.⁶³

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'.⁶⁴ Although the Commission remains unconvinced that a lawyer-juror would necessarily dominate a jury's deliberation, it recognises that there is a real danger that fellow jurors may seek a lawyer-juror's guidance on legal issues rather than that of the

judge.⁶⁵ Because juries are not required to give reasons and cannot speak publicly about their participation in a particular trial,⁶⁶ it is impossible to know whether a jury has been unduly influenced by an interpretation of the law provided by a lawyer-juror. Nonetheless, it is noted that both the Lord Chief Justice and the Chairman of the Bar in England have recognised this potential by issuing guidelines warning lawyers and judges summoned to serve on juries that they do so as 'private citizens'.⁶⁷

Having regard to the arguments for and against allowing lawyers to serve on juries, the Commission determined that, on balance, the risk of prejudice to an accused by allowing lawyers to serve as jurors was too high. However, the Commission also noted that 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. Having regard to the terminology of the *Legal Profession Act* the Commission proposed that the exclusion should be confined to 'Australian legal practitioners';⁶⁸ that is, those people holding current practising certificates and practising government lawyers.⁶⁹

The Commission received 11 submissions on this proposal, with 10 submissions supporting retaining ineligibility for lawyers. The Department of the Attorney General was the only submission to suggest that lawyers should be made eligible to serve as jurors arguing that it would increase the size and representation of the jury pool.⁷⁰ On the basis of the risk of prejudice to the accused cited above, the Commission rejects this submission.

So far as the Commission's proposed amendment to the current wording of the *Juries Act* to confine the exclusion to practising lawyers, only one submission disagreed. The Western Australia Police submitted that all persons holding 'a legal qualification under the laws of [Western Australia] or any other place' (including foreign jurisdictions) should be ineligible for jury service on the basis that any legally qualified person 'may compromise the jury's lay nature'.⁷¹ The Commission considers that

effect of excluding anyone who has ever been admitted to legal practice permanently, whether practising or not.

59. That is, admitted under the laws of another Australian jurisdiction.

60. At least one lawyer has been dismissed by a judge because of 'specialist knowledge of legal matters that could be prejudicial' to the accused: LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 69.

61. *R v Williamson* [2007] UKHL 37. See also *ibid*.

62. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 62. Unlike England, US lawyers also retain the right to peremptorily challenge a prospective juror.

63. Parry RG, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 177.

64. 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).

65. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 53; Robins J, 'Judge and Jury', *The Lawyer* (23 August 2004).

66. *Juries Act 1957* (WA) s 56B.

67. Lord Chief Justice Woolf, *Observations for Judges on Being Called for Jury Service* (15 June 2004) <http://www.judiciary.gov.uk/publications_media/general/jury-service.htm>.

68. *Legal Profession Act 2008* (WA) s 5(a).

69. Government lawyers are not necessarily certificated practitioners, but are included by virtue of the operation of the *Legal Profession Act 2008* (WA) s 36(3).

70. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

71. Western Australia Police, Submission No 20 (31 December 2009).

such criteria for exclusion are 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 why such people should be excluded from jury service.⁷² The Commission therefore confirms its proposal.⁷³

Length of lawyers' ineligibility for jury service

In its Discussion Paper the Commission stated that it had 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 sought submissions on this issue⁷⁴ and received 10 submissions with varying views. Five submissions considered that lawyers should become eligible to serve immediately upon ceasing practice,⁷⁵ three submissions considered there should be an exclusion period of five years⁷⁶ and two submissions argued that lawyers should be permanently ineligible.⁷⁷

In its submission supporting eligibility upon ceasing to practice, Legal Aid noted that many 'lawyers practice exclusively in [non-criminal areas such as] commercial conveyancing where specialist knowledge would be minimal and similar to that of retired professionals eg. accountants, auditors etc'.⁷⁸ The Department of the Attorney General similarly argued that:

[A]ll lawyers should be eligible for jury service or, at the very least, only those practicing criminal law should be ineligible. In any event once a lawyer stops practising they should be immediately eligible for jury duty.⁷⁹

The Commission appreciates the sentiment behind the argument that only those lawyers with some connection to the criminal law pose a risk in regard to unduly influencing jury deliberations but, as set out in the Discussion Paper, the Commission is not persuaded that the risk of prejudice is any less with non-criminal lawyers. Indeed, the Commission noted its concern 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.

Another submission supporting eligibility to serve upon ceasing practice was that of the District Court and Supreme Court of Western Australia. This submission argued that practising lawyers 'would be prone to the perception that they were inclined to second-guess the trial judge' and that it 'may be thought that a lawyer on the jury might think that he knew better than the trial judge what the relevant law was'.⁸⁰ The courts used the same argument to support the ineligibility of judicial officers, but in that case they considered that permanent ineligibility should be maintained. In respect of lawyers, the courts argued that:

[O]nce a lawyer ... ceases to practice law, then the perception [that a lawyer-juror may second-guess the trial judge] loses its validity, and there is no reason, we think, to maintain for the current period of five years, the present ineligibility of such individuals to serve as jurors.⁸¹

The Commission points out that lawyers are not, as the joint courts' submission suggests, currently excluded for five years following ceasing to practise. Under the present regime admitted lawyers, whether practising or otherwise, are permanently ineligible to serve as jurors. In other words, they are currently in the same position as judicial officers in respect of eligibility for jury service. If a perception does exist within the legal profession or in the public at large that judicial officers and lawyers might 'second-guess the trial judge' or 'impermissibly influence the verdict',⁸² the Commission cannot see how this perception would necessarily lose validity for lawyers immediately upon ceasing of practice. While the joint courts' submission does not explain the basis for this opinion, it is clear that in their view judicial officers

72. The Commission recognises 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.

73. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 17.

74. Ibid, Invitation to Submit F.

75. Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Department of the Attorney General; Carl Campagnoli, Jury Manager (WA).

76. Office of the Director of Public Prosecutions; Judith Bailey; Gillian Braddock SC.

77. Western Australia Police; Aboriginal Legal Service (WA). The Commission has dealt with the submissions arguing for permanent eligibility earlier in this chapter and has rejected that approach for all occupations.

78. Legal Aid Western Australia, Submission No 18 (4 January 2010).

79. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

80. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

81. Ibid.

82. Ibid.

can never overcome this perception and so must remain permanently ineligible.

In contrast, Gillian Braddock SC argued that while there was no need for lawyers to remain permanently ineligible for jury service there should be a five-year exclusion period after a lawyer ceases to practice because they ‘may still be perceived as having “inside knowledge” by their fellow jurors or exercise undue influence by reason of their experience’.⁸³ As well as the potential impact a recently retired lawyer may have on fellow jurors, Ms Braddock noted that an exclusion period is appropriate in order to enable a former lawyer to ‘regain more of a layperson’s approach’.⁸⁴ The DPP agreed with the need for an exclusion period with the argument that five years was sufficient also to remove lawyers from current knowledge of counsel and judicial officers and to reduce the potential for client conflict.⁸⁵

In regard both to the actual and perceived currency of legal knowledge within the legal profession and the opportunity to regain a layperson’s perspective in respect of jury service, the Commission notes that after a period of five years away from legal practice, a former lawyer’s practising certificate cannot be automatically renewed. In these circumstances the former lawyer must apply to the Legal Practice Board for consideration of approval for practice.⁸⁶ The Commission is informed that where a lawyer has completely left legal practice (eg, to raise a family or to follow an unrelated career path) the board will typically require the applicant to complete an 18-month period of restricted practice under the supervision of a solicitor before a practising certificate will be awarded.⁸⁷ From this it can be inferred that the legal profession considers five years to be a sufficient period of time after which a former lawyers’ currency of legal knowledge must be questioned.

This requirement sits well with the arguments of those who made submissions to the Commission that lawyers should be subject to a five-year exclusion period after they cease to practise. In all the circumstances, the Commission is of the opinion that five years is an appropriate exclusion period for lawyers and makes the following recommendation.

RECOMMENDATION 25

Ineligibility for jury service – practising lawyers

That Australian legal practitioners, within the meaning of that term in the *Legal Profession Act 2008* (WA) s 5(a), be ineligible for jury service while practising and for a period of five years from their last date of practice⁸⁸ or the date of expiry of their last practising certificate.

COURT OFFICERS

District Court and Supreme Court registrars

Under the *Juries Act* a registrar of the Supreme Court, Family Court or District Court is permanently ineligible for jury service.⁸⁹ 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 of the District Court and Supreme Court.

In its Discussion Paper, the Commission set out the extent to which delegated criminal jurisdiction was being exercised by Supreme Court and District Court registrars. It noted that registrars of these courts were increasingly being commissioned as acting or full-time judicial officers in order to ensure that the exercise of delegated jurisdiction under the *Criminal Procedure Act 2004* (WA) is within power. The Commission was advised that the *Criminal Procedure Act* was in the process of being examined to ensure that any legislative provisions that may unintentionally inhibit the full delegation of powers under the Act could be corrected. Once this is completed, the Commission is advised that the delegated criminal jurisdiction of all registrars in the District Court (and most likely also in the Supreme Court) will expand.⁹⁰

83. Gillian Braddock SC, Submission No 39 (4 February 2010).

84. Ibid.

85. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

86. Legal Practice Board policy as communicated by Tony Mylotte, Administrative Officer, Legal Practice Board (WA), telephone consultation (2 March 2010).

87. Tony Mylotte, ibid.

88. Government lawyers are not required to hold practising certificates, but are included in the term ‘Australian legal practitioners’ by virtue of the operation of the *Legal Profession Act 2008* (WA) s 36(3). For these lawyers the five-year exclusion period will run from their last date of practice.

89. 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).

90. 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).

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 proposed that registrars of these courts should be excluded from jury service while they hold office as a registrar. The Commission received a total of 12 submissions on this proposal, all of which were in support.⁹¹

In relation to whether registrars of the Supreme Court or District Court should be excluded for a period beyond their employment in that office, the Commission noted that it was appropriate that registrars of these courts should be dealt with in the same way as practising lawyers as much the same arguments apply. The Commission therefore resolved to base its final recommendation on the conclusion reached after examination of submissions in respect to its Invitation to Submit on this subject.⁹² As noted above, the Commission has concluded that practising lawyers should be subject to an exclusion period of five years following ceasing to practise. The Commission therefore applies this same qualification to the eligibility of Supreme Court and District Court registrars.

RECOMMENDATION 26

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 and for a period of five years thereafter.

91. Criminal Lawyers Association; Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Acting Registrar Danielle Davies; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA).

92. Four submissions made express comment on the need for a period of exclusion from jury service for registrars beyond employment in that role. The Office of the Director of Public Prosecutions submitted that five years was appropriate for the same reasons as for practising lawyers and Acting Registrar Davies submitted that a period of between two and five years was appropriate to reduce the risk of jurors deferring to a person known to have a recent involvement in the administration of justice in criminal courts. The Western Australia Police and Aboriginal Legal Service (WA) submitted that registrars should be permanently excluded from jury service.

Family Court registrars

The *Juries Act* does not distinguish between registrars of criminal trial courts (such as the District Court and Supreme Court) and registrars of the Family Court. Family Court registrars are therefore currently permanently ineligible for jury service. In its Discussion Paper the Commission noted that it did not see the same arguments applying to registrars of the Family Court, primarily because they do not exercise any criminal jurisdiction. The Commission therefore proposed that Family Court registrars should be made eligible for jury service.⁹³ The Commission received 10 submissions commenting on this proposal.⁹⁴ Half of the submissions supported the Commission's proposal, while the other half did not. The arguments of those who did not support making Family Court registrars eligible for jury service and the Commission's responses are set out below.

In its submission opposing the proposal, the District Court and Supreme Court of Western Australia argued that Family Court registrars should remain ineligible 'because of their connection with the judicial process'.⁹⁵ In the Commission's view, connection with the judicial process in general places the test for juror independence too high. Registrars in the Family Court perform primarily administrative duties and their service on a jury would not, in the Commission's opinion, impact upon public confidence or compromise the independence or impartiality of the jury.

While acknowledging that Family Court registrars do not perform judicial or criminal justice functions, the DPP submitted that:

[There is] the potential for certain Family Court matters and criminal matters to overlap, particularly in relation to allegations of domestic violence or child abuse. For this reason, there may be a potential for conflict of interest to arise ... which may not always be evident at the time of arraignment of the accused.⁹⁶

The Commission accepts that there is a small chance that a potential conflict of interest may not be identified until after a jury has been empanelled but, as noted

93. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 19.

94. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA); Justice Stephen Thackray, Chief Judge of the Family Court of Western Australia.

95. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

96. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

above, this risk is present in any case and changes to the jury selection process have been made to reduce the likelihood that a trial will have to be aborted in these circumstances.⁹⁷

In his submission opposing the Commission's proposal to make Family Court registrars eligible for jury service, the Chief Judge of the Family Court drew upon the inconvenience to the court that would result from eligibility. He stated that:

In the event that a Registrar was required to undertake jury duty it would be quite impracticable to arrange for another person to perform the role during their absence. The administration of justice in the Family Court would be severely affected by even their short term unplanned absence.⁹⁸

The Commission appreciates the Chief Judge's position and notes the considerable demands placed upon the Family Court and its staff. However, the Commission does not accept that this is a sufficient argument to support occupational ineligibility. The Commission has made recommendations to introduce deferral of jury service so that it may be performed at a time that is convenient to the juror and the trial court and so that the juror's absence from work can be planned. The Commission also emphasises that if the work commitments of a juror are such that undertaking jury service at any time in the next 12 months would cause serious inconvenience to the public, he or she may be excused under the Commission's recommended changes to the Third Schedule.⁹⁹

In making its recommendation that Family Court registrars be made eligible for jury service the Commission notes that the potential impact of the recommendation will be minimal. The Commission understands that all but two registrars of the Family Court hold contemporaneous commissions as magistrates and therefore will be ineligible for jury service under the Commission's Recommendation 20. The two registrars who have not been appointed magistrates currently hold commissions as acting magistrates.¹⁰⁰ Under Recommendation 20 these registrars will be ineligible during the time of their acting commission and for a period of five years thereafter. Indeed all Family Court registrars (regardless of their judicial status) will most likely be ineligible for the first five years of their appointment as registrars because they will generally have practised as lawyers. In these circumstances it might

be considered futile to recommend a change in eligibility status as the Commission has done; however, given the administrative nature of this role and its separation from the administration of criminal justice it is the Commission's view that there is no reason in principle for the continued ineligibility of Family Court registrars. The Commission therefore recommends as follows:

RECOMMENDATION 27

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).

District Court and Supreme Court judges' associates and ushers

The *Juries Act* currently excludes judges' associates and ushers of the Supreme Court and District Court from serving as jurors during their employment and for five years thereafter. The rationale behind this exclusion is that these officers, who are personal staff of the judge,¹⁰¹ 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. As set out in the Discussion Paper, 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.¹⁰² Ushers' functions in a criminal trial include announcing the judge, calling witnesses, swearing jurors and witnesses, and keeping order in the court.

Taking into account the standard of 'integral and substantially current connection with the administration of justice, most particularly criminal justice', the Commission considered that judges' associates and ushers of the Supreme Court and District Court have sufficient connection with the criminal justice system during the period of their employment to support their continuing ineligibility for jury service. However, the Commission did not see any reason to maintain the exclusion beyond the period of employment.¹⁰³

97. See above, 'Justices of the Peace'.

98. The Hon Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, Submission No 44 (11 March 2010).

99. See Chapter Six, Recommendation 60.

100. The Hon Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, Submission No 44 (11 March 2010).

101. Appointed under the *Supreme Court Act 1935* (WA) s 155A.

102. 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.

103. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 20.

In response to its proposal to this effect the Commission received 11 submissions.¹⁰⁴ While only one submission opposed the retention of occupational ineligibility for this group,¹⁰⁵ two submissions suggested that associates and ushers should be permanently ineligible for jury service on the basis that their previous involvement in the criminal trial context might ‘compromise the independence or impartiality of the jury should they be permitted to serve’.¹⁰⁶ The Commission disagrees. It is the Commission’s view that 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. In confirming its proposal as a recommendation, the Commission notes that no other Australian jurisdiction excludes associates and ushers from jury service permanently.

RECOMMENDATION 28

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.

Family Court judges’ associates and ushers

While the Commission saw merit in retaining the exclusion for judges’ staff who are employed in the criminal trial jurisdictions of the Supreme Court or District Court, it saw no reason to retain the exclusion for judicial support staff of the Family Court of Western Australia. The Commission therefore proposed in its Discussion Paper that judges’ associates and ushers of the Family Court be removed from the list of ineligible

occupations under the *Juries Act*.¹⁰⁷ The Commission received 12 submissions¹⁰⁸ on this proposal with seven submissions expressing full support.¹⁰⁹ Those submissions that did not support the proposal raised the same or similar arguments as were raised in respect of Family Court registrars. For example, the District Court and Supreme Court of Western Australia stated that associates and ushers should be ineligible because of their connection with the judicial process;¹¹⁰ while the DPP argued that there is potential for an associate or usher to have knowledge of parties that may give rise to conflicts.¹¹¹ The Commission has dealt with these arguments above in respect of Family Court registrars and does not intend to repeat them here.

In support of his submission against permitting associates and ushers of the Family Court to serve as jurors, the Chief Judge of the Family Court argued that these officers sometimes moved between the courts, including from the criminal courts and therefore may have knowledge of the criminal trial process. He further submitted that they are likely to know some counsel who appear both in the Family Court and in criminal trials.¹¹² The Commission does not find these arguments persuasive. Under the Commission’s Recommendation 28, associates and ushers from the District Court and Supreme Court become eligible for jury service as soon as they leave that employment. The rationale for their ineligibility is their direct administrative role in the criminal trial process and, as explained above, there appears to the Commission to be no reason to exclude them from jury service outside of this employment context. Therefore, if a District Court or Supreme Court associate moves to the Family Court, they have left their ineligible employment context and become immediately eligible for jury service. In regard to knowledge of counsel who may be involved in criminal trials the Commission emphasises that if any Family Court judge’s associate or usher selected for jury service in a particular trial has knowledge of any party or witness as a consequence of

104. Criminal Lawyers Association; Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA).

105. The Department of the Attorney General argued that associates and ushers should be eligible for jury service to increase the size and representation of the jury pool: Department of the Attorney General (WA), Submission No 16 (12 December 2009).

106. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010). The Western Australia police also submitted that associates and ushers should be permanently ineligible on the basis that they would compromise the lay nature of the jury and that jurors might seek their advice on legal matters: Western Australia Police, Submission No 20 (31 December 2009).

107. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 21.

108. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA); Justice Stephen Thackray, Chief Judge of the Family Court of Western Australia.

109. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; Western Australia Police; Judith Bailey; Gillian Braddock SC.

110. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

111. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

112. The Hon Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, Submission No 44 (11 March 2010).

their employment (or otherwise) they should disclose that fact and, if necessary, seek to be excused from service in that trial.

RECOMMENDATION 29

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.¹¹³ 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’.¹¹⁴ 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.¹¹⁵ The sheriff is further 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.¹¹⁶

Because of the sheriff’s overt law enforcement duties and connection to the jury selection process, the Commission proposed that the sheriff and his or her officers or deputies should remain ineligible for jury service while holding office and for a period of five years following termination of employment as sheriff, deputy sheriff or sheriff’s officer. The Commission received 12 submissions on this proposal all supporting retention of ineligibility for jury service.¹¹⁷ Of these submissions only

the Department of the Attorney General argued that the sheriff’s officers should become eligible upon ceasing employment.¹¹⁸ As expressed in its Discussion Paper, the Commission believes that a further five years’ exclusion from jury service is appropriate to ensure that sheriff’s officers are, and are seen to be, independent from their role in the jury selection process.¹¹⁹

RECOMMENDATION 30

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 or officer of the 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*. 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 the sheriff’s law enforcement duties, the Commission proposed that exclusion from jury duty should extend to bailiffs and assistant bailiffs. However, because bailiffs are divorced from jury management, the Commission saw no reason to extend the exclusion for a period beyond termination of employment as a bailiff or assistant bailiff.

The Commission received 11 submissions¹²⁰ in respect of its proposal with 10 submissions supporting bailiffs’

Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Ken Steer (Perth Bailiff); Gillian Braddock SC; Aboriginal Legal Service (WA).

118. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

119. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 72.

120. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Ken Steer (Perth Bailiff); Gillian Braddock SC; Aboriginal Legal Service (WA).

113. *Supreme Court Act 1935* (WA) s 156. The powers of the Sheriff extend to his or her deputies appointed under s 158.

114. *Supreme Court Act 1935* (WA) s 156(1).

115. *Ibid.*

116. 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.

117. Criminal Lawyers Association; Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western

ineligibility for jury service during their term of employment.¹²¹ Three submissions (Aboriginal Legal Service, DPP and the Western Australia Police) submitted that bailiffs' ineligibility should extend beyond their term of employment for a five-year period.¹²² While the DPP gave no reason for its submission, the Western Australia Police argued that because of the potential for delegation of the sheriff's law enforcement duties, bailiffs should be ineligible for the same period of time as sheriff's officers.¹²³ As noted above, the reason for an extended period of exclusion from jury service for sheriff's officers is that they are intimately involved with the jury selection process. This is not the case for bailiffs. The Commission therefore confirms its proposal in the following recommendation.

RECOMMENDATION 31

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 his or her 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 his or her parliamentary appointment and for a further five years. In its Discussion Paper the Commission proposed that the current exclusion of members of Parliament from jury service was appropriate to preserve public confidence in the independence and impartiality of the criminal justice system.¹²⁴ In recognition of the fact that political influence may exist (or be seen to exist) beyond a member's term of office, the Commission proposed that the exclusion of members of Parliament from jury

121. The Department of the Attorney General argued that bailiffs should be eligible for jury service to improve the size and representation of the jury pool.

122. Western Australia Police, Submission No 20 (31 December 2009); Aboriginal Legal Service (WA), Submission No 41 (15 February 2010); Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

123. The Aboriginal Legal Service (WA) also dealt with sheriff's officers and bailiffs together in its submission.

124. In this regard the Commission's view remains unchanged from its earlier report on this matter: LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 17.

service extend for a period of five years following the termination of their elected office.¹²⁵

Of the submissions received in respect of this proposal only one disagreed.¹²⁶ The District Court and Supreme Court of Western Australia submitted that members of Parliament should be eligible for jury service because although they are 'associated with the making of laws they are not at all associated with the process of deciding questions of guilt or innocence in a particular case'.¹²⁷ In the Commission's opinion, this submission does not give sufficient weight to the justification for this occupational exclusion. As observed in the Discussion Paper, it is the public perception of a member of Parliament's proximity to the instrument of the prosecution (ie, the state) that may impact upon public confidence (and the accused's confidence) in the independence and impartiality of the jury system.

RECOMMENDATION 32

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 his or her term of office and for a period of five years thereafter.

Officers

In its Discussion Paper the Commission expressed the view that the above exclusion should not extend, as it currently does, to 'officers' of either House of Parliament. The Commission noted that there is no clear definition of an officer of Parliament¹²⁸ and that this may unnecessarily extend the exclusion beyond members of Parliament who are properly excluded by virtue of their legislative role. For these reasons the Commission proposed that parliamentary officers should be removed from the list of ineligible occupations in the *Juries Act*.¹²⁹

125. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 24.

126. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Aboriginal Legal Service (WA).

127. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

128. 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.

129. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 25.

The Commission received 11 submissions in respect of this proposal.¹³⁰ The only opposition to making officers of Parliament eligible for jury service was expressed by the joint submission of the Legislative Assembly and Legislative Council of the Western Australian Parliament.¹³¹ The only arguments against eligibility raised by this submission were that many parliamentary staff were integral to the running of Parliament¹³² and that ‘outside demands on its staff that interfered with [their requirement to serve the Houses of Parliament] impacts upon the operations of Parliament’.¹³³

In its Discussion Paper the Commission addressed this issue by referring to its proposal to permit deferral of jury service. The Commission considered that the provision for deferral of jury service would be sufficient to ensure that Parliament was not unduly inconvenienced or delayed should an officer who was integral to the running of Parliament be called for jury service.¹³⁴ The Commission suggested that these officers may seek deferral of their jury service to a month when Parliament is not sitting. Responding to this suggestion, the Western Australian Parliament submitted that this was not a viable solution because staff are involved in other activities, such as research and inquiries, during periods when Parliament is not sitting. The Western Australian Parliament also submitted that summer and winter recesses are typically used for travel for various inquiries or for conferences and professional development.¹³⁵

The Commission is not persuaded by this submission. The same arguments can be made for individuals engaged in other professions; for example, a surgeon in a busy hospital or a small business owner may have similar pressures upon his or her time and be just as indispensable as parliamentary staff. It is the Commission’s view that under its Recommendation 63 jury service can almost always be deferred to a time that is convenient to the

juror, the employer and the court. It is noted that every employee of Parliament is entitled to take annual leave and if such leave is planned in advance any disruption caused by the employee’s absence can be mitigated. The same applies to deferred jury service. The Commission also stresses that if a prospective juror’s work commitments are such that participating in jury service would cause serious inconvenience to the public, he or she may be excused under the Commission’s recommended changes to the Third Schedule.¹³⁶ The Commission therefore makes the following recommendation.

RECOMMENDATION 33

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, clauses 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,¹³⁷ while others extend ineligibility to 10 years following termination of employment from the police service.¹³⁸ In Western Australia, the *Juries Act* expressly excludes police 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.

130. Legislative Assembly and Legislative Council of the Western Australian Parliament; Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA).

131. Legislative Council and Legislative Assembly of the Western Australian Parliament, Submission No 13 (14 December 2009).

132. The submission conceded that staff of the Parliamentary Services Department (which covers such matters as gardening, information technology, Hansard reporting, catering, security and building services) were not required to be excluded from jury service: *ibid*.

133. *Ibid*.

134. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 73.

135. Legislative Council and Legislative Assembly of the Western Australian Parliament, Submission No 13 (14 December 2009).

136. See Chapter Six, Recommendation 60.

137. *Jury Act 1995* (Qld) s 4; *Jury Act 1977* (NSW) sch 2.

138. *Juries Act 2003* (Tas) sch 2; *Juries Act 2000* (Vic) sch 2.

This has been highlighted by several cases in England where convictions have been overturned because of the presence of a police officer on a jury.¹³⁹ In particular, concern has been expressed 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.¹⁴⁰ 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'.¹⁴¹

Taking into account the experience in England, the Commission proposed in its Discussion Paper that the current exclusion of police officers from jury service during the term of their employment and for five years thereafter should remain.¹⁴² In making its proposal the Commission also found the following points to be particularly persuasive:

- the integral role that police officers play in the detection and investigation of crime and prosecution of criminal charges;
- the potential for partiality of police-jurors toward the prosecution or the evidence of fellow officers, whether real or apparent;
- the appearance to an accused that he or she would not receive a fair trial where a police-juror was empanelled;
- the need to preserve public confidence in the impartial administration of criminal justice; and
- the risk of unsafe verdicts should a police-juror know or be known to a witness or prosecutor or an accused in a trial.¹⁴³

139. See, eg, *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.

140. *R v Khan* [2008] ECWA Crim 531; 'Trial Judges Must be Told if Police Are on Jury', *The Times* (7 April 2007).

141. *R v Khan* [2008] ECWA Crim 531.

142. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 16.

143. Similar arguments have been made in the following reports considering this matter: NSWLRC, *Jury Selection*, Report No

The Commission observed in its Discussion Paper that the Commissioner of Police is not expressly excluded from jury service under the current *Juries Act*.¹⁴⁴ The Commission believed this to be an oversight and proposed that this should be corrected by the addition of the Commissioner of Police to the list of ineligible persons.

The Commission received 10 submissions¹⁴⁵ in support of its proposal to retain the current ineligibility for jury service of police officers and only one submission opposing it. This submission, from the Department of the Attorney General, argued simply that allowing police officers to serve on juries would increase 'the representative nature and size of the pool of potential jurors'.¹⁴⁶ During the submissions period on this reference media reports emerged claiming that the Department of the Attorney General was in the process of drafting legislation that would make people in certain occupations that were intimately connected with the criminal justice process, in particular police, eligible for jury service.¹⁴⁷ The potential for police officers to become eligible for jury service was reportedly criticised by the president of the police union who noted the potential for appeals against convictions as experienced in England.¹⁴⁸ The *West Australian* also reported Police Commissioner Karl O'Callaghan as saying that, while he believed that police officers were capable of being impartial jurors, he had concerns about the difficulty of overcoming the public perception of possible bias if police were permitted to serve as jurors.¹⁴⁹

The public perception of impartiality was also highlighted in many of the submissions supporting the Commission's proposal to retain the ineligible status of police officers. For example, Gillian Braddock SC submitted:

It matters not that an individual police officer or other in this category may be of the highest integrity and bring impartiality to his or her involvement as a juror.

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.

144. 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.

145. Western Australia Police; District Court and Supreme Court of Western Australia; Jury Research Unit (UWA); Criminal Lawyers Association; Law Society of Western Australia; Legal Aid Western Australia; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA).

146. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

147. 'Push for Police to Serve on Juries', *The West Australian* (18 January 2010) 1.

148. 'Union Rejects Police-on-Jury Plan', *The West Australian* (19 January 2010) 18.

149. Ibid.

Not every individual will be able to do that, for reasons of culture or direct experience. But more importantly, the perception of partiality and the risks this poses to the security of verdicts and public confidence in the system must outweigh any potential benefit gained by the additional numbers of persons included in the panel.¹⁵⁰

The Western Australia Police also prefaced its submission in support of retaining the ineligibility of police officers to serve as jurors by observing that ‘proposals to increase public confidence in the criminal justice system can only be of benefit to us all’.¹⁵¹

The Aboriginal Legal Service submitted that police were in a special position because of their ‘unique knowledge of the reporting, investigation and prosecution of criminal matters’.¹⁵² In its view, this knowledge was such that police should be made permanently ineligible for service because

it would be impossible for a current or former police officer to separate that knowledge from their deliberations as a juror in order to consider the evidence in an impartial and balanced manner.¹⁵³

The Aboriginal Legal Service also noted that:

[I]t is widely accepted in the psychological literature that police adopt a police culture or ‘code’ and robustly act in accordance with that code. ALSWA has strong concerns that a police officer would not be able to adequately question the credibility, reliability or honesty of a fellow officer.¹⁵⁴

Studies undertaken in this area suggest that a police culture of ‘group loyalty’ does exist and that it is both widespread and influential.¹⁵⁵ Assessing the studies of police culture undertaken in the United States, Eugene Paoline notes that the ‘occupational environment coupled with the coercive authority that officers wield’ enforces a separation of police from the citizenry leading to the development of an ‘us versus them’ attitude.¹⁵⁶ As mentioned earlier, the English Court of Appeal has warned that the potential for a police-juror to accept at face value a fellow officer’s evidence where that evidence

is disputed may be enough to put in doubt the safety of a verdict to convict.¹⁵⁷

Taking into account the perception by the accused that he or she would not receive a fair trial if a police officer were empanelled on the jury, the potential for unsafe verdicts and the need to maintain public confidence in the jury system, the Commission considers that the risks of permitting a police officer to serve on a jury far outweigh any benefit that can be gained by a small increase to the jury pool.¹⁵⁸ With overwhelming and strong support from submissions, the Commission therefore recommends that the current ineligible status of police officers during their term of employment and for five years thereafter should be retained. The Commission further recommends that this same ineligibility should extend to the Commissioner of Police.

RECOMMENDATION 34

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.

Corruption and Crime Commission

The Corruption and Crime Commission was established in 2004 to combat organised crime¹⁵⁹ 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

150. Gillian Braddock SC, Submission No 39 (4 February 2010).

151. Western Australia Police, Submission No 20 (31 December 2009).

152. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).

153. Ibid.

154. Ibid.

155. See, eg, Paoline EA, ‘Taking Stock: Toward a richer understanding of police culture’ (2003) 31 *Journal of Criminal Justice* 199; Terrill W, Paoline EA & Manning P, ‘Police Culture and Coercion’ (2003) 41 *Criminology* 1003.

156. Paoline, *ibid* 203.

157. *R v Khan* [2008] *ECWA Crim* 531; ‘Trial Judges Must be Told if Police Are on Jury’, *The Times* (7 April 2007).

158. On the basis of the Western Australia Police *Annual Report 2009*, only 5,778 people would be added to the total jury pool for the state if police officers and commissioned officers were made eligible for jury service.

159. 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.

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.¹⁶⁰

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 and contracted service providers. In its Discussion Paper the Commission noted that the exclusion net is currently cast too wide and it proposed that the exclusion be confined to officers, seconded employees and contracted service providers 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.¹⁶¹

However, the Commission also noted 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.¹⁶² 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 proposed that consideration of eligibility for jury service should be judged internally by the Commissioner of the Corruption and Crime Commission applying the standard of direct involvement in the detection and investigation of crime, corruption and misconduct or prosecution of relevant charges.¹⁶³

The Commission received overwhelming support for its proposal.¹⁶⁴ The Department of the Attorney General was alone in opposing the retention of ineligibility for this occupational category. It did so on the basis that making this group eligible for jury service would increase the ‘representative nature and size of the pool of potential jurors’.¹⁶⁵ In the Commission’s opinion there is good reason for maintaining the exclusion of officers and seconded employees 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.¹⁶⁶ Like police, such officers may be perceived as lacking impartiality.¹⁶⁷ It is the Commission’s view that the perception of partiality and the risks this poses to the security of verdicts and public confidence in the criminal justice system outweigh any potential benefit gained by the addition of just 81 people to the potential jury pool for the state.¹⁶⁸

163. Ibid.

164. Submissions in support of this proposal were received from the Corruption and Crime Commission; Criminal Lawyers Association; Jury Research Unit (UWA); Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; and Aboriginal Legal Service (WA). The Commission notes that both the Western Australia Police and the Aboriginal Legal Service submitted that the Commissioner and Parliamentary Inspector should remain permanently ineligible for jury service. The Commission refers to its discussion above in relation to Recommendation 18 where it has rejected the concept of permanent ineligibility.

165. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

166. 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.

167. It is also noted that some investigations staff employed by the Corruption and Crime Commission are former police officers.

168. According to the Corruption and Crime Commission only 81 out of 154 officers meet the exclusion criteria recommended by the Commission: Mia Powell, Executive Directorate, Corruption and Crime Commission, email (29 January 2010). The Commission observes that its recommendation to maintain only certain officers’ ineligibility achieves a similar increase in the size and representative nature of the jury pool

160. *Corruption and Crime Commission Act 2003* (WA) s 195.

161. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 27.

162. See, in particular, Part 9 of the *Corruption and Crime Commission Act 2003* (WA).

In its submission supporting the proposal the Corruption and Crime Commission observed that it was unnecessary to extend the ineligibility criteria to contracted service providers, as originally proposed by the Commission, because their work is not such as to cause them to be ineligible to serve as jurors (ie, they have no direct involvement in the detection and investigation of crime, corruption and misconduct or in the prosecution of relevant charges on behalf of the Corruption and Crime Commission).¹⁶⁹ Accordingly, the Commission has amended its recommendation to reflect this.

RECOMMENDATION 35

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 or secondment 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 and seconded employees 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).

without compromising public confidence in the criminal justice system.

169. Corruption and Crime Commission of Western Australia, Submission No 8 (2 December 2009).

There are currently 31 members of these boards, with some members being on more than one board. The chairperson of each board is a serving or retired judicial officer while members include lawyers, psychologists, academics, victim representatives, indigenous representatives and representatives of the Western Australia Police and Department of Corrective Services.

The Prisoners Review Board and Supervised Release Review Board are involved in the preparation for release and the release of prisoners and juvenile detainees in Western Australia. These boards also have the power to arrest for failure to comply with the obligations of parole (and other early release orders) and make determinations as to whether a person has breached such orders. The Mentally Impaired Accused Review Board has the responsibility for managing those persons who suffer from a mental illness or impairment who have been found unfit to stand trial or not guilty by reason of unsoundness of mind until such time as they can be released unconditionally by order of the Governor. Because of their self-evident connection to the administration of criminal justice, the Commission proposed that their exclusion from jury service during the period of their membership of the relevant board and for five years thereafter should be retained.¹⁷⁰

The Commission received 12 submissions in response to this proposal, with 10 submissions in support of retaining the current ineligibility of review board members.¹⁷¹ As with certain other occupational categories, the Department of the Attorney General submitted that members of review boards should be made eligible for jury service in order to increase the size and representative nature of the jury pool.¹⁷² However, as discussed in respect of other categories, the Commission is not persuaded by this justification for eligibility where the relevant occupation has a clear connection to the administration of criminal justice.

The Commission also received a submission from the Chairperson of the Prisoners Review Board,¹⁷³ which argued that members of review boards should be made

170. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 28.

171. Criminal Lawyers Association (WA); Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA); Justice Narelle Johnson (Chairperson, Prisoners Review Board and Mentally Impaired Accused Review Board).

172. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

173. The Hon Justice Narelle Johnson, Chairperson, Prisoners Review Board and Mentally Impaired Accused Review Board, Submission No 43 (8 March 2010).

eligible for jury service because ‘their role is so removed from the determination of guilt or innocence ... that there is an insufficient connection to the criminal trial process to justify an exclusion from jury service’.¹⁷⁴ In her submission the Chairperson of the Prisoners Review Board acknowledged that ‘perception is as important as reality in this context’; however she submitted that ‘any perception that the work of the members ... is in any way connected to the trial process is completely unfounded’.¹⁷⁵

As noted earlier, the standard used by the Commission to assess whether a particular occupation should be excluded from jury service is whether the occupation is so integrally connected with the administration of justice (and in particular criminal justice) that the presence on a jury of a person holding that occupation might compromise, or be seen to compromise, the jury’s status as an independent, impartial and competent lay tribunal. An occupation that involves the determination of guilt or innocence and is connected to the trial process will certainly be ineligible under these criteria, but the net must be cast wider than that in order to maintain public confidence in the criminal justice system. For example, prison officers are not involved in determinations of guilt or innocence or in the trial process, yet they would not be seen to be sufficiently independent of the criminal justice system to overcome a perception of partiality. It is, as Gillian Braddock SC submitted, the ‘perception of partiality and the risks this poses to the security of verdicts and public confidence in the system’ that is the pertinent issue.¹⁷⁶

In support of the Commission’s proposal the Aboriginal Legal Service submitted that because review board members are ‘required to focus on the risk to the public in releasing offenders’ this may improperly affect the manner in which they would carry out the role of juror.¹⁷⁷ The Aboriginal Legal Service further submitted that:

[A]s part of their role, the members of review boards are exposed to detailed information regarding offenders and prisoner management to such an extent that they could never be seen to be removed from the administration of the criminal justice system.¹⁷⁸

Having considered all submissions and applying the guiding principles set out in Chapter One, it is the Commission’s view that review board members are so substantially connected to the criminal justice system that they would not be perceived as being impartial as

between the accused and prosecution in a criminal trial. Furthermore, prisoners, detainees and people in custody on remand (whether former or current) are likely to be aware of the involvement of these boards in making determinations about the release of prisoners on parole and breach of early release orders. In the Commission’s opinion, an accused would be unlikely to perceive review board members as being sufficiently independent of the state (as prosecutor) to have confidence that they would receive a fair trial should such a person be selected on their jury. In these circumstances, the Commission is persuaded that in the interests of maintaining public confidence in the criminal justice system the ineligible status of review board members should not be changed.

Because of their close connection to the criminal justice system, both the Aboriginal Legal Service and the DPP submitted that review board members should be excluded from jury service for a period longer than five years after ceasing to be a member.¹⁷⁹ The Commission has dealt with arguments relating to permanent ineligibility earlier in this chapter and has determined that five years is a sufficient period of time to overcome any perception of partiality attaching to an occupation. The Chairperson of the Prisoners Review Board argued that five years was too long a period and that any perceived connection of review board members with the criminal justice system ‘would well and truly have diminished after three years’.¹⁸⁰ The Commission acknowledges this submission, but in the interests of administrative consistency the Commission believes the period of exclusion should be maintained at five years.

RECOMMENDATION 36

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 remain ineligible for jury service for the term of their membership of the relevant board and for a period of five years thereafter.

174. Ibid.

175. Ibid.

176. Gillian Braddock SC, Submission No 39 (4 February 2010).

177. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).

178. Ibid.

179. The Aboriginal Legal Service (WA) suggested that review board members be made permanently ineligible while the Office of the Director of Public Prosecutions suggested that if peremptory challenges are abolished they should be made ineligible for a period of 10 years after service as a member of a review board: Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

180. The Hon Justice Narelle Johnson, Chairperson, Prisoners Review Board and Mentally Impaired Accused Review Board, Submission No 43 (8 March 2010).

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.¹⁸¹

This provision properly excludes people in occupations such as prison officers, community corrections officers, juvenile justice workers, court intervention program workers (such as those working in the drug court and intellectual disability diversion program), victim counsellors, criminologists and others employed by the departments of the Attorney General and Corrective Services. However, 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. As it currently stands, the provision 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. The Commission therefore proposed in its Discussion Paper 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 Commission further proposed that the exclusion of people who fall into this occupational category should be maintained during the term of their employment and for five years thereafter.¹⁸²

The Commission received 10 submissions¹⁸³ supporting the Commission's proposal with only one submission opposing it.¹⁸⁴ The Department of the Attorney General submitted that this occupational category should be made eligible for jury service in order to increase the size and representative nature of the jury pool.¹⁸⁵ However, as discussed in respect of other categories, the Commission is not persuaded by this justification for eligibility where the relevant occupation has a clear connection to the administration of criminal justice. Further, the Commission observes that its recommendation to narrow the current provision will substantially reduce the number of people who will be ineligible for jury

182. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 29.

183. Criminal Lawyers Association; Jury Research Unit (UWA); Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC; Aboriginal Legal Service (WA).

184. The Department of the Attorney General opposed the Commission's proposal. The Aboriginal Legal Service (WA) supported the proposal but argued that such officers should be permanently ineligible. The Commission has already dealt with the concept of permanent ineligibility above and has recommended that no occupational category should be permanently ineligible: see Chapter 3, Recommendation 18.

185. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

181. *Jury Pools Regulations 1982* (WA) reg 10 (inserted 3 April 2007).

service in this occupational category. This will, in turn, increase the size and representation of the pool of potential jurors. In regard to those people for whom ineligibility is maintained, the Commission stresses that their exclusion 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.¹⁸⁶ The Commission therefore makes the following recommendation.

RECOMMENDATION 37

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.

186. The Office of the Director of Public Prosecutions submitted that there may be practical difficulties with identifying people from within these departments whose work does or does not involve the responsibilities referred to in Recommendation 37. However, the Commission points out that occupational eligibility is judged like any other exclusion category on the basis of a signed statutory declaration and any relevant evidence requested by the summoning officer. Instructions identifying those excluded are found on the back of the summons and this information will be amended by the sheriff's office to take into account any changes made to the legislation as a result of the Commission's recommendations.

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 of an administrative or procedural nature about Western Australian government agencies, statutory authorities, local governments and public universities.¹⁸⁷ The ombudsman also has the authority to initiate an enquiry or investigation about these public bodies where no specific complaint has been received.¹⁸⁸

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, including the 'reasonableness of a decision to prosecute, alleged flawed identification processes and the integrity of search warrant procedures'.¹⁸⁹ However, the ombudsman can only make recommendations to agencies as the outcome of its investigations; the office is not involved in the prosecution of matters and cannot direct that action be taken. The Commission's preliminary view expressed in its Discussion Paper was that the ombudsman had insufficient connection to the administration of justice, and in particular criminal justice, to warrant his or her exclusion from jury service. The Commission made a proposal to this effect.¹⁹⁰

The Commission received 11 submissions¹⁹¹ that responded directly to this proposal, eight of which supported removing the ombudsman from the list of ineligible occupations under the *Juries Act*. The Commission received two submissions that argued that the ombudsman should remain ineligible¹⁹² and a further submission, from the ombudsman, which helpfully directed the Commission's attention to certain

187. The ombudsman is not empowered to investigate complaints about courts, judicial officers or Parliament or parliamentary officers: *Parliamentary Commissioner Act 1971* (WA) s 13.

188. *Parliamentary Commissioner Act 1971* (WA) s 16.

189. Ombudsman Western Australia, Submission No 29 (27 January 2010).

190. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 30.

191. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Judith Bailey; Office of the Director of Public Prosecutions; Ombudsman Western Australia; Gillian Braddock SC; Aboriginal Legal Service (WA).

192. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010); Western Australia Police, Submission No 20 (31 December 2009).

aspects of the role of the ombudsman and his staff but refrained from expressing a clear view on eligibility for jury service.¹⁹³

In opposing the Commission's proposal to make the ombudsman eligible for jury service the Western Australia Police submitted that an ombudsman-juror could unduly influence the jury because:

[A]lthough not involved in the adjudication of criminal matters, [the ombudsman is] engaged in fact finding and the application of law in respect of the investigation of complaints that are administrative in nature. As a result, the ombudsman would most likely be experienced and capable in fact finding and the application of the law to facts thereby placing him or her in an advanced position vis-a-vis that of the other lay jurors.¹⁹⁴

The Commission does not agree with this argument. It is noted that many potential jurors are engaged in work that involves fact-finding and the application of laws (or policies) to facts. For example, administrative officers in local councils, rangers, building inspectors, health inspectors, engineers, Centrelink officers, tribunal members, accountants, financial advisors and town planners are all occupations that are involved in establishing facts and applying laws or policies to those facts. In some of these cases, the facts may be in dispute and the people in these occupations will also be engaged in weighing competing evidence. In the Commission's opinion, these general skills should not be seen as something that detracts from a jury, but rather enhances it.

In its submission the DPP suggested that the ombudsman should be ineligible for jury service because of his or her responsibility for 'overseeing complaints against the police and in relation to corrective facilities'.¹⁹⁵ Although no other reason is given in the DPP's submission, it is assumed that the rationale behind such exclusion would be either because of a risk of impartiality or because of proximity to 'players' in the criminal justice system. The Commission examined this point carefully in making its original proposal and determined that because the ombudsman investigates only procedural or administrative matters and not misconduct, it is unlikely that he or she would be perceived as biased against police or the prosecution in general. The Commission remains persuaded that the ombudsman's presence on a jury

would not compromise a jury's status as an independent, impartial and competent lay tribunal.

The Commission is also not persuaded that the proximity of the ombudsman to, for example, police, is enough to support occupational ineligibility for jury service. As mentioned earlier, police witnesses are identified to the jury panel assembled in the courtroom prior to empanelment. If any prospective juror recognises the name of a police witness, then the juror is required to notify the court so that he or she may be excused from attendance for that particular trial.

As stated at the outset, only the ombudsman is currently ineligible for jury service, while officers and investigators of the ombudsman's office are not.¹⁹⁶ This is so, even though these staff are intimately involved in ombudsman investigations and the ombudsman is legislatively permitted to delegate certain functions to any staff member.¹⁹⁷ In his submission the ombudsman invited the Commission to consider whether, in view of these facts, staff of the ombudsman's office should also be made ineligible if the ineligibility of the ombudsman was to be retained.¹⁹⁸

As will be clear, having considered the submissions, the Commission does not favour retaining ineligibility for the ombudsman. However, the fact that ombudsman's staff are not currently ineligible is somewhat revealing of the rationale behind the ombudsman's current ineligible status. In the Commission's opinion this indicates that historically the rationale for the ombudsman's ineligible status was that the ombudsman was considered to be an 'essential' government officer and that the exclusion had little to do with the potential of impartiality or integral connection with the administration of justice. While the Commission does not dispute that the ombudsman remains an essential officer, this rationale for exclusion is no longer valid. If selected to serve as a juror, under the Commission's recommendations an essential officer may seek deferral of jury service or may apply to be excused from jury service on the basis of substantial inconvenience to the public. In the Commission's opinion there is no principled reason why the ombudsman should remain ineligible for jury service and accordingly it recommends that the ombudsman should be removed from the list of ineligible occupations in the *Juries Act*.

193. Ombudsman Western Australia, Submission No 29 (27 January 2010).

194. Western Australia Police, Submission No 20 (31 December 2009).

195. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

196. Only Victoria includes ombudsman's staff in the list of occupations ineligible for jury service. The Commission notes that this is one of the ineligible occupations currently under review in that state: Department of Justice Victoria, *Jury Service Eligibility*, Discussion Paper (2009).

197. *Parliamentary Commissioner Act 1971* (WA) s 11.

198. Ombudsman Western Australia, Submission No 29 (27 January 2010).

RECOMMENDATION 38

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).

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).¹⁹⁹ 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,’²⁰⁰ and may search and restrain a child,²⁰¹ and move a child to a ‘safe place’.²⁰² 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 its Discussion Paper the Commission expressed the view that there was not 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 could not 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. Therefore, in the interests of increasing participation in jury service pursuant to Guiding Principle 3, the Commission proposed that the exclusion for officers of the Department for Child Protection be removed.²⁰³

199. *Juries Act 1957* (WA) sch 2, pt I, cl 2(k).

200. *Children and Community Services Act 2004* (WA) s 32(1)(d).

201. *Children and Community Services Act 2004* (WA) ss 114, 115 & 116.

202. *Children and Community Services Act 2004* (WA) s 41.

203. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 31.

Submissions on this proposal were evenly split with five supporting eligibility for jury service²⁰⁴ and five arguing that all or certain officers of the Department for Child Protection should remain ineligible for the period of their employment and for at least five years following employment.²⁰⁵ Submissions opposing the Commission’s proposal generally argued that officers of the department involved in investigation (ie, authorised officers) were sufficiently linked with the criminal justice system as to be perceived as depriving them of the ability to be impartial.²⁰⁶ Because such officers routinely investigate allegations of offending against children, in particular sexual offending, the Aboriginal Legal Service submitted that it had ‘strong concerns that ... these officers may have formed very strong preconceived views about sexual offending and offending against children’.²⁰⁷ The potential for preconceived views in these circumstances was echoed by the DPP in its submission.²⁰⁸

The Aboriginal Legal Service also noted that authorised officers ‘utilise a far lower standard of proof in their investigations and must at all times act in the best interests of the child’.²⁰⁹ It was argued that as a consequence a Department for Child Protection investigator could ‘inappropriately influence the jury’, presumably by unwittingly disregarding the judge’s directions on standard of proof and applying the more familiar standard used in their investigations.²¹⁰ So too, the Western Australia Police submitted that the work performed by these officers may compromise, or be seen to compromise, the independent, impartial and lay nature of a jury.²¹¹ The clear message from submissions opposing the Commission’s proposal was that the perception, if not reality, of bias was such that no accused charged with a sexual offence could be confident of a fair trial if an authorised officer of the Department for Child Protection was selected as a member of their jury.

204. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia.

205. Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Aboriginal Legal Service (WA); Department for Child Protection. The Aboriginal Legal Service (WA) argued that authorised officers should be permanently ineligible for jury service.

206. Office of the Director of Public Prosecutions; Western Australia Police; Aboriginal Legal Service (WA); Judith Bailey.

207. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010).

208. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

209. Aboriginal Legal Service (WA), Submission No 41 (15 February 2010). This is confirmed in the *Children and Community Services Act 2004* (WA) s 7.

210. Ibid.

211. Western Australia Police, Submission No 20 (31 December 2009).

The Department for Child Protection also argued that authorised officers should be excluded from jury service. While referring to their ‘unsuitability for jury service’ because of their involvement with the criminal justice system, the primary argument offered by the department was that these officers provide an ‘essential service’ such that their absence through jury service would ‘have an adverse consequence on the operation of the Department for Child Protection’.²¹² The Commission has addressed this argument in detail at several points within this chapter.²¹³ The Commission rejects arguments that seek to base occupational ineligibility for jury service in the concept of essential service to the public or how integral the occupation is to the smooth running of a government entity. Under the Commission’s recommendations, jury service may be planned by means of deferral to a time that is convenient to the prospective juror and his or her employer.²¹⁴ Further, prospective jurors whose absence from work would cause ‘substantial inconvenience to the public’ may apply to be excused from jury service under the Commission’s recommended reforms to the Third Schedule.²¹⁵

Overall, the Commission maintains the opinion that the current exclusion for officers of the Department for Child Protection is unnecessarily wide. It needlessly excludes all departmental employees and contracted service providers irrespective of their position or the nature of their work. However, the Commission is persuaded by submissions that there is, at the very least, a perceived risk of prejudice to an accused should authorised officers be permitted to serve as jurors. The Commission therefore recommends that officers ‘authorised’ under s 25 of the *Children and Community Services Act* be excluded from jury service during their term of employment and for a five-year period thereafter.

RECOMMENDATION 39

Ineligibility for jury service – authorised officers of the Department for Child Protection

That the Second Schedule, Part I, clause 2(k) of the *Juries Act 1957* be amended to confine occupational ineligibility to officers of the Department for Child Protection who are ‘authorised officers’ under s 25 of the *Children and Community Services Act 2004* (WA) and that such officers be excluded from jury service during the term of their employment and for a period of five years following.

212. Department for Child Protection (WA), Submission No 42 (19 February 2010).

213. See, for example, the arguments detailed above under ‘ombudsman’, ‘officers of Parliament’ and ‘Family Court registrars’.

214. See Chapter Six, Recommendation 63.

215. See Chapter Six, Recommendation 60.

Chapter Five

Qualification for Jury Service

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Qualification for jury service

IN the preceding two chapters of this Report the Commission has made various recommendations to reform 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, if they do not understand the English language, or if they are incapacitated by any disease or infirmity of the mind or body that affects their ability to discharge the duties of a juror.

Through its recommendations, the Commission has endeavoured to expand the pool of potential jurors as far as possible in order to ensure that juries are broadly representative of the general community and that the burden of jury service is shared fairly. However, these aims cannot override the fundamental goal that juries should be, and should be seen to be, independent, impartial and competent.¹ To do so, would diminish the fairness of the trial from the perspective of the accused and the state and, furthermore, would undermine public confidence in the justice system. Hence, people who are unable to discharge the duties of a juror—because of a lack of understanding of English or because of mental incapacity—should be disqualified from jury service. In addition, people who would not be perceived to be impartial because of prior criminal conduct or because of their current personal involvement in the criminal justice process should be excluded from jury service.

In this chapter, the Commission makes recommendations to reform the legislative categories of disqualification in order to ensure that those categories are appropriate and to ensure that those who are not qualified for jury service can be more easily identified and removed from the jury lists at the earliest possible stage of the jury selection process. Early identification will mean that such persons are not unnecessarily summoned for jury service. This in turn will save resources. However, inevitably some people who are not qualified will continue to be summoned for jury service. For example, a person may have been qualified at the time the juror summons was issued but has since been convicted of a disqualifying offence. Also, it may not become apparent that a potential juror does not understand English until that person attends court

in response to a juror summons. Hence, this chapter also considers the administrative requirements for enabling the sheriff's office (and the court) to identify unqualified jurors and to relieve such persons from the obligation to serve.

1. See Chapter One, Guiding Principle 1.

Criminal history

PEOPLE with specified criminal histories are disqualified from jury service in all Australian jurisdictions.¹ The principal justification for this approach is the need to maintain public confidence in the criminal justice system – people with significant criminal histories are likely to be perceived as biased against the state (or in favour of the accused). It is important to emphasise that the key factor here is the perception of bias: it is not suggested that all people with prior criminal convictions are in fact biased against the state. However, the public at large would be concerned if people with significant criminal histories were permitted to serve as jurors on the basis that there is a real risk that such persons may not be able to act impartially. On the face of it, this would mean that all prior offenders should be excluded from jury service forever. Yet, as a matter of public policy, it is also necessary to recognise the principle of rehabilitation and therefore reformed offenders should be allowed to participate in ordinary civic duties. Thus, the scope of any disqualification criteria must balance the requirement to maintain public confidence in the jury system with the need to promote and recognise rehabilitation.²

THE CURRENT LAW

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;³

1. For further discussion about the scope of disqualification criteria in other Australian jurisdictions, see LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 85–89. People with certain criminal convictions are also disqualified from jury service in England and Wales (*Criminal Justice Act 2003* (UK) sch 33); in New Zealand (*Juries Act 1981* (NZ) s 7); in the United States (see <<http://www.uscourts.gov/jury/juryact.html>>); and in various Canadian jurisdictions (eg, Alberta, British Columbia, Quebec and Manitoba).
2. The principle of rehabilitation underpins many aspects of the Western Australian criminal justice system (eg, community-based sentencing orders imposed in order to enable offenders to address underlying problems, such as alcohol or drug abuse; and the ability to apply for a spent conviction after a specified period of time has elapsed without any further offending under the *Spent Convictions Act 1988* (WA)).
3. Capital punishment was abolished in Western Australia in 1984. However, there may still be people who were sentenced

- (II) strict security life imprisonment referred to in section 282 or 679 of *The Criminal Code*;⁴
- (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-paragraph (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: those who are permanently disqualified⁵ from jury service and those who are temporarily disqualified. The permanent category is underpinned by the view that some offenders have such serious prior convictions that the public would lose confidence in the jury system if such offenders were entitled to serve. By only temporarily disqualifying certain offenders, the latter category recognises the potential for rehabilitation – if five years has elapsed since a person was subject to imprisonment, detention or a community order the person will be eligible for jury service so long as no further disqualifying offences have been committed.⁶

to death prior to 1984 but that sentence was commuted to strict security life imprisonment or life imprisonment and they have subsequently been released from prison.

4. 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.
5. Other than New South Wales, all Australian jurisdictions include a category of permanent disqualification.
6. The Commission received a submission that stated '[i]t is interesting to note that the Juries Act does not believe in rehabilitation': Criminal Lawyers' Association of Western Australia, Submission No 10 (13 December 2009). It is

As the Commission observed in its Discussion Paper, the current legislative criteria create a number of anomalies;⁷ for example:

- all offenders who have been fined or given a Conditional Release Order (irrespective of the nature of the offence or the court in which the matter was dealt with) are eligible for jury service (eg, a person fined for fraud in the District Court last week is eligible for jury service today);
- the threshold period of more than two years' imprisonment for permanent disqualification coupled with the existence of only one category of temporary disqualification means that some relatively serious offenders may be eligible for jury service (eg, a person sentenced to two years' imprisonment (or less) for a serious offence such as sexual assault, child sexual abuse, armed robbery, drug trafficking or aggravated burglary is only required to wait for five years after the sentence (including any parole) is completed before becoming eligible for jury service);
- offenders who have been convicted and sentenced as juveniles are excluded from jury service as readily as offenders who were convicted and sentenced as adults (eg, an 18 year-old who was sentenced to detention for two weeks as a juvenile four years ago is ineligible for jury service and so is a 35 year-old who was sentenced to 9 months imprisonment four years ago);
- unsentenced offenders (eg, a person remanded on bail for the preparation of a pre-sentence report or a person subject to Pre-Sentence Order) are eligible for jury service;
- unconvicted accused are eligible for jury service; and
- offenders who have been subject to a Community Based Order for a relatively minor offence (eg, possession of cannabis dealt with in the Magistrates Court) are excluded from jury service for the same time period as offenders who have served a term of imprisonment of two years or less (eg, armed robbery dealt with in the Supreme Court).⁸

correct that the category of permanent disqualification does not accommodate the possibility of rehabilitation for the most serious cases (ie, offenders sentenced to life imprisonment); however, it is possible for a person who has been permanently disqualified from jury service to subsequently become eligible if that person has applied for and been granted a spent conviction.

7. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 86.

8. Ibid, Table B for further examples.

THE COMMISSION'S PROPOSALS FOR REFORM

As a consequence of the anomalies identified in the current legislative scheme, the Commission undertook the task of restructuring the disqualification criteria with a view to achieving an appropriate balance between the competing goals of maintaining public confidence in the jury system and providing for the rehabilitation of reformed offenders.⁹ In carrying out this task, 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 may be considered suitable for jury service. This is because different members of the community will have different views about who is likely to be perceived as biased, which is clearly evident from the submissions received by the Commission in response to this issue.

Out of a total of 10 submissions on this subject, only two submissions agreed with all of the Commission's proposals.¹⁰ Two submissions took a harsher view than the Commission (ie, that the categories for disqualification should be amended to exclude more people)¹¹ and four submissions indicated a more lenient approach (ie, that the categories of disqualification should be amended to exclude less people).¹² The final

9. Ibid, Proposals 32–35 & Invitation to Submit G. In its submission, the Law Society argued that the highly publicised 'McLeod' case (which the Commission referred to in its Discussion Paper) should not be used as a justification for reforming this area of the law: Law Society of Western Australia, Submission No 17 (4 January 2010). The Commission referred to this case as background material only and noted that comments were made in Parliament about the presence of a juror in this case who had a criminal conviction. However, nothing about this case has influenced the Commission's recommendations for reform.

10. Judith Anne Bailey, Submission No 23 (12 January 2010); Gillian Braddock SC, Submission No 39 (4 February 2010). Legal Aid stated that they agreed with the Commission's proposals; however, from their response to Invitation to Submit G, it is clear that Legal Aid favour expanding the category of permanent disqualification category to include a number of convictions for offences involving the administration of justice. But, at the same time, Legal Aid also submitted that the length of imprisonment that should trigger permanent disqualification for all other offences should be increased to a sentence of more than five years' imprisonment: Legal Aid Western Australia, Submission No 18 (4 January 2010).

11. Western Australia Police, Submission No 20 (31 December 2009); Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

12. Criminal Lawyers' Association of Western Australia, Submission No 10 (13 December 2009); Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009); Law Society of Western Australia, Submission No 17 (4 January 2010); District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

two submissions expressed mixed views.¹³ As just one example of the divergence of opinion, the Law Society did not agree that a person who is currently subject to a drivers licence disqualification for 12 months or more should be excluded from jury service. In contrast, the Office of the Director of Public Prosecutions (DPP) submitted that a person who is currently subject to a drivers licence disqualification (for any period at all) should be disqualified from jury service.

Therefore, it is emphasised that a line must be drawn somewhere – the Commission has taken a balanced view and has concluded that reform in this area should be guided by the following aims:

- The exclusion of people from jury service on the basis of their criminal history or current dealings with the criminal justice process should be undertaken on the basis of clear legislative criteria rather than by prosecution jury vetting because the latter is undertaken in secret by individual prosecutors and in circumstances where no equivalent right is afforded to the accused.¹⁴
- Any reforms should, as far as practicable, remove anomalies so that one disqualification category can be considered fair and appropriate when compared to another disqualification category.
- Disqualification criteria should continue to distinguish between those people who should be permanently disqualified and those who should be temporarily disqualified. Temporary disqualification categories should be graduated so that those excluded for the longest period of time are likely to be more serious and repeat offenders and those excluded for the shortest period of time are likely to be less serious offenders. In order to achieve this, the Commission is of the view that the various categories should be formulated by using a variety of indicators (eg, offence type, sentence imposed, level of court).
- In recognition of long-standing principles of juvenile justice, people who were convicted of offences as juveniles should generally be excluded from jury service for lesser periods than people who were convicted as adults.

Permanent disqualification

As noted above, those who have been sentenced to life imprisonment, indefinite imprisonment or to imprisonment for more than two years are permanently

disqualified from jury service. The only exception to this rule is where a person who has been sentenced to more than two years' imprisonment applies for and is granted a spent conviction.¹⁵

The overwhelming majority of submissions that responded to this issue agreed that a category of permanent disqualification should remain.¹⁶ However, there were differing views about the length of imprisonment that should trigger permanent exclusion from jury service. Legal Aid submitted that the threshold period should be increased so that a sentence of more than five years' imprisonment should be required before disqualification from jury service is permanent.¹⁷ The Law Society of Western Australia also considered that the period of imprisonment should be increased, suggesting that a person should be permanently disqualified from jury service if he or she had ever been sentenced to more than three years' imprisonment.¹⁸ In support of its submission, the Law Society stated that the length of prison sentences in Western Australia had increased over the last decade but the threshold period of more than two years has not changed since 1984.

In terms of qualification for jury service, it is the fixed or maximum term that is relevant rather than the actual time served in prison. In a 2006 report by the Department of the Attorney General it was observed that as a consequence of sentencing reforms in 1996 the mean maximum term imposed by superior courts increased from 1996 to 2003.¹⁹ But, after further sentencing reforms in 2003 there has been a 'progressive decrease in mean maximum prison terms'.²⁰

15. For any sentence greater than 12 months (or for indefinite imprisonment) an application for a spent conviction must be made to the District Court and the court has discretion whether to grant a spent conviction: *Spent Convictions Act 1988* (WA) s 6. The Commission notes that the Standing Committee of Attorneys-General has released a draft Model Spent Convictions Bill (the latest version dated 24 September 2009). Pursuant to this Bill it will not be possible to apply for a spent conviction for an offence that has resulted in a term of more than 12 months' imprisonment.

16. Law Society of Western Australia; Legal Aid Western Australia; Department of the Attorney General; District Court and Supreme Court of Western Australia; and the Office of the Director of Public Prosecutions. The Jury Research Unit declined to express a view about whether the category of permanent disqualification should remain: Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

17. Legal Aid Western Australia, Submission No 18 (4 January 2010).

18. Law Society of Western Australia, Submission No 17 (4 January 2010).

19. Department of the Attorney General, 'Sentence Length v Time Served in Prison: Western Australia higher courts offenders, 1996–2006' (2006) *Contemporary Issues Bulletin* 3.

20. Ibid.

13. Department of the Attorney General (WA), Submission No 16 (12 December 2009); Legal Aid Western Australia, Submission No 18 (4 January 2010).

14. See Chapter Two, 'Jury Vetting'.

The DPP also addressed sentence lengths in its submission. It stated that the current disqualification criteria under the *Juries Act* should not be amended in light of the majority decision in *The State of Western Australia v BLM*.²¹ In simple terms, the effect of this decision is that sentence lengths should generally (at least for the foreseeable future) remain at similar levels to sentences that were imposed after August 2003. As a consequence of legislative reform to the parole and remission schemes in this state in 2003,²² fixed sentences were reduced by one-third in order to ensure that the actual time spent in prison did not increase.²³ In January 2009, the legislative requirement to reduce the fixed sentence by one-third was repealed.²⁴ According to the majority decision in *The State of Western Australia v BLM* sentencing courts should generally now take into account the minimum custodial periods imposed before and after 2003 in order to provide for consistency in sentencing.²⁵ Thus, by and large, fixed prison sentence lengths today should be on a par with fixed prison sentence lengths that have been imposed over the last seven years but these sentence lengths are in fact shorter than those generally imposed before 2003.

The Department of the Attorney General did not clearly articulate its position in relation to this issue.²⁶ It stated in its submission that increasing the period of imprisonment for permanent disqualification would increase the pool of potential jurors. However, it did not state one way or another whether this period should in fact be increased.

The majority of proposals expressed the view that the current provision is appropriate.²⁷ For example, the joint submission from the District Court and Supreme Court of Western Australia stated that the present permanent disqualification category

strikes about the right balance between cases which may be thought to be so serious that the offender should be permanently disqualified from jury service, at least by reason of a perception of bias towards one side or the other (and it matters not which), and those cases where a more flexible approach may be taken.²⁸

Bearing in mind that prison terms do not appear to have generally increased over the last decade, the Commission is of the view that there is not sufficient justification at present for increasing the period of imprisonment that will trigger permanent disqualification from jury service.

Legal Aid also submitted that a conviction for any one of a specified number of offences relating to the administration of justice²⁹ should permanently disqualify a person from participating in jury service, irrespective of the penalty imposed.³⁰ While the Commission acknowledges this argument, it does not agree that people should be *permanently* disqualified on the basis of conviction alone. For example, a young person with no prior criminal history could be convicted of attempting to pervert the course of justice by impulsively providing a false name to police after being stopped for a minor traffic infringement and then, out of fear, continuing with the deception to the point of being charged under the false name.³¹

21. [2009] WASCA 88.

22. The *Sentencing Legislation Amendment and Repeal Act 2003* (WA) and the *Sentence Administration Act 2003* (WA) introduced a number of changes to sentencing laws in Western Australia. An automatic one-third remission of sentence that had existed for a number of years was abolished in order to ensure that the sentence imposed by the court more accurately reflected the time that a prisoner would spend or be liable to spend in prison. Further, the length of time that a prisoner must serve before being eligible for parole was altered.

23. Clause 2 of Schedule 1 of the *Sentencing Legislation Amendment and Repeal Act 2003* (WA) (often referred to as the 'transitional provisions') provided (subject to a number of exceptions) that if a court was sentencing an offender to a fixed term of imprisonment, it was required to reduce the term that it would have imposed before the amendments by one-third.

24. *Sentencing Legislation (Transitional Provisions) Amendment Act 2008* (WA) s 4.

25. [2009] WASCA 88, [27] (Wheeler & Pullin JJA, Owen JA concurring). The majority stated at [7] in relation to the 2008 legislation that '[t]he construction we prefer sees the effect of the Amendment Act as requiring a sentencing judge, where there was an established sentencing range in respect of a particular offence prior to the enactment of the Amendment Act, to have regard to the minimum custodial periods of the sentences established by that range, for the purpose of ensuring that comparable minimum custodial periods are established for those who offend in a comparable way subsequent to the Amendment Act. However, in the case of offending falling within the worst category of offending, and in relation to offending of that type only, the effect of the Amendment Act is that a sentencing judge may impose the statutory maximum penalty, or a penalty close to the maximum, notwithstanding that the effect of doing so would be to require the offender to serve a substantially increased minimum custodial period'.

26. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

27. District Court and Supreme Court of Western Australia; Western Australia Police; Office of the Director of Public Prosecutions (WA); Gillian Braddock SC.

28. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

29. The offences listed in the submission included judicial corruption, perjury, corrupting or threatening jurors, fabricating evidence, destroying evidence, preventing witnesses from attending, conspiring to defeat justice and attempting to pervert the course of justice.

30. Legal Aid Western Australia, Submission No 18 (4 January 2010).

31. For example, in *Jeffery v The Queen* (unreported, CCA Supreme Court of WA, Library No 920357, 3 June 1992) the offender had provided a false name to police, entered into a false bail

Generally, convictions for serious offences such as perjury or attempt to pervert the course of justice result in significant terms of imprisonment and if the sentence imposed is more than two years the person will be disqualified permanently from jury service. If a lesser sentence is imposed the person will be temporarily disqualified.³² The Commission is not persuaded that there is a sound basis for treating these types of offenders differently to other offenders. The Commission is of the view that offenders convicted of offences relating to the administration of justice (who are not permanently disqualified as a consequence of the actual sentence imposed) should be qualified for jury service in the same way as any other offender – if the relevant time period has elapsed without committing any further disqualifying offences (ie, the person is rehabilitated) then the person should be entitled to participate in jury service. Accordingly, the Commission recommends that the current legislative provision dealing with permanent disqualification should remain unaltered.

RECOMMENDATION 40

Permanent disqualification from jury service

That s 5(b)(i) of the *Juries Act 1957* (WA) continue to provide that a person is permanently disqualified for jury service if he or she has ever been convicted of an offence and sentenced to death, strict security life imprisonment, life imprisonment, an indeterminate period or to imprisonment for a term exceeding two years.³³

Temporary disqualification

Currently, there is one category of temporary disqualification covering a wide range of circumstances. Offenders who have been sentenced to two years' imprisonment (or less) for a serious offence in the District Court or Supreme Court are treated in the same way as offenders who have been sentenced to a Community Based Order for an offence in the Magistrates Court. Further, young offenders are disqualified from jury

service as readily as adult offenders. Because of these inconsistencies, the Commission proposed a series of graduated categories designed to reflect differences in offence seriousness.³⁴ In summary, the Commission's proposal contained five categories of temporary disqualification:³⁵

- A person who has, at any time in the past 10 years, been subject to a sentence of imprisonment³⁶ for an indictable offence ('the 10-year category').
- A person who has, at any time in the past five years, been subject to a sentence of imprisonment (ie, for a summary offence); been convicted of an offence on indictment (ie, in the Supreme Court or in the District Court); or been subject to a sentence of detention of 12 months or more ('the five-year category').
- A person who has, at any time in the past three years, been subject to an adult community-based sentencing order or been subject to a sentence of detention in a juvenile detention centre ('the three-year category').
- A person who has, at any time in the past two years, been subject to a juvenile community-based sentencing order ('the two-year category').
- A person who is currently subject to a court-imposed order following conviction for an offence ('the current category').

The Commission received considerable support for its proposal from submissions.³⁷ The main areas of contention concerned the stipulated time frames and technical drafting issues.³⁸ In relation to the 10-year

undertaking and failed to appear in court and then a warrant was issued in that false name. In this case a sentence of 12 months' imprisonment was imposed on appeal: see *Ranford v The State of Western Australia* [No 2] [2006] WASCA 243 [32].

32. Under the Commission's recommendations the person would be disqualified for a period of 10 years following the expiration of a sentence of imprisonment (including suspended imprisonment) and for five years following conviction if a term of imprisonment was not imposed.

33. For the full text of the Commission's recommendation in relation to disqualification criteria based on criminal history, see Recommendation 46.

34. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 36.

35. This category also covers unsentenced offenders, unconvicted accused and traffic offenders but these groups are discussed separately below.

36. Which includes an early release order (such a parole), suspended imprisonment or conditional suspended imprisonment.

37. Those who fully supported the Commission's proposal in relation to the temporary disqualification of offenders were Legal Aid Western Australia, Law Society of Western Australia and Gillian Braddock SC. Others who supported most, but not all, of the Commission's proposals were the District Court and Supreme Court of Western Australia; Office of the Director of Public Prosecutions (WA); and Western Australia Police. Only the Department of the Attorney General opposed the proposal in relation to temporary disqualification.

38. The Western Australia Police submitted that Proposal 36.4(b) should be reworded by adding the phrase 'less than 12 months in a juvenile detention centre': Western Australia Police, Submission No 20 (31 December 2009). While the Commission agrees that the phrase 'in a juvenile detention centre' should be added for consistency with Proposal 36.3(c) the Commission does not consider that it is necessary to

category, the DPP expressed concern about the wording of the Commission's proposal noting that it must be clear that a person should have to wait 10 years from the completion of the sentence before being eligible for jury service.³⁹ The Commission agrees and has reworded its recommendation to clarify this.

The Western Australia Police and the joint submission from the District Court and Supreme Court of Western Australia did not fully support the 10-year and five-year categories. The courts submitted that there is insufficient justification for extending the current temporary disqualification period to 10 years.⁴⁰ On the other hand, the Western Australia Police submitted that the Commission's proposed five-year category should be subsumed within the 10-year category so that a person is disqualified from jury service if he or she has, in the past 10 years, been subject to a sentence of imprisonment (irrespective of whether the offence is indictable or summary); been convicted of an offence on indictment; or been subject to a sentence of detention of 12 months or more.⁴¹ Both these submissions reflect the divergence of opinion about who should and who should not be excluded from jury service on the basis of criminal history. However, the Commission maintains its view that the distinction between the 10-year category and the five-year category is valid. For example, a person sentenced to imprisonment for an indictable offence (eg, sexual assault, robbery, burglary, assault occasioning bodily harm) is likely to be considered less suitable for jury service than a person sentenced to imprisonment for a summary offence (eg, drink-driving, driving under suspension, common assault). Accordingly, the Commission makes its recommendation in essentially the same terms as its original proposal.

RECOMMENDATION 41

Temporary disqualification of offenders from jury service

That s 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 in the past 10 years been the subject of a sentence of imprisonment (including an early release order such as parole, suspended

imprisonment or conditional suspended imprisonment) imposed in relation to a conviction for an indictable offence (that was dealt with either summarily or on indictment).⁴²

2. 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 an early release order such as parole, 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.⁴³
3. Has in the past 3 years
 - (a) been subject to a community order under the *Sentencing Act 1995* (WA);⁴⁴ or
 - (b) been subject to a sentence of detention (including a supervised release order) in a juvenile detention centre.
4. Has in the past 2 years 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).
5. Is currently subject to an ongoing court-imposed order following conviction for an offence (excluding compensation or restitution) but including
 - (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);
 - (c) a Good Behaviour Bond or Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA).

expressly state that the period of detention is less than 12 months. If the period of detention is 12 months or more then the person will automatically fit into the five-year category.

39. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

40. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

41. Western Australia Police, Submission No 20 (31 December 2009).

42. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

43. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

44. A community order is defined in s 4 of the *Sentencing Act 1995* (WA) as a Community Based Order or an Intensive Supervision Order.

Unconvicted accused

After examining the disqualification criteria in other jurisdictions, the Commission formed the opinion that accused persons who are currently on bail (or in custody⁴⁵) awaiting trial should not be qualified for jury service.⁴⁶ The rationale for this approach is that people who are currently facing charges are so closely connected with the criminal justice process that they would be likely to be perceived as biased or otherwise unable to objectively discharge their duties as jurors. The Law Society opposed the Commission's proposal on the basis that it would 'erode the presumption of innocence'.⁴⁷ Similarly, the Jury Research Unit at the University of Western Australia submitted that the 'presumption of innocence would demand that a person charged with a crime ought still to be able to serve as a juror'.⁴⁸ The Commission does not agree with this sentiment. An innocent accused is just as, if not more, likely to be perceived as biased against the state as a guilty accused. A person who has been wrongly charged may find it difficult to objectively assess the prosecution's case. Hence, the Commission does not accept that the disqualification of accused from jury service undermines the presumption of innocence.

Moreover, the Commission is of the view that the abovementioned submissions do not give sufficient weight to the impact of perceived bias on public confidence. While it may be true, as stated by the Jury Research Unit, that there is no 'evidence supporting the proposition that charged people are more likely to exhibit bias', the Commission considers that accused would be perceived as biased by the public at large. Obvious examples include the presence of a juror who is currently facing child sexual assault charges in a child sexual assault trial or a juror facing drug trafficking charges in a drug trafficking trial. Jurors facing charges could be preoccupied with their own cases and legal obligations and it would be unreasonable to expect accused to disregard their own circumstances and assess the evidence dispassionately. Bearing in mind that the vast majority of submissions responding to this issue agreed with the Commission's

proposal,⁴⁹ it is recommended that accused should not be qualified for jury service.

RECOMMENDATION 42

Unconvicted accused

That s 5(b)(ii) 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

In its Discussion Paper the Commission observed that under the current law offenders who have been convicted but not yet sentenced are able to participate in jury service. For example, the sentencing of an offender on bail may be delayed while pre-sentence reports are prepared or an offender could be placed on a Pre-Sentence Order for up to two years.⁵⁰ This category of offenders includes those who are awaiting sentence for serious indictable charges and all unsentenced offenders remain closely connected to the criminal justice process. The Commission's proposal to exclude unsentenced offenders from jury service⁵¹ was met with full support.⁵²

RECOMMENDATION 43

Unsentenced offenders

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

45. A person in custody would be unable to perform jury service in any event.

46. Four Australian jurisdictions disqualify unconvicted accused from jury service (New South Wales, Victoria, South Australia and Tasmania) and unconvicted accused are also not qualified for jury service in the United Kingdom, in various jurisdictions in Canada (eg, Alberta, British Columbia, Quebec and Manitoba) and in federal cases in the United States. See also LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 87–88, Proposal 32.

47. Law Society of Western Australia, Submission No 17 (4 January 2010).

48. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

49. Submissions received from Department of the Attorney General (WA); Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Office of the Director of Public Prosecutions (WA); and Gillian Braddock SC.

50. A Pre-Sentence Order is reserved for offences that warrant a term of imprisonment but where the court considers that the offender should be given the opportunity to address any underlying causes of the offending behaviour before sentencing takes place.

51. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 37.

52. Submission in support were received from Department of the Attorney General (WA); Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Office of the Director of Public Prosecutions (WA); and Gillian Braddock SC.

Traffic offenders

A far more difficult question for the Commission has been the extent to which traffic offenders should be excluded from jury service. Although traffic matters may be viewed as less serious than other offences there are examples of serious traffic offences. Offences such as dangerous driving causing death (or grievous bodily harm), offences relating to the failure to report an accident involving personal injury and offences relating to the failure to provide a breath sample for analysis following an accident involving personal injury can be heard in the District Court.⁵³ Other offences such as dangerous driving causing bodily harm, reckless driving, driving under the influence of alcohol and driving under licence suspension can and do result in prison sentences.

Under the Commission's recommendations above, traffic offenders who have been sentenced to imprisonment (including suspended imprisonment), a community-based order, or other ongoing court-imposed orders will be excluded from jury service for a set period of time. However, the most common penalty imposed for traffic offences is a fine and this penalty is usually coupled with a drivers licence disqualification order. In its Discussion Paper the Commission concluded that the most appropriate basis for disqualifying traffic offenders (ie, those who are not otherwise disqualified from jury service) is by reference to the disqualification period imposed as part of the penalty. The disqualification period is a good indicator of offence seriousness and the offender's history of traffic offending.⁵⁴

Two other Australian jurisdictions (New South Wales and South Australia) exclude traffic offenders from jury service; however, their threshold for exclusion is relatively low.⁵⁵ It is the Commission's view that only the more serious and repeat traffic offenders should be disqualified from jury service because jury trials do not commonly deal with traffic-related matters and the presence of people with less serious traffic convictions would be unlikely to cause any apprehension of bias or loss of public confidence. On this basis, the Commission decided that a person should be disqualified from jury service if he or she is currently subject to a drivers licence disqualification of 12 months or more.⁵⁶

53. *Road Traffic Act 1974* (WA) ss 55, 56, 57 & 67.

54. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 89.

55. In New South Wales a person is not qualified for jury service if he or she is currently subject to *any* drivers licence disqualification (*Juries Act 1977* (NSW) sch 1) and in South Australia a person is not qualified for jury service if he or she has been disqualified from holding a drivers licence for a period greater than six months at *any time* during the past five years (*Juries Act 1927* (SA) s12).

56. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 35.

The Commission received varied responses to this proposal. The Department of the Attorney General submitted that this proposal will reduce the size of the available jury pool and suggested that only those with a 'repeat pattern of traffic convictions' should be excluded from jury service.⁵⁷ However, it did not explain what it meant by a 'repeat pattern of traffic convictions'. The Commission has analysed a number of common traffic offences and emphasises that its suggested disqualification period of 12 months or more would typically only apply to more serious and repeat offenders.⁵⁸ If, as an alternative, a specified number of convictions under the *Road Traffic Act 1974* (WA) is used as the disqualification criteria under the *Juries Act* less serious (albeit repeat) traffic offenders may well be unnecessarily excluded from jury service (eg, offences such as careless driving, failing to renew a vehicle licence, driving with an expired drivers licence, driving with excess 0.05% blood alcohol content, failing to report an accident and failing to provide particulars to the other party following a collision).

The Law Society did not support the Commission's proposal because, in the Society's view, it 'assumes that people convicted of relatively serious traffic offences cannot be relied upon to be true to the juror's oath'.⁵⁹ However, the Commission's proposal does not assume that people convicted of traffic offences cannot carry out their duties as a juror objectively just as its proposals do not assume that people charged or convicted of specified criminal offences cannot act objectively. Underpinning the Commission's proposal is the concern that permitting people with serious traffic convictions (and other convictions) to serve as jurors may give rise to a perception of bias and this in turn may undermine confidence in the jury system.

57. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

58. For example, a conviction for a second offence of reckless driving, dangerous driving or driving under the influence will result in a minimum licence disqualification of 12 months: see *Road Traffic Act 1974* (WA) ss 60, 61 & 63. Further, the penalty for driving under suspension pursuant to s 49 of the *Road Traffic Act* includes a licence disqualification of at least nine months up to a maximum of three years. Hence, a first offender would generally receive a licence disqualification of nine months and a disqualification period of 12 months or more would usually be reserved for repeat offenders. The Commission also notes that a second offence of excess 0.08% with a reading equal to or greater than 0.14% requires a minimum disqualification of 12 months and a third offence of excess 0.08% with a reading equal to or greater than 0.13% also requires a 12-month disqualification (*Road Traffic Act 1974* (WA) s 64). Examples of where a licence disqualification of 12 months or more could be imposed for a first offence include a first offence of dangerous driving causing bodily harm and dangerous driving causing death or grievous bodily harm (ss 59 & 59A).

59. Law Society of Western Australia, Submission No 17 (4 January 2010).

In contrast to the above submission, the DPP expressed the view that the exclusion of traffic offenders should be wider; that is, anyone with a current drivers licence disqualification (of any length) should be disqualified from jury service.⁶⁰ The Commission does not agree with this suggestion because too many people would be excluded from jury service and on the basis of relatively less serious matters. For example, a licence disqualification of three months applies to a first offence of driving with excess 0.08% (but less than 0.10%) blood alcohol or to a second offence of driving with excess 0.05% blood alcohol).⁶¹

The Commission received four other submissions responding to its proposal in relation to traffic offenders and all agreed that people who are currently subject to a drivers licence disqualification period of at least 12 months should be excluded from jury service.⁶² The Commission is of the view that its proposal strikes an appropriate balance between maintaining public confidence in the jury system and not unfairly excluding people with less serious traffic convictions from participating in jury service. Therefore, the Commission recommends that people who are currently subject to a drivers licence disqualification of 12 months or more are not qualified for jury service. The Commission also makes it clear that its recommendation only applies to those who are subject to a court-imposed disqualification so that it does not apply to people who have been suspended from driving as a result of unpaid fines. Furthermore, under the Commission's recommendation, people are only excluded from jury service while their licence disqualification is current. Once the disqualification period expires, assuming that the person has no further disqualifying convictions, he or she will be eligible for jury service.

RECOMMENDATION 44

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 court-imposed drivers licence disqualification for a period of 12 months or more.

60. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

61. *Road Traffic Act 1974* (WA) ss 64 & 64AA.

62. Submissions received from Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; and Gillian Braddock SC.

Convictions and charges in other jurisdictions

Currently, the *Juries Act* provides that disqualifying convictions and sentences in jurisdictions other than Western Australia will also bar a person from jury service. In its proposal the Commission continued with this approach by making it clear that relevant convictions, sentences and court-imposed orders in other Australian jurisdictions would also render a person disqualified for jury service. All submissions supported this approach;⁶³ however, the DPP observed that international convictions should also be taken into account when determining qualification for jury service. The Commission agrees with this sentiment in principle, but notes that in practice this would be very difficult to achieve. The administrative process for checking prospective jurors' criminal backgrounds is discussed below. At this stage the Commission notes that its recommendation is now wide enough to enable people with relevant international charges, convictions and sentences to be excluded from jury service if such information became known.

RECOMMENDATION 45

Taking into account convictions, sentences and charges in other jurisdictions

That a new s 6 of the *Juries Act 1957* (WA) be inserted and that this section provide that for the purposes of s 5(b) a person is not qualified for jury service in Western Australia if he or she

1. 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) in another jurisdiction provided that the person was subject to that similar sentence or order in the relevant time period as set out in s 5(b);
2. has been convicted of an offence on indictment in the past 5 years in another jurisdiction; or
3. is currently on bail in relation to an alleged offence or awaiting sentence in another jurisdiction.

63. Submissions received from Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Legal Aid Western Australia; Western Australia Police; and Office of the Director of Public Prosecutions (WA). The Commission notes that the Law Society disagreed with the proposal to disqualify people who are facing charges in other jurisdictions only because it did not agree that people facing Western Australian charges should be disqualified.

For ease of reference, the Commission sets out the full recommendation below incorporating all of the above recommendations for disqualification based on criminal history.

RECOMMENDATION 46

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.⁶⁴
2. Has in the *past 10 years* been the subject of a sentence of imprisonment (including an early release order such as parole, suspended imprisonment or conditional suspended imprisonment) imposed in relation to a conviction for an indictable offence (that was dealt with either summarily or on indictment).⁶⁵
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 an early release order such as parole, suspended imprisonment or conditional suspended imprisonment); or
 - (c) been subject to a sentence of detention in a juvenile detention centre (including a supervised release order) of 12 months or more.⁶⁶
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 in a juvenile detention centre (including a supervised release order).⁶⁷

64. 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).

65. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

66. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

67. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

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).⁶⁸
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 court-imposed 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 and that this section provide that for the purposes of s 5(b) a person is not qualified for jury service in Western Australia if he or she

1. 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 section 5(b) in another jurisdiction provided that the person was subject to that similar sentence or order in the relevant time period as set out in section 5(b);
2. has been convicted of an offence on indictment in the past 5 years in another jurisdiction; or
3. is currently on bail in relation to an alleged offence or awaiting sentence in another jurisdiction.

68. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

IDENTIFYING PEOPLE WHO ARE NOT QUALIFIED TO SERVE

In order to determine who is not qualified for jury service on the basis of criminal history, the sheriff's office checks (via the Western Australia Police Offender Information Bureau) the criminal records of all prospective jurors before summonses are issued. If it is found that a particular person is not qualified he or she will be removed from the jury list.⁶⁹ Currently, the sheriff's office only has access to Western Australian criminal records but the Commission has been advised by the Jury Manager that steps are currently underway to enable the sheriff's office to access national criminal records through CrimTrac.⁷⁰ This is an important development in ensuring that people who are not qualified for jury service can be more easily identified.

Under the Commission's recommendations, a person will be disqualified from jury service if he or she is currently on bail or in custody awaiting trial or sentence. Therefore, the sheriff's office will need access to relevant court and police databases so that prospective jurors can be checked for disqualifying convictions, sentences and *charges*. The Commission therefore recommends that the Western Australian government facilitate this process by enabling the sheriff's office to access any relevant databases that will show whether or not a person is currently on bail for any pending charges.

RECOMMENDATION 47

Access to court and police databases

That the Western Australian government facilitate access to relevant court and police databases to enable the sheriff's office to check whether or not a prospective juror is currently on bail or in custody in relation to an offence.

However, it remains possible for an unqualified juror to be empanelled on a jury because of the delay between the time that criminal records and other databases are checked and the time that the prospective juror attends court. In the metropolitan area, juror summonses are usually issued 4–6 weeks before the court attendance date and about four weeks before the court date in regional locations. It is therefore conceivable that a person who attends for jury service may have been charged or dealt with in court after the summons was issued. Presently, prospective jurors are advised on the juror summons

that they are not permitted to serve if they have been sentenced to more than two years' imprisonment or have been the subject of any one of a number of specified sentences in the past five years.⁷¹ Prospective jurors are also informed that if they believe that they are not qualified to serve they should complete a statutory declaration and the attached statutory declaration stipulates that knowingly making a false declaration is an offence. But, there are no specified consequences for failing to disclose disqualifying offences.

In three Australian jurisdictions, it is an offence for prospective jurors to knowingly fail to disclose that they are disqualified (or ineligible) for jury service.⁷² In Victoria the penalty is currently a fine of \$3504.60 and in Tasmania the fine is \$3600. In both cases the fine is set at the same level as the fine that applies to the offence of failing to comply with a juror summons.⁷³ In New South Wales, the penalty for knowingly failing to disclose disqualifying circumstances is presently a fine of \$1100 (which is half of the penalty applicable for the offence of failing to comply with a juror summons). The Commission is of the view that it is important to ensure that prospective jurors are aware that they may be penalised if they knowingly fail to disclose circumstances that would render them disqualified. The Commission also agrees that the penalty for such an offence should be a fine and is of the view that the maximum penalty applicable for the offence of failing to comply with a juror summons is a useful guide.⁷⁴ The requirement to disclose disqualifying convictions and the consequences for failing to do so should be clearly set out on the summons and should be reiterated verbally during the juror induction process at court.

The Commission believes that the provision for such an offence will facilitate self-identification of disqualifying circumstances. Bearing in mind that it will be difficult for the sheriff's office to determine if a summoned juror has very recent Western Australian charges, any non-Western Australian charges or any convictions overseas, this recommendation of imposing a penalty for non-disclosure will enable disqualified jurors to be more

69. Carl Campagnoli, Jury Manager (WA), telephone consultation (17 February 2010).

70. Carl Campagnoli, Jury Manager (WA), telephone consultation (9 March 2010).

71. They are also advised that they are not qualified if they do not understand English or if they have a disease or infirmity of mind or body that will affect their ability to be a juror: *Summons to Juror*.

72. *Juries Act 1977* (NSW) s 62A; *Juries Act 2000* (Vic) s 69; *Juries Act 2003* (Tas) s 55.

73. In Victoria and Tasmania the amount of the fine is expressed as 30 penalty units. The value of a penalty unit can vary over time: see LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 133.

74. In Chapter Seven the Commission recommends that the maximum penalty for failing to comply with a juror summons should be \$2000 and that the infringement penalty should be \$800: see Recommendation 67.

easily detected and relieved of the obligation to further attend for jury service.⁷⁵

For the sake of completeness and consistency the Commission also includes in this recommendation that a person summoned for jury service must disclose any other circumstances that would render them disqualified or ineligible for jury service. For example, a person who deliberately fails to disclose that he or she fits within a category of occupational ineligibility or fails to disclose that he or she is unable to speak English at all should be liable to the same consequences as a person who fails to disclose prior convictions. Having said that, the Commission believes that informing prospective jurors of their requirements in this regard will generally be sufficient to ensure that prospective jurors promptly and truthfully advise the sheriff of any relevant matters.

RECOMMENDATION 48

Offence for knowingly failing to disclose disqualification or ineligibility

1. That the *Juries Act 1957* (WA) provide that a person who has been summoned for jury service commits an offence if that person knows that he or she is not qualified for jury service or is ineligible for jury service and fails, as soon as practicable, to inform the sheriff's office of that fact and the reason for the disqualification or ineligibility.
2. That the penalty for the offence be a maximum fine of \$2000.
3. That the juror summons (and/or accompanying notice) clearly state:
 - (a) all of the circumstances in which a person will not be qualified or will be ineligible for jury service;
 - (b) that if the person summoned believes that he or she is not qualified or is ineligible for jury service the person must complete a statutory declaration setting out the basis for disqualification or ineligibility; and
 - (c) that knowingly failing to disclose any circumstances that would render the person not qualified or ineligible for jury is an offence.

75. The Western Australian Jury Manager expressed support for this approach during consultations for this Report: Carl Campagnoli, Jury Manager (WA), telephone consultation (17 February 2010). The only alternative is to permit the prosecution to vet prospective jurors before empanelment; however, given that court and police records cannot ever be completely up-to-date, the identification of disqualified jurors would still be dependent on self-identification to some extent. In Chapter Two the Commission explains its reasons for recommending that prosecution jury vetting should not be allowed: see Chapter Two, 'Jury Vetting'.

Lack of understanding of English

SECTION 5(b)(iii) of the *Juries Act 1957* (WA) provides that a person is not qualified for jury service if he or she ‘does not understand the English language’. The rationale for this rule is clear: jurors must be capable of understanding the trial proceedings and participating in jury deliberations. The rule reflects the Commission’s first guiding principle; namely, that jurors must be competent to discharge their duties.¹ However, the effect of the English language qualification requirement is that people from culturally and linguistically diverse backgrounds may be excluded from jury service² and, as a consequence, the representative nature of juries may be diminished. In this section, the Commission discusses the formulation of the English language qualification requirement as well as considering the appropriate procedures for identifying prospective jurors who may not sufficiently understand English. Mechanisms to maximise juror participation by people from culturally and linguistically diverse backgrounds are also examined.³ The Commission is of the view that it is important to emphasise at the outset that—despite the importance of ensuring that juries are broadly representative of the community⁴—this goal cannot override the requirement for jurors to be capable of understanding the proceedings. Such a requirement is fundamental to a fair trial.

THE APPROPRIATE FORMULATION OF THE ENGLISH LANGUAGE REQUIREMENT

In its Discussion Paper the Commission examined the different formulations for the English language requirement in all Australian jurisdictions.⁵ Four

jurisdictions stipulate that in order to serve as a juror, a person must be able to read English (Northern Territory, Queensland, New South Wales and the Australian Capital Territory) and two jurisdictions also specify that the person must be able to write English (Northern Territory and Queensland). In comparison, the broader Western Australian formulation does not mandate the exclusion of prospective jurors who are unable to read or write.

While the Commission observed that written aids (eg, transcripts, written directions, flowcharts, glossaries and chronologies) are increasingly being used in trials to assist jurors, it concluded that a literacy requirement across the board is not appropriate. Many trials involve only oral evidence and where written aids are provided jurors can assist one another by having one juror read the relevant material to other jurors. It is important to emphasise that in trials involving oral evidence (irrespective of whether written aids are provided) a juror who can understand English but who cannot read or write is just as capable of assessing the evidence as a literate juror. Furthermore, in reaching its conclusion, the Commission took into account that a literacy requirement may unnecessarily exclude people from non-English speaking backgrounds.⁶

In addition, the Commission concluded that for trials involving a significant amount of written evidence (as distinct to written aids) the trial judge can inform the jury panel that they will be required to read large amounts of written material and that if they believe they are not capable of undertaking this task they should seek to be excused. The Commission notes that people who are seeking to be excused from jury service on the basis of literacy difficulties may not wish to reveal their reasons in open court. As a standard practice, the sheriff’s office staff advise prospective jurors that they may present a written note to the presiding judge if they are concerned about revealing their reasons for seeking to be excused in front of others in the courtroom. Furthermore, sheriff’s office staff provide assistance to prospective jurors who wish to record their reasons in writing. These practices

1. See Chapter One, Guiding Principle 1.
2. People from culturally and linguistically diverse backgrounds may also be excluded from jury service because citizenship is a prerequisite for liability for jury service. In order to become an Australian citizen a person must demonstrate ‘a basic knowledge of the English language’: *Australian Citizenship Act 2007* (Cth) s 21(2)(e).
3. The Commission notes that some Aboriginal people may also be excluded from jury service because they cannot meet the English language requirement; however, this section does not specifically address Aboriginal juror participation. Recommendations designed, among other things, to increase juror participation levels for Aboriginal people (in particular in regional areas) are discussed in Chapter Two.
4. See Chapter One, Guiding Principle 2.
5. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 92.

6. It may also exclude people who speak English as their first language but who have difficulty in reading and writing.

should help to reduce any embarrassment associated with referring to literacy difficulties in open court.⁷

However, the Commission also formed the view that the current English language requirement in Western Australia does not properly reflect the minimum requirements for juror qualification. In any trial, all jurors should be capable of understanding the evidence (and court proceedings) as well as be capable of discussing this evidence and their views with the other jurors. Therefore, the Commission proposed that s 5(b) (iii) of the *Juries Act* should 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.⁸ This formulation is broad enough to enable jurors who are unable to read to be excused from further attendance in appropriate cases but it is not so strict as to exclude people who are unable to read in the bulk of cases where such a requirement is unnecessary.

The majority of submissions that responded to this proposal expressed strong support.⁹ While agreeing with the proposal to add a requirement to be able to communicate in English, the Western Australia Police submitted that the test should also include the requirement to read and write in English.¹⁰ As discussed above, the Commission does not agree that literacy should be the minimum standard. In particular, the Commission can see no justification for requiring that jurors should be able to write. The Department of the Attorney General also did not support the proposal but only on the basis that it prefers that the requirement to understand English be dealt with as an excuse.¹¹ The Commission is of the view that, as a matter of principle, the ability to understand and communicate in English is properly categorised as a qualification condition.¹² This makes it abundantly clear that a person who cannot understand or communicate in English is not entitled to serve as a juror, and that the sheriff's office and the court are empowered to release such a person from

further attendance. In this regard, the District Court and the Supreme Court of Western Australia submitted that 'it is necessary that a juror have a basic capacity to understand and communicate in the English language' and that the *Juries Act* should accordingly be amended so that the requirements are clear and so that the sheriff's office can 'communicate the requirement to potential jurors'.¹³ In practice, many jurors who are unable to understand or communicate in English will self-identify and will ask the sheriff's office or the presiding judge if they can be excused. This process is accommodated by the Commission's recommendations in Chapter Six to amend the Third Schedule of the *Juries Act*.¹⁴

The main opposition to the Commission's proposal in relation to the formulation of the English language requirement came from the Western Australian Office of Multicultural Interest (OMI). The OMI submitted that the addition of a requirement to communicate in English is 'likely to have a negative impact on the participation in juries of people from [culturally and linguistically diverse backgrounds]'.¹⁵ It is understandable that, in the context of this reference, the OMI is focussed on ensuring that people from culturally and linguistically diverse backgrounds are able to participate in public life.¹⁶ However, as stated at the outset, this cannot be the primary focus for the Commission. Increasing participation in juries by people from culturally and linguistically diverse backgrounds is an important goal (and one which is addressed below) but it cannot prevail over the requirement that jurors are competent to discharge their duties.

In its submission, the OMI also stated that there is no evidence to demonstrate that a person who can understand but who cannot communicate in English is unable to participate in jury deliberations. As acknowledged by the OMI, evidence of this nature is difficult to obtain because of the secrecy of jury deliberations. However, the Commission considers that if people cannot communicate their views or ask and respond to questions during deliberations then they will not be able effectively to participate. They may be able to listen to and understand the views of the other jurors, but those other jurors will not be able to listen to and understand their views.

7. Assistance may be given by the jury pool supervisor in the Jury Assembly Room or by the jury officer who accompanies the jury panel into court: Steve Cooke, Acting Jury Manager (WA), email consultation (22 March 2010).

8. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 37.

9. Jury Research Unit (UWA); Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Law Society of Western Australia; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC.

10. Western Australia Police, Submission No 20 (31 December 2009).

11. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

12. The New South Wales Law Reform Commission similarly concluded that the English language requirement should be 'stated as a precondition for qualification as a juror' in order to 'underline its importance': NSWLRC, *Jury Selection*, Final Report No 117 (2007) 98.

13. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

14. See Recommendation 60.

15. Office of Multicultural Interest (WA), Submission No 21 (8 January 2010).

16. The OMI's strategic plan states that one of its objectives is to 'support civil development, participation and contribution to public life' by people from culturally and linguistically diverse backgrounds: Office of Multicultural Interest, *Strategic Plan 2009–2013*.

The OMI further asserted that the Commission's proposal will unnecessarily exclude people from culturally and linguistically diverse backgrounds who have 'limited English literacy'. But, the current test (ie, that a person is not qualified for jury service if he or she cannot understand the English language) is just as capable of excluding people who cannot understand written English as the proposed test of communication is capable of excluding people who cannot communicate in written English. The Commission maintains its view that the ability to understand and communicate in English is an essential pre-requisite for jury service. As the Jury Research Unit stated there is 'no practical manner in which jurors who do not understand or cannot communicate in the English language could be effectively included in a jury'.¹⁷ For the most part, this will mean that a person must be able to understand spoken English and must also be able to speak in English. It will only be in cases where there are significant amounts of written evidence that the presiding judge should inform the jury panel of any literacy requirements.

RECOMMENDATION 49

English language requirement

That s 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.

INCREASING THE REPRESENTATIVE NATURE OF THE JURY

As stated above, the Commission is of the view that—subject to the requirement that jurors be able to understand and communicate in English—the jury selection process should, as far as is practicable, ensure that people from culturally and linguistically diverse backgrounds are adequately represented on juries. Unfortunately, there is currently insufficient available evidence in Western Australia to assess the extent to which people from culturally and linguistically diverse backgrounds are underrepresented as jurors. The available evidence shows that overseas-born Western Australian citizens are well represented on juries;¹⁸ however, the proportion of jurors who are from culturally and linguistically diverse backgrounds is not known.

Statistics compiled from the juror feedback questionnaire provided to jurors in Perth from 1 June 2008 to 4 June

2009 shows that the proportion of jurors who prefer speaking English at home is lower than the proportion of Western Australians who reported speaking a language other than English at home in the 2006 census.¹⁹ However, as the Commission noted in its Discussion Paper it is difficult to compare this data because the juror feedback questionnaire refers to 'preferred' language while the census data refers to language actually spoken.²⁰ In its Discussion Paper the Commission proposed 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 speak a language other than English at home and whether or not that other language is their first language.²¹

In response to this proposal the OMI suggested that the juror feedback questionnaire should also seek information about English proficiency and ask respondents to state the actual language spoken at home so that more accurate information is available for the purpose of targeting specific ethnic communities about the importance of participating in jury service.²² The Commission notes that any data obtained about proficiency in English would obviously be subjective; however, it could provide useful information to assess how the English language qualification requirement is applied in practice. Overall the Commission agrees with the OMI's suggested amendments to its proposal and these are reflected in the following recommendation. All submissions responding to the Commission's proposal were in support.²³ The Department of the Attorney General advised that the questionnaire would shortly be amended to allow collection of cultural demographic data and consultations with the sheriff's office have confirmed that the changes recommended below were underway at the time of writing.²⁴

17. Office of Multicultural Interest (WA), Submission No 21 (8 January 2010).

18. Records maintained by the sheriff's office show that at least 29% of jurors in Perth were overseas born. This compares favourably to the general Western Australian community; approximately 27% of Western Australian residents are overseas born.

19. Two percent of jurors who completed the survey stated that their preferred language at home was a language other than English but in the 2006 census approximately 11% of Western Australians reported speaking a language other than English. The figure of 11% includes persons who are not eligible for jury service in any event (eg, people who are not Australian citizens, people who are under 18 years or over the age limit for jury service).

20. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 96.

21. Ibid, Proposal 41. The juror feedback questionnaire currently asks respondents to record whether English is their 'preferred' language.

22. Office of Multicultural Interest (WA), Submission No 21 (8 January 2010).

23. Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and the Supreme Court of Western Australia; Western Australia Police; Office of Multicultural Interest (WA); Judith Bailey; Carl Campagnoli, Jury Manager (WA); and Gillian Braddock SC.

24. Department of the Attorney General (WA), Submission No 16 (12 December 2009); Steve Cooke, Acting Jury Manager (WA), email consultation (17 March 2010).

RECOMMENDATION 50

Statistics in relation to jurors from culturally and linguistically diverse backgrounds

That the sheriff's office revise its juror feedback questionnaire to ensure that data is recorded in relation to the number of jurors who state they speak a language other than English at home and, if so, the following additional information should be sought:

- whether the language spoken at home is their first language;
- the actual language spoken at home; and
- the degree of proficiency in English.

In order to increase the representation of people from culturally and linguistically diverse backgrounds on juries, the Commission proposed that the Western Australian government provide resources to the sheriff's office to conduct regular jury service awareness raising strategies specifically targeted to people from culturally and linguistically diverse backgrounds.²⁵ Again this proposal was met with full support.²⁶ The Jury Research Unit at the University of Western Australia emphasised that the English language juror qualification requirement

[does not mean that] jurors who may experience difficulty or for whom English is a second language ought to be excluded from jury service. Just as jurors assist other jurors in the understanding of expert evidence, in recalling the evidence given or in considering viewpoints other than their own, we are confident jurors will help each other in clarifying issues which may be unclear due to language. Removing systemic and procedural barriers to such

25. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 39. The Commission also invited 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). The Commission only received two submissions in response to this question. The Department of the Attorney General stated that specifically targeted awareness campaigns as proposed by the Commission was the best option in this regard: Department of the Attorney General (WA), Submission No 16 (12 December 2009). Judith Bailey suggested that a different process for selecting voters should be adopted: Judith Anne Bailey, Submission No 23 (12 January 2010). However, targeting particular jurors would compromise the random nature of jury selection.

26. Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and the Supreme Court of Western Australia; Western Australia Police; Office of Multicultural Interest (WA); Judith Bailey; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC.

jurors increases the likelihood of a linguistically and culturally representative jury.²⁷

The Commission agrees and is of the view that appropriately targeted jury service awareness raising campaigns can assist in encouraging people from culturally and linguistically diverse backgrounds to participate in jury service. In this regard, the Commission noted in its Discussion Paper that it appears that people may be too readily self-identifying as unable to understand English.²⁸ It is important for any jury awareness raising campaigns to inform members of cultural and linguistically diverse communities that the ability to read English is not generally required for jury service and that, if the ability to read is necessary for a specific trial, prospective jurors will be given the opportunity to disclose any concerns in a confidential manner. The OMI also advised that it is 'available to assist in the development of resources and strategies to assist in awareness raising campaigns among specific ethnic communities'²⁹ and accordingly this has been included in the Commission's recommendation.

RECOMMENDATION 51

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, in conjunction with the Office of Multicultural Interests, regular jury service awareness raising strategies specifically targeted to people from culturally and linguistically diverse backgrounds.

The Commission notes that the present content of the juror summons and accompanying information may also constitute a barrier to participation in jury service by people who can understand and communicate in English but who cannot read. The Juror Information Sheet currently includes instruction in only four languages (Italian, Vietnamese, Cantonese and Mandarin) to take the summons to an interpreter. People who cannot read the information sheet may simply ignore or fail to appreciate the requirements of the juror summons. Some people who cannot read the information sheet will also not be able to understand and communicate

27. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

28. Census information for 2006 shows that 1.7% of people in Western Australia indicated that they did not speak English well or at all; however, approximately 2.6% of people summoned for jury service are being excused because of a lack of understanding of English: LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 95.

29. Office of Multicultural Interest (WA), Submission No 21 (8 January 2010).

in English and therefore they will not be qualified for jury service. However, there may be some people who can understand and communicate in spoken English who will be excluded from participating in jury service because they do not understand the written instructions contained in the summons. Moreover, it is imperative that non-English speaking people and people who cannot read English are not unfairly penalised for failing to comply with the juror summons.³⁰ In order to rectify these problems the Commission proposed that the juror summons and Juror Information Sheet should be updated to provide that if the person does not understand or cannot read English, translated versions of the summons and accompanying information are available and that this updated information should be provided in at least the 10 most commonly spoken languages in Western Australia.³¹ With unanimous support,³² the Commission makes the following recommendation.

RECOMMENDATION 52

Provision of information for prospective jurors in different languages

1. That translated versions of the juror summons and the Juror Information Sheet be available online and by telephoning the sheriff's office and that these translated versions be available in at least the 10 most commonly spoken languages in Western Australia (other than English).
2. That the juror summons and the Juror Information Sheet state that translated versions of these documents are available online or by telephoning the sheriff's office and that this information be provided in at least the 10 most commonly spoken languages in Western Australia (other than English).

30. People who experience language difficulties may not respond to the juror summons and may not be in a position to properly explain their failure to comply. The sheriff's office attempts to telephone people who fail to comply with the summons but if telephone contact is not made, a follow up letter is sent. If this letter is ignored the person is likely to be fined for non-compliance.

31. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 38. The 10 most commonly spoken languages in Western Australia other than English are Italian, Mandarin, Cantonese, Vietnamese, Arabic, German, Indonesian, Polish, Croatian and Spanish.

32. Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Office of Multicultural Interest; Judith Bailey; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC.

IDENTIFYING PEOPLE WHO DO NOT UNDERSTAND ENGLISH

One of the key challenges associated with the English language qualification requirement is ensuring, as far as practicable, that people who cannot sufficiently understand and communicate in English are accurately identified.³³ Because it is impossible to identify such persons from the jury lists, the system essentially relies on self-reporting. And, as noted above, it appears that people may be too readily self-reporting English language difficulties. It is hoped that the provision of better information to people from culturally and linguistically diverse backgrounds (as recommended above) will assist in this regard. However, the Commission also proposed that guidelines be developed to assist the sheriff's office and the courts in assessing whether prospective jurors can understand and communicate in English to a sufficient degree to enable them to discharge their duties as jurors.³⁴ In its Discussion Paper the Commission suggested that guidelines could include standard questions to be asked if a person self-identifies as not understanding English, circumstances where further inquiries may be warranted, and processes to be used in cases involving a significant amount of documentary or written evidence.

The overwhelming majority of submissions supported the development of guidelines.³⁵ Only the OMI and the joint submission from the District Court and Supreme Court of Western Australia expressed opposition to the Commission's proposal. Because the OMI did not support the Commission's revised formulation of the English language requirement (to include the ability to communicate in English) it also did not support the development of guidelines to assist in the assessment of a prospective juror's capacity to communicate in English.

33. In its submission, the Office of the Director of Public Prosecutions stated that 'jurors' comprehension of, and ability to communicate in English, is often not apparent until they are taking the oath'. For this reason it was suggested that in cases involving a significant amount of written evidence it may be appropriate to enable counsel to challenge jurors after they have begun to take the oath: Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010). The Commission is wary of such an approach because a person's ability to understand and communicate in English may be easily misconstrued because of a strong accent or pronunciation difficulties or because the juror speaks slowly. Instead, the Commission prefers strategies to improve the provision of information to prospective jurors about the English language requirement including specific requirements for individual trials and the development of guidelines as discussed immediately below.

34. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 40.

35. Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC.

However, in its submission, the OMI stated that it supports the development of guidelines in principle and noted that the Western Australian language policy (which includes a questionnaire for determining if an interpreter is required) may be of assistance in developing such guidelines.³⁶

However, the OMI also mentioned the ‘potential futility of asking questions to identify English proficiency of a person who has self-identified as not understanding English’.³⁷ In response to this observation, the Commission notes that if a person cannot understand English further questioning will confirm that the juror is not qualified to serve. But, if a person self-identifies too readily, further questioning may assist in determining the capacity of the juror to serve and in reassuring the juror that he or she is capable of participating effectively. The Commission’s purpose is to assist summoning officers in identifying jurors who underestimate their capacity to properly participate in jury service.

The joint submission from the District Court and the Supreme Court of Western Australia submitted that it would be appropriate for the sheriff’s office to draw attention to cases that ‘may require a greater facility in English’ but, apart from that, the ‘testing of the capacity to understand and speak English’ should be left to the trial Judge.³⁸ However, this does not reflect current practice: prospective jurors are excused by the summoning officer before the jury summons date (on the basis of a signed statutory declaration) and on the jury summons date in the jury assembly room. The Commission has concluded that guidelines should be developed in order to assist staff in the sheriff’s office and summoning officers in regional courts when they are responding to applications to be excused from further attendance because of English language difficulties. Of course, if the summoning officer determines that a juror is qualified but the juror remains concerned about their English language capacity, an application to be excused from further attendance should be made to and determined by the presiding judge.³⁹

RECOMMENDATION 53

Guidelines for assessing English language requirements

1. That the sheriff’s office develop guidelines to assist its staff, summoning officers and judicial officers 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 that can be asked if a person self-identifies as not understanding English or not being able to communicate in English (such as those used to identify if a person requires an interpreter⁴⁰); circumstances where further inquiries may be warranted (eg, a juror appears to be unable to follow verbal instructions from jury officers or has clear difficulty when trying to ask a question in the jury assembly room); and specific processes to be used in cases involving a significant amount of documentary or written evidence (including that a juror who is concerned about his or her English language ability can seek to be excused by the presiding judge by recording his or her reasons in writing⁴¹).

36. Office of Multicultural Interest (WA), Submission No 21 (8 January 2010).

37. Ibid.

38. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

39. In Chapter Six the Commission recommends that the grounds on which a person may be excused from further attendance by the summoning officer or the court include that a person is unable to discharge the duties of a juror because of an inability to understand and communicate in English: see Recommendation 60.

40. Appendix 1 of the Western Australian Language Services Policy 2008 provides a questionnaire for determining if an interpreter is required.

41. For those jurors who are unable to write, the sheriff’s officers should assist the jurors in recording their reasons for presentation to the presiding judge.

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 the evidence and applying the law as directed by the presiding judge.

In practice s 5(b)(iv) works similarly to excuse because under the current provision there is no objective means of identifying from the jurors’ books those people who are not qualified for jury service due to incapacity. If people summoned for jury service consider that they are not qualified by reason of incapacity they must state the grounds on which they claim to be disqualified² and sign the statutory declaration attached to the summons.³ In most cases, they will be asked to provide medical certification or other supporting evidence of their ‘disease or infirmity’. Decisions to exclude a person from jury service for incapacity are made on a case-by-case basis by the summoning officer taking into account the evidence supplied. In the Commission’s opinion this is an appropriate and practical way of dealing with incapacity.

However, the question remains whether the 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 may affect the person’s capacity to discharge the duties of a juror. As discussed earlier, an insufficient 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 therefore determined that prospective jurors should not be *disqualified* from jury service on the basis of a physical disability but that such disability may ground a valid *excuse* from jury service.⁴ This approach was widely supported by submissions to the Commission’s Discussion Paper.⁵

The Discussion Paper proposed a series of legislative amendments to deal with incapacity of mind or body that will assist the summoning officer to easily distinguish between those people whose incapacity disqualifies them from jury service and those whose incapacity provides a sufficient basis upon which the person should be excused from further attendance. These proposals, and the public response to them, are discussed in more detail below.

MENTAL INCAPACITY

People of ‘unsound mind’ are disqualified from voting or disentitled to vote in every Australian jurisdiction.⁶ This can impact upon a person’s liability to serve as a juror

1. See Chapter One, Guiding Principle 1.
2. The summons states that people are not qualified if they ‘have any disease or infirmity of mind or body that will affect [their] ability to be a juror’.
3. 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.

4. And, in some cases, may ground a permanent excuse from liability for jury service under the *Juries Act 1957* (WA) s 34A(2).
5. All submissions commenting on the proposals in this section were supportive of the approach the Commission had taken in its Discussion Paper. See submissions from Disability Services Commission (WA); Jury Research Unit (UWA); Department of the Attorney General (WA); Law Society of Western Australia; Legal Aid Western Australia; Supreme Court and District Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions (WA); Gillian Braddock SC; Carl Campagnoli, Jury Manager (WA); Sussex Street Community Law Service, Disability Discrimination Unit.
6. *Electoral Act 1907* (WA) s 18(1)(a); *Parliamentary Electorates and Elections Act 1912* (NSW) s 21; *Constitution Act 1975* (Vic) s 48; *Electoral Act 1992* (Qld) s 64; *Electoral Act 1985* (SA) s 29; *Electoral Act 2004* (Tas) s 31; *Electoral Act* (NT) s 21; *Electoral Act 1992* (ACT) s 72; *Commonwealth Electoral Act 1918* (Cth) s 93.

because in order to be liable for jury service a person must be entitled to vote. Under s 51A of the *Electoral Act 1907* (WA), the Electoral Commissioner has the power to remove an elector from the electoral roll if he or she is satisfied that, because of a mental illness or disorder, the elector is incapable of complying with legislative provisions requiring compulsory voting.⁷ A person may also be removed from the electoral roll if the Electoral Commissioner is advised⁸ that a determination has been made by the State Administrative Tribunal⁹ or by a psychiatrist¹⁰ that the person is not capable of making judgements for the purposes of complying with the provisions of the *Electoral Act* relating to compulsory voting. While these provisions certainly limit the number of people with a relevant mental incapacity that may be summoned for jury service, unless the Electoral Commissioner is advised (and satisfied on the documentary evidence) that a person is of unsound mind, the person will remain on the electoral roll and be liable for jury service.

All Australian jurisdictions exclude or excuse from jury service people suffering from mental impairment¹¹ where the impairment renders the person incapable, unable or unfit to perform the functions of a juror.¹² Mental impairment can range significantly from short-term anxiety or depressive disorders¹³ to long-term psychotic and delusional disorders,¹⁴ and includes cognitive deficits

such as those caused by intellectual disability,¹⁵ acquired brain injury,¹⁶ senility or dementia.¹⁷ These conditions may impair a person's perception, thought processes, memory retention, reasoning, problem-solving skills or decision-making capacity.

Under the current formulation in s 5(b)(iv) of the *Juries Act*, if a mentally impaired person is summoned for jury service that person must essentially self-identify to claim disqualification on the basis that he or she is 'incapacitated by [a] disease or infirmity of mind'.¹⁸ Medical or other relevant evidence is generally required to support a claim for disqualification for mental incapacity. 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 impairment¹⁹ there is little that the summoning officer can do to disqualify the person from jury service, even where a mental impairment is apparent.²⁰

Psychotic Illness: An Australian study 1997–1998 (Canberra: National Survey of Mental Health and Wellbeing, 1999).

7. Though it is understood that this power is rarely unilaterally exercised by the Electoral Commissioner: Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, telephone consultation (2 February 2010).
8. Pursuant to the *Electoral Act 1907* (WA) s 51AA.
9. Pursuant to the *Guardianship and Administration Act 1990* (WA) s 111, which requires a determination of capacity to vote whenever a guardianship or administration order is made in respect of a person.
10. Pursuant to the *Mental Health Act 1996* (WA) s 201, which requires a determination of capacity to vote whenever an order is made to detain a person involuntarily in an authorised hospital, when such an order is reassessed and when a determination is made regarding the making or revocation of a community treatment order.
11. Australian juries legislation variously refers to 'mentally unfit', 'mental disability', 'disease or infirmity of the mind', 'unsound mind'. The Commission uses the term mental impairment to encompass all these phrases.
12. *Juries Act 2003* (Tas) sch 2(9); *Juries Act 1927* (SA) s 13; *Jury Act 1995* (Qld) s 4(3)(l); *Juries Act* (NT) s 10(2)(d); *Jury Act 1967* (ACT) s 10; *Jury Act 1977* (NSW) sch 2(12); *Juries Act 2000* (Vic) sch 2; *Juries Act 1957* (WA) s 5(b)(iv).
13. 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 (ABS), *Mental Health and Wellbeing: Profile of adults 1997* (Canberra: ABS, 1998) 18.
14. 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*
15. 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.
16. 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.
17. 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, while the term senility is associated with similar mental impairment occurring in old age.
18. *Juries Act 1957* (WA) s 5(b)(iv).
19. 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'.
20. The Commission is advised that jury officers do not seek information about a mental or intellectual impairment where a person presents with behaviour that may indicate such impairment. Jury officers are not qualified to make such assumptions based on behaviour and they are rightfully concerned that questioning an individual about their mental or intellectual capacity may unnecessarily offend. Carl Campagnoli, Jury Manager (WA), email (2 March 2010). It is possible, however, for the summoning officer to advise the

Several jurisdictions have sought to ameliorate problems stemming from reliance on self-identification of relevant mental impairments by tying the concept of mental incapacity to definitions contained in mental health legislation.²¹ For example, Victoria's *Juries Act 2000* refers to relevant definitions under a number of Acts²² to exclude from jury service involuntary mental health patients, people with an intellectual disability, 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 a juror.

Embracing this approach, the Commission proposed in its Discussion Paper²³ that s 5(b) be amended to specifically disqualify from jury service on the basis of mental incapacity people falling within the following categories:

- involuntary patients within the meaning of the *Mental Health Act 1996* (WA);²⁴
- mentally impaired accused within the meaning of Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA);²⁵ and
- persons the subject of a guardianship order under s 43 of the *Guardianship and Administration Act 1990* (WA).²⁶

trial judge if he or she becomes aware of a mental incapacity that would impact upon the person's ability to discharge the duties of a juror so that the person can be excused from further attendance by the court. Cases where a mental impairment is clearly apparent in the person's behaviour may also invoke a challenge from counsel.

21. See *Juries Act* (NT) s 10; *Juries Act 2000* (Vic) sch 2; *Juries Act 1981* (NZ) s 2; *Juries Act 1974* (Eng) as amended by the *Criminal Justice Act 2003* (Eng) sch 33.
22. 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).
23. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (September 2009) Proposal 42.
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

Submissions that commented on this proposal showed unanimous support for this approach, with many observing that the proposed amendment addressed current difficulties of objectively identifying those people who should properly be disqualified from jury service by reason of mental incapacity.²⁷

The Jury Research Unit at the University of Western Australia noted that, while the Commission's proposal was 'an effective initial definition disqualifying jurors who are most unlikely to be effective jurors', there will remain a number of jurors who inevitably 'slip through the net' of disqualification.²⁸ The Commission agrees and notes that one such category is intellectually disabled jurors.²⁹ Unlike Victoria's *Disability Act 2006* there is no existing legislative definition of intellectual disability in Western Australia to which disqualification under the *Juries Act* can be objectively referenced. Further, the Commission has been advised by the Disability Services Commission that adoption of a standard definition of intellectual disability 'aside from being impractical to operationalise, sets the threshold too low' for the purposes of juror qualification.³⁰ The Disability Services Commission advised that the excuse mechanism was the most appropriate means of identifying persons with an intellectual disability or mental incapacity falling outside of the disqualifying criteria.³¹

The Supreme Court and District Court of Western Australia agreed that it was appropriate that disqualification for mental incapacity should be expressed by reference to relevant mental health legislation rather than the current 'qualitative reference to the effect of any disease or infirmity upon the person's capacity to discharge the duties of a juror'.³² The courts further submitted that 'greater clarity would be given to the operation of the law if this ground was expressed in terms of a more modern expression of mental illness

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 submissions from Disability Services Commission (WA); Jury Research Unit (UWA); Department of the Attorney General (WA); Law Society of Western Australia; Legal Aid Western Australia; Supreme Court and District Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions (WA); Gillian Braddock SC; Carl Campagnoli, Jury Manager (WA).
28. Jury Research Unit (UWA), Submission No 15 (16 December 2009).
29. The Jury Research Unit advised the Commission of a case where an intellectually disabled juror, who was not capable of following or discussing the evidence, was brought to the court's attention by his fellow jurors and excused by the judge: *ibid*.
30. Disability Services Commission (WA), Submission No 7b (24 February 2010).
31. *Ibid*.
32. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

or disability, such as may be drawn from the *Mental Health Act 1996*.³³ In this regard, it should be noted that in its initial research for this reference the Commission considered the potential of tying disqualification to the definition of mental illness contained in s 4 of the *Mental Health Act*. This option was rejected because the Commission held concerns about the width of the definition and that it could apply to people whose mental illnesses were being treated and which no longer affected their capacity to discharge the duties of a juror. The Commission notes that referencing a definition of this type also presents the problem identified above by the Disability Services Commission; that is, that it is difficult to apply requiring, as it does, a current psychiatric diagnosis.

The Commission has therefore confined its recommendation for disqualification for mental incapacity to independently verifiable criteria referable to orders or determinations made under relevant mental health legislation. No assessment as to whether the person has the capacity to discharge the duties of a juror is required under the Commission's recommendation. Therefore, provision of evidence of the disqualifying criteria by a carer, family member or treating doctor should be sufficient to satisfy any claim that a prospective juror is not qualified for jury service, without the prospective juror having to sign a statutory declaration.³³ Conditions that do not fall within these statutory criteria will continue to be judged on a case-by-case basis under the mechanism of excuse (whether on application by the juror or on the motion of the summoning officer or trial judge). The practicalities of excusing mentally impaired jurors are discussed in more detail below.

RECOMMENDATION 54

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*;³⁴

33. The *Juries Act 1957* (WA) s 34A(3) contains the power that enables the sheriff to remove from the jurors' book the name of any juror who appears to the sheriff to be not qualified to serve as a juror and s 32D(3) permits the summoning officer, on such evidence as he or she deems sufficient, to excuse from attendance any person summoned as a juror.

34. *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.

(v) is a mentally impaired accused within the meaning of Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996*;³⁵ or

(vi) is the subject of a guardianship order under section 43 of the *Guardianship and Administration Act 1990*.³⁶

Excusing mentally and intellectually impaired jurors

Under the Commission's recommendations a person with a mental or intellectual impairment that falls outside the legislative criteria set out in Recommendation 54 may apply to be excused from jury service or, alternatively, may be excused from further attendance on the motion of the summoning officer or the trial judge. Pursuant to 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 excuse.³⁷ Recommendation 60 in Chapter Six amends this schedule to make clear that a prospective juror may be excused if 'because of sickness, infirmity or disability (whether physical, mental or intellectual), [that person] is unable to discharge the duties of a juror'.

The inclusion of intellectual disability in the Commission's recommended formulation for excuse is an important improvement on the current legislative provision. In its submission the Jury Research Unit at the University of Western Australia noted that the current process of self-identification was not working so far as intellectually disabled jurors was concerned.³⁸ The submission cited a

35. 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.

36. 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'.

37. However, the summoning officer has the power to excuse from further attendance any person who has been summoned for jury service pursuant to s 32D(3) and the court (before which the pool precept is returnable) has the power to excuse from further attendance any person whose name is included in the jury panel (s 32H(5)). Neither of these provisions specifies the grounds on which a person may be excused.

38. Jury Research Unit (UWA), Submission No 15 (16 December 2009).

case where a juror, who was too intellectually impaired to follow or discuss the evidence, was excused after his fellow jurors brought this to the attention of the trial judge.³⁹

The Commission is not surprised by this submission. The juror summons reflects the current, rather archaic legislative formulation, stating ‘you are not permitted to serve as a juror if you ... have any disease or infirmity of mind or body that will affect your ability to be a juror’. In the Commission’s opinion such unclear language is extremely unhelpful where the system relies largely on self-identification of people who lack the capacity to serve as jurors. It is the Commission’s view that by making it clear that intellectual disability may constitute a valid reason for excuse and by stipulating that carers, guardians and family members may request excusal on behalf of a relevantly impaired juror,⁴⁰ the number of relevantly impaired people who attend court pursuant to a juror summons is likely to diminish.

Excuse in practice

As noted earlier, it is impossible for the sheriff’s office to know which of the people summoned for jury service may have a mental or intellectual impairment that would affect their ability to discharge the duties of a juror. For this reason, the sheriff’s office asks that prospective jurors notify the summoning officer if they have any ‘disease or infirmity of the mind’ that will affect their ability to be a juror. This is usually done by the juror filling in the statutory declaration on the back of the juror summons.

In the case of mental or intellectual incapacity in a summoned juror, the sheriff’s office is often notified by a family member or carer in advance of the summons date. In these circumstances the summoning officer will ask the person to assist the juror to fill out and sign (in the presence of a witness)⁴¹ the statutory declaration on the back of the summons and to return it to the sheriff’s office. If the juror is unable to sign the statutory declaration (eg, where a schizophrenic would become agitated if he or she was informed of the summons or where the juror is severely intellectually impaired), then the sheriff’s office asks for the carer or guardian to return the summons with a note detailing the circumstances and including a copy

of ‘any relevant medical document’.⁴² Evidence sufficient to satisfy the sheriff’s office of the validity of such a claim would include a medical certificate, disability support pension number, or a letter or fax from a hospital or care facility to which the summoned juror is admitted. If it is apparent from the evidence supplied that the person is suffering from an impairment that would permanently disable him or her from jury service, the summoning officer may issue a certificate permanently excusing the person from jury service.⁴³

In correspondence with the Commission, the Disability Services Commission encouraged the adoption of processes to enable a wider range of people than the summoned juror to lodge an application for excuse in circumstances where a prospective juror lacks the capacity to perform jury service and is unable to understand, fill in or perhaps even sign the statutory declaration.⁴⁴ It was suggested that persons who should be able to apply on the juror’s behalf for relief from jury service would be family members, Disability Services personnel and ‘other advocates acting in the individual’s best interest’.⁴⁵ It appears that, while it is not evident on the juror summons, the current practice (described above) does permit others to inform the sheriff’s office on the juror’s behalf of a relevant mental or intellectual impairment that would affect that person’s capacity to discharge the duties of a juror. However, in circumstances where the juror is unable to sign the statutory declaration, the sheriff’s office prefers that a request to excuse the juror be made by the juror’s parent, guardian or family member, or by the care facility or hospital where the juror is resident and that it be accompanied by evidence of a relevant impairment.⁴⁶

The Commission considers that this is an appropriate process, both to protect the rights of people with a mental or intellectual impairment and to allow flexibility where it is not possible for the juror to understand or sign the statutory declaration. It is acknowledged, however, that there should be sufficient information contained in the juror summons or in the accompanying information

39. The Jury Manager confirmed that intellectual disability is not often evident until discussions among the jury begin: Carl Campagnoli, Jury Manager (WA), email (2 March 2010).

40. See below, Recommendation 55.

41. The juror’s signature must also be witnessed by a person authorised under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA). Persons authorised under this section include pharmacists, post office managers, doctors, teachers, bank managers, accountants, members of Parliament and nurses.

42. Carl Campagnoli, Jury Manager (WA), email (2 March 2010).

43. *Juries Act 1957* (WA) s 34A(2). The Commission is advised that generally a medical certificate with a doctor’s notation that the juror’s condition is permanent or that they request a permanent or indefinite excuse is required: Helen MacKinnon, Sheriff’s Office (WA), telephone consultation (26 February 2010).

44. Disability Services Commission (WA), Submission No 7b (24 February 2010).

45. Ibid. Other advocates could include a doctor, the public advocate’s office, a guardian or care hostel supervisor.

46. The Jury Manager has advised the Commission that many people who fall into this category are covered by a power of attorney who may sign the statutory declaration on the juror’s behalf: Carl Campagnoli, Jury Manager (WA), email (2 March 2010).

sheet to notify carers, guardians and family members of the ability to request excusal from jury service on behalf of a mentally or intellectually impaired juror and to encourage them to telephone the sheriff's office for further advice. This is important, not only to reduce the number of relevantly impaired people who may otherwise attend pursuant to the summons, but also to avoid an unnecessary penalty if the juror ignores the summons and the carer does not understand that they may seek excusal on the juror's behalf. A recommendation in these terms is made below.

RECOMMENDATION 55

Amendment to juror summons and information sheet

That the sheriff's office amend the juror summons and the accompanying information sheet to notify carers, guardians and family members of the ability to request excusal from jury service on behalf of a mentally or intellectually impaired juror and to encourage them to telephone the sheriff's office for advice on what they should do to satisfy the office's requirements for excusal.

PHYSICAL INCAPACITY

As expressed in the Discussion Paper, it is the Commission's view that a person should not be disqualified from jury service merely because of the existence of a physical disability. The rationale behind this approach is that, unlike a mental incapacity, 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 inconvenience or hardship to the individual—be sufficient to excuse a person from serving as a juror.⁴⁷

In its Discussion Paper, the Commission examined how Western Australian courts can better accommodate physical disabilities. It discussed in detail the provision of specific facilities to address mobility issues, and hearing and vision impairment to assist physically disabled people to discharge their duties as a juror.⁴⁸ The Commission noted that enabling, where practicable, physically disabled people to serve on juries will enhance a jury's representative nature.⁴⁹ In the Commission's

opinion, any decision to exclude a physically disabled juror must 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 his or her duties as a juror.

The Commission proposed that courts should consider all reasonable adjustments to accommodate physically disabled jurors. In order to enable the summoning officer to give consideration to whether adequate facilities can be provided, it was proposed that notice of the prospective juror's requirements should be given to the sheriff's office as soon as possible after receipt of the summons. Further, it was proposed that 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.⁵⁰ 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.⁵¹

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.⁵² 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,⁵³ it may be inappropriate for a totally blind person to serve on the jury in that particular trial.

The Commission agrees with the New South Wales Law Reform Commission that the fairness of a trial and the interests of justice 'must take precedence over the potential rights of a prospective juror'.⁵⁴ Under the Commission's proposed amendments to the Third

47. See below, 'Excusing physically disabled jurors' and Chapter Six.

48. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 100–103.

49. Ibid 102. See also Chapter One, Guiding Principle 2.

50. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 43.

51. Under *Juries Act 1957* (WA) s 32 with reference to the Commission's proposed amendments to sch 3.

52. *Juries Act 1957* (WA) s 34A(2).

53. Pursuant to *Criminal Procedure Act 2004* (WA) s 109.

54. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (September 2006) 11.

Schedule, either the summoning officer⁵⁵ or the judge⁵⁶ 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.⁵⁷

Submissions

Submissions unanimously supported the Commission's proposal that physical disability should not be a ground for disqualification, but that such disability may constitute a valid excuse from jury service.⁵⁸ The Disability Services Commission submitted that the Commission's proposals 'strike an appropriate balance between rights of people with disabilities ... to participate in society to the extent possible, and the need for safeguards to ensure that participation does not impose undue hardship or personal inconvenience'.⁵⁹ The District Court and Supreme Court of Western Australia commented that the Commission's proposal⁶⁰ 'broadly describes an appropriate procedure' for the sheriff's office to make internal arrangements to accommodate, so far as reasonably practicable, jurors with physical disabilities.⁶¹

An important part of the Commission's proposal was that the sheriff's office develop guidelines for the provision of reasonable adjustments, where practicable, to accommodate a prospective juror's physical disability. The Disability Services Commission commented that these guidelines need to be 'carefully framed' so as 'to ensure that people with disabilities and their carers can have their particular circumstances sensitively considered

and do not have an application for excusal or deferral unreasonably rejected'.⁶² The importance of guidelines was also emphasised by the Disability Discrimination Unit at Sussex Street Community Law Service (SSCLS), which suggested that consultations with various disability organisations be undertaken in the course of their development.⁶³

The SSCLS also advised that they had been approached by an individual who had been summoned for jury duty and who, in advance of the summons date, disclosed that he had severe to profound hearing loss. He advised the sheriff's office that while he did use hearing aids to assist him, he sometimes had difficulty deciphering sentences if he was unable to access visual cues such as lip reading or written notes. He requested that the court provide computer-aided real time transcript (CART) to guarantee that information given during court proceedings was not misinterpreted. He was informed that the court could not provide the technology requested and that he 'would not be permitted to serve' as a juror.⁶⁴

CART is available in the United States and in some Australian jurisdictions.⁶⁵ It uses the same technology as machine shorthand court reporting and is typically available only in jurisdictions that employ that technology in their general court reporting.⁶⁶ Western Australia does not use machine shorthand court reporting; in this jurisdiction court proceedings are audio taped and transcribed later.⁶⁷ Implementation of CART would require purchase of necessary equipment and provision of staff trained in its use. In these circumstances, it is understandable that the court could not accommodate the juror's request by provision of real-time transcript; however, the Commission is advised that the juror was not offered any alternative accommodations to enable him to serve.⁶⁸ Until such time as CART becomes available in Western Australia, provision of other accommodations for profoundly deaf jurors should be considered. In the above example there are several alternatives that may have been able to be offered to the juror; for example,

55. Under the power found in s 27(1) of the *Juries Act 1957* (WA).

56. 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, 80–81; *Ford* [1989] QB 868, 871; and *Jago v District Court of New South Wales* (1989) 168 CLR 23, 25.

57. 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.

58. Submissions commenting on this area were received from Disability Services Commission (WA); Sussex Street Community Law Service Inc, Disability Discrimination Unit; Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; Supreme Court and District Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Carl Campagnoli, Jury Manager (WA); and Gillian Braddock SC.

59. Disability Services Commission (WA), Submission No 7a (18 November 2009).

60. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 43.

61. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

62. Disability Services Commission (WA), Submission No 7a (18 November 2009).

63. Sussex Street Community Law Service Inc, Disability Discrimination Unit, Submission No 14 (15 December 2009).

64. *Ibid.*

65. New South Wales and Queensland presently use this technology in long and complex trials, though not usually for the aid of deaf jurors.

66. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (2006) 18.

67. In criminal trials, transcription is prioritised so that parties are fed pages of transcript at regular intervals throughout the court day. However, this in no way matches real time transcription and can only be of limited use to a profoundly deaf juror trying to keep up with proceedings in court.

68. Sussex Street Community Law Service Inc, Disability Discrimination Unit, Submission No 14 (15 December 2009).

the provision of sign language interpreters,⁶⁹ the provision of regular (though not real-time) transcript, and adjustments to the layout of the court to enable the juror to lip-read. The Commission also reported in its Discussion Paper that the District Court in Perth had installed a ‘hearing loop’ in each courtroom to enhance audio for wearers of hearing aids.⁷⁰ A useful first step in cases such as the above would be to invite the juror to the court in advance of the summons date to test whether the hearing loop is sufficient to overcome his or her disability. Such a test could be performed simply by the juror sitting in the back of the court and determining whether he or she could hear the proceedings.

If, after consideration of all reasonable adjustments, there is no available means of overcoming the prospective juror’s disability, it is appropriate for that juror to be excused from the obligation to serve. The courts’ task, as Chief Justice Wayne Martin has stated, ‘is to eliminate or ameliorate disadvantage and inequality without causing prejudice to other participants in the justice process’.⁷¹ It is important to reiterate in this regard that the fairness of a trial and the interests of justice must, in the Commission’s opinion, take precedence over the potential rights of a prospective juror.

The Department of the Attorney General’s recently released *Equality Before the Law Bench Book* encourages judicial officers and court staff to consider ‘adjustments to the usual court processes and procedures’ to accommodate jurors with disabilities and lists examples of adjustments that may need to be implemented. These include moving the court to a more accessible venue; changing the physical layout of the courtroom; providing assistance with physical entry into the court; allowing a person prior access to the court in order to familiarise themselves with it; use of Auslan interpreters for profoundly deaf people; having frequent breaks or being flexible with times to fit with people’s requirements in relation to medication, treatment, eating and transport; and ensuring all critical documents are provided in an appropriate format.⁷² The Commission applauds this development and encourages consideration of its content in developing the guidelines referred to below and in Recommendation 61.

69. The Commission discusses the practicalities of utilising sign language interpreters in its Discussion Paper and suggests that this would be an appropriate alternative to CART, especially for shorter trials: see LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 101–102.

70. The hearing loop works by passing an electrical current from the amplifier through a wire loop which surrounds the courtroom walls. If jurors (or others in the courtroom) have a hearing aid, this audio is automatically inducted into their hearing aid without any requirements to physically connect cables.

71. Chief Justice Wayne Martin in Department of the Attorney General (WA), *Equality Before the Law Bench Book* (1st ed., 2009) Foreword, v.

72. Ibid.

RECOMMENDATION 56

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 will constitute a sufficient reason to be excused by the summoning officer or the trial judge under the Third Schedule to the *Juries Act 1957* (WA).
2. That people who have physical disabilities that may impact upon their ability to discharge the duties of a juror—including mobility difficulties and severe to profound hearing or visual impairment—must notify the summoning officer upon receiving the summons so that, where practicable, reasonable adjustments may be considered to accommodate their disability.
3. That the sheriff develop guidelines for the provision of reasonable adjustments, where practicable, to accommodate a prospective juror’s physical disability and that these guidelines be developed in consultation with the Disability Services Commission, the Equal Opportunity Commission, disability organisations and the courts and take into account the information contained in the Department of the Attorney General’s *Equality Before the Law Bench Book*.
4. That where a physically disabled juror, for whom relevant facilities to accommodate the disability have been provided, is included in the jury pool or panel the court should be made aware in advance of empanelment, the nature of the disability and the facilities provided to accommodate or assist in overcoming the disability.

DISABILITY AWARENESS TRAINING

In its submission the SSCLS also directed the Commission to a case in another jurisdiction where a woman who uses a walking frame complained that when she reported for jury duty she was discharged because of a belief by the jury officer ‘that she would slow other jury members down in getting to lunch’.⁷³ The Australian Human Rights Commission website confirms that the juror’s complaint was settled with an agreement to

73. This case is also reported on the Australian Human Rights Commission’s website <http://www.humanrights.gov.au/disability_rights/decisions/conciliation/commgov_conciliation.html> (accessed 5 March 2010).

arrange disability awareness training for court staff and a payment of \$5000.⁷⁴

On consultation with the Australian Human Rights Commission, it is apparent that it receives very few complaints under the *Disability Discrimination Act 1992* (Cth) relating to jury service.⁷⁵ Nonetheless, it is important to be aware that the rights of people with a disability not to be discriminated against are protected by law. Apart from domestic Acts, such as the *Disability Discrimination Act* and the *Equal Opportunity Act 1984* (WA), Australia has recently ratified the international *Convention on the Rights of Persons with Disability*.⁷⁶ Article 13 of that Convention relevantly states:

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

The SSCLS submitted that, among other things, Article 13 ‘requires that court staff have appropriate disability awareness training, and are aware of the variety of reasonable adjustments that can be made to ensure people with disability are not unnecessarily excluded from jury duty’.⁷⁷ It is the Commission’s view that, in order to give effect to its Recommendations 56 and 61 and to embrace the guidance for courts contained in the *Equality Before the Law Bench Book*, disability awareness training for court staff and in particular for jury officers should be made available by the Department of the Attorney General. The Commission notes that the Equal Opportunity Commission provides customised disability awareness training and suggests that it be consulted

in regard to the design and provision of training to court staff. In the Commission’s opinion such training should include information about different types of disabilities and avoidance of stereotypes and biases; the various needs of people with disabilities; technologies and accommodations already existing in courts to assist people with disabilities to perform jury service;⁷⁸ and the types of reasonable adjustments that can be made to ensure that people with disabilities are not unnecessarily excluded from jury service. In relation to the latter, the examples of adjustments provided in the Department of the Attorney General’s *Equality Before the Law Bench Book* should be referenced and discussed.⁷⁹

RECOMMENDATION 57

Disability awareness training

That the Department of the Attorney General (in consultation with the Equal Opportunity Commission and relevant disability organisations) provide disability awareness training for jury officers, and court staff generally, to improve awareness of different types of disabilities; the various needs of people with disabilities; existing technologies and accommodations to assist people with disabilities to perform jury service; and the types of reasonable adjustments that can be made to ensure that people with disabilities are not unnecessarily excluded from jury service.

74. Ibid.

75. The Commission is advised by the Australian Human Rights Commission that they receive, for the whole of Australia, ‘no more than one or two complaints a year under the Disability Discrimination Act related to jury duty. In the last financial year [they] received 980 disability discrimination complaints, so those related to jury duty are a tiny minority’: Merrilyn Aylet, Principal Investigation and Conciliation Officer, Australian Human Rights Commission, email (2 March 2010).

76. Ratified by Australia on 18 July 2008.

77. Sussex Street Community Law Service Inc, Disability Discrimination Unit, Submission No 14 (15 December 2009).

78. Such as the hearing loop in the District Court in Perth and other courthouses, and wheelchair accessibility to courtrooms and jury rooms in Western Australian courthouses.

79. Department of the Attorney General (WA), *Equality Before the Law Bench Book* (1st ed., 2009) [4.4.1].

Chapter Six

Excused from Jury Service

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Excused from jury service

IN the preceding three chapters of this Report the Commission has made numerous recommendations in relation to liability, eligibility and qualification for jury service. These recommendations 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 recommended that people who are enrolled to vote and aged between 18 and 75 years should be liable for jury service.¹ In order to ensure independence and impartiality, the Commission has recommended that people holding positions that are closely connected to the criminal justice system should be ineligible for jury service. Further, the Commission has recommended that people who are not competent to perform jury service (because they are not able to understand or communicate in English or because of mental incapacity) should be disqualified from serving. Finally, the Commission has recommended that people with significant criminal histories (or people who are themselves currently being dealt with in the criminal justice system) should be disqualified from serving because of the likelihood that the inclusion of such persons on a jury would give rise to a perception of bias and undermine public confidence in the justice system.

People who are not liable, eligible or qualified for jury service are, to a limited extent, identified before prospective jurors are summoned to attend court. For example, people who are clearly over the age limit for jury service are not included in the jury lists provided by the Electoral Commission to the sheriff's office. Also, people who have relevant disqualifying convictions are removed from the jury lists before summonses are issued. However, the list of prospective jurors who have been summoned may include people who are not liable,² not eligible³ and not qualified⁴ for jury service.

1. Other than overseas and itinerant electors and silent electors: see Recommendations 14 & 15.
2. It is possible that a person may be below the age limit for jury service at the time the jurors' books are compiled (eg, 74 years old) but by the time that person is summoned for jury service he or she may have attained the age of 75 years and hence are not liable for jury service.
3. Under the Commission's recommendations, a person's eligibility for jury service will not be determined until after the juror summonses have been issued. See further discussion, Chapter Four, 'Determining Occupational Ineligibility'.
4. As discussed in Chapter Five, the sheriff's office checks the criminal record of all prospective jurors before the juror

Therefore, it is imperative that prospective jurors who are not liable, eligible or qualified for jury service can be released from further attendance after the juror summons has been issued. Currently, this occurs in two ways. A person who has been summoned for jury service 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.⁵ Statistics provided to the Commission by the sheriff's office show that approximately 6.5% of people summoned for jury service in Perth for the 2009 calendar year were released from the obligation to attend on the summons date because they were ineligible or disqualified from serving.⁶ Further, people summoned may also be released 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 summoning officer or the judge may excuse the person from further attendance.

Apart from releasing those prospective jurors who are not entitled to serve, the sheriff's office and the court are also empowered to release a prospective juror from further attendance if that person can establish a valid excuse. Presently, there are two categories of excuse: excuse 'as of right' and excuse for good cause (eg, 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 are also made by statutory declaration or by applying in person to the summoning officer or the judge. For the 2009 calendar year, approximately 50% of people

summonses are issued. A person may be qualified at that stage but be disqualified at the time he or she attends court because of a recent conviction or charge: see Chapter Five, 'Identifying People Who Are Not Qualified to Serve'.

5. The summons form currently only directs persons summoned for jury service to complete the statutory declaration if they believe that they are ineligible for or disqualified from jury service because age is presently included under the category of eligibility. Under the Commission's recommendations, age is a criteria for liability and therefore the juror summons will need to state that the statutory declaration must be completed if the person believes that he is she is not liable, not eligible or not qualified for jury service.
6. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2009* (2010).

summoned for jury service in Perth were excused either as of right or for cause.⁷

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 recommendations in this chapter are designed to accommodate all of the possible reasons why the summoning officer or the court may need to release a prospective juror from further attendance.

7. 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; they did not receive the summons at all or in sufficient time; they were excused following an investigation of why they did not attend court; they failed to attend court; or they were no longer required to attend.

Excuse as of right

CURRENTLY, in Western Australia there are several categories of people who have an entitlement to be excused from jury service.¹ These categories consist of particular occupational groups (eg, emergency workers, fire-fighters, medical practitioners and dentists), people with family or carer responsibilities, people in religious orders and people who are aged 65 years or more. People who fall within these categories have a choice: to make themselves available for jury service or to claim a statutory exemption. This differs from the ordinary process of excusal whereby a prospective juror must provide reasons (eg, illness, work commitments or pre-booked holidays) in support of an application to be excused from jury service.

Based on information provided by the sheriff's office, it appears that approximately 18% of people summoned for jury service in Perth in 2009 (over 9500 people) were excused as of right before the juror summons date.² Because certain groups in the community are entitled to be excused from jury service, it is possible that these groups will be underrepresented on juries.³ Accordingly, in this section, the Commission considers whether it is valid to continue to provide certain members of the community with an automatic right to avoid jury service.

CATEGORIES OF EXCUSE AS OF RIGHT

Section 5(c)(ii) of the *Juries Act 1957* (WA) provides that a person 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'. These categories are underpinned by the assumption that membership of the category alone is sufficient to justify being released from the obligation to perform jury service. The Commission discusses below the classes of person listed in the Second Schedule and concludes that this assumption is mistaken.

Emergency services and health occupations

People who fall within the first two statutory categories are emergency services workers and health professionals; namely, full-time operational staff of the State Emergency Service, officers of permanent fire brigades, pilots employed by the Royal Flying Doctor Service, medical practitioners, dentists, veterinary surgeons, psychologists, midwives, nurses, chiropractors, physiotherapists, pharmaceutical chemists and osteopaths. These occupational groups are provided with a right to be excused because of the importance of their roles in the community and the view that they cannot be spared from their usual occupation to undertake jury service.

However, as the Commission observed in its Discussion Paper, emergency personnel and health professionals take leave (eg, annual leave, study leave, parental leave and long service leave) and therefore the temporary and planned absence of such workers does not necessarily put the safety of the community in jeopardy or cause any substantial inconvenience to the public.⁴ As the New South Wales Law Reform Commission 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'.⁵ In its submission, the Jury Research Unit at the University of Western Australia commented that:

If people in emergency services occupations, for example, or pharmacists and chiropractors cannot be spared by the community for jury service, not only could it be argued by the same reasoning that they also cannot be spared to take annual leave, but also that they cannot be spared to sleep.⁶

Furthermore, the Commission notes that large medical practices today often accommodate part-time workers

1. No one is excused as of right in Victoria and South Australia. In Queensland only those people who have attended in response to a juror summons in the previous year have the right to be excused: *Jury Act 1995* (Qld) s 22. Tasmania also has a single category of excuse as of right: people aged 70 years or more: *Juries Act 2003* (Tas) s 11. Broader categories (similar, although not identical, to Western Australia) exist in New South Wales, the Northern Territory and the Australian Capital Territory: *Juries Act 1977* (NSW) sch 3 and s 39; *Juries Act* (NT) s 11 and sch 7; *Juries Act 1967* (ACT) s 11(2) and sch 2, pt 2.2.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2009* (2010).
3. For example, out of 667 jurors who submitted claims for reimbursement for lost income in the first three months of 2009 there was only one health professional who undertook jury service from the list of health professionals who are entitled to be excused as of right. Also included were two pastors and one fire-fighter. There is no available data in relation to public sector employees.

4. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 109.
5. NSWLRC, *Jury Selection*, Report No. 117 (2007) 115.
6. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

and, as a consequence, patients may be able to access other available doctors or health professionals within the same practice if required.

Another argument in favour of removing the occupational categories of excuse as of right is that the current categories are inconsistent. 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 operational 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. The inconsistencies could be rectified by adding various other groups to the statutory lists; however, this option would further undermine the representative nature of juries.

The Commission has not received any submissions arguing for the continuation of these occupational categories and has concluded that emergency services workers and health professionals should not continue to be entitled to an unqualified right to exemption from jury service. As is the case with other important occupations, excuse applications should be considered on their individual merits. This enables a person's specific work responsibilities and commitments and their specialist skills to be considered along with the availability of suitable substitutes during the likely jury service period. Additionally, later in this chapter the Commission recommends a system of deferral of jury service. This system will enable emergency services personnel and health professions to defer jury service, if possible, to a more suitable time.⁷

Religion

Currently, 'persons in holy orders, or who preach or teach in any religious congregation' are entitled to be excused as of right provided that they do not follow a 'secular occupation' (apart from school teaching). Different reasons have been put forward to justify this category including that ministers of religion need to be available to carry out their pastoral responsibilities; that they may have confidential information about the parties in a criminal trial; that they may be too compassionate to remain objective; and that they may have a conscientious objection to jury service.⁸ In his submission, Michael Godfrey stated that religious ministers should not be entitled to an automatic excuse because other members

of the community—who may also have a conscientious objection to jury service—are not equally entitled to exemption.⁹

In certain circumstances, ministers of religion may have a sufficient reason to seek to be excused (eg, a minister of religion may know information about the accused or victim, especially in a smaller regional location or a minister of religion may undertake a substantial amount of important voluntary work in circumstances where there are no substitutes available). The Commission is of the view that these reasons can be accommodated within the general concept of excuse for good cause (and the Commission's recommendation to amend the grounds for excuse contained in the Third Schedule of the *Juries Act*).¹⁰

Family

The statutory excuse as of right categories include pregnant women; persons residing with, and having full-time care of, children under the age of 14 years; and persons residing with, and having full-time care of, persons who are aged, in ill-health, or physically or mentally infirm. Their right to be excused applies irrespective of their individual circumstances. Significantly, this category constitutes the largest category of excuse as of right in Western Australia. In Perth in 2009 almost 12% of jurors summoned (a total of 6340 people) were excused on this basis.¹¹

The Commission is of the view that people falling within these categories should have their circumstances considered on a case-by-case basis. For example, when assessing an excuse application by a pregnant woman the stage of the pregnancy and health of the woman (and her unborn child) should be considered. A person's work status, the age of the children and available substitute care should be taken into account when assessing an excuse application made by a person having full-time care of a child. In this regard, the Commission was informed that people exercise their right to be excused on the basis of parental responsibilities even though they are working full-time.¹² If a person who has responsibility for children under the age of 14 years is in full-time employment it is highly likely that his or her children are already placed in alternative care (eg, afterschool facilities, babysitters or with other family members). Similar considerations apply to people who reside with or have care of a person who is aged, in ill health, or physically or mentally infirm. If these people also work (either part-time or full-time),

7. See below, Recommendation 63.

8. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 111.

9. Michael J Godfrey, Submission No 3 (6 October 2009).

10. See below, Recommendation 60.

11. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2009* (2010).

12. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).

then they must usually arrange for a substitute carer during that time.

However, the Commission does not consider that it is appropriate for parents and carers to be compelled to arrange substitute care that is not considered suitable. For example, a mother should not be forced to place her infant in a day-care centre if she would not ordinarily do so. A person who cares for his or her mentally infirm relative should not be forced to hire a substitute carer if that would cause the person requiring care to become upset or anxious. Accordingly, the Commission is of the view that the parent's or carer's view about any available substitute care should be taken into account when assessing excuse applications based on carer responsibilities.¹³

Importantly, a prospective juror who is able and willing to arrange for suitable substitute care during the period of jury service should not be out-of-pocket as a result. In its Discussion Paper the Commission noted that as a matter of current policy, the sheriff's office reimburses child-care expenses; however, there is no legislative obligation to do so. For this reason, the Commission proposed that the *Juries Regulations 2008* (WA) be amended to provide that the reasonable out-of-pocket expenses for substitute care incurred by jurors who have parental or other carer responsibilities should be reimbursed.¹⁴ The Commission received unanimous support from submissions responding to this proposal¹⁵ and therefore makes a recommendation in the same terms as its original proposal.

RECOMMENDATION 58

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.

13. The Commission has included this in a list of examples of considerations that could be included in guidelines for excusing prospective jurors: see below, pp 121–2.
14. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 110–111 (Proposal 44).
15. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western

Age

Currently, people aged 65 years or more (but less than 70 years¹⁶) are entitled to be excused from jury service. As stated in Chapter Three, 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. Personal circumstances such as hardship, illness or infirmity can easily be accommodated by an excuse process that enables the summoning officer or the court to consider excuse applications on a case-by-case basis.

ABOLISH EXCUSE AS OF RIGHT

Because the statutory excuse as of right categories cover a wide range of work, personal and family circumstances the Commission is of the view that membership of these categories alone is not sufficient justification for excuse from jury service. To do so, potentially undermines the important goal of ensuring that juries are broadly representative of the community as defined in the Commission's Guiding Principle 2. In addition, the provision of a right to be excused is inconsistent with the Commission's Guiding Principle 3: that wide participation in jury service should be encouraged.¹⁷ The Commission considers jury service to be an important civic responsibility that should be shared by the community and enabling particular members of the community to avoid jury service (irrespective of their individual circumstances) means that the burden of jury service is not being shared equitably.

In its Discussion Paper the Commission proposed that all categories of excuse as of right under Part II of the Second Schedule of the *Juries Act* should be abolished. The Commission received unanimous support from submissions that addressed this proposal.¹⁸ The Office of the Director of Public Prosecutions (DPP) supported the abolition of the *existing* categories of excuse as of right. However, it submitted that people who have held 'high public office' (eg, a judicial officer) should have an unqualified right to be excused from jury service because they 'may be regarded as having already fulfilled their

Australia; Western Australia Police; Judith Bailey; Carl Campagnoli, Jury Manager (WA).

16. A person who has reached 70 years of age is currently not eligible for jury service. In Chapter Three the Commission recommends that age be a criterion for liability for jury service and that the age limit be raised to 75 years: Recommendations 16 & 17.

17. See Chapter One, 'Guiding Principles for Reform'.

18. Michael J Godfrey; Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC.

civic duty in relation to the criminal justice system'.¹⁹ As discussed in Chapter Four, the Commission does not consider that this argument is valid.²⁰ Judicial service, while extremely valuable to the criminal justice system, cannot properly be categorised as a 'civic duty'. If judicial officers and the like were entitled to be excused from jury service on the basis of their contribution to the criminal justice system so too should the many volunteers who give their time freely to assist victims of crime, witnesses and others involved in the system.²¹ Furthermore, the Commission does not consider that judicial officers have any greater claim to a right of exemption than some of the existing occupational categories who also perform important public functions. Given the overwhelming support for the abolition of all excuses as of right the Commission recommends the following.

RECOMMENDATION 59

Abolition of 'excuse as of right'

That s 5(c)(i) and Part II of the Second Schedule of the *Juries Act 1957* (WA) be abolished.

19. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

20. See Chapter Four, 'Judges and Magistrates'.

21. See Department of the Attorney General & Department of Corrective Services, *Volunteers: Policy Guidelines for Engagement and Management* (2004).

Excuse for good cause

A person summoned for jury service is able to make an application to be excused either before or on the jury summons date. The Commission is of the view that, in order to ensure wide participation in jury service, an application for excuse should only be granted if the person summoned can demonstrate good cause. However, as mentioned at the beginning of this chapter, people summoned for jury service may also need to be released from the obligation to serve 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).¹ 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 considers the power to excuse a person 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 subject with a view to ensuring that people who are summoned for jury service are not excused from further attendance too readily – it is desirable 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 the *Juries Act* 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’. Pursuant to s 27(1) of the *Juries Act* the summoning officer has the power to excuse a person who has been summoned for jury service from further attendance on the grounds specified in the Third Schedule. Similarly, the presiding judge’s power to excuse a member of a jury panel under s 32 of the *Juries Act* is tied to the Third Schedule grounds. The grounds specified in the Third Schedule of the *Juries Act* are illness; undue hardship to himself or another person; circumstances of sufficient weight, importance or urgency; and recent jury service.²

1. See Chapter One, Guiding Principle 3(iii).
2. In addition, pursuant to s 32D(3) of the *Juries Act 1957* (WA) the summoning officer has the power to omit from a

jury pool a person who has been summoned for jury service and the court has the power under s 32H(5) to excuse from attendance any person who is included in a jury pool. Neither of these provisions specify the grounds on which a person may be excused and they appear to accommodate reasons other than those set out in the Third Schedule.

As explained in its Discussion Paper, the Commission is of the view that two concepts—hardship and inconvenience—encompass all of the potential reasons a person may seek to be excused from jury service.³ However, it is essential that the burden of jury service is shared as fairly as possible and that the widest possible range of people is included in the pool of prospective jurors. Therefore, it is necessary that the degree of hardship or inconvenience that must be demonstrated is sufficiently high to ensure that people are not excused too readily. This is already recognised by the Western Australian Jury Manager who explains to staff the importance of ensuring that people seeking to be excused have demonstrated ‘real hardship’ not just minor inconvenience.⁴

After examining the excuse criteria in other jurisdictions (as well as proposals put forward by other law reform bodies) the Commission concluded in its Discussion Paper that the grounds for excuse for cause should be that jury service would cause substantial inconvenience to the public, or undue hardship or extreme inconvenience to a person. The Commission set a lower threshold for public inconvenience because in cases involving public inconvenience a large number of people may potentially be disadvantaged if the person who is applying to be excused is required to participate in jury service.⁵

In addition, as mentioned above, the summoning officer or the judge may also need to excuse persons 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 or may be unable to provide appropriate accommodations to enable

jury pool a person who has been summoned for jury service and the court has the power under s 32H(5) to excuse from attendance any person who is included in a jury pool. Neither of these provisions specify the grounds on which a person may be excused and they appear to accommodate reasons other than those set out in the Third Schedule.

3. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 116.
4. Carl Campagnoli, Jury Manager (WA) consultation (7 December 2007). It is noted that in regional courts the registrar of the local District Court is responsible for determining excuse applications: see *Juries Act 1957* (WA) ss 21(b) & 32B(b).
5. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 116.

a physically disabled juror to serve. Also, a person may advise the court that he or she knows the accused and the judge may need to release this person from the jury panel. Accordingly, the Commission proposed that the Third Schedule of the *Juries Act* be amended to cover all of the potential reasons why the summoning officer or the court may need to release a person summoned from further attendance (ie, to accommodate both excuse applications and circumstances where a particular juror is unable to or should not serve).⁶

Submissions in response to the Commission's proposed amendments to the Third Schedule were essentially supportive.⁷ While the Department of the Attorney General stated in its submission that it did not support the Commission's proposal,⁸ the reasons put forward do not appear to demonstrate any significant opposition to the proposed grounds of excuse. The Department submitted that deferral of jury service (which is recommended at the end of this chapter) should be 'the first consideration when someone applies to be excused' and that the grounds for excuse should be similar to the grounds for deferral. In its Discussion Paper, the Commission stipulated that the grounds of deferral should be same as the grounds set out in its proposed reformulation of the Third Schedule. Insofar as the Department's resistance to the Commission's proposal is related to the link between excuse and deferral, the Commission has recommended below that guidelines for deferral should stipulate that when a person applies to be excused from jury service the summoning officer must first consider whether deferral is appropriate.⁹ But, as is made clear below, the grounds for deferral should be the same as the grounds for excuse. If the grounds for deferral are set at a lower threshold than the grounds for excuse, jury service could be postponed simply because the person summoned considers that undertaking jury service will not be easy or convenient.¹⁰

The joint submission from the District Court and Supreme Court of Western Australia commented that the courts were not aware of any evidence that summoning officers misapply the current grounds of excuse and they could see 'no need to amend the grounds set out in the Third Schedule'.¹¹ Nonetheless, the courts submitted that if it were considered necessary to amend the Third

Schedule, the Commission's proposed formulation was appropriate and had the benefit of expressly referring to circumstances where a person may be unable to discharge the duties of a juror (eg, lack of understanding of English) or where there may be a perception of bias. The Commission remains of the view that the criteria for excuse should be tightened to ensure that those with the responsibility for determining excuse applications (including those who may be required to perform this task in the future) are clear about the appropriate test. Furthermore, the Commission considers that the insertion into the Third Schedule of circumstances where a person may be unable to discharge the duties of a juror (eg, lack of understanding of English) or where there may be a perception of bias is important because the *Juries Act* is currently silent in relation to the manner in which a person may be released from jury service on these bases.

In its Discussion Paper, the Commission noted that its proposal to amend the Third Schedule was consistent with the Commission's Guiding Principle 5: that the law should be simple and accessible.¹² The Commission maintains this view and considers that the amended Third Schedule grounds for excuse will enable 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 released from the obligation to serve. Taking into account the favourable submissions, the Commission recommends that the Third Schedule of the *Juries Act* should be amended as proposed.

RECOMMENDATION 60

Third Schedule grounds on which a person summoned may be excused from further attendance

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.

6. Ibid, Proposal 46.

7. Submissions expressing full support were received from the Jury Research Unit (UWA); Law Society of Western Australia; Legal Aid Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Council on the Ageing; Bettine Heathcote; Gillian Braddock SC; and Disability Services Commission (WA).

8. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

9. See below, Recommendation 63.

10. See below, 'Criteria for Deferral'.

11. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

12. See Chapter One, 'Guiding Principles for Reform'.

THE APPLICATION PROCESS

Currently, applications for excuse are assessed subjectively by the sheriff's office. Those who seek to be excused usually do so before the jury summons date, but there are also people who seek to be excused on the court attendance date because their circumstances have changed since receiving the summons.¹³ In Perth, excuse applications submitted on the court attendance date are determined by sheriff's office staff whereas in regional areas excuse applications will be assessed by court staff. In order to be excused from further attendance before the court attendance date, the person summoned must complete a statutory declaration (or otherwise contact the sheriff's office). Usually, evidence must also be supplied to support the claim for excuse (eg, medical certificate or copies of pre-paid airline tickets).

Prospective jurors who attend court in Perth initially gather in the jury assembly room. After watching an induction video and being addressed by the jury pool supervisor, prospective jurors are asked to approach the supervisor if they wish to apply to be excused from jury service. During this process, the jury pool supervisor informs prospective jurors of the number and types of trials listed to commence that week. In some instances, the jury pool supervisor will advise prospective jurors that excuse applications that are based upon the circumstances of a particular trial (eg, the length of the trial) will not be determined at this stage of the process. Instead, prospective jurors are told that they should present their reasons to the judge if they are selected as a member of the jury panel for that particular trial. In addition, if excuse applications are rejected by sheriff's office staff on or before the court attendance date, an application to be excused can still be made to the presiding judge.

Prospective jurors are also told that if they are concerned about serving as a juror in a particular type of trial (eg, sexual assault) they can write a note to the presiding judge and, if selected, they will be given an opportunity to hand this note to the judge in court. In mid-2009, the Commission observed the empanelment of a jury in a five-week sexual assault trial. In this case, the presiding judge informed the jury panel that any excuses sought for personal reasons could be dealt with confidentially. Some of the jurors handed a written note to the presiding judge and, in one instance, the judge requested that the juror come forward to speak privately to the judge (out of the hearing of others present but still in the courtroom).

13. In 2009, a total of 39,227 people summoned were excused from further attendance before the court attendance date and a further 896 people were excused on attending court: Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2009* (2010).

It appears that this process is now used as a matter of course. In their joint submission, the District Court and the Supreme Court stated that they supported the universal practice of allowing 'jurors who seek to be excused to write the ground on paper or otherwise to seek to approach the Judge and have the matter dealt with confidentially, albeit in open court'.¹⁴ However, in its submission the Jury Research Unit advised that its research with Western Australian jurors revealed that:

A number of jurors expressed concern that they felt limited or unable to ask for excusal in the manner presently allowed for, that is, by applying to the Sheriff's office in advance, or making an application to the judge in open court when their number is called. This was particularly the case with those who found particular types of allegations abhorrent, or where family members or they themselves been victims of particular types of crimes.¹⁵

The Commission has been told that this research relates to jurors who served on juries in 2006–2007.¹⁶ Therefore, it would seem that the adoption of the practice described above should prevent these types of concerns occurring in the future.

Guidelines

Following on from the Commission proposed amendments to the Third Schedule grounds for excuse and the abolition of excuse as of right, the Commission also proposed that the sheriff's office (in conjunction 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.¹⁷ This proposal was designed to provide assistance, promote consistency¹⁸ and ensure that excuse applications are rigorously assessed.¹⁹ To assist in meeting these objectives, the proposal expressly referred

14. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).
15. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).
16. Judith Fordham, Jury Research Unit, University of Western Australia, email consultation (19 March 2010).
17. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 47.
18. In her submission, Gillian Braddock agreed that the provision of guidelines to summoning officers should promote consistency in the application of excuse: Gillian Braddock SC, Submission No 39 (4 February 2010).
19. In this regard, the Commission notes that the Attorney General has suggested that a sample of approximately 15–20% of excuse applications should be objectively verified: Western Australia Parliamentary Debates, *Legislative Assembly*, 26 May 2009, 162–178 (Attorney General, Mr CC Porter). The Commission noted in its Discussion Paper that the provision of guidelines may alleviate the need for such an expensive testing process: LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 118.

to two guiding principles – that juries should be broadly representative and that jury service is an important civic duty to be shared by the community. In addition, the Commission suggested that these guidelines could provide assistance for determining whether prospective jurors are unable to discharge their duties as a juror (eg, because of infirmity or language difficulties or because of a conflict of interest in a particular case). Further, it was concluded that these guidelines should not be widely publicised because 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’.²⁰

Of all of the submissions that responded to this proposal, only one expressed any reservations.²¹ In their joint submission, the District Court and the Supreme Court of Western Australia stated that the process before the summoning officer should remain informal and that the ‘extent to which the summoning officer should be fettered by the requirement to follow a particular process is debatable’.²² The Commission recognises that the summoning officer and the court must have discretion to take into account individual circumstances and emphasises that the proposed guidelines are not intended to be binding. Nor will they unduly formalise the excuse process. In its submission, the joint courts indicated their willingness to assist the sheriff’s office in the development of the guidelines.²³ Through this process, the sheriff’s office and the courts can ensure that the guidelines are flexible enough to accommodate the informal and administrative nature of the current process.²⁴

The Commission is of the view that guidelines will be particularly useful if other recommendations contained in this Report are implemented. For example, if excuse as of right is abolished²⁵ there will be a number of different categories of people who have previously not been required to provide any reason for seeking to be excused. For instance, it will no longer be sufficient for a person

to simply state that he or she is a medical practitioner and wishes to be excused. Further information such as the nature of the person’s employment, the person’s specialist skills, the availability of substitute doctors and the person’s commitments during the likely jury service period will need to be considered. For people who previously had an unqualified right to be excused, summoning officers will not yet have developed any consistent practices in determining the circumstances in which an excuse application should be granted and the types of supporting evidence that might be needed to substantiate any claims. Importantly, the excuse process will be significantly altered if the option of deferring jury service becomes available as recommended in this Report.

In its submission the Department of the Attorney General expressed support for the development of guidelines in order to promote consistency but also stated that if ‘guidelines are public, which inevitably they will be, guidelines will possibly provide a framework for jurors’ applications for excusal’.²⁶ The Commission maintains its view that guidelines should not be readily accessible. The Commission agrees that it would be counterproductive to provide prospective jurors with a checklist of circumstances that would ordinarily be accepted as constituting a valid excuse from jury service. The excuse criteria (ie, substantial inconvenience to the public or undue hardship or extreme inconvenience to a person) coupled with relevant information about the application procedure is sufficient to enable prospective jurors to make an application and discern that trivial reasons will not be sufficient to be released from the obligation to participate in jury service. It is important to stress that the purpose of guidelines is to assist those responsible for determining excuse applications. Prospective jurors who have genuine reasons for needing to be released from the obligation to undertake jury service will know what those reasons are – it is then up to the summoning officer or the court to decide if the reason is sufficient.

The Commission provides some examples below in order to demonstrate the types of issues that could be included in guidelines. However, it is emphasised that the development of guidelines should be undertaken by the sheriff’s office in consultation with judicial officers because they are responsible for determining excuse applications and would be aware of the practical issues that may arise. In other words, the list below is not intended to constitute draft guidelines and it is purposefully not intended to be exhaustive. The Commission also notes that the examples below would cover both excuse and deferral.²⁷

20. NSWLRC, *Jury Selection*, Report No 117 (2007) 134.

21. Submissions in support were received from the Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; Western Australia Police; Judith Bailey; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC; and Disability Services Commission (WA).

22. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

23. *Ibid.*

24. The joint courts’ submission also noted the determination of excuse applications in regional circuit courts may need to take into account local conditions. The Commission agrees but, as stated above, it does not consider that the development of guidelines should hinder flexibility; in fact, the guidelines could expressly refer to the different types of considerations that may apply in regional areas.

25. See above, Recommendation 59.

26. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

27. See below, Recommendation 63.

Suggested examples of issues that could be considered in guidelines:

Work commitments: People should not normally be excused from jury service because they are busy or because they are concerned about loss of income. For people claiming that they are unable to be spared from their employment, their 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. It should be recognised that in smaller regional locations and remote areas, it will be very difficult to find available substitutes and if a person is the only person available to perform the service (eg, doctor, teacher, chemist, pastor) the person should ordinarily be excused from jury service.

Self-employed persons: For people who operate their own businesses consideration should be given to whether jury service would be detrimental to their business in a way that cannot be accommodated by financial reimbursement of lost income (eg, a person may lose a substantial number of clients if unavailable for the likely jury service period).

Student commitments: Students and teachers/lecturers should not be required to undertake jury service during exam periods or where there are special requirements (eg, assignments due, clinical placements, pre-exam preparations). If students and teachers/lecturers are summoned for jury service during term time, the person's actual study or teaching commitments should be considered.

Pregnancy: Pregnant women should generally provide a medical certificate if the concern is that jury service will be detrimental to their health (or to the health of their unborn child) or if jury service would cause discomfort. If a pregnant woman seeks to be excused because her baby is due in the near future, documentary evidence of the due date should usually be sufficient.

Illness: People who seek to be excused because they are ill should provide a medical certificate in support of their application. Jurors who are unable to attend on the day due to illness should be advised that a medical certificate will be required as soon as practicable.

Recent jury service: Generally, if a person has served on a jury in the previous 12 to 18 months he or she should be excused from jury service. However, in certain regional locations this may not be possible. In addition, if a person claims to have served on an unusually lengthy or traumatic trial this should be taken into account when assessing an application based on recent jury service.

Travel requirements: Excessive travel requirements should be taken into account especially in regional and remote locations. If jury districts are expanded in the future²⁸ it may be necessary for guidelines to include a distance limit (eg, if a person who resides more than 100km from the courthouse seeks to be excused from jury service he or she should be excused without the need for further explanation or supporting evidence). Generally, claims based on excessive travel requirements should consider the length, duration and type of travel required (eg, does the person summoned have to travel for excessive periods of time before and after court in order to attend for jury service) and, if relevant, any accommodation requirements should be considered (eg, does the person summoned have to arrange for alternative accommodation during the jury service period in order to attend court and is it reasonable to expect the person to use that alternative accommodation in the circumstances).

Carer responsibilities: For people claiming excuse based on carer responsibilities, the availability of suitable substitute care and the views of the carer about the appropriateness of the substitute care should be considered (eg, if the person cared for or the child will be upset or anxious).

Personal commitments: For people who seek to be excused on the basis of personal commitments (eg, holidays, weddings, conferences and specialist medical appointments) supporting evidence should be obtained (eg, copy of airline tickets or itinerary, function centre booking confirmation, or fax from doctor's surgery confirming appointment).

English language: If a person claims that he or she is unable to discharge the duties of a juror because of language difficulties, further inquiries should be undertaken to determine if the person can understand and communicate in English.²⁹ Prospective jurors should be told that it is not generally necessary to be able to read and write English and that if a particular trial requires literacy skills they will be provided with an opportunity to advise the presiding judge of any literacy difficulties (and will be given assistance to record these reasons in writing if they wish).

28. In Chapter Two, the Commission recommended that the Western Australia Electoral Commission undertake a review of the current jury districts to determine if there is any merit in expanding the jury districts to cover more of, or all of, the state of Western Australia: see Recommendation 13.

29. As stated in Chapter Five, guidelines should include standard questions that can be asked if a juror claims that he or she is unable to understand or communicate in English: see Recommendation 53.

Physical disabilities: As discussed in Chapter Five, the Commission has recommended that the sheriff develop guidelines for the provision of reasonable adjustments, where practicable, to accommodate a prospective juror's physical disability.

Incapacity: A person who claims to be unable to discharge the duties of a juror because of incapacity should provide supporting evidence such as a medical certificate, disability support pension number, or a letter or fax from a hospital or care facility to which the summoned juror is admitted. Further, the guidelines should note that an application to be excused can be made by another person on behalf of the person summoned (eg, carer, guardian or family member). In order to assist summoning officers in identifying people who may be unable to discharge the duties of a juror due to mental or intellectual impairment, the guidelines could include examples of 'indicators' (eg, that the person is attending a 'special school or class'; or that the person currently receives services from the Disability Services Commission).³⁰

Conflict of interest or bias: If a person seeks to be excused because they do not believe that they can be impartial, further inquiries should be made to determine the reason for their belief. Claims based on prior acquaintance with or knowledge of people involved in the trial (ie, accused, witness, victim, judge, counsel, etc) should usually be accepted because it is important to ensure that the trial is perceived to be fair and that public confidence in the justice system is maintained. However, a general reluctance to perform jury service (eg, 'I don't feel equipped to pass judgment on another person') should be cautiously considered. If an application based upon potential bias is rejected by the summoning officer (eg, the summoning officer does not consider that the nature of the acquaintance or relationship is sufficiently close to justify exemption), the prospective juror should be informed that they should nevertheless inform the presiding judge of the circumstances.

The Commission recommends that guidelines be developed as originally proposed in its Discussion Paper.

30. This was suggested by the Disability Services Commission and it offered to assist the sheriff's office in formulating these guidelines: Disability Services Commission (WA), Submission No 7b (24 February 2010).

RECOMMENDATION 61

Guidelines for determining whether a person summoned should be excused from further attendance

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:

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

A right of review

In its Discussion Paper the Commission formed the preliminary view 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.³¹ As it currently stands, a person summoned for jury service can only apply to a judicial officer (the presiding judge) on the summons date. In considering this issue, the Commission took into account its proposal to abolish the statutory categories of excuse as of right. These categories include various occupational groups (eg, health professionals and emergency services personnel) and people who have carer responsibilities. The Commission considered that people in these categories would benefit from knowing in advance if they will or will not be required for jury service. As noted by the New South Wales Law Reform Commission, any inconvenience to members of occupations previously excused as of right can be alleviated by ensuring that applications for excusal are dealt with before the juror's court attendance date and by also providing a right of review if the application is refused.³²

The Commission explained in its Discussion Paper that by providing a right of review before the court attendance date, people summoned for jury service would be in a better position to arrange alternative work or carer substitutes or cancel other commitments. Also, an earlier determination of the excuse application would provide the sheriff's office with a more accurate assessment of the number of people required to be summoned each week. Nonetheless, it was noted that there did not appear to be any complaints about the current excuse application process and, accordingly, submissions were sought about this issue.³³

The Commission received three submissions that did not consider that a right of review is warranted.³⁴ The Western Australia Police stated that a right of review will be unnecessary if guidelines for determining excuse (as recommended above) are provided.³⁵ However, as discussed, guidelines are not binding and excuse applications are determined subjectively – it will remain possible for a person summoned for jury service to be aggrieved by the decision of the summoning officer.

The Department of the Attorney General submitted that a right of review would not be 'cost-effective' because court time would have to be specifically set aside for the purpose of hearing applications and the number of expected applications would be low.³⁶ The Commission does not agree with this argument. There is no need for a set period of court time to be allocated for the purpose of hearing excuse applications. Instead, a simple procedure could be employed to enable a person to attend court and appear before a 'duty' judicial officer. If, as the Department suggests, the number of applications are small the inconvenience to the court and the cost involved should be minimal.

The joint submission from the District Court and the Supreme Court of Western Australia observed that people summoned for jury service are now provided with a right of review because they can apply to be excused before the presiding judge even if the summoning officer has previously rejected their application. The Commission agrees that the ability to apply to be excused before the presiding judge provides a 'defacto' right of review; however, this right is limited to the actual summons date. The courts also submitted that the provision of a right to apply before the summons date is unnecessary because there is no evidence of any discontent with the current process.³⁷

However, the Commission is focussed on the jury selection process that would apply under its proposed reforms. In particular, as noted above, the abolition of excuse as of right will significantly alter the excuse application process. In 2009, in Perth alone, over 9500 people were excused as of right before the juror summons date.³⁸ These people were not required to provide any reason in support of their excuse application. If the Commission's recommendation to abolish excuse as of right is implemented, people who would have previously fallen under the categories of excuse as of right will now be required to provide a reason in support of their excuse application. The existence of professional obligations or carer responsibilities will not, on their own, be sufficient to constitute good cause. Thus, people with professional commitments and carer responsibilities (and pregnant women, people aged over 65 years and ministers of religion) will, depending on their circumstances, be required to participate in jury service. The consideration of the merits of any excuse application for these groups will necessarily involve subjective decisions and such persons may be concerned about the decision of the

31. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 118–19.

32. NSWLRC, *Jury Selection*, Report No 117 (2007) 131.

33. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Invitation to Submit I.

34. Department of the Attorney General; District Court and Supreme Court of Western Australia; and Western Australia Police.

35. Western Australia Police, Submission No 20 (31 December 2009).

36. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

37. This was also mentioned in another submission: Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

38. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2009* (2010).

summoning officer. The Commission does not expect that problems would occur often because the provision of guidelines should assist in ensuring that excuse applications are fairly and consistently determined by summoning officers. However, the ability to apply to a judicial officer before the summons date may reduce the inconvenience and stress that could potentially be caused to people in these categories.

The majority of submissions supported the provision of a right to apply to a judicial officer to be excused from jury service before the juror summons date.³⁹ The DPP agreed that such a right is important in the context of the proposed abolition of excuse as of right.⁴⁰ The Western Australian Disability Services Commission highlighted that if an application for excuse is unreasonably rejected by the summoning officer, the Commission's suggested option may avoid the stress and inconvenience involved in having to arrange alternative care in order to attend court on the summons date simply to be excused by the presiding judge.⁴¹ The Commission agrees and highlights that the option of an early review is particularly relevant for people who may find it difficult or impossible to make alternative arrangements for the summons date but who can more easily attend court at an earlier time (eg, a person who has an important business meeting scheduled on the jury summons date or a person who does not have access to suitable child care for the week of jury service but who is in a position to attend court earlier).

The Commission has concluded that the *Juries Act* should be amended to enable a person summoned to apply to a judicial officer to be excused before the summons date. In reaching this view, the Commission has been guided by the strong support expressed in submissions as well as the principle that the 'process of jury selection should be manifestly fair'.⁴² This principle was emphasised in the joint submission from the District Court and Supreme Court of Western Australia and has now been incorporated into the Commission's guiding principles for reform. Further, the Commission's guiding principles also stipulate that the law should seek to prevent or reduce any adverse consequences resulting from jury service.⁴³ In this context it is important to emphasise that jury service is a burden for some and that the jury selection process should endeavour to ensure that members of the

community are not inconvenienced to any greater extent than is necessary.

Having concluded that a right to apply before the summons date should be provided, two practical issues remain. In regional areas the trial judge is usually only present at court on the juror summons date.⁴⁴ Hence, the Commission suggested that the application could be made before a magistrate instead of a higher court judge. If the recommended course is to enable the application to be made before a magistrate, it is then necessary to consider whether the person should still be entitled to apply to be excused before the presiding judge on the summons date. If this were the case, the person summoned would have three opportunities to be excused and this may result in court time being wasted.

In her submission, Gillian Braddock SC stated that if there was a 'mechanism by which an application could be considered at an earlier stage' there would be less inconvenience caused to prospective jurors and to the court on the morning of the trial. She also observed that this option may reduce the instances where excuse applications appear to be duplicated by other members of the jury panel. These observations are only applicable if the earlier application replaces the application on the morning of the trial.

The Commission is of the view that the earlier application should be made before a magistrate because this will enable the application process to remain relatively informal and simple. All that should be necessary is for the person to complete an application form which can be lodged at the court registry and for the application to be heard as soon as reasonably practicable before a duty magistrate.⁴⁵ The sheriff's office is not currently given an opportunity to address the court when prospective jurors apply to be excused by the presiding judge on the juror summons date; therefore, it is not necessary for notice to be given to the sheriff's office or any other party. Moreover, by enabling the application to be made before a magistrate, people summoned for jury service in regional areas will also have the opportunity to apply early.

The Commission does not see any merit in permitting persons to reapply again on the jury summons date unless the circumstances have changed or the application

39. Disability Services Commission (WA); Jury Research Unit (UWA); Law Society of Western Australia; Legal Aid Western Australia; Judith Bailey; Office of the Director of Public Prosecutions; Gillian Braddock SC.

40. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010).

41. Disability Services Commission (WA), Submission No 7a (18 November 2009).

42. See Chapter One, Guiding Principle 7.

43. See Chapter One, Guiding Principle 4.

44. This was noted by the Department of the Attorney General in its submission: Department of the Attorney General (WA), Submission No 16 (12 December 2009).

45. If possible the application should be heard on the same day as the application form is lodged so the person is not required to attend the courthouse on two occasions. If this is not possible, it will be up to the person making the application to decide if he or she wishes to attend court at a later time or, alternatively, attend court as required by the summons.

is based upon the nature of the actual trial. Prospective jurors should be informed that if they are unhappy with the decision of the summoning officer they can either apply to a magistrate before the summons date or they can apply before the presiding judge on the juror summons date if selected to serve on a jury. The Commission

believes that this will ensure, as far as practicable, that early applications are only made where necessary; that is, where the person aggrieved is genuinely concerned about the problems that will be experienced if he or she is required to attend on the jury summons date.

RECOMMENDATION 62

Application to be excused before the juror summons date

1. That the *Juries Act 1957* (WA) be amended to provide that a person summoned for jury service can apply to a magistrate to be excused from jury service on the grounds stipulated in the Third Schedule at any time before the jury summons date.
2. That such an application can be made by another person on behalf of the person summoned if the person summoned is not capable of making the application because of sickness, infirmity or disability (whether physical, mental or intellectual); or an inability to understand and communicate in English.
3. That the *Juries Act 1957* (WA) provide that such an application can only be made if the person summoned has already applied to be excused by the summoning officer and the application has been denied.⁴⁶
4. That the *Juries Act 1957* (WA) provide that if such an application is made and the magistrate decides that the person must still attend court on the jury summons date there is no right of appeal. However, an application to be excused can still be made to the presiding judge on the court summons date if the circumstances have changed or the application is made for reasons associated with the actual trial in which the person has been selected to serve as a juror.⁴⁷
5. That such an application is to be made in the prescribed manner (eg, by completing an application form at the Perth Magistrates Court registry or the court registry where the person is require to attend for jury service).
6. That the sheriff's office should develop a standard procedure (to be adopted by all summoning officers) if an application to be excused from jury service is denied. This procedure should include a requirement to notify the person summoned that he or she can apply to a magistrate before the summons date and that if such an application is made it will not be possible to make an application to the presiding judge on the same grounds. The person summoned should be provided with an application form for this purpose and the summoning officer should record on the form that an application to be excused has already been made and rejected by the summoning officer.

46. The Commission notes that the sheriff's office advises prospective jurors in writing if their applications have been successful so this written notification could be handed to the magistrate. Alternatively, as suggested in the above recommendation, the application form could include a box to be ticked by the summoning officer to confirm that the person has already applied to the summoning officer to be excused.

47. For example, a person might apply before the summons date on the basis of work commitments that week but on the summons date the person may seek to be excused because the trial is expected to last a number of weeks and the person has a pre-booked holiday during that time. Also, a person may seek to be excused before the presiding judge because the person recognises the accused or someone else involved in the trial.

Deferral of jury service

IN four Australian jurisdictions prospective jurors are entitled, in certain circumstances, to postpone their jury service.¹ This process (known as deferral of jury service) accommodates people with temporary obligations or problems that would otherwise constitute a valid excuse (eg, illness, holidays, work commitments, medical appointments and personal commitments such as weddings). It is also useful for prospective jurors with ongoing obligations who are unable to organise alternative arrangements for the jury service period (eg, finding a locum or a substitute carer). Generally, deferral schemes enable people summoned for jury service to nominate a suitable period to undertake jury service within the following 12 months. People who have deferred their jury service will be summoned to attend court at the stipulated time but they will only be required to serve on a jury if they are randomly chosen during the selection process at court.

BENEFITS OF DEFERRAL

In its Discussion Paper the Commission observed that there are a number of benefits associated with deferral of jury service.² These benefits include that:

- Generally, less people will be required to be summoned for jury service because the sheriff's office will have a number of people flagged in the system who have undertaken to attend for jury service when summoned at a later time.
- In those regional areas where the pool of eligible jurors is insufficient to meet the required juror quota, deferral will enable some people (who would otherwise be excused and hence unavailable for jury service) to be included in the jury pool at a convenient time.³
- Deferral enables a broader range of people to participate in jury service and therefore it should increase the representative nature of juries.

- Deferral enables the burden of jury service to be shared more equitably because many people who would otherwise be excused are able to participate in jury service.
- Deferral reduces the potential inconvenience caused by jury service because generally those prospective jurors who are permitted to defer can nominate a suitable time to complete their jury service and they will have additional time to organise their affairs.

Taking into account these benefits and the strong support for this option expressed during initial consultations, the Commission proposed that a system of deferral of jury service should be introduced in Western Australia.⁴ Submissions were unanimous in their support for deferral.⁵ Favourable observations included that a deferral system is likely to increase participation in jury service and increase representativeness.⁶ The DPP commented that a deferral system will increase the number of people who are willing to undertake jury service at the time of the original summons because people will know that if they do not they will generally be required at a later time. In her submission Gillian Braddock SC stated that 'the deferral of jury service appears to be a practical method to enable a wide range of people to be involved in jury service whilst minimising personal inconvenience'.⁷ Accordingly, the Commission recommends that the *Juries Act* be amended to enable jury service to be deferred.⁸ The only contentious issues that were raised

1. Deferral of jury service is available in Victoria, Tasmania, South Australia and the Northern Territory. It is also available in England and is soon to commence in New Zealand.
2. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 120–1.
3. For example, seasonal workers such as those working in the tourism industry and farmers will be able to defer jury service to the off-peak season.

4.. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 48. The Commission also took into account that the majority of jurors surveyed by the sheriff's office were supportive of the idea of electing when they undertook jury service.
5.. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC. The Western Australian Electoral Commission did not express a view about the merits of deferral but noted that changes to its procedures may be required to accommodate a deferral system: Western Australian Electoral Commission, Submission No 12 (11 December 2009).
6. Office of the Director of Public Prosecutions (WA), Submission No 25 (20 January 2010); Department of the Attorney General (WA), Submission No 16 (12 December 2009).
7. Gillian Braddock SC, Submission No 39 (4 February 2010).
8. See below, Recommendation 63.

by submissions concerned the criteria for deferral and how the system would operate in practice. These issues are dealt with below.

CRITERIA FOR DEFERRAL

The Commission proposed that the criteria for deferral should be linked to the criteria for excuse so that a person should only be entitled to defer jury service if participation in jury service at the time of the original summons would result in substantial inconvenience to the public or undue hardship or extreme inconvenience to a person. Only one submission indicated any opposition to this approach. The Jury Research Unit at the University of Western Australia submitted that:

The community has an interest in having dedicated, interested jurors, not distracted by other matters. It may be that the juror does not have an excuse which amounts to extreme inconvenience, for example, but the inconvenience is enough to cause the juror to be resentful, or to be preoccupied with the matters which were of concern, and thus not participate fully in the trial. Jury service is an onerous task, and such courtesy shown to the citizens who are asked to give of their time and energy, if publicised, may well improve the willingness of the general population to serve as jurors.⁹

The Commission understands this sentiment but highlights that if deferral is granted too readily (ie, to avoid minor inconvenience) a large proportion of people summoned may opt to defer their jury service. Therefore, in order to accommodate both excuses and deferral, significantly more people will need to be summoned for jury service. For this reason, the Commission maintains its view that deferral should operate as a sub-category of excuse. This will mean that people who would previously have been completely excused from jury service because of serious short-term hardship or inconvenience will now have their jury service deferred.

DEFERRAL IN PRACTICE

As explained in its Discussion Paper, in all Australian jurisdictions the time period for deferral is 12 months.¹⁰ This means that the person summoned is able to nominate a time when they will be available for jury service within the following 12 months. Those deferred are then summoned to attend court at that time. The Commission expressed 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. However, because court sitting dates are not always known or may be subject to change,

it is not possible to provide prospective jurors with an unrestricted right to nominate the deferral date. It is essential that the summoning officer is able to further defer jury service if the nominated date is a date on which the relevant court is not sitting.

The Commission also concluded that other than in these circumstances, a person should not be permitted to defer jury service on more than one occasion. One of the benefits of deferral is greater certainty for the sheriff's office and the ability to summons less people for each court attendance. If those people who had previously deferred are entitled to defer again then these benefits will be reduced. 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 if their circumstances have changed. In this regard, the Commission considers that there should be a notation on the jury list indicating whether a person has previously deferred jury service. The presiding judge will then be aware that the person has been deferred and, if necessary, will be able to question the person about the basis for deferral in order to establish if the excuse application has been made on new grounds.

In order to facilitate the application of the deferral system and to provide consistency across the state, the Commission proposed that the guidelines for excuse should also include guidelines for deferral. Such guidelines should make it clear that if a person seeks to be excused from jury service on the basis of undue hardship or extreme inconvenience (or substantial inconvenience to the public), the sheriff's office should first consider whether deferral would alleviate that hardship or inconvenience. If so, the person should be deferred. Further, the guidelines should stipulate that people who have been deferred should not be excused on the deferral date unless their circumstances have significantly changed. For example, a person may have deferred jury service because of an important business meeting and then on the deferral date that person has fallen ill. The guidelines should also note that people who have elected to defer their jury service are expected to arrange their affairs so that jury service can be undertaken on the deferral date. It would not be appropriate for a person who has been deferred to then arrange for a holiday to take place during the deferral period. A person should generally only be excused on the deferral date because of unforeseen circumstances.

As noted above, the District Court and the Supreme Court of Western Australia expressed reservations about the development of guidelines for excuse. The joint court submission maintained this stance in relation to guidelines for deferral.¹¹ The Commission reiterates its

9. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

10. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 122.

11. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

view that guidelines can be developed to permit operation of the process in a flexible manner. It is important that guidelines address deferral because a deferral system

will be new to Western Australia. The Commission includes the development of deferral guidelines in its recommendation below.

RECOMMENDATION 63

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. That the sheriff's office (in consultation with the 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:
 - (a) That if a person summoned seeks to be excused from jury service on the basis of undue hardship or extreme inconvenience (or substantial inconvenience to the public) the summoning officer must first consider whether the demonstrated hardship or inconvenience would be alleviated by deferring jury service to a later time. If so, the person summoned should be deferred.
 - (b) That a person who is granted deferral is expected to ensure, as far as practicable, that he or she is available on the deferral date.
 - (c) The circumstances in which a person should be excused from further attendance on the deferral date.
 - (d) The procedures to be used to enable prospective jurors who are deferred to select the most suitable time for their deferred jury service.¹²

12. For example, it would be appropriate to provide prospective jurors with an opportunity to check their diaries before nominating the deferral date. Also, if the deferral date has to be changed because the court is not sitting on the deferral date, there should a procedure in place to enable the prospective juror to nominate a suitable alternative date. If this is not possible and an alternative date is selected by the sheriff's office, the guidelines should address how excuse applications are to be dealt with in these circumstances.

Chapter Seven

Allowances, Protections and Penalties

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Juror allowances

INADEQUACY of remuneration for jurors is a common complaint in many jurisdictions¹ 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 reimbursement in Australia, covering actual loss of earnings for all jurors. 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 that year.²

REIMBURSEMENT OF LOST INCOME

The *Juries Act 1957* (WA) 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.³ Non-government⁴ employers may then apply to be reimbursed the wage paid to the juror for the period of jury duty.⁵ 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.⁶

Regulation 8 of the *Juries Regulations 2008* (WA) provides that applications may be made by employers for reimbursement of the employee-juror's wages⁷ by way of statutory declaration supported by evidence. 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.⁸ 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. The Commission noted in its Discussion Paper that it was not aware of any problems with the current reimbursement system or of any difficulties experienced by jurors or employers applying for reimbursement. Submissions were invited as to whether there are any issues for reform.⁹

The Commission received six submissions responding to this question.¹⁰ The Department of the Attorney General submitted that 'employed jurors have not raised any issues concerning the reimbursement process with the sheriff's office'.¹¹ The Department advised that generally employers are reimbursed within two to three days of receipt of their claim.¹² However, the Jury Research Unit at the University of Western Australia submitted that 'some jurors have reported that the process is inaccessible and some do not understand their entitlements'.¹³ The unit further commented that:

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. Carl Campagnoli, Jury Manager (WA), email (2 September 2009).
3. *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.
4. Government employers (including government departments, state instrumentalities and state trading concerns) are not entitled to reimbursement and must continue to pay their employees while 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).
5. *Juries Act 1957* (WA) s 58B(4); *Juries Regulations 2008* (WA) reg 8.
6. 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.

7. For employers the amount paid is reimbursement of wages paid to the juror. Money paid to temporarily replace an employee while he or she is performing jury service is not reimbursable.
8. 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.
9. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Invitation to Submit J.
10. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Judith Bailey; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC.
11. Department of the Attorney General (WA), Submission No 16 (12 December 2009). The Western Australian Jury Manager agreed with the Department's submission: Carl Campagnoli, Jury Manager (WA), Submission No 30 (29 January 2010).
12. Department of the Attorney General (WA), *ibid*.
13. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

We have been present on occasions when the Jury Officer explains about reimbursement after trial. Our observation [was] that many jurors were distracted: talking about their verdict, thinking about transport back home, wanting their telephones back. No doubt jurors were advised of their entitlements and the process earlier, but at the time they may have been distracted or have since forgotten.¹⁴

The unit submitted that ‘consideration should be given to providing clear directions in writing about the process, and ensuring all jurors understand’.¹⁵

The Commission notes that application forms for reimbursement are provided¹⁶ to employed jurors, which the employer is required to fill out and return. A similar form is provided to self-employed jurors attaching an information sheet which details the evidence required to substantiate a claim for reimbursement of lost income. Since the Department of the Attorney General’s submission only commented that there were no complaints from employed jurors, it is possible that the feedback received from jurors by the Jury Research Unit was primarily from self-employed jurors. The Commission considers that as part of its preparation for the community awareness campaign recommended below, it would be useful for the sheriff’s office to survey self-employed jurors to discern whether more information or assistance needs to be provided to assist with their claims.

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. Furthermore, the sheriff’s office receives a large number of applications for excuse 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 claims.

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 service would not impose on them greatly in terms of time (the average length of service being just three days in duration)¹⁷ and that their lost income could be reimbursed.¹⁸ The awareness campaigns were particularly effective in educating communities about the importance of jury service and the role of a juror, 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.¹⁹

In its Discussion Paper the Commission noted the importance of raising awareness 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. The Commission proposed that the sheriff’s office be resourced to conduct regular jury awareness campaigns that include information on reimbursement of lost income.²⁰

Nine submissions addressed this proposal with all submissions in support.²¹ The Department of the Attorney General submitted that ‘the need to dispel these types of misconceptions in the community is integral to increasing the representative nature and size of the

14. Ibid.

15. Ibid.

16. Prospective jurors are informed about the reimbursement process during induction and are directed to the forms for reimbursement at that stage. They are also informed that reimbursement forms are available for download from the Department of the Attorney General website. For empanelled jurors another opportunity to access reimbursement forms is provided following delivery of the verdict when jurors are being ‘debriefed’. At that stage the jury officer takes jurors through the reimbursement process and the after-trial services available to jurors. After-trial services include counselling, advice on loss of income claims, and advice (if requested) on what sentence a convicted accused received.

17. 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.

18. Information provided by Carl Campagnoli, Jury Manager (WA).

19. Carl Campagnoli, Jury Manager (WA), telephone consultation (2 September 2009).

20. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 49.

21. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Office of the Director of Public Prosecutions; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC.

potential pool' of jurors.²² The Jury Manager for Western Australia expressed strong support for this proposal, but observed that the success of such campaigns depended on sufficient funding being allocated by the Department of the Attorney General.²³ With unanimous support, the Commission makes the following recommendation.²⁴

RECOMMENDATION 64

Jury service awareness raising – reimbursement of lost income

That the Department of the Attorney General adequately resource 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.

ALLOWANCES AND EXPENSES

Attendance allowance

Under s 58B of the *Juries Act* 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* provide for the following attendance allowances to be paid to jurors.²⁵

Table of allowances for doing jury service ²⁶	\$
If the time of attendance does not exceed one halfday	10.00
If the time of attendance exceeds one halfday 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

The attendance allowances in the table above generally apply to people who have no employment-based income; that is, people who are unemployed, engaged

in home duties, students and retirees. This accounts for approximately 10% of empanelled jurors.²⁷

Although the Commission did not make a proposal on this subject, several submissions to the Commission's Discussion Paper nonetheless commented that the daily attendance allowances were inadequate. The District Court and Supreme Court of Western Australia submitted that the allowances appeared 'rather meagre',²⁸ while the Jury Research Unit at the University of Western Australia provided a number of comments from jurors expressing concerns about the low level of allowances.²⁹ The Jury Manager of Western Australia supported an increase in the basic allowances, commenting that allowances had not been increased since they were first gazetted on 8 August 1975.³⁰

The Commission notes that while reimbursement for loss of income has risen from a maximum of \$40 per day in 1975³¹ to reimbursement of actual loss today, daily allowances have remained the same. As such, allowances in Western Australia have lagged behind those in other Australian jurisdictions.³² For example, daily juror allowances range from a low of \$20 in South Australia³³ to a high of \$107 in Queensland,³⁴ with five jurisdictions paying over \$50 per day.³⁵ Applying the Consumer Price Index (CPI) as an indicator of inflation to Western Australia's current allowances³⁶ the Commission calculates that in today's dollars the juror allowances translate as follows:

27. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009). 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: *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: see above, 'Reimbursement of Lost Income'.
28. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).
29. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).
30. Carl Campagnoli, Jury Manager (WA), Submission No 30 (29 January 2010).
31. Western Australia, Government Gazette (8 August 1975), 2873.
32. Though it is noted that other Australian jurisdictions do not have as generous loss of income reimbursement schemes.
33. *Juries (Remuneration for Jury Service) Regulations 2002* (SA) sch, cl 1.
34. *Jury Regulations 2007* (Qld) sch 2.
35. For a single day's service as an empanelled juror: New South Wales (\$90.30); Australian Capital Territory (\$88.60); Northern Territory (\$60); Queensland (\$107) and Commonwealth (\$90). Tasmania and Victoria sit midway, paying \$40 and \$36 respectively per day.
36. Reserve Bank of Australia, *Consumer Price Index – G2* <http://www.rba.gov.au/statistics/tables/index.html#prices_inflation> (accessed 5 February 2010).

22. Department of the Attorney General (WA), Submission No 16 (12 December 2009).
23. Carl Campagnoli, Jury Manager (WA), Submission No 30 (29 January 2010).
24. This recommendation should be read in conjunction with other recommendations for jury service awareness raising: see above, Recommendations 12 and 51.
25. *Juries Regulations 2008* (WA) reg 4; *Juries Act 1957* (WA) s 58B(6).
26. *Juries Regulations 2008* (WA) reg 4.

	1975 ³⁷	2009 ³⁸
Half day	\$10	\$42.70
More than half day, less than 3 days	\$15	\$64.05
More than 3 days	\$20	\$85.40

The Commission agrees with submissions that the current juror allowances are set too low and considers that they should be raised, at least in line with CPI inflation increase since 1975. In making the following recommendation to this effect the Commission notes that its recommendations to remove excuse as of right for full-time carers of children and to raise the age for jury service to 75 years will potentially cause the number of allowance recipients to increase.

RECOMMENDATION 65

Increase juror allowances

That the daily allowances set out in regulation 4 of the *Juries Regulations 2008* (WA) be increased to at least a level that would adequately account for inflation.

Other allowances and expenses

A further allowance for travel is also automatically paid to all jurors.³⁹ 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.⁴⁰ This is comparable to travel allowances in other jurisdictions.⁴¹

Unlike some jurisdictions,⁴² meal allowances are not paid to Western Australian jurors unless the meal falls during a period when they are required to stay together.⁴³

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.⁴⁴ 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 recommends that all excuses as of right be repealed (including those categories that relate to child care or other carer responsibilities).⁴⁵ Accordingly, the Commission has also recommended 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.⁴⁶

37. The nearest available CPI figure was from September 1978 (39.7), which was matched with the latest available figure from December 2009 (169.5).

38. Rounded to nearest \$0.05.

39. 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.

40. *Juries Regulations 2008* (WA) reg 5.

41. 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. In Chapter Two, the Commission recommends that the current Western Australian jury districts be reviewed:

see Recommendation 13. If Western Australian jury districts are expanded in the future, it will be necessary to consider if the present travel allowances are adequate.

42. 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's office must provide refreshments to jurors.

43. For example, when the jury has retired to consider its verdict.

44. Carl Campagnoli, Jury Manager (WA), consultation (11 September 2009).

45. See Chapter Six, 'Excuse as of Right' and Recommendation 59.

46. See Chapter Six, Recommendation 58.

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 the employment of people summoned for jury service.¹ A good example of such provision is 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—
- (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.

South Australia is the only jurisdiction that does not provide protection for jurors' employment 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

In its Discussion Paper, the Commission noted that it had been advised by the Jury Manager in Perth that on occasion prospective jurors have complained that their employer had threatened them with dismissal if they performed jury service or had applied undue pressure on the employee to seek excusal.⁶ The Jury Manager also advised that some jurors complained that they were required by their employers to take annual leave to perform jury service.⁷ The Commission was informed that until the *Juries Act* is amended to include sanctions against employers, the only response available to the sheriff's office in these circumstances is to telephone the juror's employer and warn that interference with a

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. Ibid.

person's jury service may constitute a contempt of court punishable by a fine or imprisonment.⁸

In its Discussion Paper the Commission referred to *Lovelady*,⁹ a 1981 case for contempt of court against an employer for 'improper interference with the administration of justice by dismissing from employment' an employee because that employee had been summoned for jury service.¹⁰ In that case the Full Court of the Supreme Court of Western Australia had suggested, as a matter of law reform, that a specific statutory offence to control conduct of this kind was preferable to actions for contempt of court.¹¹ The Commission agreed in its Discussion Paper that a statutory offence was appropriate and proposed¹² that a provision modelled on the Victorian provision (above), but also extending to anyone acting on behalf of an employer, be inserted into the *Juries Act*.¹³

The Commission received seven submissions commenting on this proposal, with all submissions supporting the need for a legislative provision to protect jurors against threats or acts of unfair dismissal.¹⁴ The Department of the Attorney General commented that it would provide 'tangible protection to jurors who must rely at present on a possible contempt of court action'.¹⁵ The Department noted that a provision such as that in Victoria's *Juries Act* will 'give employed jurors confidence in attending'.¹⁶ Western Australia's Jury Manager also expressed strong support for the Commission's proposal, stressing that it should be a discrete offence within the *Juries Act* both for convenience of summoning officers in respect of referencing a specific offence when dealing with employers and to ensure that employers clearly understand their obligations.¹⁷

In their submission the District Court and Supreme Court of Western Australia noted that it is contempt of court for an 'employer to act or threaten to act so as to jeopardise a person's employment if the individual

does not seek or obtain excusal from jury service'.¹⁸ It continued:

We would support the view expressed by the Commission, in its proposal 50, that there should be a specific offence concerned to deal with such behaviour, but we see no need for a specific provision to be incorporated in the *[Juries Act]*. We think that such an offence exists now in the form of s 123(1) of the *Criminal Code* – corrupting or threatening jurors, whether the person has been sworn as a juror or not.

Further, the *Code*, ss 338, 338A and 338B, provide for offences of threatening behaviour, expressed widely to include threats of detriment. They would amply cover conduct of the kind presently under discussion, and would be punishable by imprisonment for seven years, if the threat was accompanied by an intent to influence the prospective juror's behaviour.

Alternatively, if that intention was not established, a maximum penalty of three years' imprisonment, upon indictment, is provided, or summarily, the offender may be sentenced to imprisonment for 18 months, and a fine of \$18,000. Such penalties would appear to be sufficient, and there would always be the capacity to make a compensation order in relation to loss proved to have been sustained as a result of the commission of the offence. Offences in that form were not introduced into the *Code* until 1990, and so were not available when *Lovelady* was decided.

In essence, the joint courts' submission expressed the opinion that offences (which did not exist at the time *Lovelady* was decided) are now contained in the *Criminal Code* and these offences satisfactorily address the behaviour covered by the Commission's Proposal 50. The Commission has considered the joint courts' submission very carefully and finds it cannot agree. The Commission notes that the offence found in s 123(1) of the *Criminal Code* has existed in the same form since compilation of the Code in 1913.¹⁹ Further, the Commission notes that offences addressing threatening behaviour generally (ie, similar to ss 338, 338A and 338B) have also featured in the Code since compilation.²⁰ While the sections cited

8. Ibid. Such advice is confirmed in the Minutes of the Jury Advisory Committee Meeting (17 September 2007).

9. *Lovelady ex parte Medcalf* (1981) 5 A Crim R 197.

10. Ibid 197.

11. Ibid 200 (Burt CJ, Wickham and Kennedy JJ agreeing).

12. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 50.

13. As included in the New South Wales provision: *Jury Act 1977* (NSW) s 69.

14. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Carl Campagnoli, Jury Manager (WA).

15. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

16. Ibid.

17. Carl Campagnoli, Jury Manager (WA), Submission No 30 (29 January 2010).

18. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009).

19. It has also had the same section number since the compilation of the code. The only change effected in 1990 was an increase in penalty from three years' imprisonment to five years' imprisonment.

20. See, eg, s 338 of the original compilation of the *Criminal Code Compilation Act 1913* (WA), which read 'Any person who threatens to do any injury, or cause any detriment of any kind to another with intent to prevent or hinder the other person from doing any act which he is lawfully entitled to do, or with intent to compel him to do any act which he is lawfully entitled to abstain from doing, is guilty of a misdemeanour and is liable to imprisonment for one year or to a fine of One hundred pounds'.

in the joint courts' submission do satisfactorily address the potential of *threats* of dismissal or prejudice²¹ to an employee who is summoned for jury service, they do not address the problem of *acts* of dismissal in these circumstances. In the Commission's view this is likely to be the reason that the existing provisions dealing with threats to jurors and threats generally were not relied upon in *Lovelady*. Where there is an act of dismissal from employment in consequence of failure by the employee to obtain excuse from jury service it appears that while the employee may take action for unfair dismissal,²² the only relevant offence with which the employer can be charged is contempt of court. As the joint courts' submission notes, 'the process of pursuing such a matter upon a motion for contempt before a Full Court would be clumsy and time wasting, an inconvenient mode of trial'.²³ Further, as *Lovelady* shows, it is extremely difficult to prosecute contempt of court in these circumstances as the fact that the employee was dismissed because of a summons to attend jury service must be proved beyond reasonable doubt. The advantage of the Victorian provision recommended by the Commission is that the burden of proof in relation to the reason for dismissal lies with the defendant once all other facts constituting the offence are proved.²⁴

The Commission maintains its view that it would be advantageous to have a specific provision in the *Juries Act*, which provides that it is an offence to terminate or threaten to terminate the employment of an employee, or otherwise prejudice the position of an employee because the employee is, was or will be absent from employment on jury service. Such a provision will provide clarity to the current situation and give jurors greater assurance of protection against unfair dismissal or prejudice of employment as a consequence of undertaking jury service.²⁵ The Commission makes this recommendation below and highlights that this reform is crucial to bringing Western Australian juries legislation into line with its counterparts in other Australian jurisdictions.

INDEPENDENT CONTRACTORS

In its Discussion Paper the Commission noted that while its proposal would cover part-time, full-time and casual employees, a question remained as to whether persons engaged as independent contractors under a contract of service should also be protected. The New South Wales

Law Reform Commission considered this issue in 2007 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'.²⁶ It was considered that such extension was essential in the contemporary workplace where many industries have moved from traditional employment structures to service contracts.²⁷

In its Discussion Paper the Commission expressed its preliminary view that protection of employment should extend to independent contractors, noting that 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. The Commission invited submissions on this matter.²⁸ All submissions received in response to this question supported the extension of the protection to independent contractors.²⁹ Accordingly, the Commission includes independent contractors in Recommendation 66.

APPROPRIATE PENALTY

The Commission's Discussion Paper included a table of 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 in other Australian jurisdictions.³⁰ That table showed that penalties ranged from a fine of \$2,200 in New South Wales³¹ to a maximum fine of \$72,000 in Tasmania.³² All but one jurisdiction included a term of imprisonment³³ and three jurisdictions featured a higher fine for corporate employers.³⁴ In addition, the legislation in New South Wales, Tasmania, the Australian Capital Territory and Victoria (upon which the Commission's recommended offence is modelled) provide for orders

21. For example, loss of leave entitlements or promotion opportunity.

22. Under the *Industrial Relations Act 1979* (WA).

23. Ibid.

24. *Juries Act 2000* (Vic) s 76(2).

25. The Commission notes that this recommendation reflects its Guiding Principle 4, which supports reforms to the current law that will prevent or reduce any adverse consequences resulting from jury service.

26. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendation 68.

27. Ibid 246.

28. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Invitation to Submit K.

29. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Judith Bailey; Carl Campagnoli, Jury Manager (WA).

30. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 130.

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

32. For corporate employers; individual employers are subject to a maximum fine of \$14,400: *Juries Act 2003* (Tas) s 56.

33. New South Wales is the only jurisdiction that does not have imprisonment as a penalty.

34. See *Juries Act 2003* (Tas) s 56; *Juries Act 2000* (Vic) s 76; *Juries Act 1967* (ACT) s 44AA.

to be made to reinstate the unfairly dismissed employee and reimburse lost wages.³⁵

The Commission noted in its Discussion Paper that 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. It also noted that 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 light of the seriousness of the offence the Commission expressed its preliminary view that the appropriate penalty should be a maximum fine in the range of \$5,000 to \$10,000 with an alternative penalty of 12 months' imprisonment. The Commission sought submissions on this matter.³⁶

The Commission received five submissions in response to this question.³⁷ In her submission, Gillian Braddock SC commented that:

[A]ny employer who dismisses or otherwise prejudices an employee because of their liability for jury service should be liable to serious penalty. It is not uncommon to hear of jurors who fear for their jobs. Whilst it may have redress in the industrial court, it has the potential to seriously prejudice the administration of the criminal court. The conduct is analogous to a contempt. It is therefore probably necessary that the offence carry a period of imprisonment, to indicate its seriousness, and a fine of \$10,000 would not be excessive at a maximum.³⁸

The Department of the Attorney General and the Western Australian Jury Manager each submitted that conduct of the kind referred to above should 'attract a high penalty such as a fine of \$10,000 with an alternative of 12 months' imprisonment'.³⁹ These submissions were echoed by the Western Australia Police and Judith Bailey, both of whom submitted that there should be a higher maximum penalty for corporate employers.⁴⁰ The Commission notes that for comparable offences in other

jurisdictions the penalty for corporations is five times that for individuals.⁴¹

Taking into account all submissions, the Commission recommends that the offence of terminating, threatening to terminate or prejudicing a person's employment because of jury service should carry a maximum fine of \$10,000 for individuals and \$50,000 for corporations or a maximum term of 12 months' imprisonment or both.

RECOMMENDATION 66

Protection of employment – offence and penalty

1. 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 or independent contractor because the employee or independent contractor is, was or will be absent from employment on jury service.
2. That the above offence carry a maximum fine of \$10,000 for individuals and \$50,000 for corporations or a maximum term of 12 months' imprisonment or both.

35. Such orders are standard in unfair dismissal legislation and are reflected in the *Industrial Relations Act 1979* (WA) s 23A.

36. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Invitation to Submit L.

37. Department of the Attorney General; Western Australia Police; Judith Bailey; Carl Campagnoli, Jury Manager (WA); Gillian Braddock SC.

38. Gillian Braddock SC, Submission No 39 (4 February 2010).

39. Department of the Attorney General (WA), Submission No 16 (12 December 2009); Carl Campagnoli, Jury Manager (WA), Submission No 30 (29 January 2010).

40. Western Australia Police, Submission No 20 (31 December 2009); Judith Anne Bailey, Submission No 23 (12 January 2010).

41. See, eg, *Juries Act 2003* (Tas) s 56; *Juries Act 2000* (Vic) s 76; *Juries Act 1967* (ACT) s 44AA.

Penalties for failure to comply with a juror summons

EARLIER in this chapter, the Commission considered the allowances and protections available to jurors as well as reimbursement for lost income. The Commission made a number of recommendations including that juror allowances should be increased in recognition of the valuable service provided by jurors and to reflect inflation.¹ The Commission has also recommended 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.² Reimbursing lost income, 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.³

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. As stipulated by the Commission's Guiding Principle 3, the law should recognise that the obligation to serve on a jury is an important civic responsibility to be shared by the community.⁴ Statistics provided by the sheriff's office show that for the 2009 calendar year almost 18% of people summoned for jury service in Perth (or 9482 people) did not attend court or otherwise respond to the summons. However, this figure includes people who had not been served with the summons (4% of all summonses) and people who had been served too late (3.5% of all summonses). Also, 8% of people summoned in 2009 were excused after the sheriff's office conducted an investigation into why they did not attend for jury service. Just over 2% of people summoned (or 1146 people) were referred to the District Court for action in respect of non-compliance.⁵ In this section, the Commission considers the appropriate consequences for failing to comply with a juror summons and the administrative processes involved in responding to non-compliance.

PROCESS FOR DEALING WITH NON-COMPLIANCE

If summoned, people are required to attend court at the nominated time and place or complete the statutory declaration attached to the summons providing a sufficient reason to satisfy the summoning officer that they are not permitted or should not be required to attend for jury service. It is clearly noted on the summons that failure to attend as required 'may result in a fine'.

However, the current process for responding to non-compliance is complicated. In order to determine whether action in respect of non-compliance is justified the sheriff's office compiles a list of people who did not attend ('DNA') for jury service in the metropolitan area.⁶ 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 provided with police records. If the address on this record 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.

Those people who have not responded to these inquiries 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 Commission noted in its Discussion Paper that these provisions create a scheme that is 'cumbersome and inadequate'.⁷ The process involves multiple stages: a DNA investigation by the sheriff's office (referred to above); referral of matters to the District Court; imposition of a fine by a judge;⁸ issuing of summons and notices to the person fined;⁹

1. See above, Recommendation 65.

2. See above, Recommendation 66.

3. Chapter One, 'Guiding Principles for Reform'.

4. Ibid.

5. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2009* (2010).

6. Non-compliance with juror summonses is dealt with by summoning officers in regional courts.

7. The process so described to the Commission during its initial consultations: see Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007); Chief Judge Kennedy, consultation (17 January 2008).

8. Section 55(2) of *Juries Act 1957* (WA) provides that a court may, after receiving a report from the summoning officer, impose summarily 'such fine as the court thinks fit'.

9. Once a fine is summarily imposed by the judge, the sheriff's offices notifies the person that he or she has 28 days in which

consideration by a judge of any affidavits in relation to why the fine should not be enforced; and finally a decision by a judge to remit or reduce the previous fine imposed.¹⁰ Following this process, outstanding fines are enforced under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) (which contains a series of options and stages for enforcing fines including possible licence suspension, seizure of goods and, ultimately, imprisonment).¹¹

In addition to the obvious complexity and time involved in this process, the Commission identified two other significant problems associated with the process for responding to non-compliance with a juror summons. First, there is no set maximum penalty – a judge may impose such fine as he or she thinks fit. 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 some instances fines of up to \$1,200 have been given in regional courts.¹² Second, the statutory process is more onerous in regional locations because even if the fine has been imposed initially by a District Court judge, the person fined must present grounds as to why the fine should not be enforced to the Supreme Court.¹³ In contrast, in the metropolitan area, a person fined is required to show cause to the court which imposed the fine (usually the District Court).

For these reasons, the Commission formed the view that the process for prosecuting (and enforcing penalties imposed in relation to) non-compliance with a juror summons should be simplified and streamlined. The Commission's initial consultations suggested that an automatic infringement notice issued by the sheriff's office was the best way of dealing with this issue. While the Commission agreed that the power to issue an infringement notice was appropriate, it concluded that this should not be done automatically in response to all failures to attend. The Commission's reasons included that a significant number of people do not attend court as required because the summons was not served (or because it was served too late). Furthermore, in some regional locations there is no postal delivery service¹⁴

to pay or, alternatively, show cause (by affidavit or appearance in court) why the fine should not be enforced.

10. *Juries Act 1957* (WA) ss 56(2) & (3).

11. See *Juries Act 1957* (WA) s 59(1). 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 when a summons was issued to the person to show cause why the fine should not be enforced (whichever is later): see *Juries Act 1957* (WA) s 59(2). For further discussion of these procedures, see LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 131–34.

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

13. *Juries Act 1957* (WA) s 56(1).

14. See Chapter Two, 'Problems with the Jury Selection Process'.

and, therefore, unless mail is regularly collected from the post office the person is unlikely to receive the juror summons in time. If such persons are automatically issued with an infringement notice, they may be liable to licence suspension.¹⁵

Therefore, in order to minimise any potential unfairness to members of the community who were unaware that they had been issued with a summons to attend for jury service, the Commission expressed its support for the continuation of the existing sheriff's office practice of conducting a DNA investigation following non-attendance by a summoned juror.¹⁶ The investigation process may identify some jurors who should not be penalised and will, therefore, avoid the potential negative consequences of an automatic infringement for these people (eg, a drivers licence suspension order for those persons who fail to pay the infringement penalty within the required time). It was proposed by the Commission, that following the DNA investigation, the summoning officer should be given the power to issue an infringement notice in those cases where it appears that the person has failed to comply with the juror summons without a reasonable excuse.¹⁷ The benefits that flow from an infringement process are that court proceedings are not required to deal with the offence and a lower amount is stipulated for those people who elect to pay the infringement penalty.

The Commission received nine submissions responding to this proposal and all agreed that non-compliance with a juror summons should be dealt with in a more simplified manner including the option of an infringement notice.¹⁸ For example, the Jury Research Unit at the University of Western Australia submitted that 'the present process is unwieldy and time consuming'.¹⁹ Similarly, the Department of the Attorney General submitted that the Commission's proposal would create a simpler and more efficient process.²⁰ The Western Australian Jury

15. If a person does not receive the infringement notice and subsequent notices from the Fines Enforcement Registry, the person may not realise that he or she is subject to a licence suspension order.

16. 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).

17. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposal 51.

18. Jury Research Unit (UWA); Department of the Attorney General; Law Society of Western Australia; Legal Aid Western Australia; District Court and Supreme Court of Western Australia; Western Australia Police; Judith Bailey; Office of the Director of Public Prosecutions; Carl Campagnoli, Jury Manager (WA).

19. Jury Research Unit, University of Western Australia, Submission No 15 (16 December 2009).

20. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

Manager expressed strong support for the Commission's proposal.²¹ The District Court and Supreme Court of Western Australia agreed that the current process is 'cumbersome and inadequate' and submitted that the offence of non-compliance with a juror summons should be created and dealt with in the ordinary way.²²

The only outstanding issues are the appropriate penalty that should be set for the infringement notice and the penalty that should apply if the person elects to have the matter dealt with in court rather than paying the infringement penalty.

The appropriate penalties

In its Discussion Paper the Commission examined the current penalties for non-compliance with a juror summons in other Australian jurisdictions. The penalties vary from fines between \$500 and \$3,600 to imprisonment for up to three months.²³ Western Australia is the only jurisdiction with an open-ended penalty and although the Commission is unaware of the level of fines imposed in practice in other jurisdictions, it appears that the penalty commonly imposed in Western Australian (ie, a fine of \$250) is more lenient than elsewhere.

It has been observed that the penalty for failing to comply with a juror summons needs to be sufficiently high in order to deter people from ignoring their obligations to undertake jury service. For example, the New Zealand Law Commission stated in 2001 that a fine of \$300 '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'.²⁴ The New South Wales Law Reform Commission 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'.²⁵

In its Discussion Paper, the Commission concluded that the penalty for failing to comply with a juror summons should be high enough to reflect the seriousness of the offence and to provide a sufficient incentive for jurors to attend for jury service. At the same time, the Commission recognised 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,²⁶ the Commission did not consider that imprisonment should be available as a penalty.²⁷ Taking into account the penalties imposed in other jurisdictions, the Commission's preliminary view was that the infringement notice penalty should be a fine between \$600 and \$800. The Commission also noted that if the person elected to have the matter dealt with in court rather than paying the modified infringement penalty, the maximum penalty would have to be higher. The Commission sought submissions about what level of fine should be prescribed for the infringement notice and what penalty should apply if the offence is dealt with by a court.²⁸

Submissions responding to this question agreed that the penalty imposed for failing to comply with a juror summons should be increased.²⁹ The Department of the Attorney General agreed that the current penalties imposed in practice do not operate as a sufficient deterrent, especially for people on high wages. The Department stated that an infringement penalty of \$800 would be appropriate (and in line with what is proposed by the Department in its draft legislation).³⁰ The Western Australia Police submitted that the penalty must be sufficiently high to act as a deterrent; however, it declined to suggest what level of fine should apply.³¹ Likewise, the DPP submitted that the penalty should be increased.

The Commission received two submissions suggesting that imprisonment should be available as an option for failing to comply with a juror summons. In her submission Judith Bailey stated that the infringement

21. Carl Campagnoli, Jury Manager (WA), Submission No 30 (29 January 2010).

22. District Court and Supreme Court of Western Australia, Submission No 19 (24 December 2009). The joint court submission particularly emphasised the unwieldy enforcement process required for circuit courts pursuant to s 56(1) of the *Juries Act 1957* (WA) (ie, that even if a District Court judge summarily imposes a fine for non-compliance with the juror summons, cause must be shown to a Supreme Court judge).

23. See LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 133 for a table setting out the penalties in each jurisdiction as at 7 September 2009.

24. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 67. In order to provide for greater deterrence the NZLC recommended that the maximum penalty be increased to \$1,000 and seven days' imprisonment, and this recommendation was implemented in part in 2008. Section 32 of the *Juries Act 1981* (NZ) now provides for a maximum fine of \$1000.

25. NSWLRC, *Jury Selection*, Report No 117 (2007) 165.

26. In contrast, the offence of threatening a juror's employment as set out in Recommendation 66 involves much more wilful behaviour.

27. The Commission notes that the most severe penalty available is three months' imprisonment (Victoria and Tasmania). If it was considered appropriate to provide for imprisonment in Western Australia, the lowest maximum penalty that could be imposed is six months, see *Sentencing Act 1995* (WA) s 86.

28. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Invitation to Submit M.

29. Department of the Attorney General; Judith Bailey; District Court and Supreme Court of Western Australia; Office of the Director of Public Prosecutions.

30. Department of the Attorney General (WA), Submission No 16 (12 December 2009).

31. Western Australia Police, Submission No 20 (31 December 2009).

penalty should be \$900 and the penalty available if the matter is dealt with by a court should be \$1,500 or two months' imprisonment.³² The District Court and the Supreme Court of Western Australia submitted that the penalty should be 'of some substance' and referred, by way of example, to offences that are punishable summarily under the Code (eg, common assault which carries a maximum penalty of 18 months' imprisonment or an \$18,000 fine). Nonetheless, the courts suggested that invariably in practice a fine would be imposed.

The Commission maintains its view that imprisonment should not be available as a penalty because, as stated above, it would not be appropriate to imprison otherwise law-abiding citizens for such an offence. It is important to remember that citizens do not volunteer for jury service and the requirement to participate can be onerous. Further, a failure to comply may often result from inadvertence rather than wilful disregard (eg, a person may forget the court attendance date or a person who is ineligible to serve may forget to fill out the statutory declaration). Taking into account the unanimous support received for the Commission's proposed reform of the enforcement process and the acceptance by all who responded to this issue that the penalty should be increased, the Commission makes the following recommendation.

RECOMMENDATION 67

Non-compliance with a juror summons

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

1. That a person who fails to comply with a juror summons, without reasonable excuse, commits a simple offence and that the maximum penalty for this offence is a fine of \$2,000.
2. That 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 serve an infringement notice on that person informing the person that if he or she does not wish to be prosecuted for the offence in court, he or she may pay the amount stated in the notice (the infringement penalty).
3. That the infringement penalty be \$800.
4. That any other consequential amendments to the *Juries Act 1957* (WA) and the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) be made.³³

32. Judith Anne Bailey, Submission No 23 (12 January 2010).

33. For example, pursuant to s 12 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) (the FER

OTHER JURIES ACT OFFENCES

In its Discussion Paper, the Commission noted that the processes for dealing with other offences under the *Juries Act* are similar to the procedure for the offence of non-compliance with a juror summons.³⁴ For example, pursuant to s 55(1) any court may summarily impose such fine as it thinks fit upon a talesman³⁵ who fails to attend court or wilfully withdraws him or herself from the court; a person who 'personates or attempts to personate a juror whose name is on a jury panel for the purpose of sitting as that juror'; or a person who knowingly receives any sum over and above the amount allowed as fees or remuneration for attending a trial. The Commission commented that these other offences may need to be reconsidered in light of the Commission's proposal to reform the process in relation to non-compliance with a juror summons. While it may not necessarily be appropriate to issue an infringement notice for all of the other offences involving juror misconduct,³⁶ there should be separate offences created in the ordinary way with a specified maximum penalty.

In its submission, the District Court and Supreme Court of Western Australia also referred to other offences under the *Juries Act* and suggested that reform should extend beyond the offence of non-compliance with a juror summons. In this regard, the courts' submission referred to the offence of failure by the sheriff, a summoning officer, a jury pool supervisor, the Electoral Commissioner, a jury officer or a police officer to faithfully carry out their

Act), the enforcement procedures under that FER Act will only be applicable to the infringement if the *Juries Act 1957* (WA) is prescribed as an enactment to which Part 3 of the FER Act applies. Similarly, the fines enforcement process under the FER Act will not apply unless the sheriff's office or summoning officer is approved as a prosecuting authority under the FER Act.

34. LRCWA, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 132.
35. A talesman is a bystander who has been called upon to participate in jury service because of an insufficient number of available jurors: see *Juries Act 1957* (WA) s 52.
36. In her submission, Judith Bailey observed that the Commission had not made any proposals in relation to juror behaviour: Judith Anne Bailey, Submission No 23 (12 January 2010). Specifically, she expressed concern about juror behaviour during deliberations (eg, jurors not concentrating, jurors 'bullying' other jurors into reaching a verdict, and being preoccupied with other matters). Although the Commission agrees that this type of behaviour should be discouraged, it does not consider that criminal prosecution is the appropriate response. In particular, the Commission notes that it is not possible to investigate behaviour during deliberations because of the confidentiality requirements under the *Juries Act* (see Part IXA). Further, views about this type of conduct are very subjective and therefore it would be difficult to provide sufficient evidence to substantiate a charge. For example, it might be claimed that a juror was not concentrating properly but the juror maintains that he or she has listened to and properly considered the evidence.

duties under the *Juries Act*.³⁷ Such an offence can only be dealt by a Supreme Court judge and if sufficient cause for the omission is not shown, a fine of no more than \$100 can be imposed. The submission also noted other offences such as the incorrect alternation of or addition to jurors' lists and jurors' books; the unauthorised provision of access to jurors' lists and jurors' books; and the receipt of money or reward for excusing a prospective juror from further attendance.³⁸ It was emphasised that these offences can only be dealt with in a summary way by a Supreme Court judge and a fine of any amount can be imposed.

The joint courts' submission suggested that the *Juries Act* offences that relate to conduct by the sheriff or other public officers can be adequately covered by existing offences under the *Criminal Code*. Specifically, offences under ss 122, 173, 177 and 178 and under Chapter XIII of the Code were mentioned. The Commission notes that these Code offences typically involve corrupt, dishonest or wilful behaviour and are treated as very serious offences with significant maximum penalties. In contrast, the offences under the *Juries Act* potentially apply to neglectful or inadvertent behaviour. For example, a summoning officer commits an offence under s 54(1) of the *Juries Act* if he or she, without lawful justification or excuse, includes or omits a name in the jurors' list that should not or should be included. Equally, however, the *Juries Act* offences may apply to serious misconduct or dishonest behaviour (eg, a summoning officer receiving money for excusing a prospective juror from the requirement to undertake jury service).

It is clear that there is an overlap with existing Code offences and the Commission is of the view that the offences under the *Juries Act* should be reviewed to determine if they are necessary or if they should be reformulated. In all instances, an offence under the *Juries Act* should be created in the ordinary manner so that there is a stipulated maximum penalty. It is not appropriate to continue with such a convoluted and outmoded process of dealing with offences committed by prospective jurors, jurors and public officials involved in the jury selection process. In particular, if such offences are to be enforced, it is an unnecessary burden on higher court judges to be required to impose monetary penalties in such fashion.

In Chapter Five of this Report, the Commission recommended that a new offence be created in relation to a prospective juror who knowingly fails to disclose that they are disqualified or ineligible for jury service. It was also recommended that maximum penalty for this offence should be \$2,000.³⁹ The Commission declined

to provide for an infringement penalty option for this offence because it considers that the commission of such an offence would be uncommon.⁴⁰ In contrast, an infringement penalty option is viable for the offence of non-compliance with a juror summons because this offence is likely to be committed more frequently. Accordingly, the Commission recommends that, as part of its current review of the *Juries Act*, the Department of the Attorney General examine all of the offences in Part IX of the *Juries Act*.

RECOMMENDATION 68

Other offences

That, as part of its current review of the *Juries Act 1957* (WA), the Department of the Attorney General examine ss 53–55 of the *Juries Act* to determine whether the provisions are required and, if so, whether any proscribed conduct should be the subject of an offence with a specified maximum penalty.

37. *Juries Act 1957* (WA) s 53.

38. *Juries Act 1957* (WA) s 54.

39. See Chapter Five, Recommendation 48.

40. The Commission is not aware of any evidence to suggest that members of the community would be likely to deliberately fail to reveal disqualifying circumstances or the fact that they are ineligible in order to be able to undertake jury service.

Appendices

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Appendix A: List of recommendations

1 RECOMMENDATION 1 _____ Page 17

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 RECOMMENDATION 2 _____ Page 17

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 purpose of reducing the number of persons required to attend the jury pool.

3 RECOMMENDATION 3 _____ Page 24

Peremptory challenges

1. That the current entitlement to peremptory challenges be retained.
2. That the sheriff's office records the total number of peremptory challenges made per trial and the breakdown of peremptory challenges made by the prosecution and the accused.
3. That the Western Australian government consider undertaking research to examine the characteristics of prospective jurors who have been challenged and to determine the reasons why challenges are made.

4 RECOMMENDATION 4 _____ Page 26

Peremptory challenges – trials involving multiple accused

That s 104 of the *Criminal Procedure Act 2004* (WA) be amended to provide that in trials involving more than one accused, each accused is entitled to five peremptory challenges and the state is entitled to the total number of peremptory challenges that are available to all of the co-accused.

5 RECOMMENDATION 5 _____ Page 27

Information for jurors – challenges

That, in order to reduce any disquiet experienced by members of the public who have been randomly selected as part of a jury panel, prospective jurors should be informed (during induction) about the process for and purpose of peremptory challenges including examples of reasons why a prospective juror might be challenged in a particular trial.

6 RECOMMENDATION 6 _____ Page 29

Prosecution vetting of jurors' criminal records

That Rule 57 of 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).

7 RECOMMENDATION 7 _____ Page 30

Availability and access to jury lists

1. 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.
2. That the sheriff's office investigate options to facilitate the provision of jury lists to counsel appearing in Supreme Court trials.

8 RECOMMENDATION 8 _____ Page 32

Provision of personal information about jurors

That the *Juries Act 1957* (WA) be amended to provide that the jury panel or pool list made available to the parties in a criminal trial (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.

9 RECOMMENDATION 9 _____ Page 33

Information for jurors – security issues and personal information

1. That during induction, the sheriff's office should inform prospective jurors that the prosecutor, defence counsel and the accused are permitted access to a copy of the jury list and that this list contains the juror's full name, the suburb or town in which the juror resides and the juror's occupation (if recorded on the electoral roll).
2. That prospective jurors should also be informed that the prosecutor and the defence are only entitled to access this list if they sign an undertaking that they will not copy the list or divulge its contents to any person other than the accused or another lawyer acting for the accused, and that they must return the list to the jury officer immediately following empanelment.

10 RECOMMENDATION 10 _____ Page 36

Updating electoral details

1. That the Western Australian Department of Transport 'Change of Personal Details' form include advice that people are required to separately update their details with the Electoral Commission 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) the viability of 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 purpose of updating licensing details; and
 - (b) the investigation of options for automatic updates sourced from other government agencies.

11 RECOMMENDATION 11 _____ Page 36

Updating jury lists and jurors' books

1. That s 14(9) of the *Juries Act 1957* (WA) be inserted to provide that if a person 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.

12 RECOMMENDATION 12 _____ Page 37

Jury service awareness raising – regional areas

That the Western Australia government provide resources to the sheriff's office to undertake regular jury service awareness raising campaigns throughout regional Western Australia.

13 RECOMMENDATION 13 _____ Page 38

Review of current jury districts

That the Western Australia Electoral Commission undertake a review of the current jury districts to determine if there is any merit in expanding the jury districts to cover more of, or all of, the state of Western Australia.

14 RECOMMENDATION 14 _____ Page 42

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).

15 RECOMMENDATION 15 _____ Page 42

Silent 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 have been granted silent elector status under s 51B of the *Electoral Act 1907* (WA).

16 RECOMMENDATION 16 _____ Page 45

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 in Part II of the Second Schedule of the *Juries Act 1957* (WA) be abolished.
2. That the maximum age for liability for jury service be raised to 75 years.

17 RECOMMENDATION 17 _____ Page 46

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 section 17A of the *Electoral Act 1907* or a person who is an elector with no fixed address and who is enrolled pursuant to section 17B of the *Electoral Act 1907* is not liable to serve as a juror.
3. A person who has been granted silent elector status pursuant to section 51B of the *Electoral Act 1907* is not liable to serve as a juror.

18 RECOMMENDATION 18 _____ Page 51

Permanence of occupational eligibility

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

19 RECOMMENDATION 19 _____ Page 52

Determination of occupational eligibility

1. That removal of a person's name from the jurors list on the basis of occupational ineligibility for jury service be exclusively determined by the sheriff's office or summoning officer.
2. That s 14(2) of the *Juries Act 1957* (WA) be amended to read:

Before 30 April in each year the Electoral Commissioner shall by ballot in accordance with the provisions of subsection 2(a) select jurors to the number so notified to him by the sheriff for each jury district from all the electors who are shown in the electoral rolls for the Assembly district or districts which, or parts of which, comprise the jury district and who appear to be liable to serve as jurors under section 4.
3. That consequential amendments be made to s 14(3a)(b) of the *Juries Act 1957* (WA).

20 RECOMMENDATION 20 _____ Page 54

Ineligibility for jury service – judicial officers

1. That judges and magistrates of any of the state's courts 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.

21 RECOMMENDATION 21 _____ Page 55

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.

22 RECOMMENDATION 22 _____ Page 55

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.

23 RECOMMENDATION 23 _____ Page 57

Ineligibility for jury service – industrial relations commissioners

That the president and commissioners of the Industrial Relations Commission be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 1(c) of the *Juries Act 1957* (WA).

24 RECOMMENDATION 24 _____ Page 58

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 (or former 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.

25 RECOMMENDATION 25 _____ Page 61

Ineligibility for jury service – practising lawyers

That Australian legal practitioners, within the meaning of that term in the *Legal Profession Act 2008* (WA) s 5(a), be ineligible for jury service while practising and for a period of five years from their last date of practice or the date of expiry of their last practising certificate.

26 RECOMMENDATION 26 _____ Page 62

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 and for a period of five years thereafter.

27 RECOMMENDATION 27 _____ Page 63

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).

28 RECOMMENDATION 28 _____ Page 64

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.

29 RECOMMENDATION 29 _____ Page 65

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).

30 RECOMMENDATION 30 _____ Page 65

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 or officer of the sheriff.

31 RECOMMENDATION 31 _____ Page 66

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 his or her term of employment.

32 RECOMMENDATION 32 _____ Page 66

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 his or her term of office and for a period of five years thereafter.

33 RECOMMENDATION 33 _____ Page 67

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, clauses 2(a) and 2(b) of the *Juries Act 1957* (WA).

34 RECOMMENDATION 34 _____ Page 69

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.

35 RECOMMENDATION 35 _____ Page 71

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 or secondment 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 and seconded employees 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.

36 RECOMMENDATION 36 _____ Page 72

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 remain ineligible for jury service for the term of their membership of the relevant board and for a period of five years thereafter.

37 RECOMMENDATION 37 _____ Page 74

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.

38 RECOMMENDATION 38 _____ Page 76

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).

39 RECOMMENDATION 39 _____ Page 77

Ineligibility for jury service – authorised officers of the Department for Child Protection

That the Second Schedule, Part I, clause 2(k) of the *Juries Act 1957* be amended to confine occupational ineligibility to officers of the Department for Child Protection who are ‘authorised officers’ under s 25 of the *Children and Community Services Act 2004* (WA) and that such officers be excluded from jury service during the term of their employment and for a period of five years following.

40 RECOMMENDATION 40 _____ Page 86

Permanent disqualification from jury service

That s 5(b)(i) of the *Juries Act 1957* (WA) continue to provide that a person is permanently disqualified for jury service if he or she has ever been convicted of an offence and sentenced to death, strict security life imprisonment, life imprisonment, an indeterminate period or to imprisonment for a term exceeding two years.

41 Recommendation 41 _____ Page 87

Temporary disqualification of offenders from jury service

That s 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 in the past 10 years been the subject of a sentence of imprisonment (including an early release order such as parole, suspended imprisonment or conditional suspended imprisonment) imposed in relation to a conviction for an indictable offence (that was dealt with either summarily or on indictment).
2. 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 an early release order such as parole, 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.
3. 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) in a juvenile detention centre.
4. Has in the past 2 years 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).
5. Is currently subject to an ongoing court-imposed order following conviction for an offence (excluding compensation or restitution) but including
 - (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);
 - (c) a Good Behaviour Bond or Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA).

42 RECOMMENDATION 42 _____ Page 88

Unconvicted accused

That s 5(b)(ii) 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.

43 RECOMMENDATION 43 _____ Page 88

Unsentenced offenders

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

44 RECOMMENDATION 44 _____ Page 90

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 court-imposed drivers licence disqualification for a period of 12 months or more.

Taking into account convictions, sentences and charges in other jurisdictions

That a new s 6 of the *Juries Act 1957* (WA) be inserted and that this section provide that for the purposes of s 5(b) a person is not qualified for jury service in Western Australia if he or she

1. 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) in another jurisdiction provided that the person was subject to that similar sentence or order in the relevant time period as set out in s 5(b);
2. has been convicted of an offence on indictment in the past 5 years in another jurisdiction; or
3. is currently on bail in relation to an alleged offence or awaiting sentence in another jurisdiction.

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 the subject of a sentence of imprisonment (including an early release order such as parole, suspended imprisonment or conditional suspended imprisonment) imposed in relation to a conviction for an indictable offence (that was dealt with either summarily or on indictment).
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 an early release order such as parole, suspended imprisonment or conditional suspended imprisonment); or
 - (c) been subject to a sentence of detention in a juvenile detention centre (including a supervised release order) of 12 months or more.
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 in a juvenile detention centre (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 court-imposed 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 and that this section provide that for the purposes of s 5(b) a person is not qualified for jury service in Western Australia if he or she

1. 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 section 5(b) in another jurisdiction provided that the person was subject to that similar sentence or order in the relevant time period as set out in section 5(b);
2. has been convicted of an offence on indictment in the past 5 years in another jurisdiction; or
3. is currently on bail in relation to an alleged offence or awaiting sentence in another jurisdiction.

47 RECOMMENDATION 47 _____ **Page 92**

Access to court and police databases

That the Western Australian government facilitate access to relevant court and police databases to enable the sheriff's office to check whether or not a prospective juror is currently on bail or in custody in relation to an offence.

48 RECOMMENDATION 48 _____ **Page 93**

Offence for knowingly failing to disclose disqualification or ineligibility

1. That the *Juries Act 1957* (WA) provide that a person who has been summoned for jury service commits an offence if that person knows that he or she is not qualified for jury service or is ineligible for jury service and fails, as soon as practicable, to inform the sheriff's office of that fact and the reason for the disqualification or ineligibility.
2. That the penalty for the offence be a maximum fine of \$2000.
3. That the juror summons (and/or accompanying notice) clearly state:
 - (a) all of the circumstances in which a person will not be qualified or will be ineligible for jury service;
 - (b) that if the person summoned believes that he or she is not qualified or is ineligible for jury service the person must complete a statutory declaration setting out the basis for disqualification or ineligibility; and
 - (c) that knowingly failing to disclose any circumstances that would render the person not qualified or ineligible for jury is an offence.

49 RECOMMENDATION 49 _____ **Page 96**

English language requirement

That s 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.

50 RECOMMENDATION 50 _____ Page 97

Statistics in relation to jurors from culturally and linguistically diverse backgrounds

That the sheriff's office revise its juror feedback questionnaire to ensure that data is recorded in relation to the number of jurors who state they speak a language other than English at home and, if so, the following additional information should be sought:

- whether the language spoken at home is their first language;
- the actual language spoken at home; and
- the degree of proficiency in English.

51 RECOMMENDATION 51 _____ Page 97

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, in conjunction with the Office of Multicultural Interests, regular jury service awareness raising strategies specifically targeted to people from culturally and linguistically diverse backgrounds.

52 RECOMMENDATION 52 _____ Page 98

Provision of information for prospective jurors in different languages

1. That translated versions of the juror summons and the Juror Information Sheet be available online and by telephoning the sheriff's office and that these translated versions be available in at least the 10 most commonly spoken languages in Western Australia (other than English).
2. That the juror summons and the Juror Information Sheet state that translated versions of these documents are available online or by telephoning the sheriff's office and that this information be provided in at least the 10 most commonly spoken languages in Western Australia (other than English).

53 RECOMMENDATION 53 _____ Page 99

Guidelines for assessing English language requirements

1. That the sheriff's office develop guidelines to assist its staff, summoning officers and judicial officers 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 that can be asked if a person self-identifies as not understanding English or not being able to communicate in English (such as those used to identify if a person requires an interpreter); circumstances where further inquiries may be warranted (eg, a juror appears to be unable to follow verbal instructions from jury officers or has clear difficulty when trying to ask a question in the jury assembly room); and specific processes to be used in cases involving a significant amount of documentary or written evidence (including that a juror who is concerned about his or her English language ability can seek to be excused by the presiding judge by recording his or her reasons in writing).

54 RECOMMENDATION 54 _____ Page 103

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*;

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

(vi) is the subject of a guardianship order under section 43 of the *Guardianship and Administration Act 1990*.

55 RECOMMENDATION 55 _____ Page 105

Amendment to juror summons and information sheet

That the sheriff's office amend the juror summons and the accompanying information sheet to notify carers, guardians and family members of the ability to request excusal from jury service on behalf of a mentally or intellectually impaired juror and to encourage them to telephone the sheriff's office for advice on what they should do to satisfy the office's requirements for excusal.

56 RECOMMENDATION 56 _____ Page 107

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 will constitute a sufficient reason to be excused by the summoning officer or the trial judge under the Third Schedule to the *Juries Act 1957* (WA).
2. That people who have physical disabilities that may impact upon their ability to discharge the duties of a juror—including mobility difficulties and severe to profound hearing or visual impairment—must notify the summoning officer upon receiving the summons so that, where practicable, reasonable adjustments may be considered to accommodate their disability.
3. That the sheriff develop guidelines for the provision of reasonable adjustments, where practicable, to accommodate a prospective juror's physical disability and that these guidelines be developed in consultation with the Disability Services Commission, the Equal Opportunity Commission, disability organisations and the courts and take into account the information contained in the Department of the Attorney General's *Equality Before the Law Bench Book*.
4. That where a physically disabled juror, for whom relevant facilities to accommodate the disability have been provided, is included in the jury pool or panel the court should be made aware in advance of empanelment, the nature of the disability and the facilities provided to accommodate or assist in overcoming the disability.

57 RECOMMENDATION 57 _____ Page 108

Disability awareness training

That the Department of the Attorney General (in consultation with the Equal Opportunity Commission and relevant disability organisations) provide disability awareness training for jury officers, and court staff generally, to improve awareness of different types of disabilities; the various needs of people with disabilities; existing technologies and accommodations to assist people with disabilities to perform jury service; and the types of reasonable adjustments that can be made to ensure that people with disabilities are not unnecessarily excluded from jury service.

58 RECOMMENDATION 58 _____ Page 115

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.

59 RECOMMENDATION 59 _____ Page 116

Abolition of ‘excuse as of right’

That s 5(c)(i) and Part II of the Second Schedule of the *Juries Act 1957* (WA) be abolished.

60 RECOMMENDATION 60 _____ Page 118

Third Schedule grounds on which a person summoned may be excused from further attendance

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 for determining whether a person summoned should be excused from further attendance

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:

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

Application to be excused before the juror summons date

1. That the *Juries Act 1957* (WA) be amended to provide that a person summoned for jury service can apply to a magistrate to be excused from jury service on the grounds stipulated in the Third Schedule at any time before the jury summons date.
2. That such an application can be made by another person on behalf of the person summoned if the person summoned is not capable of making the application because of sickness, infirmity or disability (whether physical, mental or intellectual); or an inability to understand and communicate in English.
3. That the *Juries Act 1957* (WA) provide that such an application can only be made if the person summoned has already applied to be excused by the summoning officer and the application has been denied.
4. That the *Juries Act 1957* (WA) provide that if such an application is made and the magistrate decides that the person must still attend court on the jury summons date there is no right of appeal. However, an application to be excused can still be made to the presiding judge on the court summons date if the circumstances have changed or the application is made for reasons associated with the actual trial in which the person has been selected to serve as a juror.
5. That such an application is to be made in the prescribed manner (eg, by completing an application form at the Perth Magistrates Court registry or the court registry where the person is required to attend for jury service).
6. That the sheriff's office should develop a standard procedure (to be adopted by all summoning officers) if an application to be excused from jury service is denied. This procedure should include a requirement to notify the person summoned that he or she can apply to a magistrate before the summons date and that if such an application is made it will not be possible to make an application to the presiding judge on the same grounds. The person summoned should be provided with an application form for this purpose and the summoning officer should record on the form that an application to be excused has already been made and rejected by the summoning officer.

63 RECOMMENDATION 63 _____ Page 128

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. That the sheriff's office (in consultation with the 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:
 - (a) That if a person summoned seeks to be excused from jury service on the basis of undue hardship or extreme inconvenience (or substantial inconvenience to the public) the summoning officer must first consider whether the demonstrated hardship or inconvenience would be alleviated by deferring jury service to a later time. If so, the person summoned should be deferred.
 - (b) That a person who is granted deferral is expected to ensure, as far as practicable, that he or she is available on the deferral date.
 - (c) The circumstances in which a person should be excused from further attendance on the deferral date.
 - (d) The procedures to be used to enable prospective jurors who are deferred to select the most suitable time for their deferred jury service.

64 RECOMMENDATION 64 _____ Page 133

Jury service awareness raising – reimbursement of lost income

That the Department of the Attorney General adequately resource 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.

65 RECOMMENDATION 65 _____ Page 134

Increase juror allowances

That the daily allowances set out in regulation 4 of the *Juries Regulations 2008* (WA) be increased to at least a level that would adequately account for inflation.

66 RECOMMENDATION 66 _____ Page 138

Protection of employment – offence and penalty

1. 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 or independent contractor because the employee or independent contractor is, was or will be absent from employment on jury service.
2. That the above offence carry a maximum fine of \$10,000 for individuals and \$50,000 for corporations or a maximum term of 12 months' imprisonment or both.

67 RECOMMENDATION 67 _____ Page 142

Non-compliance with a juror summons

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

1. That a person who fails to comply with a juror summons, without reasonable excuse, commits a simple offence and that the maximum penalty for this offence is a fine of \$2,000.
2. That 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 serve an infringement notice on that person informing the person that if he or she does not wish to be prosecuted for the offence in court, he or she may pay the amount stated in the notice (the infringement penalty).
3. That the infringement penalty be \$800.
4. That any other consequential amendments to the *Juries Act 1957* (WA) and the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) be made.

68 RECOMMENDATION 68 _____ Page 143

Other offences

That, as part of its current review of the *Juries Act 1957* (WA), the Department of the Attorney General examine ss 53–55 of the *Juries Act* to determine whether the provisions are required and, if so, whether any proscribed conduct should be the subject of an offence with a specified maximum penalty.

Appendix B: List of submissions

Submissions for this Reference were received from the following:

Aboriginal Legal Service (WA)
Bettine Heathcote
Brian Tennant
Carl Campagnoli, Jury Manager (WA)
Chief Justice Wayne Martin, Chief Justice of Western Australia
Corruption and Crime Commission of Western Australia
Council on the Ageing (WA)
Criminal Lawyers Association of Western Australia
Danielle Davies, Acting Registrar, Supreme Court of Western Australia
Department of the Attorney General (WA)
Department for Child Protection (WA)
Department for Communities (WA)
Disability Services Commission (WA)
District Court of Western Australia and Supreme Court of Western Australia (joint submission)
Gillian Braddock SC
John Slattery
June Dunstan
June MacDonald
Judith Anne Bailey
Jury Research Unit, University of Western Australia
Justice of the Peace Branch, Department of the Attorney General (WA)
Justice Narelle Johnson, Chairperson, Prisoners Review Board and Mentally Impaired Accused Review Board
Justice Stephen Thackray, Chief Judge, Family Court of Western Australia
Ken Steer, Perth Bailiff
Law Society of Western Australia
Legal Aid Western Australia
Legislative Assembly and Legislative Council (joint submission)
Margaret Thomas
Mary Chape
Michael Godfrey
Nicholas Agocs JP
Nita Sadler

Office of the Director of Public Prosecutions (WA)
Office of Multicultural Interests (WA)
Ombudsman Western Australia
Professor Michael Gillooly, University of Western Australia
Ray Hunt
Rory Ellison
Ruth Kershaw
Sussex Street Community Law Services (Inc), Disability Discrimination Unit
Tom Rollo
Western Australia Police
Western Australian Electoral Commission
Western Australian Industrial Relations Commission

Appendix C: List of people consulted

The Commission thanks the following people for their input during this Reference:

Andrew Marshall, Department of the Attorney General (WA)
Andy Gill, Senior Legal Officer, Department for Child Protection (WA)
Ann Brown, Associate to Master Sanderson, Supreme Court of Western Australia
Carl Campagnoli, Manager Jury Services, Sheriff's Office (WA)
Chief Judge Antoinette Kennedy, District Court of Western Australia
Debbie Cooper, Aboriginal Fines Liaison Officer, Kununurra Magistrates Court
Dr Ron Chalmers, Director General, Disability Services Commission (WA)
Gavan Jones, Director Higher Courts, Department of the Attorney General (WA)
Gavin Whittome, Operations Manager District Court Building, Western Liberty Group
Geoff Manton, State Manager, Deaf Society of Western Australia
Helen MacKinnon, Sheriff's Office (WA)
Hon Michael Mischin MLC, Parliament of Western Australia
Ian Norrish, Jury Summoning Officer, Jury Central Summoning Bureau, Her Majesty's Court Service (UK)
Jennifer Endersbee, Acting Manager Business Services, District Court of Western Australia
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
Judith Fordham, University of Western Australia
June van de Klashorst, Chair, Seniors Ministerial Advisory Council (WA)
Justice John McKechnie, Supreme Court of Western Australia
Kay Lunt, A/Director, Seniors Carers and Volunteering, Department for Communities (WA)
Keith Chapman, Principal Registrar, Supreme Court of Western Australia
Li Li Law, Legal Practice Board (WA)
Mary Anne Warren, Jury Manager (NT)
Merrilyn Aylett, Principal Investigation and Conciliation Officer, Australian Human Rights Commission
Mia Powell, Executive Directorate, Corruption and Crime Commission of Western Australia
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)
Steven Cook, Acting Manager Jury Services, Sheriff's Office (WA)
Tara Gupta, General Counsel, Department for Child Protection (WA)
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)