



A Review of Jury Selection

Report

**Queensland
Law Reform Commission**

**A Review of Jury Selection
Report**

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To: The Honourable Paul Lucas MP
Deputy Premier, Attorney-General, Minister for Local Government and
Special Minister of State

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the
Commission is pleased to present its Report, *A Review of Jury Selection*.

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Table of contents

EXECUTIVE SUMMARY	i
SUMMARY OF RECOMMENDATIONS	vii
CHAPTER 1	1
INTRODUCTION	1
INTRODUCTION	1
SCOPE AND STRUCTURE OF THIS REVIEW	1
METHODOLOGY OF THIS REVIEW.....	2
Discussion Paper	2
Consultation and submissions	2
This Report.....	3
TERMINOLOGY	4
CURRENCY	5
CHAPTER 2	7
THE ROLE AND NATURE OF JURIES IN CRIMINAL TRIALS	7
THE CENTRAL ROLE OF THE JURY IN CRIMINAL TRIALS	7
FREQUENCY OF CRIMINAL JURY TRIALS IN QUEENSLAND.....	10
HISTORICAL BACKGROUND.....	11
CONTEMPORARY SOURCES OF THE LAW.....	11
HOW CRIMINAL TRIALS OPERATE: BASIC CONCEPTS	12
JURORS' PERCEPTIONS OF THE JURY SYSTEM	14
CONSIDERATIONS FOR THIS REVIEW.....	14
CHAPTER 3	17
LIABILITY TO SERVE AS A JUROR	17
INTRODUCTION	17
THE CURRENT PROVISIONS IN QUEENSLAND.....	17
HISTORY OF THE QUEENSLAND PROVISIONS.....	22
The Jury Acts of 1867, 1884 and 1923	22
The <i>Jury Act 1929</i> (Qld).....	23
The <i>Jury Act 1995</i> (Qld).....	23
COMMONWEALTH LEGISLATION	25
TRENDS IN OTHER JURISDICTIONS.....	26
THE OTHER AUSTRALIAN JURISDICTIONS	27
Australian Capital Territory.....	27
New South Wales.....	28
Northern Territory.....	30
South Australia	30
Tasmania.....	31
Victoria	31
Western Australia	32
JURISDICTIONS OUTSIDE AUSTRALIA.....	34
England and Wales	34
Hong Kong	39
Ireland	39

New Zealand	40
Scotland	41
CHAPTER 4	43
WHO SERVES ON JURIES?	43
INTRODUCTION	43
WHO ARE THE JURORS?	44
Queensland	44
Queensland population demographics	44
Queensland jury demographics	46
Elsewhere in Australia.....	49
New South Wales.....	51
Tasmania.....	53
Victoria	53
Western Australia.....	54
INDIGENOUS AUSTRALIANS.....	55
Statistics	55
Indigenous representation on juries.....	56
RATES OF EXCUSAL OR EXEMPTION.....	57
RATES OF DISOBEDIENCE	59
CHAPTER 5	61
JURY SELECTION: A STRATEGY FOR REFORM	61
GUIDING PRINCIPLES.....	61
Right to a fair trial	61
Independence	62
Representativeness	62
Impartiality	65
Non-specialist composition	66
Competence	66
Non-discrimination	67
THE COMMISSION'S APPROACH TO REFORM	67
Increasing the pool of prospective jurors	67
Reducing the burden of jury service	68
CHAPTER 6	71
QUALIFICATION FOR JURY SERVICE.....	71
INTRODUCTION	71
ELECTORAL ENROLMENT	71
Citizenship.....	76
NSWLRC's recommendations	79
LRCWA's recommendations	79
Discussion Paper	80
Consultation	80
The Commission's view	80
Recommendation	81
CRIMINAL RECORD DISQUALIFICATION.....	81
The <i>Criminal Law (Rehabilitation of Offenders) Act 1986</i> (Qld).....	87
Graduated periods of exclusion	89
NSWLRC's recommendations	91
LRCWA's recommendations.....	92

Permanent exclusion.....	93
NSWLRC's recommendations	96
LRCWA's recommendations.....	96
Temporary exclusion.....	97
People who are serving or have completed a term of imprisonment.....	97
NSWLRC's recommendations	98
LRCWA's recommendations.....	99
Juvenile offenders.....	100
NSWLRC's recommendations	101
LRCWA's recommendations.....	102
People who are subject to a criminal court order.....	103
NSWLRC's recommendations	104
LRCWA's recommendations.....	106
Discussion Paper	107
Consultation	108
Summary convictions.....	108
Convictions for which the rehabilitation period has expired.....	109
People who are currently serving a sentence or are subject to a criminal court order.....	110
Sentence of detention as a juvenile	111
The Commission's view	112
Recommendations	114

CHAPTER 7	117
EXCLUSION ON THE BASIS OF OCCUPATION	117
INTRODUCTION	117
CURRENT OCCUPATIONAL EXCLUSIONS	118
THE BASIS FOR OCCUPATIONAL EXCLUSION.....	119
Limiting the categories of exclusion	120
Discussion Paper	123
Consultation	123
The Commission's view	124
Recommendation	125
EXCLUSION WHILST HOLDING AN OFFICE OR POSITION	125
The Governor	125
Discussion Paper	127
Consultation	127
The Commission's view	128
Recommendations	128
Members of Parliament and officers of the parliamentary service.....	128
NSWLRC's recommendations	130
LRCWA's recommendations.....	131
Discussion Paper	131
Consultation	132
The Commission's view	132
Recommendations	132
Directors-General of Government departments.....	132
Discussion Paper	133
Consultation	133
The Commission's view	133
Recommendation	133
Judges and magistrates	134

NSWLRC's recommendations	136
LRCWA's recommendations.....	137
Discussion Paper	137
Consultation	138
The Commission's view	138
Recommendation.....	138
Members of other courts of record.....	138
Discussion Paper	140
Consultation	140
The Commission's view	141
Recommendation.....	141
Local government mayors and other councillors	141
Discussion Paper	142
Consultation	142
The Commission's view	145
Recommendation.....	145
Local government chief executive officers.....	145
Discussion Paper	146
Consultation	146
The Commission's view	146
Recommendation.....	147
Lawyers.....	147
NSWLRC's recommendations	151
LRCWA's recommendations.....	152
Discussion Paper	153
Consultation	154
The Commission's view	155
Recommendations	157
Police officers.....	159
NSWLRC's recommendations	160
LRCWA's recommendations.....	161
Discussion Paper	162
Consultation	162
The Commission's view	163
Recommendation.....	163
Detention centre employees, corrective services officers, and Parole Board members ..	163
NSWLRC's recommendations	164
LRCWA's recommendations.....	165
Discussion Paper	165
Consultation	165
The Commission's view	167
Recommendation.....	167
Other public sector officers and people involved with the criminal justice system	168
Discussion Paper	171
Consultation	171
The Commission's view	171
Recommendation.....	172
Crime and Misconduct Commission	172
Discussion Paper	173
Consultation	174
The Commission's view	174
Recommendation.....	174
Court officers.....	175

Discussion Paper	177
Consultation	177
The Commission's view	178
Recommendation	178
Justices of the peace with power to constitute a court	178
Discussion Paper	180
The Commission's view	180
Recommendation	181
EXCLUSION AFTER LEAVING AN OFFICE OR POSITION	181
Permanent exclusion	182
Discussion Paper	183
Consultation	183
The Commission's view	184
Recommendations	184
Exclusion for a limited period after leaving office	185
Discussion Paper	188
Consultation	188
The Commission's view	190
Recommendations	191
SPOUSES OF EXCLUDED PEOPLE	193
Discussion Paper	193
Consultation	194
The Commission's view	194
Recommendation	194
COMMONWEALTH EXCLUSIONS	194
Senior Commonwealth public servants	196
Discussion Paper	196
Consultation	197
The Commission's view	197
Recommendation	197
CHAPTER 8	199
EXCLUSION ON THE BASIS OF PERSONAL ATTRIBUTES	199
INTRODUCTION	200
CURRENT GROUNDS OF INELIGIBILITY	200
THE BASIS FOR EXCLUSION	200
Competence	201
Non-discrimination	201
The need for balance	203
PERSONS 70 YEARS OR OLDER	203
NSWLRC's recommendations	205
LRCWA's recommendations	206
Discussion Paper	206
Consultation	207
The Commission's view	208
Recommendations	208
PERSONS WHO ARE UNABLE TO READ OR WRITE ENGLISH	209
NSWLRC's recommendations	213
LRCWA's recommendations	214
Discussion Paper	215
Consultation	216
The Commission's view	217

Recommendations	219
PERSONS WITH A PHYSICAL DISABILITY	220
Reasonable accommodation.....	223
NSWLRC's recommendations	225
LRCWA's recommendations	227
Discussion Paper	228
Consultation	229
The Commission's view	232
Recommendations	233
PERSONS WITH A MENTAL DISABILITY	234
NSWLRC's recommendations	237
LRCWA's recommendations	237
Discussion Paper	239
Consultation	239
The Commission's view	241
Recommendations	243
PERSONS OF RELIGIOUS VOCATION OR BELIEF	243
Discussion Paper	246
Consultation	246
The Commission's view	248
Recommendation	248
CHAPTER 9	251
EXCUSAL AND DEFERRAL	251
INTRODUCTION	252
THE BASIS FOR EXCUSAL	252
EXCUSAL AS OF RIGHT.....	254
Discussion Paper	256
Consultation	257
The Commission's view	258
Recommendation	259
EXCUSAL AS OF RIGHT FOR PREVIOUS JURY SERVICE	259
NSWLRC's recommendations	260
LRCWA's recommendations	261
Discussion Paper	261
Consultation	262
The Commission's view	262
Recommendations	263
EXCUSAL FOR CAUSE.....	263
NSWLRC's recommendations	267
LRCWA's recommendations	268
Discussion Paper	270
Consultation	270
The Commission's view	272
Recommendations	274
DEFERRAL OF JURY SERVICE	274
NSWLRC's recommendations	275
LRCWA's recommendations	275
Advantages of a system of deferral	276
Resource implications	277
Discussion Paper	278
Consultation	278

The Commission's view	279
Recommendation	280
EXCUSAL AND DEFERRAL GUIDELINES	281
Discussion Paper	283
Consultation	283
The Commission's view	283
Recommendations	284
CHAPTER 10	285
JURY SELECTION AND EMPANELMENT PROCESSES.....	285
INTRODUCTION	286
JURY LISTS AND SUMMONSES.....	287
Compilation of jury rolls.....	288
Notice to prospective jurors.....	289
Summons	290
NSWLRC's recommendations	291
Discussion Paper	292
Consultation	292
The Commission's view	292
Recommendation	293
JUROR ORIENTATION	293
Review of orientation material.....	294
Discussion Paper	296
Consultation	296
The Commission's view	297
Recommendation	297
EMPANELLING A JURY	297
Empanelment of jurors	297
Reserve jurors	299
Supplementing the jury panel.....	300
CHALLENGING JURORS.....	300
Information about jurors	301
LRCWA's recommendations	304
Challenges to the jury panel as a whole	306
Challenges for cause	307
Special challenges for cause	308
Peremptory challenges	308
Arguments favouring peremptory challenges	312
Arguments against peremptory challenges.....	314
NSWLRC's recommendations	315
LRCWA's recommendations	316
Discussion Paper	318
Consultation	318
Peremptory challenges	318
The number of peremptory challenges	323
Information about jurors	324
Calling of jurors by number and name.....	324
The Commission's view	324
Challenges to the jury panel as a whole	325
Challenges for cause	325
Special challenges for cause	325
Peremptory challenges	325

The number of peremptory challenges generally	325
The number of peremptory challenges if there are two or more defendants in a criminal trial	326
Information about jurors	326
The calling of jurors by number and name	327
Recommendations	327
EXCUSING AND DISCHARGING JURORS.....	327
Discharge at the final stage of selection	328
Discharge during the trial	329
NSWLRC's recommendations	332
LRCWA's recommendations	334
Discussion Paper	334
Consultation	334
The Commission's view	335
Recommendations	336
MINIMISING OR RESTRICTING THE LENGTH OF SERVICE	336
Serving on long trials.....	337
Excusal after serving on lengthy trials	338
One day, one trial attendance	339
Discussion Paper	340
Consultation	341
The Commission's view	343
Serving on longer juries	343
Excusal after serving on lengthy trials	343
One day, one trial attendance.....	343
Recommendations	343
IRREGULARITIES IN SUMMONING OR EMPANELMENT	344
Discussion Paper	346
Consultation	346
The Commission's view	346
Recommendation	347
CHAPTER 11	349
REGIONAL ISSUES AND INDIGENOUS REPRESENTATION	349
INTRODUCTION	349
JURY DISTRICT BOUNDARIES.....	350
Queensland	350
Other Australian jurisdictions	352
NSWLRC's recommendations	355
LRCWA's recommendations	356
INDIGENOUS PARTICIPATION	357
NSWLRC's recommendations	363
LRCWA's recommendations	364
Discussion Paper	365
Consultation	365
General comments.....	365
Jury districts	367
Transport and accommodation	368
Education	369
Research.....	369
The Commission's view	369
Introduction	369

Review of jury districts	370
Transport.....	371
Accommodation	372
Education	372
Research.....	372
Establishment of working group.....	373
Recommendations	373
JUDICIAL POWER TO DIRECT THE COMPOSITION OF THE JURY.....	375
Discussion Paper	378
Consultation	378
The Commission's view	380
Recommendation	381
CHAPTER 12	383
REMUNERATION OF JURORS	383
INTRODUCTION	383
WORKPLACE RELATIONS LEGISLATION AND AWARDS.....	384
<i>Fair Work Act 2009</i> (Cth)	384
<i>Industrial Relations Act 1999</i> (Qld)	385
Directive 13/2010: Court Attendance and Jury Service	386
JURORS' ALLOWANCES IN QUEENSLAND	386
Statutory allowances	386
Comparison with minimum and average salaries	388
Actual expenditure on jurors	388
THE POSITION IN OTHER AUSTRALIAN JURISDICTIONS	389
Australian Capital Territory.....	389
New South Wales.....	389
Northern Territory.....	391
South Australia	392
Tasmania.....	392
Victoria	394
Western Australia	394
DISCUSSION PAPER.....	397
CONSULTATION	397
THE COMMISSION'S VIEW	398
Daily allowance for jury service.....	398
Travelling allowance.....	400
Family care expenses	401
RECOMMENDATIONS	401
CHAPTER 13	403
CIVIL JURY TRIALS	403
INTRODUCTION	403
AVAILABILITY OF TRIAL BY JURY	403
FREQUENCY OF CIVIL JURY TRIALS.....	404
FEE FOR CIVIL JURIES	405
HOW CIVIL JURY TRIALS OPERATE: BASIC CONCEPTS	405
ISSUES FOR CONSIDERATION.....	406
NSWLRC's recommendations	407
LRCWA's recommendations	408
Discussion Paper	408
Consultation	409

The Commission's view	409
Recommendation	410
CHAPTER 14	413
BREACHES AND PENALTIES.....	413
INTRODUCTION	413
PENALTIES UNDER THE <i>JURY ACT 1995</i> (QLD).....	415
Regulations	417
Contempt of court.....	418
Proceedings for offences and enforcement of fines	419
COMPARISON WITH THE JURY LEGISLATION IN OTHER JURISDICTIONS	420
Failure to attend or answer questions	421
Breaches of confidentiality	422
Influencing or threatening a juror	424
Impersonating a juror	424
Wrongful termination of employment	425
Receiving excess juror fees	426
Breaches by officials	427
COMPARISON WITH OTHER LEGISLATION IN QUEENSLAND.....	427
Penalties for failing to enrol or vote.....	427
Penalties for failing to appear when summoned as a witness	428
Penalties for offences against the administration of law and justice.....	428
ARE THE PRESENT PENALTIES APPROPRIATE?	429
ARE THE PRESENT PENALTIES EFFECTIVE?	431
A POSSIBLE INFRINGEMENT NOTICE SCHEME.....	433
Infringement notices under the <i>State Penalties Enforcement Act 1999</i> (Qld)	433
Issuing of infringement notices	433
Obligations and options under infringement notices.....	434
Registration of default certificate by administering authority	434
Infringement notices for failing to vote	435
NSWLRC's recommendations	437
LRCWA's recommendations	438
DISCUSSION PAPER.....	439
CONSULTATION	440
THE COMMISSION'S VIEW	442
RECOMMENDATIONS	444
APPENDIX A.....	447
TERMS OF REFERENCE	447

Executive Summary

INTRODUCTION

[1] This Executive Summary gives an overview of the principal recommendations made in this Report. A complete set of all of the Commission's recommendations is included in the Summary of Recommendations, immediately following this section of the Report.

THE COMMISSION'S APPROACH

[2] The recommendations in this Report are intended to ensure that the pool from which prospective jurors are drawn is as large as circumstances and principle permit. This will enhance the representative nature of juries, and ensure that the burdens and benefits of jury service are shared as widely and fairly as possible.

[3] The following principles have informed the Commission's recommendations, particularly in relation to qualification for jury service, exclusion based on occupation or personal attributes, and excusal from jury service:

- the right to a fair trial;
- the independence, impartiality and competence of jurors;
- the representativeness and non-specialist composition of the jury; and
- the importance of non-discrimination in juror selection.

THE EFFECT OF A PERSON'S CRIMINAL HISTORY

[4] The Commission recommends (Recs 6-2, 6-3, 6-4) that the *Jury Act 1995* (Qld) be amended to ameliorate the disqualifying effect of a person's criminal history. In particular, the Commission recommends that:

- section 4(3)(m) of the Act be amended so that a conviction in relation to an indictable offence does not exclude a person from jury service if the conviction is heard and determined summarily; and
- the operation of section 4(3)(m) and (n) of the Act is to be subject to the operation of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), so that these provisions will not exclude a person from jury service if the rehabilitation period in relation to the relevant conviction has expired and the conviction has not been revived.

[5] The Commission also recommends (Rec 6-5) that the *Jury Act 1995* (Qld) be amended to clarify that a person is not eligible for jury service while the person

is serving a sentence of imprisonment, on bail awaiting trial or sentence, subject to a non-custodial sentence, or on parole.

EXCLUSION OR EXCUSAL ON THE BASIS OF OCCUPATION

The effect of a person's current office or occupation

[6] The Commission recommends (Rec 7-1) that occupational ineligibility should be confined to those categories of people whose presence on a jury would, or could be seen to, compromise:

- the independence of the jury from the executive, legislative and judicial arms of government because of their special or personal duties to the state; or
- the impartiality and non-specialist composition of the jury because of their employment or engagement in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of criminal justice or penal administration.

[7] Accordingly, the Commission recommends that:

- the Governor, Members of Parliament, judges and magistrates, police officers, detention centre employees and corrective services officers should continue to be ineligible for jury service (Recs 7-2, 7-4, 7-7, 7-14, 7-15(a)–(b));
- local government mayors and councillors, who are presently ineligible for jury service, should be made eligible (Rec 7-9);
- lawyers, as a general class, should be made eligible for jury service (Rec 7-11), but:
 - certain lawyers should continue to be ineligible, including the Director of Public Prosecutions and prosecutors within the Office of the Director of Public Prosecutions, Australian lawyers employed by Legal Aid or Crown Law, and Australian legal practitioners who have specialist accreditation in criminal law or who have nominated criminal law as an area of practice (Rec 7-12);
 - certain other lawyers who are employed or engaged in the provision of legal services in criminal cases will be eligible but entitled to be excused from jury service (Rec 7-13(a)); and
 - additionally, for a civil trial, certain lawyers who are employed or engaged in the provision of legal services in civil cases will be entitled to be excused (Rec 13-1(a));
- the following persons, who are presently eligible for jury service, should be made ineligible: members of a court of record; public service employees

whose functions involve the supervision of young persons who are subject to non-custodial court orders; members of a Parole Board; Commissioners of the Crime and Misconduct Commission and persons employed or engaged by that Commission (other than officers or employees in a clerical, administrative or support staff role); various court officers; and appointed justices of the peace (magistrates court) (Recs 7-8, 7-15(c), (d), 7-17, 7-18, 7-19).

The effect of a person's previous office or occupation

[8] The Commission recommends (Rec 7-20) that no occupation, office or profession should render a person permanently ineligible for jury service. However, persons who have held certain specified offices or occupations within the preceding three years (such as a judge, magistrate, police officer, detention centre employee or corrective services officer) should be ineligible for jury service for that limited period (Rec 7-22).

EXCLUSION OR EXCUSAL ON THE BASIS OF PERSONAL ATTRIBUTES

[9] The Commission recommends that:

- a person who is 70 years or more should be eligible for jury service, but entitled to be excused without having to show cause (Recs 8-1 to 8-3);
- a person who is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively is ineligible for jury service (Rec 8-4);
- the *Jury Act 1995* (Qld) should be amended to remove the ineligibility of persons with a physical disability, and should instead provide that prospective jurors should inform the Sheriff, as part of the questionnaire issued with the *Notice to Prospective Juror*, of any physical disabilities and special needs that they have (Recs 8-8, 8-9);
- the *Jury Act 1995* (Qld) should be amended to provide that a person who has an intellectual, psychiatric, cognitive, or neurological impairment that makes the person incapable of effectively performing the functions of a juror is ineligible for jury service (Rec 8-14); and
- if it appears to the Sheriff or a judge that:
 - a prospective juror does not meet the required standard of language proficiency; or
 - after consideration of the facilities that are required and can be made available to accommodate a person's physical disability, a prospective juror is unable to discharge the duties of a juror effectively; or

- a prospective juror or juror is incapable of effectively performing the functions of a juror because of an intellectual, psychiatric, cognitive, or neurological impairment;

the Sheriff or the judge, as the case may be, may excuse the person from further attendance, or the judge may discharge the person from further attendance (Recs 8-5, 8-6, 8-10, 8-11, 8-15).

DEFERRAL OF JURY SERVICE

[10] The Commission recommends that a system of deferral be introduced to deal with valid, but temporary, reasons why a person is unable to perform jury service. Under the recommended system, the Sheriff and the judge should have the power to defer a person's jury service to a jury service period within the next 12 months that the person has indicated would be a more convenient time (Rec 9-6). Generally, deferral should be preferred to excusal, and excusal should be granted only if deferral is not reasonably practicable and appropriate (Rec 9-7).

[11] The Commission also recommends that a single set of guidelines, applying in both the Supreme Court and the District Court, should be developed and published to provide assistance in considering applications for excusal from, and deferral of, jury service (Rec 9-7).

SELECTION AND EMPANELMENT PROCESS

Notice of long trials

[12] The Commission recommends (Rec 10-11) that, to avoid difficulties in forming juries for long trials, the *Notice to Prospective Juror* should indicate if there is a possibility that prospective jurors may be required to serve for longer than the standard two week period, and the *Questionnaire for Prospective Juror* that accompanies the Notice should elicit information about whether prospective jurors are prepared to serve on a jury for that extended period.

Peremptory challenges

[13] The Commission considers that peremptory challenges are one of the fundamental safeguards in the *Jury Act 1995* (Qld) against the selection of a jury that is, or is perceived to be, biased or unfairly unrepresentative. It therefore recommends that section 42 of the Act:

- should continue to provide for the parties' rights to exercise peremptory challenges (Rec 10-4); and
- should not be amended to reduce the current maximum number of peremptory challenges that are available to the parties (Recs 10-5, 10-6).

REGIONAL ISSUES AND INDIGENOUS REPRESENTATION

[14] The Commission considers that it is critical that steps be taken to increase Indigenous participation in the jury system. This is important not only to increase the representativeness of juries, but also to reduce the sense of exclusion from the criminal justice system that is experienced by many Indigenous people.

[15] It is anticipated that some of the Commission's recommendations, although not specifically directed towards Indigenous people, should nonetheless contribute to an increased representation of Indigenous people on juries. In addition, the Commission makes a number of non-legislative recommendations to address practical barriers to Indigenous participation:

- the Department of Justice and Attorney-General should, as a priority, review the current jury districts with a view to increasing the representativeness of juries and including additional Indigenous communities (Rec 11-1);
- if public or private transport is not reasonably available or cannot reasonably be used, the Sheriff should, if necessary, make arrangements, in advance, to assist people from Indigenous communities to attend court when summoned for jury service, and should meet the costs of those arrangements (Rec 11-2);
- if it is not reasonably practicable for a person from an Indigenous community to travel each day to attend court for jury service, accommodation should be arranged, and funded, to enable the person to attend (Rec 11-3);
- culturally appropriate educational programs that promote the importance and benefits of jury service should be developed and made available within Indigenous communities (Rec 11-4); and
- research should be conducted to determine the extent of representation of Indigenous people on juries in Queensland and the factors that may increase or reduce their rate of participation in jury service (Rec 11-5).

REMUNERATION AND ALLOWANCES

[16] The Commission recommends that the *Jury Regulation 2007* (Qld) be amended:

- so that the daily remuneration of a juror or reserve juror is based on the National Minimum Wage (Rec 12-1);
- to provide that the additional remuneration for a long trial is to apply after the 10th weekday, rather than the 20th weekday (Rec 12-2);
- to clarify the circumstances in which taxi fares may be reimbursed (Rec 12-3); and

- to provide for the reimbursement of reasonable out-of-pocket expenses for child care or family care (Rec 12-5).

BREACHES AND PENALTIES

[17] To discourage prospective jurors from failing to return the *Questionnaire for Prospective Juror* to the Sheriff, the Commission recommends (Rec 14-2) that:

- failure to return the questionnaire in accordance with section 18(3) of the *Jury Act 1995* (Qld) should be made an infringement notice offence under the *State Penalties Enforcement Regulation 2000* (Qld); and
- the maximum penalty for that offence should be changed from 10 penalty units (\$1000) or two months' imprisonment to two penalty units (\$200).

RESOURCING ISSUES

[18] The Commission recognises that a number of its recommendations will have resourcing implications for the Department of Justice and Attorney-General, particularly the recommendations in relation to the review of the current jury districts, the provision of transport and accommodation to facilitate Indigenous participation in the jury system, changes to remuneration and allowances for jury attendance, and the establishment of a system of deferral.

[19] The Commission considers, however, that jury service is an important civic duty and that funding of these matters is critical to ensure that:

- the current barriers to Indigenous participation are alleviated or removed;
- the important public service performed by jurors is given increased recognition; and
- greater numbers of people are willing and able to serve as jurors.

Summary of Recommendations

CHAPTER 6: QUALIFICATION FOR JURY SERVICE

Electoral enrolment

- 6-1 Electoral enrolment should continue to be the basis of juror qualification. Section 4(1) and (2) of the *Jury Act 1995* (Qld) should therefore be retained.

Criminal record disqualification

- 6-2 Section 4(3)(m) of the *Jury Act 1995* (Qld) should be amended to provide that a person who has been convicted of an indictable offence is ineligible for jury service but only if the person was convicted on indictment.

- 6-3 The *Jury Act 1995* (Qld) should be amended to provide that:

- (a) a person is not ineligible under section 4(3)(m) if, under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld):

- (i) the rehabilitation period has expired in relation to the conviction; and
- (ii) the conviction has not been revived; and

- (b) a person is not ineligible under section 4(3)(n) if, under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld):

- (i) the rehabilitation period has expired in relation to the conviction for which the sentence of imprisonment was imposed; and
- (ii) the conviction has not been revived.

- 6-4 Sections 12(4) and 68(6) of the *Jury Act 1995* (Qld), which exclude the operation of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) for the purpose of determining whether a person is ineligible for jury service, should be omitted.

- 6-5 The *Jury Act 1995* (Qld) should be amended to provide a person is not eligible for jury service if the person, in Queensland or elsewhere, is:

- (a) serving a sentence of imprisonment;

- (b) on bail awaiting trial or sentence;
- (c) subject to a non-custodial sentence, such as a suspended sentence of imprisonment or a community service order;
- (d) on parole.

6-6 The *Jury Act 1995* (Qld) should be amended to provide that, for the purpose of section 4(3)(n), a sentence of imprisonment should be taken to include a sentence of detention under the *Youth Justice Act 1992* (Qld).

CHAPTER 7: EXCLUSION ON THE BASIS OF OCCUPATION***The basis for occupational exclusion***

- 7-1 Occupational ineligibility should be confined to those categories of people whose presence on a jury would, or could be seen to, compromise:**
- (a) the independence of the jury from the executive, legislative and judicial arms of government because of their special or personal duties to the state; or**
 - (b) the impartiality and non-specialist composition of the jury because of their employment or engagement in law enforcement, criminal investigation, the provision of legal services in criminal cases, or the administration of criminal justice or penal administration.**

Exclusion whilst holding an office or position

- 7-2 The Governor should be ineligible for jury service while holding that office. Section 4(3)(a) of the *Jury Act 1995 (Qld)* should therefore be retained without amendment.**
- 7-3 The Governor's household and other staff should remain eligible for jury service.**
- 7-4 Section 4(3)(b) of the *Jury Act 1995 (Qld)*, which provides that a Member of Parliament is ineligible for jury service, should be retained without amendment.**
- 7-5 Officers and employees of the Queensland parliamentary service should remain eligible for jury service.**
- 7-6 Directors-General of Queensland Government departments and other senior public servants in Queensland should remain eligible for jury service.**
- 7-7 Section 4(3)(d) of the *Jury Act 1995 (Qld)* should be amended to provide that a person who is (in the State or elsewhere) a judge or magistrate, or an acting judge or magistrate, is ineligible for jury service.**
- 7-8 Section 4(3)(e) of the *Jury Act 1995 (Qld)*, which provides that a person who is a presiding member of the Land and Resources Tribunal is ineligible for jury service, should be amended to provide that a person who is a member of a court of record in Queensland is ineligible for jury service.**

- 7-9 Section 4(3)(c) of the *Jury Act 1995* (Qld), which provides that a local government mayor or other councillor is ineligible for jury service, should be repealed.
- 7-10 Local government chief executive officers should remain eligible for jury service in Queensland.
- 7-11 Lawyers as a general class should be eligible for jury service, subject to Recommendation 7-12 below.
- 7-12 Section 4(3)(f) of the *Jury Act 1995* (Qld) should be amended to provide that the following persons are ineligible for jury service:
- (a) a person who holds the office of Director of Public Prosecutions, Acting Director of Public Prosecutions, or Deputy Director of Public Prosecutions;
 - (b) a person who is an Australian lawyer and who is appointed or employed by the Office of Director of Public Prosecutions, including a person who is appointed as a Crown Prosecutor;
 - (c) a member of the Legal Aid Board appointed under the *Legal Aid Queensland Act 1997* (Qld);
 - (d) the Chief Executive Officer of Legal Aid appointed under the *Legal Aid Queensland Act 1997* (Qld);
 - (e) an Australian lawyer who is employed or engaged by Legal Aid, including as a Public Defender;
 - (f) an Australian lawyer who is employed or engaged by Crown Law, including as a Crown Solicitor, Senior Deputy Crown Solicitor, Deputy Crown Solicitor, Assistant Crown Solicitor, or Crown Counsel;
 - (g) a person who is an Australian legal practitioner and who has attained specialist accreditation in criminal law;
 - (h) a person who is an Australian legal practitioner and who has nominated criminal law as an area of practice with a publicly accessible database or directory held by the Queensland Law Society or the Bar Association of Queensland.

- 7-13** The *Jury Act 1995* (Qld) should be amended to provide that:
- (a)** a person who is otherwise eligible for jury service is entitled to be excused from jury service, on written notice to the Sheriff, if the Sheriff is satisfied that the person is a government legal officer or an Australian legal practitioner and is employed or engaged in the provision of legal services in criminal cases; and
 - (b)** if a person on a jury could have claimed excusal on that basis but did not, the person's presence on the jury does not, by itself, invalidate the verdict.
- 7-14** Section 4(3)(g) of the *Jury Act 1995* (Qld) should provide that a person who is a police officer (in the State or elsewhere) is ineligible for jury service.
- 7-15** Section 4(3)(h) and (i) of the *Jury Act 1995* (Qld) should be amended to provide that a person is ineligible for jury service if the person is:
- (a)** a detention centre employee under the *Youth Justice Act 1992* (Qld);
 - (b)** a corrective services officer under the *Corrective Services Act 2006* (Qld);
 - (c)** a public service employee whose functions under the *Youth Justice Act 1992* (Qld) involve the supervision of a young person who is subject to a supervised, non-custodial court order; or
 - (d)** a member of a Parole Board.
- 7-16** The *Jury Act 1995* (Qld) should not be amended to introduce a general category of ineligibility or exclusion for persons employed or engaged in the Department of Justice and Attorney-General, Queensland Corrective Services or the Queensland Police Service.
- 7-17** The *Jury Act 1995* (Qld) should be amended to provide that a person who is a Commissioner of the Crime and Misconduct Commission, or is employed or engaged by the Crime and Misconduct Commission other than in a clerical, administrative or support staff role, is ineligible for jury service.

7-18 The *Jury Act 1995* (Qld) should be amended to provide that officers of a court of record in Queensland,¹ including registrars, Sheriffs, bailiffs, shorthand reporters and recorders, and judges' associates, are ineligible for jury service.

7-19 The *Jury Act 1995* (Qld) should be amended to provide that a person who is a justice of the peace (magistrates court) appointed under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is ineligible for jury service.

Exclusion after leaving an office or position

7-20 No occupation, office or profession should render a person permanently ineligible for jury service.

7-21 The *Jury Act 1995* (Qld) should be amended to remove the ineligibility of former presiding members of the Land and Resources Tribunal and to remove the permanent ineligibility of former judges and magistrates, former police officers, former detention centre employees, and former corrective services officers.

7-22 The *Jury Act 1995* (Qld) should be amended to provide that a person is ineligible for jury service if, in the preceding three years, the person has been:

- (a) a judge or magistrate, an acting judge or magistrate, or a member of another court of record, in Queensland or elsewhere;
- (b) the holder of the office of Director of Public Prosecutions, Acting Director of Public Prosecutions, or Deputy Director of Public Prosecutions;
- (c) an Australian lawyer appointed or employed by the Office of Director of Public Prosecutions, including a person appointed as a Crown Prosecutor;
- (d) a member of the Legal Aid Board appointed under the *Legal Aid Queensland Act 1997* (Qld);
- (e) the Chief Executive Officer of Legal Aid appointed under the *Legal Aid Queensland Act 1997* (Qld);

¹

This does not refer to a person who is admitted to the legal profession in Queensland and is an officer of the Supreme Court under s 38(1)–(2) of the *Legal Profession Act 2007* (Qld).

- (f) an Australian lawyer employed or engaged by Legal Aid, including as a Public Defender;
- (g) an Australian lawyer employed or engaged by Crown Law, including as a Crown Solicitor, Senior Deputy Crown Solicitor, Deputy Crown Solicitor, Assistant Crown Solicitor, or Crown Counsel;
- (h) an Australian legal practitioner with specialist accreditation in criminal law;
- (i) an Australian legal practitioner who has nominated criminal law as an area of practice with a publicly accessible database or directory held by the Queensland Law Society or the Bar Association of Queensland;
- (j) a police officer, in Queensland or elsewhere;
- (k) a detention centre employee, or a person with corresponding functions under a law of another State;
- (l) a public service employee whose functions under the *Youth Justice Act 1992* (Qld) involve the supervision of a young person who is subject to a supervised, non-custodial court order, or a person with corresponding functions under a law of another State;
- (m) a corrective services officer under the *Corrective Services Act 2006* (Qld) or a person with corresponding functions under a law of another State;
- (n) a Commissioner of the Crime and Misconduct Commission, or person employed or engaged by the Crime and Misconduct Commission other than in a clerical, administrative or support staff role, or a person with corresponding functions under a law of another State;
- (o) an officer of a court of record in Queensland or elsewhere,² including a registrar, Sheriff, bailiff, shorthand reporter or recorder, or judge's associate;

²

This does not refer to a person who has been an officer of the Supreme Court under s 38(1)–(2) of the *Legal Profession Act 2007* (Qld) by virtue of his or her admission to the legal profession in Queensland.

- (p) a justice of the peace (magistrates court) appointed under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

7-23 The *Jury Act 1995* (Qld) should be amended to provide that a person who is otherwise eligible for jury service is entitled to be excused from jury service, on written notice to the Sheriff, if the Sheriff is satisfied that the person has been, in the preceding three years, a government legal officer or an Australian legal practitioner employed or engaged in the provision of legal services in criminal cases.

Spouses of excluded people

7-24 A spouse³ of a person who is ineligible on the basis of occupation, office or profession should remain eligible for jury service.

Commonwealth exclusions

7-25 The Queensland Government should press for a review of the exclusion of all senior Commonwealth public servants under regulation 4 of the *Jury Exemption Regulations 1987* (Cth) to determine whether it can be narrowed or confined, having regard to the desirability of keeping juries as representative as possible, sharing the burden of jury service fairly among the community, and not unnecessarily restricting the right to serve on a jury.

3

Under the *Acts Interpretation Act 1954* (Qld) s 36, 'spouse' is defined to include 'de facto partner'.

CHAPTER 8: EXCLUSION ON THE BASIS OF PERSONAL ATTRIBUTES***Persons 70 years or older***

- 8-1 Section 4(3)(j) of the *Jury Act 1995* (Qld), which provides that a person who is 70 years or more is ineligible for jury service unless the person has elected to be eligible for jury service, should be repealed.
- 8-2 Part 4, Division 4 of the *Jury Act 1995* (Qld), which deals with excusals from jury service, should be amended to include a provision to the effect that a person who is 70 years or more is entitled to be excused from jury service for the jury service period or permanently on written notice to the Sheriff and without having to demonstrate any particular disability or other reason why the person should be excused.
- 8-3 Section 4(4) of the *Jury Act 1995* (Qld) and section 4 of the *Jury Regulation 2007* (Qld) are unnecessary and should be repealed.

Persons who are unable to read or write English

- 8-4 Section 4(3)(k) of the *Jury Act 1995* (Qld) should be amended to provide that a person who is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively is ineligible for jury service.
- 8-5 The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to the Sheriff that a prospective juror is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively, the Sheriff may excuse the person from further attendance.
- 8-6 The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to a judge that a prospective juror, or juror, is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively, the judge may excuse or discharge the person from further attendance.
- 8-7 The *Notice to Prospective Juror, Questionnaire for Prospective Juror* and juror summons should include relevant information for people from non-English speaking backgrounds in community languages, including a statement about the availability of translated copies or translation services for the *Notice*.

Persons with a physical disability

- 8-8 Section 4(3)(l) of the *Jury Act 1995* (Qld) should be amended to remove the ineligibility of persons with a physical disability.

- 8-9 Provision should be made for prospective jurors to inform the Sheriff of any physical disabilities and special needs that they have as part of the *Questionnaire* issued with the *Notice to Prospective Juror*, and for the Sheriff, after receiving such information, to make such further inquiries as are necessary to give consideration to the facilities that are required and can be made available to accommodate the person's disability.
- 8-10 The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to the Sheriff, after consideration of the facilities that are required and can be made available to accommodate a person's physical disability, that a prospective juror is unable to discharge the duties of a juror effectively, the Sheriff may excuse the person from further attendance.
- 8-11 The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to a judge, after consideration of the facilities that are required and can be made available to accommodate a person's physical disability, that a prospective juror or juror is unable to discharge the duties of a juror effectively, the judge may excuse or discharge the person from further attendance.
- 8-12 The *Jury Act 1995* (Qld) should be amended to provide that a person who is excused from service by the Sheriff on the basis of physical disability may apply to the judge for a different decision.
- 8-13 The branch of the Department of Justice and Attorney-General that has responsibility for the administration of the Queensland courts (being the branch located within the Brisbane Supreme Court and District Court complex) should consult with peak advocacy organisations for people with physical disabilities on the types of accommodations and assistive technologies that may need to be made or provided by the courts to assist people with disabilities to perform jury service.

Persons with a mental disability

- 8-14 Section 4(3)(l) of the *Jury Act 1995* (Qld) should be amended to provide that a person who has an intellectual, psychiatric, cognitive, or neurological impairment that makes the person incapable of effectively performing the functions of a juror is ineligible for jury service.
- 8-15 The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to the judge that a prospective juror or juror is incapable of effectively performing the functions of a juror because of an intellectual, psychiatric, cognitive, or neurological impairment, the judge may excuse or discharge the person from further attendance.

Persons of religious vocation or belief

8-16 Religious vocation or belief should not render a person ineligible for jury service or otherwise entitle a person to automatic exclusion from jury service. Concerns about impartiality, prior commitments or hardship arising out of a person's religious vocation are appropriately dealt with on a case-by-case basis, according to merit, by the existing provisions for discretionary excusal and discharge that are available to all persons who are summoned for jury service, and, if it is adopted, by a system of deferral of jury service.

CHAPTER 9: EXCUSAL AND DEFERRAL***Excusal as of right***

9-1 Subject to Recommendations 7-13, 7-23, 8-2, 9-2 and 13-1, a person who is otherwise eligible to serve should not be entitled to claim excusal as of right from jury service.

Excusal as of right for previous jury service

9-2 Subject to Recommendation 9-3, section 22 of the *Jury Act 1995* (Qld), which provides an entitlement to excusal for previous jury service, is appropriate and should be retained.

9-3 Section 22 of the *Jury Act 1995* (Qld) should be amended to clarify that the entitlement to excusal provided by that section does not apply to a person who was summoned for a jury service period ending less than one year before the current jury service period but had his or her service deferred to the current jury service period.

Excusal for cause

9-4 Sections 19 and 20 and, subject to Recommendation 9-5, section 21 of the *Jury Act 1995* (Qld) are appropriate and should be retained.

9-5 Section 21 of the *Jury Act 1995* (Qld) should be amended to clarify that section 21(1) does not limit the power of the Sheriff or the judge to excuse a person from jury service under section 19 or 20 of the Act.

Deferral of jury service

9-6 The *Jury Act 1995* (Qld) should be amended to provide for a system of deferral of jury service to deal with valid, but temporary, reasons why a person is unable to perform jury service, to the effect that:

- (a) as an alternative to excusing the person from jury service under section 19 or 20 of the Act, the Sheriff or a judge may defer a person's jury service to a time within the next 12 months that the person has indicated would be a more convenient period;
- (b) in deciding whether to defer a person's jury service, the Sheriff or judge must have regard to the matters listed in section 21 of the Act;
- (c) if the Sheriff or judge thinks fit, the Sheriff or judge may treat an application for excusal as an application for deferral, and may treat an application for deferral as an application for excusal;

- (d) deferral of a person's jury service may be made once only on the particular summons;
- (e) the Sheriff may alter the deferral date if necessary to accommodate court sittings;
- (f) if the Sheriff does not grant a deferral, the person may apply to the judge and the judge may defer the person's jury service;
- (g) when a person whose jury service has been deferred is recalled at the deferral date, the person should not be excused from service unless, having regard to the matters in section 21 of the Act, the person's circumstances have changed.

Excusal and deferral guidelines

9-7 A single set of guidelines, applying in both the Supreme Court and the District Court, should be developed and published to provide assistance in considering applications for:

- (a) excusal from jury service; and
- (b) the deferral of jury service.

9-8 The deferral guidelines should be informed by best practice in the other Australian jurisdictions that have deferral systems.

CHAPTER 10: JURY SELECTION AND EMPANELMENT PROCESSES

Jury lists and summonses

- 10-1 The current two-stage notice and summons procedure provided for under the *Jury Act 1995 (Qld)* for the selection of prospective jurors is appropriate and should be retained.

Juror orientation

- 10-2 The orientation material and processes provided to jurors in Queensland Courts are generally appropriate. It is important that the juror orientation material and processes are internally consistent in order to facilitate the transition of prospective jurors into jury service. They also need to be kept up to date and presented in innovative and flexible formats. In particular, the video presentation given to prospective jurors should be reviewed to ensure that it reflects the current law and practice. As much of the jurors' orientation material as possible, including the jurors' information video, should also be made available on the Courts' website.

Challenging jurors generally

- 10-3 The provisions for challenges to the whole jury panel, challenges for cause, and special challenges for cause in sections 40, 43 and 47 of the *Jury Act 1995 (Qld)* are appropriate and should be retained.

Peremptory challenges

- 10-4 Section 42 of the *Jury Act 1995 (Qld)* should continue to provide for the parties' rights to exercise peremptory challenges.
- 10-5 Section 42 of the *Jury Act 1995 (Qld)* should not be amended to reduce the current maximum number of peremptory challenges available to the parties.
- 10-6 If there are two or more defendants in a criminal trial, each defendant should continue to be entitled to the number of challenges that is allowed to the defence if there is one defendant in a criminal trial; and the prosecution should continue to be entitled to a number of peremptory challenges that is equal to the total number available to the defendants.

Information about jurors

- 10-7 The provisions in sections 29 and 30 of the *Jury Act 1995 (Qld)* dealing with the content of, and the parties' access to and use of, the list of persons summoned for jury service are appropriate and should be retained.

10-8 The procedure for jury selection set out in section 41 of the *Jury Act 1995* (Qld) should not be amended to provide that prospective jurors are to be called by number only.

Excusing and discharging jurors

10-9 Subject to Recommendations 8-6, 8-11 and 8-15, the provisions for the discharge of jurors in sections 46 and 56 of the *Jury Act 1995* (Qld) are appropriate and should be retained.

10-10 The provisions for the discharge of the jury in sections 60 and 61 of the *Jury Act 1995* (Qld) are appropriate and should be retained.

Minimising or restricting the length of service

10-11 The *Notice to Prospective Jurors* sent to prospective jurors who are summoned for jury service in Brisbane should indicate if there is a possibility that they may be required to serve as a juror for longer than the standard two week period. The *Questionnaire for Prospective Juror* that accompanies the *Notice* should elicit information about whether the person is prepared to serve on a jury for that extended period.

10-12 It is unnecessary to amend the *Jury Act 1995* (Qld) to make express provision to allow a trial judge to excuse a juror from further attendance on the basis of having served on a particularly long or harrowing trial.

10-13 A one day, one trial system should not be implemented in Queensland.

Irregularities in summoning or empanelment

10-14 The *Jury Act 1995* (Qld) should not be amended to provide specifically for the saving of verdicts when there has been an omission, error or irregularity in the selection, summoning or empanelment of the jury.

CHAPTER 11: REGIONAL ISSUES AND INDIGENOUS REPRESENTATION

Review of jury districts

- 11-1 The Department of Justice and Attorney-General should, as a priority, review the current jury districts with a view to increasing the representativeness of juries. In particular, specific consideration should be given to the inclusion of additional Indigenous communities.

Transport

- 11-2 If public or private transport is not reasonably available or cannot reasonably be used, the Sheriff should, if necessary, make arrangements, in advance, to assist people from Indigenous communities to attend court when summoned for jury service, and should meet the costs of those arrangements.

Accommodation

- 11-3 If it is not reasonably practicable for a person from an Indigenous community to travel each day to attend court for jury service, accommodation should be arranged, and funded, to enable the person to attend.

Education

- 11-4 Culturally appropriate educational programs that promote the importance and benefits of jury service should be developed and made available within Indigenous communities.

Research

- 11-5 Research should be conducted to determine the extent of representation of Indigenous people on juries in Queensland and the factors that may increase or reduce their rate of participation in jury service.
- 11-6 The *Questionnaire for Prospective Juror* that is included with the *Notice to Prospective Juror* should be changed to include an additional question that asks jurors whether they identify as being an Aboriginal or Torres Strait Islander person. However, this information should not be included on the jury roll that is kept for the relevant jury district.

Establishment of a working group

11-7 The Department of Justice and Attorney General should establish a Working Group to ensure that any reforms made under the proposed review of the jury districts, and any other changes made as a result of the recommendations in this Report to the extent that they relate to the participation of Indigenous people on juries, are effective and achieve their aims.

Judicial power to direct the composition of the jury

11-8 There should not be any provision to allow a trial judge to direct that the jury must contain persons from the same ethnic or racial background or gender as the defendant.

CHAPTER 12: REMUNERATION OF JURORS

Daily allowance for jury service

12-1 Schedule 2 of the *Jury Regulation 2007* (Qld) should be amended to provide that:

- (a) the allowance in item 1 for attending court for each day or part of a day when a person is not empanelled is equal to one-third of the daily remuneration in item 2;
- (b) the remuneration rate of a juror or reserve juror in item 2 is equal to one-fifth of the National Minimum Wage that applies for the financial year in which the jury service is performed;
- (c) the additional remuneration in item 3 is equal to one-third of the daily remuneration in item 2 and should apply after the tenth weekday;
- (d) the daily allowance of a juror or reserve juror in item 4 is equal to one-fifth of the National Minimum Wage that applies for the financial year in which the jury service is performed.

12-2 Section 9(1)–(2) of the *Jury Regulation 2007* (Qld) should be amended so that the entitlements provided apply after ten weekdays.

Travelling allowance

12-3 Section 10 of the *Jury Regulation 2007* (Qld) should continue to make provision for a person who is summoned for jury service to be reimbursed for taxi fares. However, the entitlement to reimbursement of taxi fares should rank *after* the allowance for travel by private motor vehicle, and should apply if:

- (a) public transport is not reasonably available or cannot be reasonably be used; and
- (b) a private motor vehicle is not reasonably available or cannot reasonably be used.

12-4 The *Notice to Prospective Juror* should be amended so that, in addition to mentioning reimbursement of public transport fares, it also explains the circumstances in which an allowance may be paid for travel by private motor vehicle and the circumstances in which taxi fares may be reimbursed.

Family care expenses

12-5 The *Jury Regulation 2007* (Qld) should be amended to provide that jurors and reserve jurors, and persons who are summoned for jury service but not empanelled, are entitled to be reimbursed for the reasonable out-of-pocket expenses for child care or family care incurred as a result of attending court when summoned to perform jury service.

CHAPTER 13: CIVIL JURY TRIALS

13-1 The *Jury Act 1995* (Qld) should be amended to provide that:

- (a) a person who is otherwise eligible for jury service is entitled to be excused from jury service for any civil trial, on written notice to the Sheriff, if the Sheriff is satisfied that the person is, or has been in the preceding three years, a government legal officer or an Australian legal practitioner employed or engaged in the provision of legal services in civil cases; and**
- (b) if a person on a jury could have claimed excusal on that basis but did not, the person's presence on the jury does not, by itself, invalidate the verdict.**

CHAPTER 14: BREACHES AND PENALTIES

- 14-1 Subject to Recommendations 14-2 to 14-4, the penalties that are presently prescribed for breaches of the *Jury Act 1995* (Qld) are appropriate and should be retained.
- 14-2 Section 18(3) of the *Jury Act 1995* (Qld), which provides that a person to whom a *Notice to Prospective Juror* has been given must not fail to return the completed prospective juror questionnaire to the Sheriff within the reasonable time allowed in the notice, unless the person has a reasonable excuse, should be:
- (a) amended to change the maximum penalty that is prescribed for that offence from 10 penalty units or two months' imprisonment to two penalty units; and
 - (b) added to the *State Penalties Enforcement Regulation 2000* (Qld) as an infringement notice offence for which the Sheriff may issue an infringement notice requiring the person to pay a penalty of two penalty units.
- 14-3 The *Jury Act 1995* (Qld) should be amended to include provisions, modelled on sections 125 and 125A of the *Electoral Act 1992* (Qld), to the general effect that:
- (a) the Sheriff may send a notice to a prospective juror who appears to have failed to return the completed prospective juror questionnaire requiring the person, within the reasonable time stated in the notice, to either pay one penalty unit or state the reason for the person's failure to return the questionnaire; and
 - (b) if, within the time stated in the notice, the person pays the one penalty unit or provides a reason that is accepted by the Sheriff as a reasonable excuse for the failure to return the completed prospective juror questionnaire, no further action against the person for failing to return the questionnaire is to be taken.
- 14-4 If Recommendations 14-2 and 14-3 are implemented, the new penalty system for breaches of section 18(3) of the *Jury Act 1995* (Qld) should be the subject of a widespread and ongoing education campaign.
- 14-5 If Recommendations 14-2 and 14-3 are implemented, the effectiveness of the new penalty system should be reviewed within three years with a view to determining whether it should be extended to any other offences under the *Jury Act 1995* (Qld), including, in particular, the failure to attend in response to a summons under section 28(1) of the Act.

Chapter 1

Introduction

INTRODUCTION	1
SCOPE AND STRUCTURE OF THIS REVIEW	1
METHODOLOGY OF THIS REVIEW.....	2
Discussion Paper	2
Consultation and submissions	2
This Report.....	3
TERMINOLOGY	4
CURRENCY	5

INTRODUCTION

1.1 The Terms of Reference require the Commission to review the provisions of the *Jury Act 1995* (Qld) relating to the selection, participation, qualification and excusal of jurors. The Terms of Reference are set out in full in Appendix A to this Report.

SCOPE AND STRUCTURE OF THIS REVIEW

1.2 The Terms of Reference require the Commission to review ‘the operation and effectiveness of the provisions in the *Jury Act 1995* (Qld) relating to the selection (including empanelment), participation, qualification and excusal of jurors’. The Commission is to have particular regard to the following issues:

- Whether the current provisions and systems relating to the qualification, ineligibility and excusal of jurors are appropriate, including specifically whether:
 - there are any additional classes of people currently ineligible for jury duty who should be eligible;
 - there are any classes of people currently liable for jury service who should be ineligible; and
 - the ineligibility of a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror remains appropriate.
- Whether alternatives to excusal from jury service, such as deferral, should be introduced.

- Whether juries in Queensland are representative of the community, and whether minority groups (including Indigenous Australians) are adequately represented on Queensland juries.
- Whether any reform is required to the current regime of penalties for breaches of the *Jury Act 1995* (Qld).

METHODOLOGY OF THIS REVIEW

Discussion Paper

1.3 In June 2010, the Commission published a Discussion Paper in this review.⁴ The main purpose of the Discussion Paper was to outline the current arrangements in Queensland governing the selection of jurors, both in relation to the range of people who are liable for jury service and the processes of selection and empanelment, and to propose some possible avenues of reform and preliminary questions to assist the Commission in formulating and finalising its recommendations.

Consultation and submissions

1.4 The preparation of the Discussion Paper benefited from, and made reference to views obtained from, some preliminary consultation. In particular, the Commission had the benefit of some preliminary consultations with members of the Queensland Law Society,⁵ Legal Aid Queensland, the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, and Vision Australia.

1.5 Copies of the Discussion Paper were distributed to judges of the Supreme Court and District Court, key professional bodies such as the Queensland Law Society, the Bar Association of Australia, the Law Council of Australia, Legal Aid Queensland, and the Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd, as well as other interested organisations and individuals.

1.6 An advertisement was placed in *The Courier-Mail* on 31 July 2010 calling for submissions. A media statement was issued to the print and electronic media on 27 July 2010. Notices calling for submissions to the Discussion Paper were also placed in selected print and electronic publications of the Queensland Law Society and the Bar Association of Queensland, and on the Queensland government website 'Get involved'.

1.7 The closing date for submissions was 30 September 2010.

1.8 The Commission received responses to the Discussion Paper from 49 organisations and individuals. They included submissions from the Department of

⁴ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (June 2010).

⁵ Where relevant throughout this Report, references are made to preliminary views expressed by members of the Criminal Law Section of the Queensland Law Society. Those preliminary views do not necessarily represent the views of that Committee as a whole.

Justice and Attorney-General,⁶ the Queensland Law Society, the Bar Association of Queensland, the Office of the Director of Public Prosecutions, Legal Aid Queensland, the Crime and Misconduct Commission, the Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd, the Indigenous Lawyers Association of Queensland, the Queensland Police Service, the Queensland Retired Police Association Inc, the Department of Communities, the Department of Community Safety, the Local Government Association of Queensland, a number of city, regional and shire councils, Queensland Advocacy Incorporated and Vision Australia.

1.9 The Commission would like to thank all those organisations and individuals who participated in its consultation process. The submissions received by the Commission have been of considerable assistance to it in the preparation of this Report and in the formulation of its recommendations.

1.10 The Commission would also like to acknowledge the contributions of the Executive Director and Executive Manager of the Supreme and District Courts Branch of the Department of Justice and Attorney-General, the Sheriff of Queensland, and the Courts Performance and Reporting Unit of the Department of Justice and Attorney-General to this review.

This Report

1.11 Although juries are used very occasionally in civil trials, their primary role is in criminal trials. Accordingly, the main focus of this Report is on jury selection in criminal trials and, unless stated otherwise, a reference to a jury is a reference to a jury in a criminal trial.

1.12 Chapters 2 to 4 provide a broad overview of the Queensland jury system. Chapter 2 outlines the current role of juries in Queensland. Chapter 3 examines the current law in Queensland and provides an overview of relevant legislative provisions and recent reforms and reform proposals in other jurisdictions. Chapter 4 examines the demographic make-up of Australian and Queensland juries, and considers the extent to which they can be said to be representative of the Australian and Queensland populations as a whole.

1.13 In Chapter 5, the Commission has identified a number of key principles and objectives that have informed its recommendations for reform.

1.14 The Commission's Recommendations are contained in Chapters 6 to 14.

1.15 Chapter 6 recommends the continuation of enrolment on the electoral roll and residence within a jury district as the basic qualification for jury service. It also recommends changes to the scope of the criminal history disqualifications that presently apply under the *Jury Act 1995* (Qld).

6

The submission from the Department of Justice and Attorney-General was prepared by the former and current Executive Director of the Supreme and District Courts Branch, the former and current Sheriff of Queensland, and the Executive Manager of the Supreme and District Courts Branch.

1.16 Chapter 7 makes a number of recommendations in relation to the effect of a person's current or former occupation or office on the person's eligibility for jury service, with reference to the need to ensure the independence, impartiality and non-specialist composition of the jury.⁷

1.17 Chapter 8 recommends changes to the *Jury Act 1995* (Qld), informed by the importance of non-discrimination in the opportunity to perform jury service, to remove the automatic exclusion of people who are 70 years or older or who have a physical disability, and to refine and narrow the categories of ineligibility dealing with a person's inability to perform jury service because of an insufficient proficiency in English or a mental disability.

1.18 Chapter 9 examines the bases for excusal from jury service and recommends the introduction of a system of deferral, as an alternative to excusal, in appropriate cases.

1.19 Chapter 10 examines the processes for the selection, summoning and empanelment of jurors and makes recommendations for the improvement of juror orientation materials and information about long trials given to prospective jurors, and for the retention of the present peremptory challenge process.

1.20 Chapter 11 makes a number of practical, non-legislative recommendations to increase the representativeness of people in regional and remote communities on Queensland juries, particularly people in Indigenous communities, including review of jury district boundaries to expand their scope, provision for financial assistance with transport and accommodation, and continued education and research.

1.21 Chapter 12 makes recommendations for improvements to the system of remuneration and allowances that are paid to jurors, including the provision of reasonable out-of-pocket expenses for child care or other family care.

1.22 Chapter 13 examines the role of juries in civil trials, which occur far less frequently than criminal jury trials, and makes recommendations for the excusal of civil lawyers in civil trials.

1.23 Finally, Chapter 14 examines the penalties for breaches of the *Jury Act 1995* (Qld) and recommends the introduction of a modified infringement notice system, with a reduced penalty, for the imposition of penalties when a person fails to respond to a prospective juror notice.

TERMINOLOGY

1.24 Throughout this Report, the following terminology has been used:

⁷

Local government chief executive officers are mentioned specifically in the Terms of Reference. See Appendix A to this Report.

- A reference to the ‘Sheriff’ in the other Australian jurisdictions includes the Juries Commissioner in Victoria and the Summoning Officer in Western Australia.
- The *Jury Act 1995* (Qld) is referred to as ‘the Act’ or ‘the Queensland Act’.

1.25 In addition, although there are many similarities across jurisdictions in the overall provisions for juror eligibility and selection, the jurisdictions use different terminology. Unless otherwise specified, the Commission generally uses the expressions ‘exclusion’, to refer to those categories of people who are automatically excluded from serving as jurors;⁸ ‘excusal as of right’, to refer to those categories of people who are entitled to opt out of service without showing any further reason;⁹ and ‘excusal’, to refer to the ability for a person to be excused from service only on demonstrating some special justification.¹⁰

CURRENCY

1.26 Unless otherwise specified, the law in this Report is stated as at 1 February 2011.

1.27 Where relevant, reference is made to the *Jury Amendment Act 2010* (NSW), which will amend the *Jury Act 1977* (NSW). The *Jury Amendment Act 2010* (NSW) was assented to on 28 June 2010, but has not yet commenced.

1.28 Reference is also made to the Juries Legislation Amendment Bill 2010 (WA), which proposes amendments to the *Juries Act 1957* (WA). That Bill was passed by the Legislative Assembly on 24 February 2011, but is yet to be passed by the Legislative Council of the Parliament of Western Australia.

⁸ In Queensland, this covers those persons who are ‘ineligible’ for service. Some other jurisdictions use the term ‘exempt’, ‘disqualified’ or ‘excluded’.

⁹ There are generally no such categories provided for in Queensland. Some jurisdictions use the term ‘exempt’, while others refer to ‘excusal’.

¹⁰ In Queensland, this covers excusal, by the Sheriff or a judge, in accordance with criteria set out in s 21 of the *Jury Act 1995* (Qld). In other jurisdictions, this is generally referred to as ‘excusal’. To distinguish it from excusal as of right, it is also referred to in this Report as ‘discretionary excusal’ or excusal on a case-by-case basis.

Chapter 2

The Role and Nature of Juries in Criminal Trials

THE CENTRAL ROLE OF THE JURY IN CRIMINAL TRIALS	7
FREQUENCY OF CRIMINAL JURY TRIALS IN QUEENSLAND.....	10
HISTORICAL BACKGROUND.....	11
CONTEMPORARY SOURCES OF THE LAW.....	11
HOW CRIMINAL TRIALS OPERATE: BASIC CONCEPTS	12
JURORS' PERCEPTIONS OF THE JURY SYSTEM	14
CONSIDERATIONS FOR THIS REVIEW.....	14

THE CENTRAL ROLE OF THE JURY IN CRIMINAL TRIALS

2.1 The Terms of Reference require the Commission to have regard to a number of matters, including:¹¹

The critical role juries have in the justice system in Queensland to ensure a fair trial.

2.2 The important role of juries has been described in the following terms:¹²

All institutions of government exist to serve the community, and the judicial branch of government, which has no independent force to back up its authority, depends on public acceptance of its role. That acceptance requires a certain level of faith. What is it that sustains, or threatens, such faith? ...

Public participation in the administration of justice is a part of our legal tradition. ... Through the jury system, members of the public become part of the court itself. This ought to enhance the acceptability of decisions, and contribute to a culture in which the administration of justice is not left to a professional cadre but is understood as a shared community responsibility.

2.3 A central pillar of criminal justice in Queensland is that defendants accused of serious offences should be judged fairly and impartially by a jury of their fellow citizens who deliver their verdict in accordance with the law based on the evidence led at the trial.¹³

2.4 Two key characteristics of juries are incorporated in this statement: jurors should be impartial and have no personal interest in the case that they are trying,

11 The Terms of Reference are set out in Appendix A to this Report.

12 Chief Justice M Gleeson, 'Juries and public confidence in the courts' (2007) 90 *Reform* 12.

13 Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 1.

and a jury should be drawn from, and be representative of, the community.¹⁴ Neither characteristic can be put into practice in absolute terms; indeed the Victorian Court of Appeal has suggested that there has 'always' been some tension in these twin objectives.¹⁵

2.5 The jury has been described as being at the heart of the Anglo-Australian system of criminal justice and 'fundamental to the freedom that is so essential to our way of life'.¹⁶ The effectiveness of the system is measured, at least in part, by continued public confidence in it and its procedures and outcomes, which is in turn dependent on its accountability and public scrutiny.¹⁷

2.6 The use of juries in criminal trials serves a number of important and related functions.¹⁸ Juries comprised of ordinary, impartial citizens help ensure a fair trial for defendants. Jury trials also provide direct community involvement in the administration of justice:¹⁹

The great strength of the jury system is that it ensures continuing community involvement in the administration of criminal justice. The criminal justice system exists to serve and protect the community. It is vitally important that the community be intimately involved in, and fully aware of, the administration and implementation of that system.

2.7 It is also said that juries act as a check against the arbitrary or oppressive exercise of authority, lend legitimacy to the criminal justice system, make public acceptance of verdicts more likely, and contribute to the accessibility of proceedings to members of the community:²⁰

That justice should be done *coram publico* is a good thing for the lawyers as well as for the public. It reminds them that they are not engaged upon a piece of professional ritual but in helping to give the ordinary man the sort of justice he can understand. Upon what the jurymen think and say when they get home the prestige of the law in great measure depends.

2.8 The High Court of Australia has commented on the role of the jury on many occasions. In *Brown v The Queen*,²¹ Deane J referred to the role of juries in ensuring the impartiality of the criminal justice system:²²

¹⁴ The concept of representativeness is considered at [5.7]–[5.9] below.

¹⁵ *R v Su* [1997] 1 VR 1, 18 (Winneke, Hayne JJA, Southwell AJA). See also Judge M Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62 *Law and Contemporary Problems* 69, 78.

¹⁶ Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 4.

¹⁷ *Ibid.*

¹⁸ See *Brown v The Queen* (1986) 160 CLR 171, 197 (Brennan J), 201–2 (Deane J); *Kingswell v The Queen* (1985) 159 CLR 264, 299–302 (Deane J). See also the High Court's remarks set out at [2.8]–[2.10] below.

¹⁹ Chief Justice W Martin, 'Current Issues in Criminal Justice' (Paper presented at the Rotary District 9460 District Conference 2009, Perth, 21 March 2009) 17.

²⁰ Lord P Devlin, *Trial by Jury* (1956) 25.

²¹ (1986) 160 CLR 171.

²² *Ibid.* 202. See also Brennan J at 197.

regardless of the position or standing of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community, at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment. That essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached. It fosters the ideal of equality in a democratic community ...

2.9 Deane J expanded on these observations in *Kingswell v The Queen*:²³

Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a 'fair go' tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases (cf Knittel and Seiler, 'The Merits of Trial by Jury', *Cambridge Law Journal*, vol 30 (1972), 316 at pp 320–321).

The institution of trial by jury also serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.

2.10 Deane, Dawson, Toohey, Gaudron and McHugh JJ summarised the central importance of the jury system in these terms in *Doney v The Queen*:²⁴

the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by

²³ (1985) 159 CLR 264, 301–2.

²⁴ (1990) 171 CLR 207, 214.

inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful.

2.11 Some of these observations need to be understood against the background that, in times past, judges did not necessarily represent the independent branch of government that they do under the constitutional arrangements prevailing in this country, but were seen as much more closely aligned with the monarchy and the instrumentalities of power. Put into more contemporary terms, the jury system can be seen as exercising a form of guardianship against 'the corrupt or over-zealous prosecutor and against the compliant, biased or eccentric judge'.²⁵

FREQUENCY OF CRIMINAL JURY TRIALS IN QUEENSLAND

2.12 Notwithstanding their critical role in the criminal justice system of all common law jurisdictions, including Queensland, jury trials represent only a very small proportion of criminal proceedings. They are restricted to the trial of more serious criminal offences.

2.13 Statistics produced by the Australian Bureau of Statistics show that jury trials are a small minority of all criminal matters finalised in the Supreme Court of Queensland and the District Court of Queensland. From 2003–04 to 2009–10, an average of only 9.7% (one in ten) of all criminal matters resolved each year in those courts were resolved at trial (not all of which would have been jury trials). Over three-quarters were resolved by a plea of guilty, and about one in five was resolved in some other fashion (such as a plea of *nolle prosequi*).²⁶

	2003–04	2004–05	2005–06	2006–07	2007–08	2008–09	2009–10	Total	Average	
Resolved at trial										
Acquitted	259	307	235	217	251	257	331	1857	265.3	5.0%
Guilty	207	239	309	250	278	249	239	1771	253.0	4.8%
Total	466	546	544	467	529	506	570	3628	518.3	9.7%
Plea of guilty	5098	4852	4469	4359	4420	4262	3975	31435	4490.7	84.4%
Other	1299	1148	1105	1017	1122	1047	895	7633	1090.4	20.5%
Total	6863	6546	6118	5843	6071	5815	5457	37256	5322.3	100.0%

Table 2.1: Resolution of criminal matters in Queensland courts (ABS)²⁷

²⁵ *Duncan v Louisiana* 391 US 145 (1968) (White J). Defendants in the United States, where legal systems feature elected judges and prosecutors (which is quite alien to Australian constitutional arrangements) might be seen to non-American eyes as requiring that sort of protection more than others. However, some writers are a little more reserved in their support of the jury as a bulwark against oppression: see G Williams, quoted in D Watt, *Helping Jurors Understand* (2007) 9.

²⁶ See Criminal Code (Qld) s 563 (Nolle prosequi).

²⁷ Australian Bureau of Statistics, *Criminal Courts, Australia* (various years) Cat No 4513.0.

HISTORICAL BACKGROUND

2.14 Juries have been used in many legal systems and can be dated back to at least Periclean Athens in the 5th century BC,²⁸ ancient Rome and ancient Babylon,²⁹ although the determination of guilt based on a consideration of objective evidence was a much later development. In Anglo-Australian law, the use of a jury in criminal trials can be traced back to the reign of Henry II (1154–89), especially to the Assizes of Clarendon in 1164,³⁰ at which time trial by combat and trial by ordeal were still established methods of determining guilt.³¹ The use of juries in criminal trials was later guaranteed by the Magna Carta, subscribed by King John in 1215:³²

No free man shall be seized, or imprisoned, or dispossessed or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, except by the legal judgement of his peers, or by the law of the land.

2.15 Given the penal status of the first colony in New South Wales, it cannot be said that trial by jury arrived in Australia with the First Fleet.³³ However, trial by jury was established in New South Wales by 1832 and in Queensland at the time of its separation from New South Wales in 1859.³⁴ All Australian colonies provided for trial by jury by the time of Federation in 1901.³⁵ It was first covered by statute in Queensland as early as 1867. That original Act (as amended in 1884 and 1923) was replaced by later Acts passed in 1929 and again in 1995.

CONTEMPORARY SOURCES OF THE LAW

2.16 In Queensland, the principal sources of the law governing the role and operation of the jury system are found in:³⁶

- the *Jury Act 1995* (Qld) and the *Jury Regulation 2007* (Qld);

²⁸ RL Fox, *The Classical World* (2005) 132, 145; P Woodruff, *First Democracy* (2005) 16, 32–5, 50, 109, 119, 123–4, 225.

²⁹ J Horan and D Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 181.

³⁰ Lord P Devlin, *Trial by Jury* (1956) 7–9. Of course, the jury's role was very different then: see Charter of the Assize of Clarendon 1166 art 1 <<http://avalon.law.yale.edu/medieval/assizecl.asp>> at 25 January 2011.

³¹ Trial by combat was lawful in England until 1819: see *Ashford v Thornton* (1818) KB 1 B & Ald 349. It was removed in the following year: 59 Geo III c 56. See EJ White, *A Collection of Essays upon Ancient Laws and Customs* (1913) 132–3.

³² The current status of the Magna Carta in the law of Queensland is considered at [5.11]–[5.12] below.

³³ Chief Justice M Black, 'The introduction of juries to the Federal Court of Australia' (2007) 90 *Reform* 14.

³⁴ Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 6. For a detailed review of the history of juries in criminal trials in Australia, see Judge M Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62 *Law and Contemporary Problems* 69, especially Part III at 77–91.

³⁵ *Cheatle v The Queen* (1993) 177 CLR 541, 549 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

³⁶ A more detailed review of the relevant legislation in Queensland and the other Australian States and Territories begins in Chapter 3 of this Report. In relation to juries in civil trials, see Chapter 13 below.

- the *Jury Exemption Act 1965* (Cth) and the *Jury Exemption Regulations 1987* (Cth), which exempt various Commonwealth office-holders and employees from liability to serve as a juror in State courts³⁷ (as well as Federal courts and specified Territory courts);
- the Criminal Code (Qld);
- the *Evidence Act 1977* (Qld);
- the *Criminal Practice Rules 1999* (Qld) made under the *Supreme Court of Queensland Act 1991* (Qld); and
- the common law.

2.17 All references in this Report to ‘the Act’ are references to the *Jury Act 1995* (Qld) and, unless otherwise specified, all references to sections of legislation are references to the *Jury Act 1995* (Qld).

HOW CRIMINAL TRIALS OPERATE: BASIC CONCEPTS

2.18 Jurors are given three principal tasks:

- They must assess the evidence and come to any necessary resolution of disputed facts impartially and free from influences from outside the courtroom.
- They must follow the judge’s instructions on the law.³⁸
- They must fairly apply the law to the evidence as instructed to reach their verdict.

2.19 In Queensland, unless otherwise provided, indictable offences are to be tried by a judge and jury in the Supreme Court or the District Court.³⁹ Under the Criminal Code (Qld), there is scope for some indictable offences to be heard by a judge sitting alone without a jury.⁴⁰ The Code also makes provision for a number of indictable offences to be heard and decided summarily — that is, by a Magistrate.⁴¹

³⁷ See *Jury Exemption Act 1965* (Cth) s 4(1), (2)(b), sch; *Jury Exemption Regulations 1987* (Cth) regs 4(c), 5(1)(c), 6(1)(c), 7(1)(c). These exemptions apply generally and are not limited to the prosecution of an offence against a law of the Commonwealth.

³⁸ See generally Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009).

³⁹ Criminal Code (Qld) s 3(3); *Supreme Court Act 1995* (Qld) s 203; *District Court of Queensland Act 1967* (Qld) ss 60–61A.

⁴⁰ Criminal Code (Qld) ss 614–615E.

⁴¹ See Criminal Code (Qld) ch 58A. In particular, if the maximum term of imprisonment for an indictable offence is not more than three years, the offence must be heard and decided summarily: s 552BA.

2.20 The indictment itself is the document containing the written charge listing the offence or offences for which the defendant is to be put on trial.⁴²

2.21 The right to a trial by jury in relation to indictable offences against Commonwealth laws is guaranteed by section 80 of the *Australian Constitution*.⁴³ The High Court has held that the reference in section 80 to 'trial by jury' is to the common law institution of jury trial,⁴⁴ and that an essential feature of trial by jury is the requirement for a verdict of guilty to be unanimous.⁴⁵ For this reason, the provisions of the *Jury Act 1995* (Qld) that allow a jury to reach a majority verdict do not apply to the trial of an offence against a law of the Commonwealth.⁴⁶ Trials on indictment of an offence against a law of the Commonwealth are also omitted from the range of trials that may be heard by a judge alone in Queensland.⁴⁷

2.22 The judge in a criminal trial decides questions of law only; these include rulings on the admissibility of evidence and other procedural questions. Based on the evidence which has been admitted, it is for the jury to decide whether the defendant is guilty of the offence or offences charged by applying the law to the facts.

2.23 In Queensland, the jury in a criminal trial consists of 12 people,⁴⁸ although the trial may continue without the full complement of jurors provided that there are at least ten jurors.⁴⁹ Up to three additional people may be selected as reserve jurors.⁵⁰

2.24 A criminal jury has 12 members in all of the other Australian States and Territories, and in New Zealand.⁵¹ There is some variation in relation to proceeding to a verdict with a lesser number,⁵² and in relation to additional or reserve jurors.⁵³

42 Criminal Code (Qld) s 1 (definition of 'indictment'). The forms of indictment are found in schs 2 to 4 of the *Criminal Practice Rules 1999* (Qld).

43 In *Brown v The Queen* (1986) 160 CLR 171, a majority of the High Court (Brennan, Deane and Dawson JJ, Gibbs CJ and Wilson J dissenting) held that, for an offence against a law of the Commonwealth, an accused cannot waive the benefit conferred by s 80 and elect to be tried by a judge alone. Deane J stated (at 200) that the constitutional guarantee found in s 80 is 'for the benefit of the community as a whole as well as for the benefit of the particular accused'.

44 *Cheatle v The Queen* (1993) 177 CLR 541, 549 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

45 Ibid 562. In *Cheatle v The Queen*, the appellants had been convicted in the District Court of South Australia of an indictable offence under the *Crimes Act 1914* (Cth). The jury returned a majority verdict in accordance with s 57 of the *Juries Act 1927* (SA). The High Court held (at 562) that the convictions were unconstitutional and must be set aside. It further held (at 563) that 'the provisions of s 57 must be read down so as not to purport to apply, of their own force, to the trial on indictment of an offence against a law of the Commonwealth'.

46 *Jury Act 1995* (Qld) ss 59(1)(a)(iii), (2), 59A(1)(a).

47 Criminal Code (Qld) s 615D.

48 *Jury Act 1995* (Qld) s 33.

49 *Jury Act 1995* (Qld) s 57(2).

50 *Jury Act 1995* (Qld) s 34.

51 *Juries Act 1967* (ACT) s 7; *Jury Act 1977* (NSW) s 19; *Juries Act* (NT) s 6; *Juries Act 1927* (SA) s 6; *Juries Act 2003* (Tas) s 25(2); *Juries Act 2000* (Vic) s 22(2); *Juries Act 1957* (WA) s 18; *Juries Act 1981* (NZ) s 17.

JURORS' PERCEPTIONS OF THE JURY SYSTEM

2.25 Participation by ordinary members of the community in juries is one of the few remaining means of direct involvement in the democratic processes of a modern state; the others, such as participation in the legislative process, have been taken over by representative bodies or other indirect systems.

2.26 Jury service is perhaps one of the most important and demanding of all civic duties. It imposes significant and unusual demands on jurors' time, resources and intellect.⁵⁴

2.27 Nonetheless, many people who have performed jury service report satisfaction with the system and their service to it. Research in Australia has demonstrated that people who have served on juries have significantly more confidence in juries and the criminal justice system than other members of the jury-eligible population.⁵⁵ Even people who attended for jury service but were not empanelled showed high confidence levels, though not as high as those shown by jurors.⁵⁶

2.28 Research conducted by the School of Psychology at the University of Queensland in late 2009 for the Commission's review of jury directions also found that jurors who participated in the interviews were generally positive about their experience as a juror.⁵⁷

CONSIDERATIONS FOR THIS REVIEW

2.29 In developing its recommendations for this review, the Commission has had regard to the following considerations:

- the important role of juries in ensuring a fair trial;

⁵² *Juries Act 1967* (ACT) s 8; *Jury Act 1977* (NSW) s 22; *Juries Act 1927* (SA) s 56; *Juries Act 2003* (Tas) s 42(3); *Juries Act 2000* (Vic) s 44; *Criminal Procedure Act 2004* (WA) s 115; *Juries Act 1981* (NZ) ss 22(1)(b), 22A, as proposed to be amended by Criminal Procedure (Reform and Modernisation) Bill 2010 (NZ) cl 426, 427.

⁵³ *Juries Act 1967* (ACT) s 31A; *Jury Act 1977* (NSW) ss 19, 55G; *Juries Act* (NT) s 37A; *Juries Act 1927* (SA) s 6A; *Juries Act 2003* (Tas) ss 25(2), 26; *Juries Act 2000* (Vic) ss 23, 48; *Juries Act 1957* (WA) s 18.

⁵⁴ See, for example, [5.26]–[5.28] below.

⁵⁵ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 148–52. In all, 4765 people participated in the survey in three States, including a total of 1048 non-empanelled jurors and 628 empanelled jurors: at xi–xii. Similar results have been obtained overseas. In a survey of 361 jurors in London and Norwich conducted in 2001–02: see R Matthews, L Hancock and D Briggs, *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04 (2004) 7, 9.

⁵⁶ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 148.

⁵⁷ School of Psychology, University of Queensland (B McKimmie, E Antrobus and K Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 23. See also Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) App E.

- the role that jurors perform and the skills required to discharge the role effectively; and
- the demands imposed by jury service and the desirability of minimising, to the greatest extent practicable, the inconvenience of performing jury service.

2.30 The Commission's approach to reform in this area (including the principles underpinning its recommendations) are set out in Chapter 5 of this Report.

Chapter 3

Liability to Serve as a Juror

INTRODUCTION	17
THE CURRENT PROVISIONS IN QUEENSLAND.....	17
HISTORY OF THE QUEENSLAND PROVISIONS.....	22
The Jury Acts of 1867, 1884 and 1923	22
The <i>Jury Act 1929</i> (Qld).....	23
The <i>Jury Act 1995</i> (Qld).....	23
COMMONWEALTH LEGISLATION	25
TRENDS IN OTHER JURISDICTIONS.....	26
THE OTHER AUSTRALIAN JURISDICTIONS	27
Australian Capital Territory.....	27
New South Wales.....	28
Northern Territory	30
South Australia.....	30
Tasmania.....	31
Victoria	31
Western Australia.....	32
JURISDICTIONS OUTSIDE AUSTRALIA.....	34
England and Wales	34
Hong Kong	39
Ireland	39
New Zealand	40
Scotland	41

INTRODUCTION

3.1 This chapter gives an overview of the provisions in Queensland dealing with the qualification, eligibility and liability of persons to serve as jurors, and their historical development. It also provides an overview of the relevant legislative schemes in other jurisdictions and of proposals for reform in other jurisdictions.

THE CURRENT PROVISIONS IN QUEENSLAND

3.2 The *Jury Act 1995* (Qld) specifies who is qualified, eligible⁵⁸ and liable to serve as a juror in Queensland, and in what circumstances a person may be excused. Similar, though not identical, provisions exist in legislation in each of the Australian jurisdictions. In most cases they are contained in specific jury Acts; these are sometimes supplemented by provisions in criminal procedure legislation (for example, in South Australia and Western Australia).

⁵⁸ Or, more accurately, ineligible.

3.3 In Queensland, the starting point is whether a person is ‘qualified’ to serve.⁵⁹ Qualification simply involves being a registered elector in the jury district and being ‘eligible’. Unless excused,⁶⁰ a qualified person is ‘liable’ to perform jury service.⁶¹

3.4 The Act⁶² then states that a person is ‘eligible’ unless he or she falls into one of the categories of ‘ineligible’ people that are set out in section 4(3). Broadly speaking, ineligibility is determined by a person’s standing or occupation (or, in some cases, previous occupation), criminal record, age or disability. Any person falling into one of the nominated categories of ineligibility is automatically excluded from jury service, in many cases permanently.

3.5 Section 4 of the *Jury Act 1995* (Qld) reads as follows:

4 Qualification to serve as juror

- (1) A person is qualified to serve as a juror at a trial within a jury district (***qualified for jury service***) if—
- (a) the person is enrolled as an elector; and
 - (b) the person’s address as shown on the electoral roll is within the jury district; and
 - (c) the person is eligible for jury service.
- (2) A person who is enrolled as an elector is eligible for jury service unless the person is mentioned in subsection (3).
- (3) The following persons are not eligible for jury service—
- (a) the Governor;
 - (b) a member of Parliament;
 - (c) a local government mayor or other councillor;
 - (d) a person who is or has been a judge or magistrate (in the State or elsewhere);
 - (e) a person who is or has been a presiding member of the Land and Resources Tribunal;
 - (f) a lawyer actually engaged in legal work;
 - (g) a person who is or has been a police officer (in the State or elsewhere);

⁵⁹ *Jury Act 1995* (Qld) s 4(1).

⁶⁰ For the power to excuse from jury service, see *Jury Act 1995* (Qld) ss 19–23.

⁶¹ *Jury Act 1995* (Qld) s 5.

⁶² All references in this Report to ‘the Act’ are references to the *Jury Act 1995* (Qld). All references to sections of legislation are references to the *Jury Act 1995* (Qld) unless otherwise specified.

- (h) a detention centre employee;
 - (i) a corrective services officer;
 - (j) a person who is 70 years or more, if the person has not elected to be eligible for jury service under subsection (4);
 - (k) a person who is not able to read or write the English language;
 - (l) a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror;
 - (m) a person who has been convicted of an indictable offence, whether on indictment or in a summary proceeding;
 - (n) a person who has been sentenced (in the State or elsewhere) to imprisonment.
- (4) A person who is 70 years or more may elect to be eligible for jury service in the way prescribed under a regulation.

3.6 Even if eligible, a person may be excused from jury service by the Sheriff or a judge.⁶³ Unlike the grounds of ineligibility, excusal is based on an individual assessment of, among other things, the hardship that jury service would cause a person given his or her personal circumstances, and may be temporary or permanent.⁶⁴ This type of excusal is discretionary and is determined on a case-by-case basis, with reference to a number of criteria. Prospective jurors are also entitled to be excused if they have performed jury service in the last 12 months.⁶⁵ Excusals are dealt with in sections 19 to 23 of the Act:

19 Sheriff's power to excuse from jury service

- (1) On an application to be excused from jury service, the sheriff may excuse the applicant from jury service—
 - (a) for a particular jury service period (or part of a particular jury service period); or
 - (b) permanently.
- (2) In exercising the power to excuse from jury service, the sheriff must comply with procedural requirements imposed under the practice directions.

⁶³ *Jury Act 1995* (Qld) ss 5, 19, 20.

⁶⁴ *Jury Act 1995* (Qld) ss 19(1), 20(1), 21.

⁶⁵ *Jury Act 1995* (Qld) s 22.

20 Power of judge to excuse from jury service

- (1) A judge may excuse a person from jury service—
 - (a) for a particular jury service period (or part of a particular jury service period); or
 - (b) permanently.
- (2) A judge may exercise the power to excuse from jury service—
 - (a) on the judge's own initiative; or
 - (b) on application by a member of a jury panel who wants to be excused from jury service.
- (3) A judge may hear an application under this section with or without formality.
- (4) If the judge's decision on an application under this section is inconsistent with the sheriff's decision on an earlier application made to the sheriff by the same applicant, the judge's decision prevails.

21 Criteria to be applied in excusing from jury service

- (1) In deciding whether to excuse a person from jury service, the sheriff or judge must have regard to the following—
 - (a) whether jury service would result in substantial hardship to the person because of the person's employment or personal circumstances;
 - (b) whether jury service would result in substantial financial hardship to the person;
 - (c) whether the jury service would result in substantial inconvenience to the public or a section of the public;
 - (d) whether others are dependent on the person to provide care in circumstances where suitable alternative care is not readily available;
 - (e) the person's state of health;
 - (f) anything else stated in a practice direction.
- (2) A person may be permanently excused from jury service only if the person is eligible to be permanently excused from jury service in the circumstances stated in the practice directions.

22 When prospective juror entitled to be excused from jury service

- (1) This section applies to a prospective juror if the prospective juror—
 - (a) has been summoned to perform jury service for a particular jury service period, or is on a list of prospective jurors who may be

- summoned to perform jury service for a particular jury service period; and
 - (b) has earlier been summoned for jury service and has attended as required by the summons for a jury service period (or, if excused from jury service for part of a jury service period, the balance of the jury service period) ending less than 1 year before the jury service period mentioned in paragraph (a).
- (2) The prospective juror is entitled to be excused from jury service for the jury service period.

23 Time for exercising power to excuse

A prospective juror may be excused from jury service before or after the prospective juror is summoned for jury service.

3.7 Thus, in Queensland, the scheme for determining whether someone on the electoral roll for the jury district is liable to perform jury service involves only two questions, as shown in Figure 3.1 below: whether the person falls into one of the specified categories of ineligibility and, if not, whether the person can be discretionarily excused from jury service.

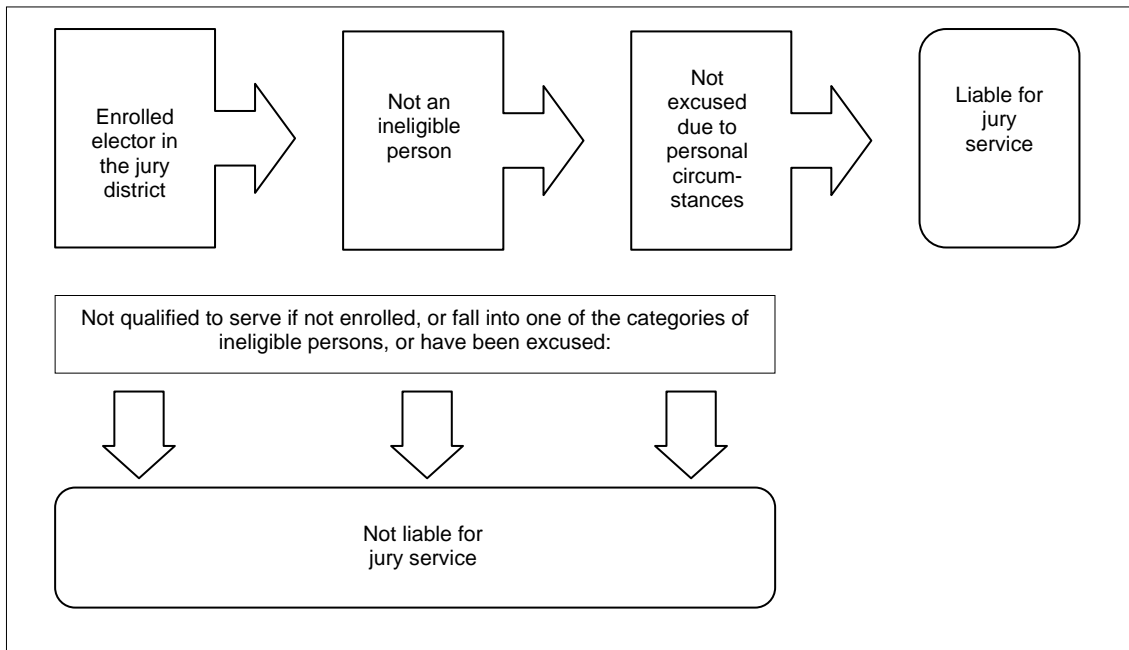


Figure 3.1: Liability to perform jury service in Queensland

3.8 The *Jury Act 1995* (Qld) also sets out the process for the summoning and empanelment of jurors, including challenge of prospective jurors by the prosecution or defence, and provides for the discharge of jurors by the judge, juror remuneration and allowances, juror confidentiality and other offences relating to jurors.⁶⁶

⁶⁶ See also *Jury Regulation 2007* (Qld).

HISTORY OF THE QUEENSLAND PROVISIONS

3.9 The current legislation, the *Jury Act 1995* (Qld), commenced on 17 February 1997. It repealed and replaced the *Jury Act 1929* (Qld). The 1929 Act repealed and replaced the earlier jury legislation in Queensland: the Jury Acts of 1867 and 1884.⁶⁷

The Jury Acts of 1867, 1884 and 1923

3.10 Section 3 of the *Jury Act of 1867* (Qld) disqualified all men from serving 'on any jury in any court or on any occasion whatsoever' who:

[were not] a natural born or naturalized subject of the Queen and ... who shall not be able to read and write and ... who shall have been convicted of any treason or felony or of any crime that is infamous (unless he shall have obtained a free pardon thereof) or who is insolvent or bankrupt and shall not have obtained his certificate ...

3.11 The Act of 1867 also 'freed and exempted' a long list of people from 'serving upon any juries whatsoever'.⁶⁸ Section 2 of the Act of 1867 exempted:

All executive councillors all members of the legislature all judges of courts whether of record or otherwise all chairmen of general sessions all stipendiary magistrates all official assignees in insolvency all clergymen in holy orders all persons who shall teach or preach in any religious congregation and shall follow no secular occupation except that of a schoolmaster all schoolmasters all managers cashiers accountants and tellers respectively employed as such in any bank all barristers-at-law actually practising all attorneys solicitors proctors and conveyancers duly admitted and actually practising and all officers and servants of any such courts actually exercising the duties of their respective offices or places all coroners gaolers and keepers of houses of correction all physicians surgeons apothecaries chemists and druggists duly qualified and in actual practice all officers in Her Majesty's navy or army on full pay every member of any corps of volunteers whom the Governor in Council shall in any year release in this behalf and all masters of vessels actually trading and all pilots licensed under any Act now or hereafter to be in force for the regulation of pilots in any port all officers of customs and police all sheriffs and bailiffs and their officers or assistants all constables all persons holding any office or employment in or under any department of the public service the mayor aldermen councillors town clerk[s] and other officers and servants of any municipal corporation all household officers and servants of the Governor all postmasters and clerks of petty sessions and all inspectors of schools ...

3.12 The Act of 1884 added to this list any person who is 'incapacitated by disease or infirmity ... or who is actually employed as a Mining Manager',⁶⁹ and the *Jury Act Amendment Act of 1923* (Qld) added 'all women who for medical reasons are unfit to attend as jurors' to the list.⁷⁰ That latter Act also provided a right of

⁶⁷ *Jury Act 1929* (Qld) s 4, sch 1.

⁶⁸ *Jury Act of 1867* (Qld) s 2.

⁶⁹ *Jury Act of 1884* (Qld) s 4.

⁷⁰ *Jury Act Amendment Act of 1923* (Qld) s 2(3).

excusal for 'every female person who applies to be exempted from service on a jury by reason of the nature of the evidence to be given or of the issues to be tried'.⁷¹

The *Jury Act 1929* (Qld)

3.13 The *Jury Act 1929* (Qld), which replaced the earlier legislation, made some changes to the eligibility for, and the basis of excusal or exemption (which is a term not used in the current Act) from, jury service. It distinguished between categories of disqualification — people who were not natural-born or naturalised subjects of Her Majesty, convicted criminals, bankrupts, people who could not read or write English, and people of 'bad fame and repute'⁷² — and categories of exemption,⁷³ which were conceptually similar to the categories of ineligibility under section 4(3) of the current Act.

3.14 The list of exempted people under the 1929 Act was, even at that time, described as 'formidable'.⁷⁴ It included such persons as ministers of religion, medical practitioners, dentists, pharmaceutical chemists, nurses and physiotherapists, university professors and lecturers, registrars of universities, inspectors of schools, schoolmasters and schoolteachers, senior public servants, commercial travellers and journalists, as well members of the executive and judiciary and others involved in the justice system.

3.15 The *Jury Act 1929* (Qld) provides an interesting point of comparison in the review of the categories of people who are, and are not, eligible for jury service under the current Act. Apart from anything else, the 1995 Act as originally passed expanded the scope of people who were eligible for jury service by removing several categories of people who had previously been exempt.⁷⁵ However, as is discussed in more detail below, some of those categories were later re-inserted before the Act came into effect.

The *Jury Act 1995* (Qld)

3.16 In 1993, the Litigation Reform Commission recommended that a new Jury Act be enacted in Queensland.⁷⁶ This followed a number of other reviews into the operation of the jury system in Queensland.⁷⁷ The result was the introduction into

⁷¹ *Jury Act Amendment Act of 1923* (Qld) s 3(6).

⁷² *Jury Act 1929* (Qld) s 7(1).

⁷³ *Jury Act 1929* (Qld) ss 8, 8A.

⁷⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 15 November 1929, 1676 (Edward Hanlon).

⁷⁵ See M Shanahan, 'Implications of the Jury Act 1995', *Proctor* (December 1995) 16.

⁷⁶ Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) 81–2.

⁷⁷ See the discussion in Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) ch 1.

Parliament of the Jury Bill 1995 (Qld).⁷⁸

3.17 The Bill had been intended to drastically cut the range of people who were exempt from jury service⁷⁹ and to:⁸⁰

ensure that juries are more representative of the community, that jury vetting is a thing of the past therefore protecting the privacy of potential jurors and that the confidentiality of jury deliberations is secured.

3.18 As originally passed on 31 October 1995, it would have removed the exemptions for ministers of religion, medical practitioners, members of emergency services, government employees (including heads of Department and employees of the Department of Justice and Attorney-General), professors and teachers, members of local authorities, commercial travellers, journalists involved in court reporting, 'senior male persons' and women who wished to be exempt, pilots, and lawyers and their clerks.

3.19 The *Jury Act 1995* (Qld) was assented to on 9 November 1995 but did not commence until 17 February 1997 (other than sections 1 and 2).

3.20 In 1996, amendments to section 4 of the newly-passed Act restored lawyers, mayors, councillors and people over 70 years of age (subject to their wish to remain eligible) to the list of ineligible groups in section 4(3).⁸¹ The rationale for this was explained in the Explanatory Notes to the Bill:⁸²

The extension of the categories of persons ineligible for jury service by the addition of the three classes listed above is grounded on appropriate policy reasons applying in respect of each group.

Automatic exemption of persons aged 70 years or over was recommended by the Litigation Reform Commission in its August 1993 Report on the Reform of the Jury System in Queensland. The qualification contained in this Bill allowing for such persons to elect to become eligible recognises that there are persons in that category who may wish to volunteer for, and are capable of undertaking, jury service. In this way, appropriate acknowledgment is accorded persons in this age category in the community.

Excluding mayors and other local authority councillors from eligibility for jury service puts them on a similar level to that occupied by Members of Parliament, with whom they share many significant characteristics.

⁷⁸ See Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1995, 210 (Matthew Foley, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts). See generally Queensland Parliamentary Library (K Sampford), 'Reforming Queensland's Jury System: The Jury Bill 1995', *Legislation Bulletin No 2/95* (1995).

⁷⁹ M Shanahan, 'Implications of the Jury Act 1995', *Proctor* (December 1995) 16, 16–17.

⁸⁰ Explanatory Notes, Jury Bill 1995 (Qld) 626.

⁸¹ See *Jury Amendment Act 1996* (Qld) s 3; Queensland, *Parliamentary Debates*, Legislative Assembly, 1191–2, 16 May 1996 (Denver Beanland, Attorney-General and Minister for Justice).

⁸² Explanatory Notes, Jury Amendment Bill 1996 (Qld) 1–2.

The presence of practising lawyers on a jury has the potential, unintentionally or otherwise, for the decision of such a jury to be unduly influenced, given their special expertise in legal matters. For this reason, it was considered the appropriate arrangement would be to exclude such persons from jury service.

3.21 Additional categories of exemption were included in section 4(3) of the *Jury Act 1995* (Qld) by amendments made in 2002 with respect to:

- persons who are or have been a presiding member of the Land and Resources Tribunal;⁸³ and
- detention centre employees.⁸⁴

3.22 The Explanatory Notes accompanying those amending Bills do not clarify the reasons for the inclusion of those exemptions.⁸⁵

3.23 The *Jury Bill 1995* (Qld) also introduced a number of provisions to address concerns about jury vetting by removing the requirement for jury lists to be publicly displayed, limiting the parties' access to the jury list to 4 pm on the working day prior to the trial, prohibiting the reproduction or dissemination of the jury list to anyone else, and prohibiting pre-trial questioning of prospective jurors to ascertain their reaction to issues in the case.⁸⁶ Those provisions have remained virtually unchanged since their original enactment.⁸⁷

COMMONWEALTH LEGISLATION

3.24 In addition to the provisions in the *Jury Act 1995* (Qld), a number of Commonwealth enactments and regulations exclude certain people from liability to serve as a juror in Queensland courts (as well as in other State courts, Federal courts and specified Territory courts).⁸⁸

⁸³ *Justice and Other Legislation (Miscellaneous Provisions) Act 2002* (Qld) s 27.

⁸⁴ *Juvenile Justice Amendment Act 2002* (Qld) s 154. Section 156 of that Act inserted the following definition in sch 3 of the *Jury Act 1995* (Qld):

'detention centre employee' means a person who—

- (a) is or has been, in Queensland, a detention centre employee under the *Juvenile Justice Act 1992*; or
- (b) has been, in Queensland, a person with functions corresponding to those of a detention centre employee under the *Juvenile Justice Act 1992*; or
- (c) is or has been, under a law of another State, a person with functions corresponding to those of a detention centre employee under the *Juvenile Justice Act 1992*.

⁸⁵ The Explanatory Notes to the *Juvenile Justice Amendment Bill 2002* (Qld) provide that the provision was made 'consistent with provisions excluding corrective services officers from jury service' but do not otherwise explain the reason for the exemption: Explanatory Notes, *Juvenile Justice Amendment Bill 2002* (Qld) 43.

⁸⁶ See Explanatory Notes, *Jury Bill 1995* (Qld) 630–1; Queensland Parliamentary Library (K Sampford), *Reforming Queensland's Jury System: The Jury Bill 1995*, Legislation Bulletin No 2/95 (1995) 5–8.

⁸⁷ *Jury Act 1995* (Qld) ss 29, 30, 31, 35. Those provisions are discussed in Chapter 10 of this Report.

⁸⁸ See *Jury Exemption Act 1965* (Cth) s 4(1), (2)(b), sch; *Jury Exemption Regulations 1987* (Cth) regs 4(c), 5(1)(c), 6(1)(c), 7(1)(c). These exclusions apply generally and are not limited to the prosecution of an offence against a law of the Commonwealth.

3.25 The *Jury Exemption Act 1965* (Cth) and the *Jury Exemption Regulations 1987* (Cth) specify a number of people who are 'not liable, and shall not be summoned to serve as a juror',⁸⁹ or who are 'exempt from liability to serve as a juror',⁹⁰ in any Federal Court or any court of an Australian State or Territory. These exclusions are all based on occupation or office and include such persons as Federal Members of Parliament, judges and officers of the High Court and other federal courts, and certain Commonwealth government employees.

3.26 Other relevant exclusions are provided for in section 147 of the *Navigation Act 1912* (Cth) (masters and seamen of all ships) and regulation 150 of the *Air Navigation Regulations 1947* (Cth) (operating crew of airlines).⁹¹

TRENDS IN OTHER JURISDICTIONS

3.27 The Terms of Reference⁹² direct the Commission to have regard to reforms that have occurred in other jurisdictions, including those in England and Wales, and to the reports of the NSW Law Reform Commission on jury selection and blind or deaf jurors,⁹³ and the review of jury selection and eligibility undertaken by the Law Reform Commission of Western Australia.⁹⁴

3.28 The remaining part of this chapter gives an overview of the comparative provisions of the other Australian jurisdictions and New Zealand, as well as those of England and Wales, Ireland, Scotland and Hong Kong. In many of those jurisdictions, jury selection has been the subject of recent reforms and proposals. The Commission has had regard to these developments in formulating its own recommendations and they are discussed where relevant throughout this Report.

3.29 The review of other jurisdictions shows a general trend toward increasing the pool of prospective jurors, by reducing the number of automatic exclusions from jury service and limiting the circumstances in which excusal from jury service is available. There has also been a trend toward the removal of barriers to jury service and people's willingness to participate, by allowing deferral of jury service, improving juror remuneration, and ensuring appropriate penalties for non-compliance with juror summonses.

3.30 The underlying concern has been with improving the representativeness of juries and the rates of participation in jury service. As outlined earlier in this chapter, some steps have already been taken in this direction in Queensland.

⁸⁹ *Jury Exemption Act 1965* (Cth) s 4(1).

⁹⁰ *Jury Exemption Act 1965* (Cth) s 4(3); *Jury Exemption Regulations 1987* (Cth).

⁹¹ The Commonwealth exclusions are discussed in more detail in Chapter 7 of this Report.

⁹² The Terms of Reference are set out in Appendix A to this Report.

⁹³ See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007); and New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006).

⁹⁴ See Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010).

3.31 Although there are many similarities across jurisdictions in the overall provisions for juror eligibility and selection, the persons who are included in, or excluded from, the jury pool differ between jurisdictions. The jurisdictions also use different terminology. Unless otherwise specified, the Commission generally uses the expressions ‘exclusion’, to refer to those categories of people who are automatically excluded from serving as jurors;⁹⁵ ‘excusal as of right’, to refer to those categories of people who are entitled to opt out of service without showing any further reason;⁹⁶ and ‘excusal’, to refer to the ability for a person to be excused from service only on demonstrating some special justification.⁹⁷

THE OTHER AUSTRALIAN JURISDICTIONS

Australian Capital Territory

3.32 The *Juries Act 1967* (ACT) provides that every person whose name is on the roll of electors of the ACT is liable to serve as a juror, unless disqualified or exempt.⁹⁸ There are a small number of disqualifications, including a criminal history disqualification and the disqualification of persons of unsound mind.⁹⁹ The Act includes, however, a large number of other exclusions, virtually all of which relate to occupation or office. It excludes from jury service such persons as lawyers, doctors, and emergency services workers, as well as persons involved in the administration of justice.¹⁰⁰

3.33 The *Juries Act 1967* (ACT) also allows a person who is summoned for jury service to be excused from attendance in special circumstances, such as illness.¹⁰¹ In addition, some people, including ministers of religion and teachers, are entitled to be excused as of right if they so choose.¹⁰² Previously, those persons had been automatically excluded.¹⁰³

⁹⁵ In Queensland, this covers those persons who are ‘ineligible’ for service. Some other jurisdictions use the term ‘exempt’, ‘disqualified’ or ‘excluded’.

⁹⁶ There are generally no such categories provided for in Queensland. Some jurisdictions use the term ‘exempt’, while others refer to ‘excusal’.

⁹⁷ In Queensland, this covers excusal, by the Sheriff or a judge, in accordance with criteria set out in s 21 of the Act. In other jurisdictions, this is generally referred to as ‘excusal’. To distinguish it from excusal as of right, it is also referred to in this Report as ‘discretionary excusal’ or excusal on a case-by-case basis.

⁹⁸ *Juries Act 1967* (ACT) s 9. See also s 19 (Jury list).

⁹⁹ *Juries Act 1967* (ACT) s 10.

¹⁰⁰ *Juries Act 1967* (ACT) s 11, sch 2 pt 2.1.

¹⁰¹ *Juries Act 1967* (ACT) ss 14–17, 18A.

¹⁰² *Juries Act 1967* (ACT) s 11, sch 2 pt 2.2.

¹⁰³ See *Juries Act 1967* (ACT) s 11 later repealed and replaced by *Justice and Community Safety Legislation Amendment Act 2003* (ACT).

3.34 Provisions covering the summoning and empanelment of jurors, juror remuneration, and offences relating to jurors, including non-attendance in compliance with a jury summons, are also included in the *Juries Act 1967* (ACT).¹⁰⁴

New South Wales

3.35 Under the *Jury Act 1977* (NSW), every enrolled elector is qualified and liable to serve as a juror, unless he or she is excluded from service under the Act.¹⁰⁵ Prospective jurors are drawn from the persons enrolled in each jury district.¹⁰⁶

3.36 Prior to recent amendments, the *Jury Act 1977* (NSW) included a number of categories of people who were either disqualified, ineligible, or entitled to be excused. These exclusions from jury service have been streamlined and reduced by the *Jury Amendment Act 2010* (NSW).¹⁰⁷

3.37 The *Jury Act 1977* (NSW) will retain certain criminal history exclusions. It will also retain occupational exclusions. These will generally be confined, however, to persons connected with the administration of criminal justice, and will no longer apply for life.¹⁰⁸ The Act will also retain some of the categories of excusal as of right, for example, for clergy and emergency services workers, but many other categories will be removed.¹⁰⁹

3.38 The *Jury Act 1977* (NSW) also includes provisions for persons to seek excusal from, or deferral of, jury service in particular circumstances,¹¹⁰ and deals with the summoning, empanelment and selection of jurors, the remuneration of jurors, and offences in relation to jury service.¹¹¹

3.39 The *Jury Amendment Act 2010* (NSW) gives effect to a number of recommendations made by the NSW Law Reform Commission in its recent review of jury selection.¹¹²

¹⁰⁴ See also *Juries (Payment) Determination 2010* (ACT).

¹⁰⁵ *Jury Act 1977* (NSW) ss 5, 6 to be inserted by *Jury Amendment Act 2010* (NSW).

¹⁰⁶ *Jury Act 1977* (NSW) s 12 to be amended by *Jury Amendment Act 2010* (NSW).

¹⁰⁷ See *Jury Act 1977* (NSW) ss 6, 7 schs 1, 2, 3 to be repealed by *Jury Amendment Act 2010* (NSW). See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2010, 23675 (Barry Collier, Parliamentary Secretary).

¹⁰⁸ *Jury Act 1977* (NSW) s 6, sch 1 cl 5–7 to be inserted by *Jury Amendment Act 2010* (NSW).

¹⁰⁹ *Jury Act 1977* (NSW) ss 6, 7, schs 1, 2 to be inserted by *Jury Amendment Act 2010* (NSW).

¹¹⁰ *Jury Act 1977* (NSW) ss 14(2)–(3), 14A, 14B, 38 to be inserted by *Jury Amendment Act 2010* (NSW).

¹¹¹ *Jury Act 1977* (NSW) pts 5–7, 9–10 to be amended by *Jury Amendment Act 2010* (NSW). See also *Jury Regulation 2010* (NSW).

¹¹² New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007). That Report was preceded by an Issues Paper: New South Wales Law Reform Commission, *Jury Service*, Issues Paper 28 (2006). Some of the amendments made by the *Jury Amendment Act 2010* (NSW) differ in detail from the NSWLRC's recommendations. See also *Jury Amendment Act 2007* (NSW) and *Jury Amendment Act 2008* (NSW) which gave effect to some of the NSWLRC's other recommendations.

3.40 In its Report, the NSWLRC made a number of recommendations on the ineligibility and excusal of jurors, the identification and summoning of jurors, juror empanelment and discharge, juror remuneration, and the penalties for failing to attend for jury service. Its main concerns were to enhance the representativeness of juries and to improve jury service participation.¹¹³ It recommended that the distinction between disqualification and ineligibility should be removed and replaced with a single category of 'exclusion', and that the number of exclusions should be reduced.¹¹⁴ It also recommended the removal of excusal as of right, clarification of the circumstances in which a person may be excused for good cause, and the introduction of a system of deferral of jury service.¹¹⁵

3.41 The NSWLRC also recently undertook a review on jury service by persons who are deaf or have a significant hearing or sight impairment.¹¹⁶

3.42 As part of that project, the NSWLRC commissioned an empirical study on deaf jurors' access to courtroom proceedings through Australian Sign Language ('Auslan') interpreting. The results showed a high level of accuracy in the Auslan interpretation of legal concepts contained in the judge's summing up, and little significant difference in overall comprehension of the judge's summing up between 'deaf jurors' relying on Auslan interpretation and 'hearing jurors'.¹¹⁷

3.43 The NSWLRC's principal recommendations were:¹¹⁸

- (a) that people who are blind or deaf should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone;
- (b) that people who are blind or deaf should have the right to claim exemption from jury service;
- (c) that the Court should have power to stand aside a blind or deaf person summoned for jury duty if it appears to the Court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge the duties of a juror in the circumstances of the trial for which that person is summoned. This power should be exercisable on the Court's own motion or on application by the Sheriff.

113 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.5]–[1.7]. For a more detailed overview of the NSWLRC's recommendations see Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP 69 (2010) ch 5.

114 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [2.32]–[2.35], [2.36]–[2.42], Rec 2.

115 *Ibid* ch 6–7, Rec 26–28, 31, 32.

116 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006). That Report was preceded by a Discussion Paper: New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004).

117 J Napier, D Spencer and J Sabolcec, *Deaf Jurors' Access to Court Proceedings via Sign Language Interpreting: An Investigation*, New South Wales Law Reform Commission Research Report 14 (2007) [5.34], [5.36], [7.2].

118 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 59, Rec 1(a)–(c).

Northern Territory

3.44 Under the *Juries Act* (NT), a person whose name is on the electoral roll and who resides within a jury district is, unless disqualified or exempt, liable to serve as a juror.¹¹⁹ Having a particular criminal history is a ground of disqualification,¹²⁰ while most of the categories of 'exemption' are based on occupation or office having to do with the administration of justice.¹²¹ In addition to these automatic exclusions, the legislation allows a person to be excused from service for 'sufficient cause', and makes limited provision for deferral of jury service to a subsequent time.¹²²

3.45 The *Juries Act* (NT) also regulates the summoning and empanelment of jurors, the payment of jurors, and offences relating to jury service.¹²³

South Australia

3.46 In South Australia, qualification and eligibility of jurors is provided for in the *Juries Act 1927* (SA). Every South Australian resident within a jury district who is on the electoral roll and not above the age of 70 years is liable to serve as a juror, unless disqualified or ineligible.¹²⁴

3.47 Prior to amendments made in 1984, an extensive list of people were excluded from jury service, including army and navy officers, bank managers, mayors, dentists, medical practitioners, fire brigade officers, teachers, chemists, pilots, and persons in the paid and active service of government.¹²⁵

3.48 At present, a relatively small number of persons are excluded from service, including persons with particular criminal histories, persons who are mentally or physically unfit to carry out the duties of a juror, and certain persons involved in the administration of justice.¹²⁶

3.49 Provision is also made, in special circumstances, for excusal and deferral of jury service at the discretion of the Sheriff or a judge.¹²⁷

119 *Juries Act* (NT) ss 9, 12.

120 *Juries Act* (NT) s 10.

121 *Juries Act* (NT) s 11, sch 7.

122 *Juries Act* (NT) ss 15, 17A. See also s 18AB.

123 See also *Juries Regulations* (NT).

124 *Juries Act 1927* (SA) ss 11, 14.

125 See *Juries Act 1927–1974* (SA) s 13, sch 3 later repealed and replaced by *Juries Act Amendment Act 1984* (SA).

126 *Juries Act 1927* (SA) ss 12, 13, sch 3. The South Australian jury system was reviewed in 2002. It proposed that the existing categories of ineligibility should remain unchanged: see South Australia, Courts Administration Authority, Sheriff's Office, *South Australian Jury Review* (May 2002) [2.2] <<http://www.courts.sa.gov.au/sheriff/index.html>> at 21 January 2011.

127 *Juries Act 1927* (SA) s 16.

3.50 The *Juries Act 1927* (SA) also deals with other aspects of jury service, including the summoning and empanelment of jurors, and juror remuneration.¹²⁸

Tasmania

3.51 Under the *Juries Act 2003* (Tas), persons on the State electoral roll are liable for jury service in Tasmania, unless disqualified or ineligible.¹²⁹ Prospective jurors are drawn from persons within the relevant jury district.¹³⁰

3.52 When the *Juries Act 2003* (Tas) was introduced, the number of persons who were excluded from jury service was significantly curtailed by the removal of exclusions for several categories of persons such as medical practitioners, newspaper editors, teachers and pilots.¹³¹

3.53 At present, the persons excluded from jury service include those with particular criminal histories and those in certain occupations connected with the administration of justice, including police officers and lawyers.¹³²

3.54 The *Juries Act 2003* (Tas) also allows a person, on application, to be excused from jury service for 'good reason', such as illness or incapacity, or to have the person's jury service deferred to another time.¹³³

3.55 Provisions dealing with other aspects of jury service are also contained in the *Juries Act 2003* (Tas), including the summoning and empanelling of jurors, the discharge of jurors during a trial, offences in relation to jury service, and remuneration for jurors.¹³⁴

Victoria

3.56 Liability for jury service in Victoria is provided for in the *Juries Act 2000* (Vic). Unless disqualified or ineligible, every person who is 18 years or older and who is on the electoral roll for Victoria is liable for jury service.¹³⁵ Prospective jurors are selected from those persons residing within a jury district.¹³⁶

¹²⁸ See also *Juries (General) Regulations 1998* (SA). For offences in relation to conduct by or towards jurors see *Juries Act 1927* (SA) s 78; *Criminal Law Consolidation Act 1935* (SA) ss 245–248.

¹²⁹ *Juries Act 2003* (Tas) s 6.

¹³⁰ *Juries Act 2003* (Tas) ss 19, 20.

¹³¹ See *Jury Act 1899* (Tas) s 7, sch 1 later repealed and replaced by *Juries Act 2003* (Tas). The 2003 Act was introduced following a review of the legislation in 1999: see Tasmania, Department of Justice, *Review of the Jury Act 1899*, Issues Paper (1999).

¹³² *Juries Act 2003* (Tas) s 6(2)–(3), schs 1, 2.

¹³³ *Juries Act 2003* (Tas) ss 8–14.

¹³⁴ See also *Juries Regulations 2005* (Tas).

¹³⁵ *Juries Act 2000* (Vic) s 5.

¹³⁶ *Juries Act 2000* (Vic) ss 19, 25.

3.57 At present, disqualifications relate to criminal history, and almost all of the categories of ineligibility relate to occupation.¹³⁷

3.58 The Act also allows a person to apply for excusal from service 'for good reason', for example, if attendance would cause substantial hardship to the person or substantial inconvenience to the public. A person may also apply to have his or her service deferred to another time.¹³⁸

3.59 Prior to the introduction of the *Juries Act 2000* (Vic), several categories of people were also entitled to be excused as of right if they did not wish to serve, including women, doctors, dentists, pharmacists, teachers, mayors and town clerks.¹³⁹

3.60 A number of changes to the rules of juror eligibility and exclusion were recommended in a Report by the Law Reform Committee of the Victorian Parliament in 1997.¹⁴⁰ Many of those recommendations were implemented by the *Juries Act 2000* (Vic), including the removal of excusals as of right.¹⁴¹

3.61 Juror eligibility has recently been revisited in a Discussion Paper by the Victorian Department of Justice,¹⁴² and, in June 2010, a Bill to amend the *Juries Act 2000* (Vic) to reduce the occupational categories of ineligibility was introduced into parliament, but lapsed before it was considered by the Legislative Council.¹⁴³

3.62 Other aspects of jury service, including the summoning and empanelment of jurors, juror allowances and remuneration, and offences relating to jurors, are also dealt with in the *Juries Act 2000* (Vic).¹⁴⁴

Western Australia

3.63 Under the *Juries Act 1957* (WA), every enrolled elector is liable to serve as a juror at trials in the jury district in which the person resides.¹⁴⁵ However, some

¹³⁷ *Juries Act 2000* (Vic) s 5(2)–(3), schs 1, 2.

¹³⁸ *Juries Act 2000* (Vic) ss 7–15.

¹³⁹ See *Juries Act 1967* (Vic) s 4(3), sch 4 later repealed and replaced by *Juries Act 2000* (Vic).

¹⁴⁰ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, (1997) vol 2, (1997) vol 3. That Report was preceded by two Issues Papers: Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Issues Paper 1 (1994); Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Issues Paper 2 (1995). The Committee had also published a Background Paper on juries as part of an earlier review: Law Reform Commission of Victoria, *The Role of the Jury in Criminal Trials*, Background Paper 1 (1985).

¹⁴¹ See Victoria, *Parliamentary Debates*, Legislative Assembly, 27 May 1999, 1349 (Jan Wade, Attorney-General).

¹⁴² See Victoria, Department of Justice, *Jury Service Eligibility*, Discussion Paper (2009).

¹⁴³ *Juries Amendment (Reform) Bill 2010* (Vic), which was introduced into Parliament on 22 June 2010.

¹⁴⁴ See also *Juries Regulations 2001* (Vic) and *Juries (Fees, Remuneration and Allowances) Regulations 2001* (Vic).

¹⁴⁵ *Juries Act 1957* (WA) s 4.

people are disqualified or ineligible for jury service, and some are entitled to be excused as of right.¹⁴⁶

3.64 As with other jurisdictions, criminal history is a basis for exclusion. At present, a person may also be excluded on the basis of disability or a lack of understanding of English. Most of the other bases for exclusion relate to occupation or profession, although some relate to age, family circumstances, and religion.¹⁴⁷

3.65 The *Juries Act 1957 (WA)* also includes a limited number of grounds on which a person may be excused, on an individual basis.¹⁴⁸ In addition, the Act deals with the summoning and empanelment of jurors, payments for jury service, and offences relating to jurors and jury service.¹⁴⁹

3.66 Many of these issues were considered in the review of juror selection, eligibility and exemption that was recently undertaken by the Law Reform Commission of Western Australia.¹⁵⁰ It made a number of recommendations to improve juror selection and, in particular, to ensure community representation and broad participation on juries. Its principal recommendations included limiting the categories of occupational ineligibility, abolishing excusal as of right, tightening the grounds for discretionary excusal, and introducing a deferral system.¹⁵¹ The LRCWA nevertheless considered that some exclusions, for persons connected with the administration of criminal justice, should be retained.¹⁵²

3.67 The LRCWA also made recommendations for the introduction of an infringement notice scheme for failure to comply with a juror summons, and community education on various jury service issues.¹⁵³

3.68 The Juries Legislation Amendment Bill 2010 (WA) has since been introduced into parliament. It streamlines the categories of exclusion from jury service, provides for deferral of jury service, and specifies new grounds for discretionary excusal, thereby giving effect, either in whole or in part, to a number of the LRCWA's recommendations. The Bill is intended to 'increase community representation on juries'.¹⁵⁴

¹⁴⁶ *Juries Act 1957 (WA)* s 5.

¹⁴⁷ *Juries Act 1957 (WA)* s 5(a)–(c)(i), sch 2 pts I, II.

¹⁴⁸ *Juries Act 1957 (WA)* ss 5(c)(ii), 27, 32.

¹⁴⁹ See also *Criminal Procedure Act 2004 (WA)* pt 4 div 6; *Juries Regulations 2008 (WA)*.

¹⁵⁰ See Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010). That Report was preceded by a Discussion Paper: Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009). See also an earlier review on similar issues: Law Reform Commission of Western Australia, *Exemption from Jury Service*, Report in Project No 71 (1980).

¹⁵¹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) vii.

¹⁵² *Ibid* 49.

¹⁵³ *Ibid* 37, 97, 133–42, Rec 12, 51, 64, 65, 67.

¹⁵⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 9709 (Charles Porter, Attorney General).

JURISDICTIONS OUTSIDE AUSTRALIA

England and Wales

3.69 Liability for jury service in England and Wales is governed by the *Juries Act 1974* (Eng). That Act was amended, and significant changes to juror eligibility were introduced, by the *Criminal Justice Act 2003* (Eng).¹⁵⁵

3.70 Prior to those amendments, the *Juries Act 1974* (Eng) had provided a number of exclusions from jury service. As with other jurisdictions, criminal history provided a basis of disqualification.¹⁵⁶ The Act also set out an extensive list of people who were ineligible to serve. This included judicial officers, lawyers and their clerks, public servants administering the legal system, court officers, court reporters, penal officers, probation officers, police officers, people employed in forensic science laboratories, the clergy, and people with certain 'mental disorders'. Judicial officers were excluded for life, and many others were excluded if they had fallen into one of those categories in the previous ten years.¹⁵⁷

3.71 In addition, several categories of people were entitled under the *Juries Act 1974* (Eng) to excusal as of right. This included peers and peeresses, parliamentarians and parliamentary officers, full-time serving members of the armed forces, medical and health professionals, and persons with religious beliefs that are incompatible with jury service.¹⁵⁸ Provision had also been made for persons to seek excusal or deferral for 'good reason'.¹⁵⁹

3.72 The *Criminal Justice Act 2003* (Eng) removed virtually all categories of automatic exclusion from jury service. Most controversially, judges, lawyers and police officers became liable to serve. These changes are the most significant in recent times in any comparable jurisdiction, and warrant particular attention.

3.73 Pursuant to those changes, every registered elector between the ages of 18 and 70 who has been ordinarily resident in the United Kingdom, the Channel Islands or the Isle of Man for any period of at least five years since attaining the age of 13 years, is liable for jury service, other than a person who is disqualified because of a criminal record or who is 'mentally disordered'.¹⁶⁰

3.74 Special provision is made for persons who have attended for jury service in the previous two years and full-time serving members of the armed forces to

¹⁵⁵ *Criminal Justice Act 2003* (Eng) s 321, schs 33, 37 pt 10. Those amendments commenced on 5 April 2004. For a more detailed review of the changes in England and Wales, including the recommendations of Lord Justice Auld and a review of appeal cases arising out of the eligibility of police officers and lawyers, see Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP 69 (2010) ch 5.

¹⁵⁶ *Juries Act 1974* (Eng) s 1, sch 1 pt II later substituted by *Criminal Justice Act 2003* (Eng).

¹⁵⁷ *Juries Act 1974* (Eng) s 1, sch 1 pt I later substituted by *Criminal Justice Act 2003* (Eng).

¹⁵⁸ *Juries Act 1974* (Eng) s 9(1), sch 1 pt III later substituted by *Criminal Justice Act 2003* (Eng).

¹⁵⁹ *Juries Act 1974* (Eng) ss 9(2), 9A later amended by *Criminal Justice Act 2003* (Eng).

¹⁶⁰ *Juries Act 1974* (Eng) s 1, sch 1 pts 1, 2.

apply for excusal.¹⁶¹ However, there are no longer any other categories of automatic exclusion. A person will be required to serve unless he or she can show 'to the satisfaction of the appropriate officer that there is good reason why he should be excused' or 'his attendance ... should be deferred'.¹⁶² Guidelines issued by the Courts Service provide that deferral is generally to be preferred to excusal.¹⁶³

3.75 The *Juries Act 1974* (Eng) also includes provisions dealing with the discharge of jurors in certain circumstances, the summoning and empanelment of jurors, payment for jury service, and offences related to jury service.

3.76 The changes introduced by the *Criminal Justice Act 2003* (Eng) gave effect to recommendations made in a Report on the criminal courts of England and Wales by Lord Justice Auld in 2001.¹⁶⁴ The report dealt with many aspects of the criminal justice system, including juries, and was the most recent in a line of reports on similar issues. Earlier reports included the Report of the Departmental Committee on Jury Service chaired by Lord Morris and the Report of the Royal Commission on Criminal Justice chaired by Viscount Runciman.¹⁶⁵

3.77 In relation to juror eligibility, Lord Justice Auld concluded that there was 'a strong case for removal of all the categories of ineligibility based on occupation' and recommended that:¹⁶⁶

- everyone should be eligible for jury service, save for the mentally ill, and the law should be amended accordingly; and
 - there should be no change to the categories of those [with a criminal record] disqualified from jury service.
- ...
- save for those who have recently undertaken, or have been excused by a court from, jury service, no-one should be excusable from jury service as of right, only on showing good reason for excusal;
 - the Central Summoning Bureau or the court, in examining a claim for discretionary excusal, should consider its power of deferral first; and
 - the Bureau should treat all subsequent applications for deferral and all applications for excusal against clear criteria identified in the jury summons.

¹⁶¹ *Juries Act 1974* (Eng) ss 8, 9(2A), 9A(1A).

¹⁶² *Juries Act 1974* (Eng) ss 9, 9A.

¹⁶³ Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' (2009) [4], [2].

¹⁶⁴ See Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001).

¹⁶⁵ See *Report of the Departmental Committee on Jury Service*, Cmnd 2627, HMSO (1965) (the 'Morris Report'); *The Royal Commission on Criminal Justice, Report*, Cm 2263 HMSO (1993) (the 'Runciman Report').

¹⁶⁶ Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [31], 149, 151–2.

3.78 Lord Justice Auld considered that concerns about a person's impartiality because, for example, of the person's acquaintance with the trial participants, or about the hardship that jury service would cause because of a person's other duties, could be adequately dealt with on a case-by-case basis.¹⁶⁷

3.79 Lord Justice Auld also made a number of other suggestions to increase juror participation, such as shortening the length of jury service, providing better facilities for jurors and jurors in waiting, and increasing juror allowances.¹⁶⁸ He also considered that a system of fixed penalties for failure to comply with a jury summons should be introduced to 'bring home to the public that jury service is a public duty' that must be performed.¹⁶⁹

3.80 More recently, proposals have been made to increase or abolish the upper age limit for jury service,¹⁷⁰ and to review the disqualification of 'mentally disordered persons'.¹⁷¹

3.81 One of the principal aims of the amendments made by the *Criminal Justice Act 2003* (Eng) was to increase the rate of participation in jury service, especially by 'a wide range of professional and otherwise ... busy people'.¹⁷² Subsequent research has confirmed that the amendments resulted in a substantial increase in the overall rate of participation among those summoned for jury service.¹⁷³ It is not surprising, however, that the inclusion of judges, lawyers and police officers on English juries has proved to be controversial.

3.82 The introduction of the reforms was accompanied by a certain amount of public disquiet about the eligibility of judges, lawyers and police officers. Concerns were raised, for example, that the specialist knowledge of judges and lawyers on

167 Ibid ch 5 [30], [32], [37].

168 Ibid ch 5 [214]–[227], and see [39].

169 Ibid ch 5 [26].

170 Ministry of Justice (United Kingdom), Office for Criminal Justice Reform, *The Upper Age Limit for Jury Service in England and Wales*, Consultation Paper CP05/10 (March 2010). That Paper also raised the possibility of allowing persons over 70 years to be excused as of right from jury service.

171 Eg Office of the Deputy Prime Minister (United Kingdom), Social Exclusion Unit, *Mental Health and Social Exclusion*, Report (June 2004) ch 7 [27]–[28], ch 9 [16] <<http://www.socialinclusion.org.uk/publications/SEU.pdf>> at 25 January 2011; Ministry of Justice (United Kingdom), *Secretary of State's Report on Disability Equity 2008–2011* (2008) 77–8 <<http://www.justice.gov.uk/publications/docs/secretary-state-disability-report.pdf>> at 25 January 2010.

172 Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [13].

173 Ministry of Justice (United Kingdom) (C Thomas and N Balmer), *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (2007) 107.

juries may make it harder to secure a fair trial, and that the new provisions would be unworkable.¹⁷⁴

3.83 When the new rules first took effect, it was reported, for example, that one barrister's two weeks' attendance for jury service culminated in his service on a half-day trial only after he was first moved from his local court to the central London court to avoid possible conflicts of interest and then discharged from juries in two different trials because he had known the lawyers or judges involved.¹⁷⁵

3.84 The presence of lawyers and police officers on juries has also led to several appeals on the ground of bias.¹⁷⁶

3.85 The leading case is the House of Lords decision in *R v Abdroikof* which involved three appeals heard together: those of Abdroikof, Green and Williamson.¹⁷⁷ Abdroikof's appeal arose out of the presence on the jury of a serving police officer. The juror did not, however, have any connection with the prosecutors or the police in the case, and the appeal was dismissed by 5:0. In contrast, Green's appeal involved a police-juror who had worked in the same borough and police station as one of the police witnesses, whose evidence conflicted significantly with the evidence of the defendant; and Williamson's appeal concerned a solicitor-juror who had worked for the Crown Prosecution Service, which was the prosecuting authority in the case. Those appeals were upheld by a 3:2 majority.

3.86 In giving the leading judgment, Lord Bingham noted that:¹⁷⁸

¹⁷⁴ Eg 'Police in plea for jury exemption', *BBC News* (online), 3 May 2004 <http://news.bbc.co.uk/2/hi/uk_news/3679431.stm>; C Dyer, 'No escaping jury duty, lawyers told', *The Guardian* (online), 17 June 2004 <<http://www.guardian.co.uk/uk/2004/jun/17/politics.politicalnews/print>>; R Verkaik, 'Barrister told to turn up for jury despite rejections', *The Independent* (online), 17 June 2004 <<http://www.independent.co.uk/news/uk/crime/barrister-told-to-turn-up-for-jury-despite-rejections-732462.html>>; J Robins, 'Judge and jury', *The Lawyer* (online), 23 August 2004 <<http://www.thelawyer.com/judge-and-jury/111658.article>>. See also RG Parry, 'Jury service for all? Analysing lawyers as jurors' (2006) 70 *Journal of Criminal Law* 163.

¹⁷⁵ Eg J Robins, 'Judge and jury', *The Lawyer* (online), 23 August 2004 <<http://www.thelawyer.com/judge-and-jury/111658.article>> at 17 February 2011.

¹⁷⁶ *R v Abdroikof* [2007] 1 WLR 2697; *R v I* [2007] EWCA Crim 2999; *R v Pintori* [2007] EWCA Crim 1700; *R v Khan* [2008] EWCA Crim 531; *R v Samuels* [2008] EWCA 701; *R v Ali* [2009] EWCA Crim 1763; *R v Burdett* [2009] EWCA Crim 543; *R v J* [2009] EWCA Crim 1638; *R v Yemoh* [2009] EWCA Crim 930.

In Queensland, the test to be applied in the case of a juror's disqualification for apprehended bias is whether the incident or matter in question 'is such that it gives rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror or jury has not discharged or will not discharge their task impartially': see *R v Webb* (1994) 181 CLR 41, 53 (Mason CJ and McHugh J); *R v McCosker* [2010] QCA 52, [67] (Chesterman JA); *R v Gately* [2010] QCA 166, [7] (Holmes JA). In *R v Webb* (1994) 181 CLR 41, Deane J described (at 74) four main areas covered by the apprehended bias disqualification: disqualification by interest, where the person has a direct or indirect interest, pecuniary or otherwise, in the proceedings; disqualification by conduct, including by published statements; disqualification by association, where the apprehension of prejudice or bias results from a direct or indirect relationship, experience or contact with a person who is interested or otherwise involved in the proceeding; and disqualification by extraneous information, where the person has knowledge of some prejudicial and inadmissible fact or circumstance. A similar test applies in the United Kingdom: see *R v Abdroikof* [2007] 1 WLR 2697 [15] (Lord Bingham).

¹⁷⁷ *R v Abdroikof*, *R v Green*, *R v Williamson* [2007] 1 WLR 2697.

¹⁷⁸ [2007] 1 WLR 2697 [23].

these cases do not involve the ordinary prejudices and predilections to which we are all prone but the possibility of bias (possibly unconscious) which ... inevitably flows from the presence on a jury of persons professionally committed to one side only of an adversarial trial process, not merely (as the Court of Appeal put it) 'involved in some capacity or other in the administration of justice'. Lord Justice Auld's expectation that each doubtful case would be resolved by the judge on a case by case basis is not, he pointed out, met if neither the judge nor counsel know of the identity of a police officer or the juror, as appears to be the present practice.

3.87 On the other hand, Lord Rodger commented in his dissent that:¹⁷⁹

As [counsel for the appellants] candidly admitted in the course of his careful submissions, your Lordships' decision to allow two of the appeals will drive a coach and horses through Parliament's legislation and will go far to reverse its reform of the law, even though the statutory provisions themselves are not said to be incompatible with Convention rights.¹⁸⁰ Moreover, any requirement for police officers and CPS [Crown Prosecution Service] lawyers balloted to serve on a jury to identify themselves routinely to the judge would discriminate against them by introducing a process of vetting for them and them alone. Parliament cannot have considered that such a requirement was necessary since it did not impose it. The rational policy of the legislature is to decide who are eligible to serve as jurors and then to treat them all alike.

For my part, ... the mere presence of these individuals, without more, would not give rise to a real possibility that the jury had been unable to assess the evidence impartially and reach an unbiased verdict. (note added)

3.88 Subsequent appeal cases have confirmed that the fact that a juror is a police officer will not, of itself, disqualify the juror for want of impartiality. Appeals have been successful, however, in cases where the police-jurors have personally known the police witnesses.¹⁸¹

3.89 At present, the Guidelines issued by the Courts Service provide that employees of the Crown Prosecution Service should not serve on trials prosecuted by that Service, and should either be transferred to another court or trial or excused from jury service. Similar guidance is provided in relation to serving police officers and prison officers.¹⁸² Judges are also advised that a juror may need to be excused from a particular case if the juror is 'personally concerned with the facts of the particular case or is closely connected with a prospective witness'.¹⁸³

179 Ibid [43]–[44].

180 See art 6 of the European Convention on Human Rights which deals with the right to a fair trial.

181 *R v J* [2007] EWCA Crim 2999; *R v Pintori* [2007] EWCA Crim 1700. See also *R v Khan* [2008] EWCA Crim 531; *R v Ali* [2009] EWCA Crim 1763; *R v Burdett* [2009] EWCA Crim 543; *R v J* [2009] EWCA Crim 1638; *R v Yemoh* [2009] EWCA Crim 930.

182 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' (2009) [18].

183 Ministry of Justice (United Kingdom), Consolidated Criminal Practice Direction, Part IV Further Directions applying in the Crown Court, 'IV.42 Juries', [IV.42.2] <http://www.justice.gov.uk/criminal/procrules_fin/pd_consolidated.htm> at 25 January 2011.

Hong Kong

3.90 In Hong Kong, jury service liability is determined by the *Jury Ordinance, Cap 3* (HK). A person is liable for jury service only if he or she is resident in Hong Kong, at least 21 years old but not 65 years old, of sound mind, not afflicted by blindness, deafness or other disability that would prevent the person from serving, and of good character, and only if he or she has sufficient knowledge of the language in which proceedings are to be conducted.¹⁸⁴

3.91 At present, the *Jury Ordinance, Cap 3* (HK) also includes a long list of people who are excluded from serving as jurors, ranging from certain public officials and, in some cases, their spouses, to medical practitioners, clergymen and full-time students.¹⁸⁵

3.92 The Law Reform Commission of Hong Kong has recently recommended the removal of several of these exclusions, and the introduction of a system of excusal and deferral.¹⁸⁶ Among other things, it was guided by the need for the jury pool to be 'as widely representative of the community as is compatible with ensuring the accused's right to a fair trial'.¹⁸⁷

3.93 The *Jury Ordinance, Cap 3* (HK) also includes provisions dealing with summoning and empanelment, remuneration, and offences.¹⁸⁸

Ireland

3.94 Under the *Juries Act 1976* (Ireland), every citizen aged at least 18 years who is entered on the register of electors in a jury district is liable for jury service, unless he or she is for the time being disqualified or ineligible.¹⁸⁹

3.95 Disqualification under the *Juries Act 1976* (Ireland) is confined to persons with particular criminal histories.¹⁹⁰ Ineligibility generally applies to persons in occupations concerned with the administration of justice and to members of the defence forces.¹⁹¹

3.96 In addition, the legislation presently entitles several people, including parliamentarians, persons in Holy Orders, numerous health professionals, teachers, students, and persons aged 65 years or older, to claim excusal as of right

184 *Jury Ordinance, Cap 3* (HK) s 4(1).

185 *Jury Ordinance, Cap 3* (HK) s 5.

186 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010). That Report was preceded by a Consultation Paper: Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008).

187 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.2].

188 See also *Allowances to Jurors Order, Cap 3A* (HK).

189 *Juries Act 1976* (Ireland) s 6.

190 *Juries Act 1976* (Ireland) s 8.

191 *Juries Act 1976* (Ireland) s 7, sch 1 pt 1.

if they do not wish to perform jury service.¹⁹² Provision is also made to excuse a person 'for good reason' on a case-by-case basis.¹⁹³

3.97 The Law Reform Commission of Ireland is presently undertaking a review of these, and some other, aspects of jury service in Ireland. In a Consultation Paper published in March 2010, it provisionally recommended the removal of the categories of excusal as of right in favour of a general right of excuse for good cause for which evidence must be provided (although it proposed that certain occupational exclusions related to the administration of justice should be retained). It also proposed that provision be made for deferral of jury service.¹⁹⁴

3.98 The summoning and empanelment of jurors, payment of jurors and offences by, or in relation to, jurors is also dealt with under the *Juries Act 1976* (Ireland).

New Zealand

3.99 Under the *Juries Act 1981* (NZ), every person registered as an elector is qualified and liable to serve on a jury in the jury district in which the person resides, unless the person is disqualified or excluded.¹⁹⁵

3.100 The exclusions, most of which relate to particular occupations, are similar to those that apply in many of the Australian jurisdictions and cover, for example, parliamentarians and judges.¹⁹⁶

3.101 The Act also provides for excusal as of right for a limited number of people, including people over the age of 65.¹⁹⁷ Recent amendments to the Act made provision for deferral of jury service in cases of undue hardship or serious inconvenience. A person may also be excused from jury service, but only if the person's service cannot be deferred.¹⁹⁸

3.102 Provision for deferral was recommended by the Law Commission of New Zealand in its Report on juries in criminal trials.¹⁹⁹ That Report also examined other aspects of jury service in New Zealand, including peremptory challenges and discharge of jurors by the judge.

¹⁹² *Juries Act 1976* (Ireland) s 9(1), sch 1 pt II.

¹⁹³ *Juries Act 1976* (Ireland) s 9(2).

¹⁹⁴ Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) ch 3.

¹⁹⁵ *Juries Act 1981* (NZ) s 6.

¹⁹⁶ *Juries Act 1981* (NZ) s 8.

¹⁹⁷ *Juries Act 1981* (NZ) s 15(2).

¹⁹⁸ *Juries Act 1981* (NZ) ss 14B, 14C, 15(1)–(1B) inserted by *Juries Amendment Act 2008* (NZ) ss 11(1), 12(1) which commenced on 4 October 2010.

¹⁹⁹ Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001). That Report was preceded by two Preliminary Papers: Law Commission of New Zealand, *Juries in Criminal Trials Part One*, Preliminary Paper 32 (1998); Law Commission of New Zealand, *Juries in Criminal Trials Part Two*, Preliminary Paper 37 (1999) vols 1, 2.

3.103 Provisions dealing with the summoning and empanelment of jurors, payment of jurors, and juror offences are also included in the *Juries Act 1981* (NZ).²⁰⁰

Scotland

3.104 Under the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980*, liability for jury service applies to registered electors of at least 18 years who have been ordinarily resident in the United Kingdom, the Channel Islands or the Isle of Man for any period of at least five years since attaining the age of 13.²⁰¹ The Act sets out a list of persons who are, however, ineligible or disqualified for service.

3.105 Disqualification is based on criminal history. Ineligibility applies to members of the judiciary, certain persons who are concerned with the administration of justice, including solicitors, police officers and prison officers, and the 'mentally disordered'.²⁰²

3.106 The Act also entitles a number of people to excusal as of right from jury service. This applies, for instance, to parliamentarians, the Auditor-General, full-time serving members of the defence forces, practising medical practitioners and ministers of religion.²⁰³

3.107 The Act was also amended in 2010 to provide that persons who have attained the age of 71 are entitled to be excused as of right from service on a criminal jury trial.²⁰⁴

3.108 Those amendments were introduced after a review of jury service in criminal trials by the Scottish Government.²⁰⁵ It considered the approach taken in England and Wales, and the argument for widening the jury pool, but did not ultimately propose the removal of any of the existing categories of exclusion or excusal as of right. It noted, for example, that 'it would be unwise to open up jury duty to those who work within the justice system'.²⁰⁶

3.109 The Scottish Government did, however, propose that claims for excusal as of right must be made when prospective jurors are first notified that they may be

²⁰⁰ See also *Jury Rules 1990* (NZ).

²⁰¹ *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1), (1A).

²⁰² *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pts I, II.

²⁰³ *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* ss 2, 1A, sch 1 pt III.

²⁰⁴ *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* ss 1(1A), 1A(3), sch 1 pt III Group F para (a) inserted by *Criminal Justice and Licensing (Scotland) Act 2010*, which commenced on 10 January 2011.

²⁰⁵ See Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009); Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials*, Consultation Paper (2008); L Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses*, Report (2009).

²⁰⁶ Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [6].

called to serve, and that the rates of juror remuneration be increased.²⁰⁷ Recent amendments have introduced those changes.²⁰⁸

3.110 The *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* also provides for discretionary excusal and deferral of jury service for 'good reason',²⁰⁹ and includes a number of offences in connection with jury service.²¹⁰

207 Ibid.

208 *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1A inserted by *Criminal Justice and Licensing (Scotland) Act 2010*, which commenced on 10 January 2011; and *Jurors' Allowances (Scotland) Regulations 2010*, which revoked the *Jurors' Allowances (Scotland) Regulations 1977* with effect from 10 January 2011.

209 *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(5)–(6).

210 *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* ss 2, 3.

Chapter 4

Who Serves on Juries?

INTRODUCTION	43
WHO ARE THE JURORS?	44
Queensland	44
Elsewhere in Australia.....	49
New South Wales.....	51
Tasmania.....	53
Victoria	53
Western Australia.....	54
INDIGENOUS AUSTRALIANS.....	55
Statistics.....	55
Indigenous representation on juries.....	56
RATES OF EXCUSAL OR EXEMPTION.....	57
RATES OF DISOBEDIENCE	59

INTRODUCTION

4.1 The Terms of Reference require the Commission to have regard to a number of matters, including:²¹¹

It is an essential feature of the institution of juries that a jury is a body of persons representative of the wider community, to be composed in a way that avoids bias or the apprehension of bias and that one of the elements of the principle of representation is that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State.

4.2 The representativeness of Queensland juries is achieved (or sought to be achieved) by drawing jurors at random from those members of the community who are eligible, and liable, to serve on juries.²¹² However, the exclusion of various groups from the overall pool from which jurors are drawn, and the process of excusal, inevitably reduce the pool from which jurors are drawn. Together with the challenging of jurors, these matters have the potential to undermine the overall representativeness of juries.

4.3 It is important to understand whether the demographic make-up of Queensland juries does in fact reflect the community as a whole. The community in question will vary: the pool of jurors (and defendants) in metropolitan Brisbane is potentially significantly different from that in a small country town. One important aspect of this issue in Queensland is the rate of participation on juries by Indigenous Australians.

211 The Terms of Reference are set out in Appendix A to this Report.

212 The concept of 'representativeness' is considered at [5.7]–[5.9] below.

WHO ARE THE JURORS?

Queensland

4.4 In assessing the extent to which juries are representative of the general community, this section of the chapter provides a breakdown of the age, educational qualifications and employment of the Queensland population, and then compares those statistics with the data available from a number of studies conducted in relation to Queensland jurors.

Queensland population demographics

4.5 Jurors are drawn initially from the electoral roll. Information from the electoral roll is received electronically by the Sheriff every month, and the lists of prospective jurors are drawn from that information on a weekly basis for criminal sittings throughout the State.²¹³

4.6 As at 30 June 2010, there were 2 684 858 electors enrolled to vote in Queensland.²¹⁴ Of course, the overall pool of potential jurors is smaller than this once all the people who are ineligible, permanently excused or uncontactable are taken into account.

4.7 The total resident population of Queensland at 30 June 2010 was estimated to be 4 516 400.²¹⁵ The adults on the electoral roll in Queensland as at 30 June 2010 (2 684 858) therefore represented some 59.4% of the total Queensland population.

4.8 Figures from the Australian Bureau of Statistics ('ABS') provide a breakdown in that overall population at 30 June 2010 by age groups, a summary of which appears in the following table.²¹⁶

Age group	Males	Females	Total
0–19 years	624 141	591 666	1 215 807
20–69 years	1 458 906	1 456 787	2 915 693
70+ years	174 297	210 564	384 861
Total (All age groups)	2 257 344	2 259 017	4 516 361
Total (20+ years)	1 633 203	1 667 351	3 300 554

Table 4.1: Queensland population by age groups (ABS)

²¹³ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

²¹⁴ Electoral Commission Queensland, *Annual Report 2009–2010* (2010) 6.

²¹⁵ Australian Bureau of Statistics, *3101.0 — Australian Demographic Statistics, Jun 2010*, 1.

²¹⁶ These figures are derived from the tables at Australian Bureau of Statistics, *3101.0 — Australian Demographic Statistics, Jun 2010*, 46. The estimated resident figures at 30 June 2010 are preliminary.

4.9 Accurate comparisons of these various figures are not possible as the age group divisions differ between the ABS and the Electoral Commission.²¹⁷ However, it can be seen that the number of adults enrolled to vote at 30 June 2010 (2 684 858) is equivalent to about 81% of the resident population aged 20 years and over (3 300 554). A number of factors need to be borne in mind when considering these figures:

- A significant number of resident adults are not entitled to be enrolled on the electoral roll, and are therefore disqualified from jury service.²¹⁸
- A small number of people, many of whom are Indigenous people, live outside designated jury districts and will therefore not appear on a jury roll even if they are on the electoral roll.²¹⁹
- The number of people aged 70 years and above (384 861) — who are in general disqualified from jury service but entitled to serve if they wish — represent 11.6% of the population aged 20 years and over (3 300 554).

4.10 The ABS's National Regional Profile for Queensland contains the following statistical information in relation to the post-school qualifications achieved by the Queensland population aged 15 years and over at 30 June 2006.²²⁰ It shows that over half of this portion of the Queensland population had acquired further qualifications of some sort. This percentage might be expected to rise slightly when considering people aged 18 years and above only.

Post-graduate degree	1.9%
Graduate diploma or graduate certificate	1.2%
Bachelor degree	10.0%
Diploma or advanced diploma	6.6%
Certificate	17.9%
Inadequately described	12.8%
Total with post-school qualification	50.4%

Table 4.2: Post-school qualifications held by Queenslanders aged 15 years and over (ABS)

217

The ABS uses five-year age groups (0–4, 5–9, and so on), with persons who are 18 and 19 years of age appearing in the age group of 15–19. Accordingly, the number of persons aged 18 and 19 cannot be calculated from the ABS statistics, even though persons of that age would be included in the number of registered voters mentioned at [4.6] above. Some approximation is therefore to be expected in any conclusions or comments based on these figures.

218

See Chapter 6 below.

219

Information provided by the Department of Justice and Attorney-General, 25 February 2011.

220

Australian Bureau of Statistics, *1.379.0.55.001 National Regional Profile, Queensland, 2005 to 2009*, Table 2: Population/People. The information is from the 2006 census.

4.11 The same data from the ABS includes a breakdown of the occupations of the employed Queensland population at 30 June 2006, expressed as a percentage of the total number of employed persons.²²¹

Managers	12.4%
Professionals	17.1%
Technicians and trades workers	15.4%
Community and personal service workers	9.1%
Clerical and administrative workers	14.8%
Sales workers	10.4%
Machinery operators and drivers	7.2%
Labourers	11.9%
Inadequately described	1.8%

Table 4.3: Occupations of employed Queenslanders (ABS)

4.12 As at 30 June 2006, 19.2% of the Queensland population was born overseas, and 8.2% spoke a language other than English at home (although this does not indicate how many had sufficient skill in English to allow them to serve on a jury).²²²

Queensland jury demographics

4.13 Relatively little information is held by the Sheriff about prospective jurors. This is generally limited to the information held on the electoral roll.²²³

4.14 Some demographic information was obtained as part of the recent research carried out by the University of Queensland for this Commission's review of jury directions.²²⁴ That research involved surveys and interviews with people who had served as jurors on criminal trials held in the Supreme Court and District Court of Queensland in Brisbane in mid-2009. The following demographics were revealed:²²⁵

- Effectively equal numbers of women (17 or 51.5%) and men (16 or 48.5%) participated in the survey.

²²¹ Australian Bureau of Statistics, *1.379.0.55.001 National Regional Profile, Queensland, 2005 to 2009*, Table 2: Population/People. This material does not indicate how many people were unemployed, full-time students, full-time carers or retired.

²²² Australian Bureau of Statistics, *1.379.0.55.001 National Regional Profile, Queensland, 2005 to 2009*, Table 2: Population/People.

²²³ Information provided by the Department of Justice and Attorney-General, 25 February 2011. See the discussion of entitlement to enrol in Chapter 6 below.

²²⁴ The University of Queensland research concerned juror comprehension and the application by jurors of the directions given by judges in criminal trials.

²²⁵ School of Psychology, University of Queensland (B McKimmie, E Antrobus and K Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 7–8, contained in Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) vol 2, App E.

- The jurors ranged in age from 21 to 69, with an average age of about 43 years.²²⁶
- Fourteen jurors (42%) had a bachelor's degree or post-graduate qualification, a further 12 (36%) had a diploma or certificate, one had completed an apprenticeship, and the remaining 6 (18%) had completed (or partly completed) secondary school.
- Two-thirds (23 out of 33) of the jurors were employed, four (12%) were retired, three (9%) were employed in the home, two were full-time students and one gave no response.
- No juror described himself or herself as Indigenous.²²⁷
- All jurors used English as their first language.

4.15 Similar results were obtained by Richardson in 2001–02 as part of her doctorate work on the impact on jurors of non-verbal cues in courtrooms. Her study covered 192 District Court jurors, 140 in Brisbane and 52 in Cairns. The following statistics emerged from that study.²²⁸

4.16 There was a slight preponderance of women participating in the study: they constituted 56% of the jurors surveyed. At the time, women made up just over 50% of the Queensland population, according to the Australian Bureau of Statistics.²²⁹

4.17 Participants were aged between 18 and 69, with an average age of 46.2 years. Although this was well above the median age of the Queensland population at the time (about 35 years), Richardson noted that people under 18 cannot be called for jury service and, although she could not determine the mean age of Queenslanders over 18, it is clear that juries would on average be older than the population as a whole.

4.18 The highest level of formal education achieved by the participating jurors is set out in the following table.²³⁰

226 Similarly, a 1999 survey of 491 jurors across 14 court locations in Queensland, including Brisbane, found small numbers of jurors under 25 years of age (9.2%) and higher numbers of jurors aged over 40 years (65.2%): Deborah Wilson Consulting Services Pty Ltd, *Survey of Queensland Jurors December 1999*, Main Report (2000) [3].

227 The survey was conducted in Brisbane only.

228 C Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence* (Doctoral thesis, Griffith University, 2006) 111–16.

229 It would seem from the figures from the ABS that the percentage of women in the Queensland population has increased slightly since the beginning of the century.

230 C Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence* (Doctoral thesis, Griffith University, 2006) 114.

Post-graduate degree	11.46%
Undergraduate degree	22.91%
TAFE or equivalent	29.69%
Completed Grade 12	11.46%
Completed Grade 11	2.60%
Completed Grade 10	15.63%
Lower than Grade 10	6.25%

Table 4.4: Queensland jurors' education (Richardson)

4.19 About two-thirds (64.06%) of the surveyed jurors had received some form of training or education since leaving school: more than 34% had gone to university and just under 30% had undertaken some other form of training or education. A comparison with statistics for the Queensland population as a whole²³¹ indicates that jurors are better educated than Queenslanders overall.

4.20 Most jurors were employed, but more than one-third reported that they were not in the workforce, as noted in the following table:²³²

Not in workforce	38.30%
Management and professional	36.70%
Trades and labourers	7.45%
Clerical and sales	17.55%

Table 4.5: Queensland jurors' employment status (Richardson)

4.21 This is significantly higher than the unemployment rate for Queensland at the time, but would also include retirees, students, carers and full-time homemakers, about whom no statistics were noted. Richardson observed that, as hardship because of a person's employment is a basis for excusal, it might be expected that jurors would include a higher percentage of people not in full-time or permanent employment than the adult population as a whole.²³³

4.22 The available research does not seem to reveal any significant lack of representativeness in Queensland juries in relation to the characteristics that they measure. If anything, Queensland juries are better educated than the population as a whole, although that is perhaps to be expected given that people with a poor command of English are more likely to be excluded from the jury lists or excused from jury service. The figures tend to go against the validity of any assumption that

²³¹ See Table 4.2 at [4.10] above.

²³² C Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence* (Doctoral thesis, Griffith University, 2006) 114.

²³³ Ibid 89, 115. *Jury Act 1995* (Qld) s 21(a) provides, as a relevant matter to be considered in an application for excusal, 'whether jury service would result in substantial hardship to the person because of the person's employment or personal circumstances'.

juries are dominated by ‘housewives and pensioners’,²³⁴ the ‘unemployed and the retired’.²³⁵

4.23 The Commission has nevertheless heard from some former jurors who expressed concern about the representativeness of juries, some noting that, in their experience, juries were made up of retirees, the unemployed, students and public servants. Some specifically commented that greater efforts should be made to widen the jury pool.²³⁶ One respondent disputed that jurors are representative of the general population. In his view, professionals and trade workers are underrepresented compared with other occupational categories, while clerical workers are somewhat overrepresented compared with others.²³⁷

4.24 The exclusion from juries of resident non-citizens, irrespective of the length of their residence in Australia and their other skills and civic obligations and entitlements, might also skew the demographic mix of the pool from which juries are drawn, and may tend to reduce the representation of migrant groups and other minorities. Richardson’s research did not look at the ethnic origins of the jurors, nor their first language.

Elsewhere in Australia

4.25 Jury composition was considered in the 2007 survey of jurors and jury-eligible citizens conducted by the Australian Institute of Criminology (‘AIC’) in New South Wales, Victoria and South Australia.²³⁸ The AIC’s report reveals the following demographic data about the 4765 jury-eligible citizens, 1048 non-empanelled jurors and 628 jurors surveyed in those three States:²³⁹

	Jury-eligible citizens	Non-empanelled jurors	Empanelled jurors
State			
NSW	32.9%	30.9%	24.8%
Victoria	31.9%	4.4%	50.5%
South Australia	35.2%	24.2%	24.7%
Metropolitan / Regional			
Metropolitan	69.5%	65.9%	70.4%

²³⁴ Cf D Hurst, ‘Jury of housewives and pensioners? Not fair, says expert’, *Brisbane Times* (Brisbane), 30 April 2010 <<http://www.brisbanetimes.com.au/queensland/jury-of-housewives-and-pensioners-not-fair-says-expert-20100429-tv22.html>> at 3 February 2011.

²³⁵ Cf T Sweetman, ‘Majority pass on jury duty’, *The Sunday Mail* (Brisbane) 2 May 2010, 55.

²³⁶ Submissions 2, 3, 5, responding to Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

²³⁷ Submission 44.

²³⁸ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008).

²³⁹ The data in this table are drawn from Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 130, Table 12.

	Jury-eligible citizens	Non-empanelled jurors	Empanelled jurors
Regional	29.8%	34.1%	39.5%
Level of court			
District / County Court	–	86.5%	84.2%
Supreme Court	–	13.5%	15.6%
Sex			
Male	40.9%	29.3%	33.0%
Female	59.1%	35.9%	35.7%
Not recorded	–	34.8%	31.4%
Age (in years)			
18–29	20.6%	13.9%	18.6%
30–39	33.5%	15.6%	15.9%
40–49	22.3%	22.5%	26.4%
50–59	18.9%	21.8%	21.0%
60+	14.7%	14.2%	12.8%
Ethnic background			
Indigenous descent	0.9%	0.9%	0.5%
Non-English speaking background	12.8%	0.9%	3.0%
Highest educational qualification			
University degree	28.4%	25.4%	26.1%
Diploma or equivalent	19.3%	13.7%	15.0%
Trade certificate or equivalent	14.9%	15.6%	14.5%
High school	33.4%	30.1%	36.0%
Less than high school	4.0%	3.5%	3.0%
Occupation			
Professional	26.5%	34.0%	34.7%
Administrative or clerical worker	18.3%	13.5%	15.0%
Retiree or pensioner	11.6%	9.1%	5.9%
Tradesperson	4.1%	7.3%	10.7%
Labourer or similar worker	3.1%	7.6%	6.7%
Home duties	9.7%	5.3%	6.2%
Self-employed	7.6%	4.7%	5.7%
Casual employee	4.6%	4.1%	6.1%
Student	4.3%	1.5%	1.4%
Unemployed	1.8%	1.0%	1.6%

Table 4.6: Demographic data of jurors in three Australian States (AIC)

4.26 These figures do not seem to reveal any significant variation from the figures for Queensland juries produced by Richardson.²⁴⁰

4.27 Participants in the AIC study were also surveyed about their perceptions of the representativeness of juries. Empanelled and non-empanelled jurors were more likely to disagree with this statement (59% and 53% respectively) than community members who had never served as jurors (32%).²⁴¹

New South Wales

4.28 The composition of juries was also one aspect of a survey conducted by Trimboli and published by the Bureau of Crime Statistics and Research ('BOCSAR') in September 2008.²⁴²

A total of 1,225 jurors from 112 juries completed a short, structured questionnaire regarding their self-reported understanding of judicial instructions, judicial summing-up of trial evidence and other aspects of the trial process. These jurors heard District Court or Supreme Court trials held between mid-July 2007 and February 2008 in six courthouses in Sydney, Wollongong and Newcastle.²⁴³

4.29 Of the 1225 jurors in the survey, about 1200 answered several questions about themselves. The following figures emerged.

4.30 The sexes were almost equally represented: 50.8% of the jurors were men and 49.2% were women.²⁴⁴

4.31 The age spread was remarkably even:²⁴⁵

Age (years)	
18–24	11.8%
25–34	20.8%
35–44	21.5%
45–54	21.4%
55–64	20.3%
65+	4.3%

Table 4.7: Ages of NSW jurors (BOCSAR)

²⁴⁰ See [4.15] above.

²⁴¹ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 151.

²⁴² NSW Bureau of Crime Statistics and Research (L Trimboli) 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin*, No 199 (2008).

²⁴³ Ibid 1.

²⁴⁴ Ibid 3.

²⁴⁵ Ibid 3–4, 15.

4.32 The jurors were also much better educated than some stereotypes would suggest, with over 41% holding a bachelor's degree or higher. The comment made at [4.19] above in relation to the high education level of Queensland jurors applies more strongly here. The full breakdown of the highest level of education achieved was as follows:²⁴⁶

Post-graduate degree	12.7%
Graduate diploma or certificate	8.4%
Bachelor degree	20.2%
Advanced diploma or certificate	12.9%
Certificate level	24.4%
Secondary education	20.9%
Pre-primary or primary education	0.3%
Other (eg, apprentice)	0.2%

Table 4.8: Educational levels achieved by NSW jurors (BOCSAR)

4.33 The vast majority of jurors were employed, which again suggests that, generally speaking, jurors are not unsophisticated. It also has implications when considering the impact that jury service has on jurors' lives. The full breakdown of employment status was as follows:²⁴⁷

Employed or self-employed	83.2%
Unemployed and seeking work	1.6%
Unemployed and not seeking work	2.1%
Retired	10.0%
Student or other	3.2%

Table 4.9: Employment status of NSW jurors (BOCSAR)

4.34 English was the first language of 82.6% of the jurors.²⁴⁸ It is likely that many potential jurors whose command of English was poor were eliminated at some stage before empanelment.

4.35 The research did not indicate whether there was any skewing of these results in longer trials, particularly in relation to employment status and education.²⁴⁹

²⁴⁶ Ibid 15.

²⁴⁷ Ibid 4.

²⁴⁸ Ibid.

Tasmania

4.36 The question of how representative jurors are of the general population was recently considered as part of a Tasmanian study.²⁵⁰ It surveyed jurors from 51 trials and compared the demographic information collected from its questionnaire with Australian Bureau of Statistics 2006 census data for Tasmania.

4.37 It found that jurors were roughly similar in age, gender and country of birth distribution to the general Tasmanian population. Australian born respondents were slightly over-represented (90% of respondents were Australian born compared with 83% of the Tasmanian population), but this was expected due to citizenship and language requirements. Women and persons in the 45 to 65 age group were slightly over-represented, while those aged 65 and over were under-represented.²⁵¹

4.38 The major area of difference between Tasmanian jurors and the general population was in educational level. It found that jurors were more likely to hold post Year 12 qualifications than Tasmanians aged 15 years and over.

Victoria

4.39 Studies in Victoria of civil juries conducted in 2000–01 reported by Horan and Tait²⁵² indicate that the gender balance on those juries generally reflected the overall gender balance in Victoria. This was despite a ‘bias’ in the jury legislation that provided numerous exemptions for women (notably in relation to pregnant women and child-carers), which may have been overcome in turn by biases in the use of peremptory challenges.²⁵³

4.40 This was contrasted with an earlier study in Victoria in 1998 of criminal juries, of which only 42.5% were women.²⁵⁴ Perhaps more significant was the fact that in 1998, of all people called for jury service, both civil and criminal, only 44% were women.²⁵⁵

249 In the United Kingdom, trial length has been found to affect jury composition. On trials lasting 11 days or longer, manual workers and unskilled workers were more likely to serve, while professionals and skilled non-manual workers were less likely to serve: R Matthews, L Hancock and D Briggs, *Jurors’ perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04 (2004) 6. It should be noted that this research was conducted in 2001–02, after the release of the report by Lord Justice Auld on the Criminal Justice System in England and Wales in 2001, but before the reforms to the *Juries Act 1974* (Eng) took effect in April 2004.

250 Australian Institute of Criminology (K Warner et al), *Gauging public opinion on sentencing: can asking jurors help?*, Trends & issues in crime and criminal justice No 371 (2009) 3.

251 However, it noted that this was to be expected because persons over the age of 70 may be excused from service. See *Juries Act 2003* (Tas) s 11(3).

252 J Horan and D Tait, ‘Do juries adequately represent the community? A case study of civil juries in Victoria’ (2007) 16 *Journal of Judicial Administration* 179.

253 *Ibid* 179, 191.

254 *Ibid*.

255 *Ibid* 179, 192.

4.41 The statistics reported by Horan and Tait compared the composition of civil juries with the overall Victorian population in several areas of demographic statistics.

4.42 The statistics revealed, perhaps unsurprisingly, an over-representation of middle-aged and older people on civil juries, although the former was exaggerated and the latter reduced when variables associated with disability and long-term illness were taken into account. Younger people were under-represented.²⁵⁶

People aged 18 years or over		
Age group	Resident population	Civil jurors
18–24 years	13.3%	12.3%
25–44 years	40.5%	42.5%
45–64 years	30.5%	38.7%
> 65 years	15.7%	6.5%
People with no disability or long-term illness		
Age group	Resident population	Civil jurors
18–24 years	15.8%	12.3%
25–44 years	46.9%	42.5%
45–64 years	29.7%	38.7%
> 65 years	7.5%	6.5%

Table 4.10: Age distribution of Victorian civil jurors (Horan and Tait)

4.43 The study went on to consider the age distribution of men and women separately. It indicated that younger men, middle-aged women and older men were over-represented.²⁵⁷

4.44 However, the ethnicity of jurors, as measured by their place of birth, almost exactly reflected the make-up of the Victorian population.²⁵⁸

4.45 It is unclear to what extent, if any, there is a significant variation in the relevant results between civil and criminal juries.

Western Australia

4.46 In its examination of data available for Western Australia, the Law Reform Commission of Western Australia ('LRCWA') found that popular perceptions that

²⁵⁶ Ibid 179, 192–3.

²⁵⁷ Ibid 179, 193–4.

²⁵⁸ Ibid 179, 195. This result is discussed in more detail in Chapter 8 of this Report in the context of the ineligibility of people who are unable to read or write English.

juries are largely made up of the unemployed and housewives and that professional classes are under-represented 'have little or no basis in fact'.²⁵⁹

For example, it has been reported that Western Australian juries are populated by the unemployed and by 'housewives'. The Commission has found that this is not the case, with data showing that these categories make up only 5% of current jurors. There is also a perception that the 'professional' classes are not widely represented on juries. Again, data analysed by the Commission shows that this criticism cannot be sustained. Further, there is a perception that Aboriginal people and ethnic minorities are significantly underrepresented on juries. The available evidence does not appear to support this contention; however, existing data is limited in this regard.

4.47 However, the LRCWA's research did find that the burden of jury service may be borne unequally, particularly in regional areas where people may sometimes be called for jury service more than once in a year.²⁶⁰

INDIGENOUS AUSTRALIANS

Statistics

4.48 Figures from the Australian Bureau of Statistics ('ABS') show that, at 30 June 2006, it was estimated that Indigenous Australians made up the following proportions of the Australian population.²⁶¹

	Total Population	Indigenous population	Indigenous population as %age of total	%age of total Indigenous population
Australian Capital Territory	334 119	4282	1.28%	0.83%
New South Wales	6 816 087	152 685	2.24%	29.54%
Northern Territory	210 627	64 005	30.39%	12.38%
Queensland	4 090 908	144 885	3.54%	28.03%
South Australia	1 567 888	28 055	1.79%	5.43%
Tasmania	489 951	18 415	3.76%	3.56%
Victoria	5 126 540	33 517	0.65%	6.49%
Western Australia	2 059 381	70 966	3.45%	13.73%
Australia	20 695 516	516 810	2.50%	

Table 4.11: Indigenous population of Australia (ABS)

²⁵⁹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) ix. See also Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 7.

²⁶⁰ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 8.

²⁶¹ Australian Bureau of Statistics, *3101.0 — Australian Demographic Statistics, Jun 2008*, 17, 27.

4.49 Only New South Wales had a larger Indigenous population (152 685) than Queensland (144 885). Although the figures from the ABS do not show how many Indigenous people of jury-eligible ages reside in Queensland, they do show the following breakdown:²⁶²

Age group	Males	Females	Total
0–19 years	36 519	35 023	71 542
20–69 years	34 442	36 522	70 964
70+ years	989	1390	2379
Total (All age groups)	71 950	72 935	144 885
Total 20+ years	35 431	37 912	73 343

Table 4.12: Indigenous people in Queensland (ABS)

4.50 If these figures are compared with those set out in Table 4.1 above (bearing in mind that the figures for the Indigenous population relate to 2006 and those for the total population to 2010), it emerges that Indigenous people represent about 2.2% of the Queensland population aged over 20 years.

Indigenous representation on juries

4.51 The Commission has no statistics or other information available to it that reveal the number of Indigenous people summoned for jury service or empanelled on Queensland juries. In Chapter 11, however, the Commission has referred to the submission from the Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd, which suggests that it is extremely rare for Indigenous people to serve on Queensland juries.

4.52 Research by the Australian Institute of Criminology in 2007 involved a survey of 4765 people who were eligible to serve as jurors, including 628 who served and another 1048 who were summoned but not empanelled. In total, only 0.9% identified themselves as being of Indigenous descent, and only 0.5% of empanelled jurors did so.²⁶³ This research was conducted in New South Wales, Victoria and South Australia, and not in Queensland, Western Australia or the Northern Territory, where the proportion of Indigenous people in the community is higher.

4.53 The research also involved interviews with judges, prosecutors, defence counsel and jury administrators.²⁶⁴

Several stakeholders commented that juries lack ethnic diversity and few Aborigines serve on juries. This is particularly problematic in regional courts where Aborigines are not adequately represented (if at all) on juries. As was noted by a lawyer:

²⁶² Ibid 26–7.

²⁶³ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 129.

²⁶⁴ Ibid 78.

Repeatedly I've found that those Aboriginal accused were not being tried by their peers, ... in fact it was much worse than that, they were usually tried by white people who had a very stereotyped view of ... Aboriginal people. (NSW lawyer 4)

4.54 In practice, Indigenous Australians appear to be under-represented on juries in Queensland;²⁶⁵ this may be for a number of reasons, including under-representation on the electoral roll and within jury districts.²⁶⁶

4.55 It is not unusual for an Indigenous Australian to be tried by a jury that includes no Indigenous Australians and, one might suspect, few (if any) jurors who are familiar with life in Indigenous communities.²⁶⁷ In Western Australia, Martin CJ has made the following observations:²⁶⁸

One aspect of these issues [about the representativeness of juries] that continues to be of concern to me, is the very low rate of Aboriginal participation in jury service, even in those parts of the State [Western Australia] in which Aboriginal people comprise a significant proportion of the population. Despite the efforts that have been taken in recent years to increase Aboriginal participation in jury service, it remains the fact that Aboriginal accused are almost always tried by juries made up entirely, or almost entirely, of non-Aboriginal persons, even in parts of the State where such juries are not representative of the community as a whole.

RATES OF EXCUSAL OR EXEMPTION

4.56 The survey conducted by the Australian Institute of Criminology in 2007 of jury-eligible citizens and jurors revealed the following figures in relation to their stated reasons for avoiding jury duty:²⁶⁹

²⁶⁵ Information provided by the Department of Justice and Attorney-General, 25 February 2011. However, the information available to the Sheriff from the electoral roll does not indicate whether or not a person is Indigenous.

²⁶⁶ See Chapter 11 of this Report.

²⁶⁷ Justice R Atkinson, 'Selection of Juries: The Search for the Elusive Peer Group' (Paper presented at Jury Research and Practice Conference, Sydney, 11 December 2007) 1. See also Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 78, 84–5.

²⁶⁸ Chief Justice W Martin, 'Current Issues in Criminal Justice' (Paper presented at the Rotary District 9460 District Conference 2009, Perth, 21 March 2009) 18.

²⁶⁹ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 132.

	NSW	Victoria	South Australia	Total
Ineligible or disqualified	12%	15%	15%	13%
Ignored summons	1%	0%	2%	1%
Claimed exemption or deferral	38%	43%	45%	40%
Reasons claimed for exemption or deferral				
Care of dependants	27%	19%	16%	23%
Work commitments	30%	31%	34%	31%
Study	5%	6%	5%	5%
Holiday plans	5%	5%	0%	4%
Loss of income	6%	6%	7%	6%
Health	14%	11%	11%	12%
Conscientious objection	0%	2%	0%	1%
Other	22%	27%	41%	26%

Table 4.13: Rates of Australian juror excusal and exemption (AIC)

4.57 This research also produced some information about jurors' and other citizens' attitudes to eligibility for exemption:²⁷⁰

Jurors and community participants were divided on questions as to who should be allowed exemptions from jury duty ... There was a general consensus amongst one-half of the jurors and community members that exemption from jury duty should be granted to people who live more than 50 km from the courthouse, and people with responsibility for children under the age of 12 years. Jurors were slightly more likely to believe that people with holiday plans (60%) and financial hardships (41%) should be exempt from jury duty, compared with community members (48% and 40% respectively). Conversely, both jurors and community members were less supportive of exemptions for people with important jobs (28%), study commitments (39%), or for people with responsibility for children aged 12–18 years (21%).

4.58 Lord Justice Auld reported in his 2001 Report that 38% of people summoned for jury service were able to avoid it, mainly those who are self-employed or in full-time employment who can make out a case of economic or other hardship.²⁷¹

4.59 As discussed in Chapter 3 of this Report, many of the previous categories of exemption from jury service were abolished in England and Wales in 2004. One of the principal aims of those changes was to increase the rate of participation in jury service. More recent research conducted for the United Kingdom Ministry of

270

Ibid 152. See also Chapter 9 of this Report in relation to the basis for, and rates of, excusal in Queensland.

271

Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [39].

Justice confirmed that the amendments prompted a ‘substantial increase’ in the overall rate of participation among those summoned for jury service.²⁷²

The introduction of the new juror eligibility rules clearly resulted in a substantial overall increase in the proportion of those serving (from 54% to 64%), as well as an increase in those serving on the date for which they were summoned (from 35% to 47%). In addition, it resulted in disqualifications being reduced by a third and excusals falling by a quarter. The percentage of deferred remained constant.

	2003	2005
Served	36%	47%
Deferred	18%	17%
Disqualified	11%	8%
Excused	35%	28%

Table 4.14: Juror participation rates (UK Ministry of Justice)²⁷³

4.60 After the 2004 amendments, the main reasons for not serving were medical (34%), child care (15%), work (12%) and age (11%).²⁷⁴ Other reasons cited were mental disorder, non-residence and criminal history (disqualifications), language difficulty, care of the elderly and religion (excusals).

RATES OF DISOBEDIENCE

4.61 The Commission does not have access to information about the number of people in Queensland who fail to comply with a summons to attend for jury service. However, the Commission understands that, in 2009–10, the rate of failure to respond to the *Notice to Prospective Juror* and the attached *Questionnaire for Prospective Juror*²⁷⁵ was approximately 30%.²⁷⁶

4.62 The NSW Law Reform Commission has reported that in 2005–06 approximately 40 000 people were required to attend for jury service in New South Wales. Of those, 12 202 (about 30%, or a little under one in three) failed to attend.²⁷⁷

²⁷² Ministry of Justice (United Kingdom) (C Thomas and N Balmer), *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (2007) 107.

²⁷³ The figures in the table are taken from Ministry of Justice (United Kingdom) (C Thomas and N Balmer), *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (2007) 108, Fig 4.24, 4.25.

²⁷⁴ Ministry of Justice (United Kingdom) (C Thomas and N Balmer), *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (2007) 102–3, Fig 4.20.

²⁷⁵ These documents are described in Chapter 10 of this Report.

²⁷⁶ Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

²⁷⁷ New South Wales Law Reform Commission, *Jury service*, Issues Paper 28 (2006) [9.39].

4.63 A much worse result was reported by the Law Commission of New Zealand: it was estimated that in 2001, only about 15% to 25% of people summoned for jury service in New Zealand attended,²⁷⁸ being a failure rate that is possibly as high as 85%.

4.64 It has been observed, however, that 'it cannot be assumed that all non-returns represent a wilful attempt to avoid jury service'.²⁷⁹ Figures of failure to respond to juror questionnaires, notices and summonses will necessarily include people who have moved or are otherwise not contactable, and people whose command of English is so poor that they ignore or cannot understand the notices sent to them. It is impossible to obtain any real data about the reasons for their non-participation, which could be many.

278

Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [284].

279

Ministry of Justice (United Kingdom) (C Thomas and N Balmer), *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (2007) 72.

Chapter 5

Jury Selection: A Strategy for Reform

GUIDING PRINCIPLES.....	61
Right to a fair trial	61
Independence	62
Representativeness	62
Impartiality	65
Non-specialist composition	66
Competence	66
Non-discrimination	67
THE COMMISSION'S APPROACH TO REFORM	67
Increasing the pool of prospective jurors	67
Reducing the burden of jury service	68

GUIDING PRINCIPLES

5.1 The Terms of Reference require the Commission to have regard to the following matters in its review:²⁸⁰

- The critical role juries have in the justice system in Queensland to ensure a fair trial;
- The fact that jury duty is an important civic duty and those who become involved in criminal trials have an expectation that they will be determined by a judge and jury;
- It is an essential feature of the institution of juries that a jury is a body of persons representative of the wider community, to be composed in a way that avoids bias or the apprehension of bias and that one of the elements of the principle of representation is that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State;
- The importance of ensuring and maintaining public confidence in the justice system.

5.2 These matters point to a number of underlying principles that have informed the Commission's approach to this review.

Right to a fair trial

5.3 Foremost among these principles is the right of a defendant to a fair trial or, as article 14 of the *International Covenant on Civil and Political Rights* puts it,

²⁸⁰ The Terms of Reference are set out in Appendix A to this Report.

the entitlement to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law’.²⁸¹

5.4 With respect to jury trials, a defendant therefore has a right to an independent, impartial and competent jury, and one that is seen to be so.²⁸² While perfect adherence to these interrelated aspects of a fair trial can probably never be achieved — indeed, the right to a fair trial is not a right to a perfect trial²⁸³ — the system of selecting jurors and the conduct of jury trials should include all the safeguards that can be provided.²⁸⁴

Independence

5.5 The doctrine of the separation of powers generally requires that none of the three branches of government — the legislature, the executive and the judiciary — exercises the functions of either of the other branches.²⁸⁵ The purpose of the doctrine, in not concentrating these functions in ‘the one set of hands’, is the protection of individual liberty.²⁸⁶ The doctrine is a recognition of the importance of ensuring that each branch of government acts independently of the other.

5.6 Because criminal proceedings involve a prosecution that is brought by the State, it is important to ensure that jurors are, and are seen to be, independent of all three branches of government. The goal of independence provides a constitutional basis for the exclusion of the Governor, Members of Parliament, and the members of the judiciary — that is, judges of the Supreme Court, District Court and Childrens Court and Magistrates and Childrens Court Magistrates.²⁸⁷

Representativeness

5.7 In *Cheatle v The Queen*,²⁸⁸ the High Court considered representativeness to be an essential feature of trial by jury.²⁸⁹

²⁸¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14 (entered into force 23 March 1976; entered into force in Australia 13 November 1980).

²⁸² See, for example, *Gregory v United Kingdom* (1997) 25 EHRR 577, [43]; *Sander v United Kingdom* [2000] ECHR 34129/96, [22]; *Brown v The Queen* (1986) 160 CLR 171, 201–2 (Deane J).

²⁸³ See, for example, *Jago v District Court of New South Wales* (1989) 168 CLR 23, 49 (Brennan J); *Jarvie v Magistrates Court (Victoria)* [1995] 1 VR 84, 90–1 (Brooking J).

²⁸⁴ See, for example, *R v Glennon* (1992) 173 CLR 592, 615 (Brennan J) in relation to the protection of jurors from external influences.

²⁸⁵ Thomson Reuters, *The Laws of Australia* (at 24 February 2011) ‘Separation of powers’ [19.1.830].

²⁸⁶ See *R v Davison* (1954) 90 CLR 353, 381 (Kitto J).

²⁸⁷ The Supreme Court, District Court, Childrens Court and Magistrates Courts are all established as courts of record: *Constitution of Queensland 2001* (Qld) s 58(2)(a); *District Court of Queensland Act 1867* (Qld) s 8; *Childrens Court Act 1992* (Qld) s 4(2); *Magistrates Courts Act 1921* (Qld) s 14(1). In Chapter 7 of this Report, the Commission has considered the eligibility of members of other bodies that are established as courts of record.

²⁸⁸ (1993) 177 CLR 541.

²⁸⁹ *Ibid* 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

The relevant essential feature or requirement of the institution [of trial by jury] was, and is, that the jury be a body of persons representative of the wider community. It may be that there are certain unchanging elements of that feature or requirement such as, for example, that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State. The restrictions and qualifications of jurors which either advance or are consistent with it may, however, vary with contemporary standards and perceptions.

5.8 'Representativeness' has been variously defined. The Victorian Parliamentary Law Reform Committee adopted the following definition, based on a formulation developed by the Law Commission of New Zealand:²⁹⁰

In its search for a working definition the committee gratefully adopts a recent New Zealand Law Commission formulation of the concept. "Representative" means an accurate reflection of the composition of society in terms of ethnicity, culture, age, gender, occupation, socio-economic status (etc)'. Of course, it is not possible to obtain a representative jury in each and every case. The best that can be achieved in practice is that juries overall are broadly representative of the Victorian community. (note omitted)

5.9 This Commission endorses this formulation of the concept of representativeness.

5.10 The notion of a jury that is broadly representative of the community is of fundamental importance. It is fair to defendants, to victims and complainants (assuming that they come from the same or a similarly composed community), and to jurors themselves. It helps ensure an impartial tribunal, a key aspect of a fair trial. As a result, it is an important aspect of ensuring public confidence in, and giving legitimacy to, the criminal justice system.

5.11 In *R v Walker*,²⁹¹ the Court of Criminal Appeal of the Supreme Court of Queensland held that entitlement to a trial by one's 'peers', as that expression is found in the Magna Carta, is not part of the law of Queensland. The appellant was an Indigenous man from South Stradbroke Island. He appealed against his conviction, arguing that the absence from the panel of any Nunukul people meant that he had been denied trial by his peers, thereby vitiating the trial and his conviction.²⁹² The Court rejected this argument.²⁹³ It held that what was required by the Magna Carta was a trial by 'equals',²⁹⁴ which had occurred in this case.²⁹⁵

²⁹⁰ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [1.20] citing Law Commission of New Zealand, *Juries: Issues Paper* (1995) 6. The Law Commission of New Zealand went on in that paper to ask (at 6) 'whether representativeness should be an aim of juries taken as a whole, or an aim of the selection of each jury. The latter would be extremely difficult, if not impossible, to attain in each case'. In its later inquiry into juries in criminal trials, the Law Commission of New Zealand concluded that 'What is required is that all persons who are eligible to serve on juries, including those who are younger or older, or from ethnic minorities, do have an equal opportunity to serve', and not that each jury includes representatives of particular groups in the community: Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [135].

²⁹¹ [1989] 2 Qd R 79.

²⁹² *R v Walker* [1989] 2 Qd R 79, 84 (McPherson J). Similar concerns about the absence of Aboriginal people on juries in Queensland were raised in the New South Wales case of *Binge v Bennett* (1989) 42 A Crim R 93. See also *Binge v Bennett* (1988) 35 A Crim R 273. For a more detailed discussion of this case, see Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [2.41]–[2.42].

To accept that what is required by ch 39 [of *Magna Carta*] is a trial by 'equals' is effectively to dispose of the appellant's second ground of appeal. For, in contemporary Australia, all individuals are equal before the law, and, whatever else may be said about those who comprised the jury at the trial of the applicant in this case, they were at law certainly all his equals, as he was theirs.

5.12 The Court characterised the appellant's objection at his trial to the composition of the jury panel as a challenge to the array²⁹⁶ 'because his objection was evidently directed to the whole panel of jurors'.²⁹⁷ The Court also rejected this argument:²⁹⁸

There is nothing at all in the record to suggest that the jury before whom the applicant's trial in the District Court proceeded was not formed from a panel selected and summoned in the manner provided by the provisions of the *Jury Act*. The fact, if it be so, that the panel included no Nunukel people may have been attributable to chance, or to the limits, prescribed under s 11 of the *Jury District of Brisbane*. However that may be, it does not follow that the appellant did not receive trial by a jury of his 'peers' or equals; and, even if it did, it would not signify. The provisions of the *Jury Act* regulating the composition of juries were complied with at his trial and, if in conflict with ch 39 of *Magna Carta*, the provisions of ch 39 are to that extent impliedly repealed.

The appellant's complaint that he was not tried by a jury of Nunukel people is therefore not one that is admitted under the law of Queensland, which does not recognise the possibility of a jury drawn exclusively from a particular ethnic or other distinctive group in the community. The ancient right of an alien to claim trial by jury *de medietate lingua*,²⁹⁹ which was statutory in origin, was recognised in early Queensland, although not, it seems, in New South Wales: see *R v Valentine* (1871) 10 SCR (NSW) 113. The right to such a jury was confirmed in s 35 of the *Jury Act of 1867*; but that section was repealed in 1884 by s 2 of *The Jury Act of 1884*. A special jury composed of merchants and others could be had on application to the court; but, as appears from the judgment of Macnaughton J in *R v Connolly & Sleeman* [1922] St R Qd 273, orders to summon such jurors for trials on indictment were very seldom made. The facility was abolished by *The Jury Act Amendment Act of 1923*, and in

293 *R v Walker* [1989] 2 Qd R 79, 84–6 (McPherson J with whom Andrews CJ and Demack J agreed). The High Court refused special leave to appeal from this decision. This may be contrasted with *R v Smith* (Unreported, District Court of New South Wales, Martin DCJ, 19 October 1981), in which a District Court judge in rural New South Wales discharged the whole of a newly empanelled jury in the trial of an Indigenous man because the prosecution had used peremptory challenges to exclude all Indigenous members of the jury panel. This case is unreported, but see the case note by Neil Rees at [1982] *Aboriginal Law Bulletin* [8]. See the discussion of peremptory challenges in Chapter 10 of this Report.

294 *R v Walker* [1989] 2 Qd R 79, 84–5 (McPherson J with whom Andrews CJ and Demack J agreed).

295 *Ibid* 85. The Court further held that, if the *Magna Carta* ever formed part of the law of Queensland, it had since been displaced by local statutes: at 85.

296 See Chapter 10 of this Report for a discussion of challenges to the array.

297 *R v Walker* [1989] 2 Qd R 79, 85 (McPherson J with whom Andrews CJ and Demack J agreed).

298 *Ibid* 85–6.

299 For several centuries, juries with compositions that were apparently consciously mixed or balanced to reflect the varying backgrounds of the protagonists — juries *de medietate linguæ* — were used in cases involving defendants at special risk of suffering prejudice (such as merchants from other countries). These mixed juries allowed the parties to use their own languages and could take into account differing customs, expectations and practices: J Horan and D Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 183; RG Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 164–5.

criminal cases was never revived. Since then, all juries in criminal proceedings on indictment in Queensland have been common juries of persons now qualified, summoned and chosen in accordance with the provisions of the *Jury Act 1929–1982*. The appellant was entitled to be and was tried by such a jury, and not by any other. That being so, this ground of appeal cannot succeed. (note added)

5.13 The issue of representativeness in relation to Indigenous participation on juries is considered further in Chapter 11 of this Report.

Impartiality

5.14 An important feature of a fair trial is that the jurors are impartial and are seen to be so. All people carry with them certain prejudices and biases, but the random selection of a jury of ordinary persons from the community, ensuring a ‘cross-section of society’s biases’³⁰⁰ is said to achieve a kind of ‘diffused impartiality’³⁰¹ that is harder to attain with a single-person tribunal.

5.15 However, while the representative nature of juries is a key aspect of ensuring their impartiality, the principle of impartiality may still require that particular categories of persons are excluded or, depending on the circumstances, that certain persons be excused from performing jury service.³⁰² For example, a perception of bias might arise in relation to certain people who are involved in the administration of the criminal justice system or in the investigation, enforcement and prosecution of crime, such as the police and prosecutors within the Office of the Director of Public Prosecutions. Other matters that might affect a juror’s impartiality include ‘acquaintance with the accused, a witness or a legal practitioner engaged in the trial or with the victim of the crime in question’.³⁰³

300 I Kawaley, ‘The fair cross-section principle: Trial by special jury and the right to criminal jury trial under the Bermuda Constitution’ (1989) 38 *International and Comparative Law Quarterly* 522, 527.

301 Ibid quoting *Thiel v Southern Pacific Co* 66 S Ct 984 (1946).

302 See, for example, *Pullar v United Kingdom* [1996] ECHR 22399/93, [29]–[30]; *R v Abdroikof* [2007] 1 WLR 2679, [14]–[17] (Lord Bingham). The test to be applied for apprehended bias is whether the incident or matter in question ‘is such that it gives rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror or jury has not discharged or will not discharge their task impartially’: see *R v Webb* (1994) 181 CLR 41, 53 (Mason CJ and McHugh J); *R v McCosker* [2010] QCA 52, [67] (Chesterman JA); *R v Gately* [2010] QCA 166, [7] (Holmes JA). In *R v Webb* (1994) 181 CLR 41, Deane J described (at 74) four main areas covered by the apprehended bias disqualification: disqualification by interest, where the person has a direct or indirect interest, pecuniary or otherwise, in the proceedings; disqualification by conduct, including by published statements; disqualification by association, where the apprehension of prejudgment or bias results from a direct or indirect relationship, experience or contact with a person who is interested or otherwise involved in the proceeding; and disqualification by extraneous information, where the person has knowledge of some prejudicial and inadmissible fact or circumstance.

303 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 10.

Non-specialist composition

5.16 Related to representativeness is the notion that juries should be comprised of ordinary, lay people — that is, that they should have a non-specialist composition.³⁰⁴

5.17 In *Huddart, Parker & Co Pty Ltd v Moorehead*,³⁰⁵ O'Connor J described the essential features of trial by jury in these terms:³⁰⁶

It is the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process.

5.18 More recently, in *Doney v The Queen*,³⁰⁷ the High Court referred to the 'genius of the jury system' as being that:³⁰⁸

it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters.

5.19 Juries should be comprised of non-specialists: members of the community who do not have special professional functions, or legal expertise, in the criminal justice system. On this basis, judges and magistrates, people involved in the administration of the criminal justice system and criminal lawyers should not perform jury service. Specialists in the system, such as judges, criminal lawyers and police, may otherwise be seen to exert a disproportionate influence on the other members of a jury, not because of a dominant personality or strongly held view (which may be the case with any juror), but because of their specialist knowledge. In the case of judges, there is also a risk that other jurors might be susceptible to influence because of the judges' institutional role and perceived position of authority in the system.

Competence

5.20 The criterion of competence requires that only those people who are actually capable of serving as jurors do so. It may mean that people who cannot comprehend the proceedings, because of a profound disability or impairment, or because they do not understand the language in which the proceedings are being conducted, should be excluded from sitting on the jury (subject to the operation of the principle of non-discrimination discussed below).

304 See, for example, *Report of the Departmental Committee on Jury Service*, Cmnd 2627, HMSO (1965) (the 'Morris Report') [99].

305 (1909) 8 CLR 330.

306 *Ibid* 375.

307 (1990) 171 CLR 207.

308 *Ibid* 214 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

Non-discrimination

5.21 The duty to perform jury service is so important that some have argued that it is an entitlement, rather than a mere obligation.³⁰⁹ This points to a final principle of eligibility, also related to representativeness: the right of members of the community not to be discriminated against in the opportunity to perform jury service. Everyone, regardless of disability, ethnicity or other distinction, is entitled to participate in public and political life,³¹⁰ and the principles of non-discrimination and equality of opportunity for all people are well-recognised.³¹¹ The characterisation of jury service as a basic civil duty (or entitlement) requires that people with disabilities, for example, should not be excluded from jury service arbitrarily or unjustifiably.

5.22 Queensland Advocacy Incorporated, in its submission, commented that the importance of the principle of non-discrimination does not depend on whether jury service is characterised as a 'right' or a 'duty'. In its view, if jury service is a right, the United Nations Convention on the Rights of Persons with Disabilities requires that people with a disability have 'the full and equal enjoyment' of that right. If it is a duty, the Convention requires that there is 'the full and equal freedom' to perform jury service.³¹²

THE COMMISSION'S APPROACH TO REFORM

Increasing the pool of prospective jurors

5.23 In the Commission's view, the pool of potential jurors should be as large as circumstances and principle permit for two reasons. First, this enhances the representative nature of juries. Secondly, a large pool ensures that the burdens and benefits of jury service are shared as widely and fairly as possible, and reflects the fact that jury service is both a duty and a privilege. On a practical level, the objective of increasing the jury pool is especially important in smaller, regional areas where persons who are eligible for jury service tend to be summoned for jury service more frequently than persons living in towns or cities with larger populations.

5.24 However, the objective of increasing the pool of prospective jurors needs to be balanced against the importance of safeguarding the independence, impartiality, competence and non-specialist composition of juries. The application of these principles requires that provision should continue to be made to exclude

³⁰⁹ See J Horan and D Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 184; New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004) [1.4].

³¹⁰ See, for example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 23 (entered into force 23 March 1976; entered into force in Australia 13 November 1980); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12, art 29 (entered into force 3 May 2008; entered into force in Australia 16 August 2008).

³¹¹ See, for example, *Disability Discrimination Act 1992* (Cth); *Anti-Discrimination Act 1991* (Qld).

³¹² Submission 60, which is referred to at [8.119] below.

certain people from jury service, although it is important that there should be a clear rationale for the exclusion of any group or individual, sounding in one or more of the general principles enunciated above.³¹³

5.25 Because the excusal of jurors has the potential to reduce the pool of available jurors and to undermine the representative nature of juries, the grounds for excusal should generally be limited to excusal for cause. Further, because jury service is inevitably an inconvenience for almost everybody, a relatively high threshold of hardship or inconvenience should continue to apply in relation to the granting of excusals.³¹⁴

Reducing the burden of jury service

5.26 The Commission acknowledges that, in many cases, jury service is a burden and has the potential to cause considerable disruption to a citizen's life. In this regard, no other civic obligation is comparable to jury service. For example, the duty to vote arises infrequently and typically occupies an hour or less once every 12 to 18 months.

5.27 Research on Queensland jurors has noted their frustration with the inconvenience of jury service — in particular, their inability to plan their lives while on call for jury service.³¹⁵

5.28 The aspects of jury service that create inconvenience or dissatisfaction can be summarised as follows:

- The financial remuneration paid to jurors is scant compensation for the time spent at the trial and lost from their other activities.
- The unpredictability of jury service makes it difficult to plan for the period that jurors are on call, even for people without particularly demanding professional or domestic obligations. Although it might be expected that many people, including those with demanding professional or domestic obligations, can make alternative arrangements with proper notice, the obligation to serve on a jury is open-ended. The fact that a jury service period may last only two weeks does not mean that a juror's obligations are necessarily limited to that period. A trial, even if short, may start at the end of that period and go beyond it, and a long trial can stretch for months.³¹⁶ Until a trial has ended, a juror is discharged, or a particular jury service

³¹³ See Chapters 6, 7 and 8 of this Report.

³¹⁴ See Chapter 9 of this Report.

³¹⁵ C Richardson, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence* (Doctoral thesis, Griffith University, 2006) 317–18.

³¹⁶ In Brisbane, only those people summoned for the two week service period who indicate that they would be prepared to sit on a longer trial are drawn into jury panels for trials that are expected to last longer than two weeks; in regional centres, the expected length of the trial is taken into account in setting the jury service period for which people are summoned: Information provided by the Department of Justice and Attorney-General, 25 February 2011.

period has passed without a juror being required or empanelled, that juror cannot say precisely when he or she will be free.

- The increasing length of trials generally³¹⁷ — and the extraordinary length of exceptionally complex trials — places unique demands on jurors.
- The particular duties placed on jurors in determining the guilt or innocence of a member of their community, at times in relation to allegations that might be extremely distressing, are unusual and can be stressful.
- Jury service puts unusual restrictions on how jurors can deal with their family and friends during and after the trial. A juror cannot, for example, discuss the case in any way with anyone outside the jury,³¹⁸ whereas other people can relieve the stress of a day's work or other demands in conversation with their families and close friends.

5.29 Because jury service is an important civic duty and an essential element of the criminal justice system, it is important that the system of jury selection operates to recognise both the valuable contribution to civic life and to the criminal justice system that jurors, and prospective jurors, make and the importance and serious nature of the duty to perform jury service.

5.30 Consideration is therefore given in this Report to the deferral of jury service as an alternative to excusal. Deferral has the potential to reduce the inconvenience of jury service and enable jury service to be shared more equitably, by allowing people who might otherwise be excused from jury service on the ground of substantial hardship to serve at a time that is more convenient to them.³¹⁹ In addition to increasing the jury pool and, therefore, the representative nature of juries, deferral is also a means of ensuring that the civic responsibility of jury service is not denied to people who are able to perform jury service at some time in the near future, although not necessarily at the time when they are initially summoned.

5.31 Consideration is also given to other issues that affect the extent to which people are able and willing to perform jury service — namely, the frequency and duration of jury service, remuneration, and penalties for non-attendance.³²⁰

317 See, for example, Supreme Court of Queensland, *Annual Report 2009–2010* (2010) 19, 22, 26.

318 See *Jury Act 1995* (Qld) s 70.

319 Deferral is considered in Chapter 9 of this Report.

320 See Chapters 10, 12 and 14 of this Report.

Chapter 6

Qualification for Jury Service

INTRODUCTION	71
ELECTORAL ENROLMENT	71
Citizenship	76
NSWLRC's recommendations	79
LRCWA's recommendations	79
Discussion Paper	80
Consultation	80
The Commission's view	80
Recommendation	81
CRIMINAL RECORD DISQUALIFICATION	81
The <i>Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)</i>	87
Graduated periods of exclusion	89
Permanent exclusion	93
Temporary exclusion	97
Discussion Paper	107
Consultation	108
The Commission's view	112
Recommendations	114

INTRODUCTION

6.1 The Commission's Terms of Reference direct it to consider 'whether the current provisions and systems relating to qualification' for jury service are appropriate.³²¹ At present, qualification for jury service is determined by enrolment as an elector within the relevant jury district³²² and eligibility for service; and one of the categories of ineligibility is having a particular criminal history.³²³

6.2 Electoral enrolment and criminal history commonly inform the criteria for qualification for jury service and are the subject of this chapter.

ELECTORAL ENROLMENT

6.3 A person is qualified to serve as a juror in Queensland if he or she is enrolled as an elector within the relevant jury district and is not within one of the

321 See the Terms of Reference set out in Appendix A to this Report.

322 Jury districts are considered in Chapter 11 of this Report.

323 *Jury Act 1995 (Qld)* s 4.

classes of ineligible people specified in section 4(3) of the Act.³²⁴

4 Qualification to serve as juror

- (1) A person is qualified to serve as a juror at a trial within a jury district (***qualified for jury service***) if—
- (a) the person is enrolled as an elector; and
 - (b) the person's address as shown on the electoral roll is within the jury district; and
 - (c) the person is eligible for jury service.
- (2) A person who is enrolled as an elector is eligible for jury service unless the person is mentioned in subsection (3).

6.4 These requirements are reflected in all Australian jurisdictions,³²⁵ although there is some variation in relation to jury districts and similar organisational matters.

6.5 The starting point, therefore, is enrolment on the Queensland electoral roll, which is maintained by the Australian Electoral Commission under a joint roll arrangement with the Commonwealth.³²⁶ Under sections 64 and 65 of the *Electoral Act 1992* (Qld), eligibility for enrolment on the Queensland electoral roll is principally determined by the requirements of the *Commonwealth Electoral Act 1918* (Cth).

6.6 Section 64 of the *Electoral Act 1992* (Qld) provides that a person is entitled to be enrolled for an electoral district if the person:

- is eligible for enrolment under the *Commonwealth Electoral Act 1918* (Cth); and
- has lived in the electoral district for the last month.

6.7 Section 65 requires a person who is entitled to enrol, but who has not enrolled, to give notice to an electoral registrar for the district in the required form. It also requires a person to notify a change of address within a given electoral district within 21 days.

³²⁴ The classes of ineligible people specified in s 4(3) of the Act include people who have been convicted of an indictable offence or have served a sentence of imprisonment (discussed in this chapter); people who are or have been members of certain occupations (discussed in Chapter 7); and people who are ineligible on the basis of age, inability to read or write English, or physical or mental disability (discussed in Chapter 8).

³²⁵ *Juries Act 1967* (ACT) s 9; *Jury Act 1977* (NSW) s 5 to be re-inserted by *Jury Amendment Act 2010* (NSW); *Juries Act* (NT) s 9; *Juries Act 1927* (SA) s 11; *Juries Act 2003* (Tas) s 6; *Juries Act 2000* (Vic) s 5; *Juries Act 1957* (WA) s 4. The position is similar under *Juries Act 1981* (NZ) s 6; *Juries Act 1974* (Eng) s 1; *Juries Act 1976* (Ireland) s 6; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(a).

³²⁶ See *Electoral Act 1992* (Qld) ss 58, 62; *Commonwealth Electoral Act 1918* (Cth) s 84; *Caltabiano v Electoral Commission of Queensland (No 4)* [2009] QSC 294, [25] (Atkinson J).

6.8 Under the *Commonwealth Electoral Act 1918* (Cth), entitlement to enrol is conferred on people who are at least 18 years old and who are Australian citizens.³²⁷ Certain people are specifically disqualified from enrolment: holders of temporary visas within the meaning of the *Migration Act 1958* (Cth) and people who are unlawful citizens under that Act;³²⁸ people who have been convicted of treason or treachery and have not been pardoned;³²⁹ and people who, 'by reason of being of unsound mind, [are] incapable of understanding the nature and significance of enrolment and voting'.³³⁰

6.9 A person who is serving a sentence of imprisonment of three years or more for an offence against the law of the Commonwealth or of a State or Territory is not entitled to enrolment (or to vote) at federal elections.³³¹ Under the *Commonwealth Electoral Act 1918* (Cth), a person is serving a term of imprisonment only if:³³²

- (a) the person is in detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory; and
- (b) that detention is attributable to the sentence of imprisonment concerned.

6.10 Because disqualification is limited to a person who is currently serving a term of imprisonment of three years or more (and does not apply to a person who

327

Commonwealth Electoral Act 1918 (Cth) s 93(1). In addition, people eligible to enrol include people who would, if the *Australian Citizenship Act 1948* had continued in force, be British subjects within the meaning of that Act and whose names were, immediately before 26 January 1984, on a relevant electoral roll: s 93(1)(b)(ii), (8A). See also *Commonwealth Electoral Act 1918* (Cth) ss 94 (Enrolled voters leaving Australia), 94A (Enrolment from outside Australia), 95 (Eligibility of spouse, de facto partner or child of eligible overseas elector), 95AA (Norfolk Island electors), 96 (Itinerant electors).

328

Commonwealth Electoral Act 1918 (Cth) s 93(7).

329

Commonwealth Electoral Act 1918 (Cth) s 93(8)(c). The reference to treason or treachery includes a reference to treason or treachery committed in relation to the Crown in right of a State or the Northern Territory or in relation to the government of a State or the Northern Territory: s 93(10).

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Commonwealth Electoral Act 1918 (Cth) s 93(8)(a).

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See *Commonwealth Electoral Act 1918* (Cth) ss 93(8)(b), 93(8AA), compilation as at 16 May 2005; and Australian Electoral Commission, Special Category Electors, 'Prisoners' <http://www.aec.gov.au/Enrolling_to_vote/Special_Category/Prisoners.htm> at 27 January 2011.

In 2006, the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) sch 1 items 14, 15 repealed s 93(8)(b) and replaced s 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth) to disqualify people who are serving sentences of imprisonment of any duration from voting at federal elections. Previously, ss 93(8)(b) and 93(8AA) had disqualified only those people serving sentences of imprisonment of three years or more. In *Roach v Electoral Commissioner* (2007) 233 CLR 162, the High Court ruled the 2006 amendment to be invalid and held that the former provisions applying a three-year threshold were valid. As Gleeson CJ explained (at [24]):

The step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people.

See also Gummow, Kirby and Crennan JJ at [90]–[95]. In Queensland, the *Electoral Act 1992* (Qld) was also amended in 2006 to insert s 101(3) in similar terms to the now invalid Commonwealth provision, purporting to disqualify people serving a sentence of imprisonment of any duration from voting at Queensland elections.

332

Commonwealth Electoral Act 1918 (Cth) s 4(1A) (definition of 'sentence of imprisonment'). See also *Electoral Act 1992* (Qld) s 101(4), which is in virtually identical terms.

has served such a sentence), a person recovers his or her entitlement to enrol (and to vote) after serving the term of imprisonment.

6.11 People who are entitled to enrol are obliged to do so.³³³ There is some concern, however, that some people who are eligible to enrol decline to do so.

6.12 The Australian Electoral Commission has a number of strategies for continuous review of the electoral roll to ensure that it is 'as up to date as possible at any given point in time'³³⁴ including monthly mailouts to electors who appear to have changed address, regular door knocks to check enrolments, and ongoing enrolment programs targeting specific groups of people such as new citizens and 17- and 18-year-old school students. The mail review system is enhanced by data matching with Australia Post redirection advices, Centrelink change of address advices and State driver licence data.³³⁵ Enrolment forms are made widely available, including online.³³⁶ Provision is also made to streamline the enrolment of new citizens³³⁷ and to deal with the removal of names from the roll when someone is no longer entitled to enrolment or is deceased.³³⁸ As at June 2010, approximately 89.7% of all eligible voters were enrolled.³³⁹

6.13 The Australian Electoral Commission has also expressed support for the implementation of automatic enrolment procedures.³⁴⁰ This is currently being considered by the Federal Government in response to the Joint Standing Committee on Electoral Matters inquiry into the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* (NSW).³⁴¹ The New South

333 Failure to enrol is an offence punishable by a fine of one penalty unit (\$110) under s 101(4) of the *Commonwealth Electoral Act 1918* (Cth). Failure to enrol or to give notice of a change of address for enrolment is also an offence, punishable by a fine of one penalty unit (\$100) under s 150 of the *Electoral Act 1992* (Qld).

334 Australian Electoral Commission, About Electoral Roll, 'Electoral Roll Review' <http://www.aec.gov.au/Enrolling_to_vote/About_Electoral_Roll/Roll_review.htm> at 27 January 2011.

335 See *Commonwealth Electoral Act 1918* (Cth) s 92; Australian Electoral Commission, About Electoral Roll, 'Electoral Roll Review' <http://www.aec.gov.au/Enrolling_to_vote/About_Electoral_Roll/Roll_review.htm> at 27 January 2011; Australian Electoral Commission, *Annual Report 2009–2010* (2010) 31–46.

336 Australian Electoral Commission, *Annual Report 2009–2010* (2010) 36–37, 45. Forms are supplied by the Australian Electoral Commission and can also be obtained from post offices and offices of government agencies such as Centrelink and Medicare. The AEC enrolment SmartForm was introduced in September 2010, enabling electors to complete enrolment online.

337 See [6.22] below.

338 See *Commonwealth Electoral Act 1918* (Cth) pt VIII; Australian Electoral Commission, About Electoral Roll, 'Electoral Roll Review' <http://www.aec.gov.au/Enrolling_to_vote/About_Electoral_Roll/Roll_review.htm> at 27 January 2011. See also *Caltabiano v Electoral Commission of Queensland (No 4)* [2009] QSC 294, [27]–[28] (Atkinson J) and *Commonwealth Electoral Act 1918* (Cth) pt IX in relation to the removal of an elector's name when an objection to the person's enrolment is made.

339 Australian Electoral Commission, *Annual Report 2009–2010* (2010) 31.

340 Ibid 30; Australian Electoral Commission, Submission to the Government's Electoral Reform Green Paper – Strengthening Australia's Democracy (2009) 8 <http://www.dpmc.gov.au/consultation/elect_reform/strengthening_democracy/pdfs/58%20-%20Australian%20Electoral%20Commission.pdf> at 9 February 2011.

341 Joint Standing Committee on Electoral Matters, Parliament of Australia, Inquiry into the implications of the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* (NSW) for the conduct of Commonwealth elections (2010) <<http://www.aph.gov.au/house/committee/em/autobill2009/report/fullreport.pdf>> at 9 February 2011.

Wales Act provides for the automatic enrolment of electors for the purposes of NSW elections.³⁴² Victoria has also made provision for the automatic enrolment of electors.³⁴³

6.14 Although data is not available, it appears that Indigenous people in Australia are under-represented on the electoral roll, particularly those from rural or remote areas.³⁴⁴ A Commonwealth Parliamentary Committee has suggested several reasons for this:³⁴⁵

Factors which impact on enrolment levels and voter participation in Indigenous communities include literacy and numeracy levels, cultural activities, school retention rates, health and social conditions, as well as the general remoteness of Indigenous communities and the transient nature of their inhabitants.

The Independent Schools Council of Australia (ISCA) noted in its submission that participation by Indigenous Australians in mainstream democratic processes 'is often viewed with scepticism, anxiety and distrust'.

In 2002, the then State Secretary of the Tasmanian Aboriginal Centre, Ms Trudy Maluga stated that 'many Aborigines do not consider themselves part of the Australian nation and so have deliberately decided not to vote in white elections.'

The challenge of engaging Indigenous people in the election process is further exacerbated by the act of voting being perceived as 'irrelevant' to their everyday lives. (notes omitted)

6.15 In 2007, the Australian Parliament's Joint Committee on Electoral Matters recommended that the Australian Electoral Commission continue to work collaboratively with the electoral commissions of the Australian states and territories in undertaking electoral awareness campaigns targeting Indigenous Australians.³⁴⁶

6.16 The Australian Electoral Commission has established a new Indigenous Electoral Participation Program ('IEPP') to improve Indigenous participation in the electoral system. The program began in April 2010:³⁴⁷

The program operates Australia wide, in remote, rural and urban areas.

The four objectives of the IEPP are:

³⁴² *Parliamentary Electorates and Elections Amendment (Automatic Enrolments) Act 2009* (NSW). This is implemented through a SmartRoll procedure: see New South Wales Electoral Commission, 'SmartRoll' <http://www.elections.nsw.gov.au/enrol_to_vote/smarroll> at 9 February 2011.

³⁴³ *Electoral Amendment (Electoral Participation) Act 2010* (Vic).

³⁴⁴ Parliament of Australia, House of Representatives, Joint Committee on Electoral Matters, *Civics and Electoral Education*, Report (2007) [5.5].

³⁴⁵ Ibid [5.8]–[5.11].

³⁴⁶ Ibid [5.30]–[5.33].

³⁴⁷ Australian Electoral Commission, Information for Indigenous Australians, 'Indigenous Electoral Participation Program' <http://www.aec.gov.au/Voting/indigenous_vote/index.htm> at 27 January 2011.

- to increase levels of knowledge of democratic and electoral processes
- to increase levels of enrolment
- to increase levels of participation in democratic and electoral processes
- to decrease levels of informal voting

The program components include an extensive field program, programs for schools, TAFEs and communities, prison visits, small community activity sponsorships; a future leaders program, an ambassador program; and increasing and supporting Indigenous employment in Australia's electoral processes.

6.17 The importance of fieldwork as part of the IEPP cannot be overestimated, given the recognition that 'mail-based activities are largely ineffective' in large, remote communities.³⁴⁸

6.18 Increasing Indigenous representation on the electoral roll may be one of the most important means for improving Indigenous representation on juries.

Citizenship

6.19 Because of the requirements for enrolment that apply under the *Commonwealth Electoral Act 1918* (Cth), the requirement in section 4(1)(a) of the *Jury Act 1995* (Qld) 'to be enrolled as an elector' effectively amounts to a citizenship requirement.

6.20 In 1992, the Australian Law Reform Commission noted that:³⁴⁹

Juries do not reflect the cultural diversity of the community because individuals who are not registered on the electoral roll or do not have an adequate command of the English language are excluded.

6.21 To overcome this, the ALRC suggested that people should be encouraged to take up citizenship³⁵⁰ and recommended that 'when migrants become citizens, they should be given an opportunity to register immediately on the electoral roll'.³⁵¹

³⁴⁸ Australian Electoral Commission, *Annual Report 2009–2010* (2010) 49. The IEPP has 23 field officers who deliver the face-to-face elements of the program, including four in Queensland. See Australian Electoral Commission, Information for Indigenous Australians, 'Indigenous Electoral Participation Program' <http://www.aec.gov.au/Voting/indigenous_vote/index.htm> at 9 February 2011.

³⁴⁹ Australian Law Reform Commission, *Multiculturalism and the Law*, Report 57 (1992) [10.44].

³⁵⁰ Ibid [10.57].

³⁵¹ Ibid [10.63].

6.22 The current procedure is for new citizens to be given the opportunity to enrol at their citizenship ceremonies.³⁵² In the year 2009–10, 94.4% of new citizens eligible for enrolment were enrolled within three months of becoming citizens.³⁵³

6.23 The requirement for citizenship, however, means that non-citizen permanent residents are precluded from electoral enrolment and, therefore, from the pool of potential jurors. According to the Australian Bureau of Statistics, Census data from 2006 showed that 73% of people born overseas who had been resident in Australia for two years or more (and thus potentially eligible for citizenship)³⁵⁴ were Australian citizens,³⁵⁵ indicating at least some gap in citizenship take-up.³⁵⁶ In the fifteen years between 1991 and 2006, the rate of uptake has wavered between 60 and 74%.³⁵⁷

6.24 The Australian Government has strategies to encourage citizenship take-up. For example, the 60th anniversary of Australian citizenship in 2009 was used as a basis for a number of special citizenship activities that attracted significant media attention.³⁵⁸ The Department of Immigration and Citizenship reports that between 2008–09 and 2009–10, citizenship conferrals increased by 12%.³⁵⁹

6.25 The Victorian Law Reform Committee considered the removal of the citizenship requirement in its 1996 report on jury selection. While it was of the view that the requirement ‘reduces the representativeness of the jury system’³⁶⁰ and considered that ‘the basic qualification for jury service should include non-citizen permanent residents’,³⁶¹ the VLRC did not recommend immediate change ‘because of the current administrative difficulties in establishing an accurate database of citizens and non-citizen permanent residents’.³⁶² There are also likely to be privacy concerns involved with the use of information from alternative databases.

352 Australian Electoral Commission, *Annual Report 2009–2010* (2010) 40. See also Australian Electoral Commission, Enrolling To Vote, ‘Enrolment and Voting Information for people becoming Australian citizens’ <http://www.aec.gov.au/enrolling_to_vote/New_citizens.htm> at 27 January 2011; Department of Immigration and Citizenship Australia, Citizenship, Attending your citizenship ceremony, ‘What happens at the ceremony?’ <http://www.citizenship.gov.au/ceremonies/attending_ceremony/> at 27 January 2011.

353 Australian Electoral Commission, *Annual Report 2009–2010* (2010) 40.

354 Permanent residents are able to apply for citizenship after fulfilling minimum residency requirements. At present, non-citizen permanent residents are eligible to apply for citizenship if they have been present in Australia for the preceding four years and permanently resident for the last 12 months: *Australian Citizenship Act 2007* (Cth) ss 21(2)(c), 22(1). The previous residency requirement was two years: see former *Australian Citizenship Act 1948* (Cth) s 13(1)(e).

355 B Pink, *Year Book Australia 2009–10*, Australian Bureau of Statistics No 91, Cat No 1301.0, 28.

356 See Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [6.21]–[6.23] for a discussion of the rates at which people from different countries acquire citizenship.

357 See Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [6.23] Table 6.1.

358 Department of Immigration and Citizenship Australia, *Annual Report 2009–10* (2010) 247.

359 *Ibid* 253.

360 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.7].

361 *Ibid* [3.11].

362 *Ibid*.

6.26 In its 1993 report on the jury system in Queensland, the Litigation Reform Commission suggested that names for jury lists be obtained from sources other than the electoral roll, such as the Department of Transport, the Department of Social Security and the Taxation Office. It considered that this would enable permanent residents to be made eligible for jury service and could 'facilitate a more frequent representation of racial and ethnic groups on juries'.³⁶³

6.27 The Australian position can be contrasted with that in New Zealand. Section 74 of the *Electoral Act 1993* (NZ) provides that both citizens and permanent residents of New Zealand who have at some time resided continuously in New Zealand for a period of not less than one year are eligible to be registered as electors. Registered electors are, subject to the disqualifications and exclusions in the *Juries Act 1981* (NZ), entitled to serve as jurors.³⁶⁴

6.28 In Hong Kong, the relevant jury service qualification requirement is 'residency'.³⁶⁵ The legislation does not specify what residency means and whether, for example, a minimum length of residency is required. The Law Reform Commission of Hong Kong recently considered this qualification, and recommended that a minimum residency period of three years should apply.³⁶⁶

We ... prefer that a person should have resided in Hong Kong long enough to acquire sufficient knowledge of local culture and social values so that he may properly assess the witnesses' evidence. ... At the same time, we think it important that the mix of peoples which make up Hong Kong's community should be represented in the jury pool. ...

Having taken these considerations into account, we think that, though arbitrary, a minimum period of actual residence in Hong Kong should be required before a person is eligible for jury service. That period of residence should not be so long as to exclude all but permanent residents, but should be sufficient to ensure that the juror has a reasonable connection to Hong Kong.

6.29 In Hong Kong, inclusion in the jury list on the basis of residency is facilitated by the system of mandatory registration and issuing of identity cards.³⁶⁷

6.30 In Ireland, jurors are drawn from the list of electors for general elections.³⁶⁸ However, the Law Reform Commission of Ireland has recently proposed that this should be expanded to capture European Union citizens registered to vote at European and local elections and who have been resident in Ireland for five years, the period of residency that entitles non-Irish citizens to Irish citizenship. It

³⁶³ Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [2.12]–[2.13].

³⁶⁴ *Juries Act 1981* (NZ) s 6.

³⁶⁵ *Jury Ordinance, Cap 3* (HK) s 4(1).

³⁶⁶ Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.18]–[5.20], Rec 2.

³⁶⁷ See *Registration of Persons Ordinance, Cap 177* (HK) s 3; *Registration of Persons Regulation, Cap 177A* (HK) reg 3. See also Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.20].

³⁶⁸ *Juries Act 1976* (Ireland) s 6.

considered this appropriate to increase the diversity and representativeness of juries.³⁶⁹

NSWLRC's recommendations

6.31 In its 2007 Report on jury selection, the NSW Law Reform Commission expressed a view similar to that of the Victorian Law Reform Committee, preferring that citizenship remain the criterion for juror eligibility:³⁷⁰

While it would be desirable to increase the involvement of some minority groups so as to reinforce the representative nature of juries, it would seem to be impractical and unduly expensive to include permanent residents, due to the absence of any accessible and up to date listing of their names and current addresses. Otherwise, we are satisfied that citizenship should remain the criterion for jury eligibility, since it represents an acceptance of the laws of the community and a commitment to important mutual rights and obligations. (note omitted)

6.32 The *Jury Amendment Act 2010* (NSW) maintains the current requirement of enrolment as an elector for the Legislative Assembly of New South Wales.

LRCWA's recommendations

6.33 In its Final Report, the Law Reform Commission of Western Australia recognised the difficulties identified by the Victorian Law Reform Committee and the New South Wales Law Reform Commission in obtaining accurate lists of non-citizen permanent residents for the purpose of jury service summonses.³⁷¹ It therefore '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'.³⁷²

6.34 The LRCWA also recommended that the jury feedback questionnaire be modified to collect statistics in relation to jurors from culturally and linguistically diverse backgrounds,³⁷³ and for translated versions of the juror summons and Juror Information Sheet to be made available to prospective jurors.³⁷⁴

369 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [2.49]–[2.56].

370 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [2.27]. The Runciman Royal Commission expressed a similar view: The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO (1993) 131 [53].

371 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 41.

372 *Ibid*; see also Rec 50.

373 *Ibid* 97, Rec 50.

374 *Ibid* 98, Rec 52.

Discussion Paper

6.35 In its Discussion Paper, the Commission expressed the provisional view that qualification for jury service should continue to be limited to people who are enrolled on the electoral roll for the relevant jury district. The Commission noted that this would keep juror and voter eligibility in tandem. It therefore made the following proposal on which it sought submissions.³⁷⁵

- 6-1 Electoral enrolment should continue to be the basis of juror qualification. Section 4(1) and (2) of the *Jury Act 1995* (Qld) should be retained without amendment.

Consultation

6.36 The Queensland Law Society agreed with the Commission's proposal that the provision for qualification for selection on the basis of electoral enrolment and being resident in the requisite area should be retained without amendment.³⁷⁶

6.37 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd commented that encouraging people to vote was one of the 'important longer term options to increase Aboriginal and Torres Strait Islander peoples' presence on juries'.³⁷⁷

The Commission's view

6.38 In the Commission's view, qualification for jury service should continue to be limited to people who are enrolled on the electoral roll for the relevant jury district, as is presently the case.

6.39 While this basis for qualification excludes non-citizen residents (because they are not eligible for enrolment), the electoral roll is a comprehensive roll of citizens. All people who are eligible to enrol are *required* to do so,³⁷⁸ and procedures are adopted to ensure that the roll is kept as up to date as possible.

6.40 Suggestions to expand jury service qualification to include non-citizen residents would, in the Commission's view, be difficult and costly to implement in the absence of a single, reliable source of data, such as the electoral roll represents for adult citizens.

6.41 To the extent that the jury pool is diminished by the exclusion of non-citizen permanent residents, the Commission considers that continued effort to encourage citizenship take-up and enrolment as an elector are the best approaches.

³⁷⁵ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [6.35]–[6.41], Proposal 6-1.

³⁷⁶ Submission 52.

³⁷⁷ Submission 43.

³⁷⁸ See n 333 above.

6.42 In the Commission's view, therefore, the *Jury Act 1995* (Qld) should continue to provide that a person is qualified for jury service if:

- the person is enrolled as an elector;
- the person's address as shown on the electoral roll is within the jury district; and
- the person is otherwise eligible for jury service.

6.43 The Act should also continue to provide that a person who is enrolled as an elector is eligible for jury service unless the person falls within one of the categories of ineligible persons specified in section 4(3) of the Act. What those categories should be is considered in Chapters 7 and 8 of this Report and, in relation to criminal history, the remainder of this chapter.

Recommendation

6.44 The Commission makes the following recommendation:

6-1 Electoral enrolment should continue to be the basis of juror qualification. Section 4(1) and (2) of the *Jury Act 1995* (Qld) should therefore be retained.

CRIMINAL RECORD DISQUALIFICATION

6.45 Disqualification on the basis of a criminal record applies in all jurisdictions, although it is differently expressed in each Australian jurisdiction.

6.46 In general, people convicted of indictable offences or who have been sentenced to imprisonment (or to particular periods of imprisonment) in any Australian State or Territory are excluded from jury service.³⁷⁹ Similar provisions are found in New Zealand, England and Wales, Ireland, and Scotland.³⁸⁰

6.47 In Queensland, people who have been convicted of an indictable offence, or who have been sentenced to imprisonment, are permanently ineligible for jury service. Section 4(3)(m) and (n) of the *Jury Act 1995* (Qld) provides:

- (3) The following persons are not eligible for jury service—

³⁷⁹ *Jury Act 1995* (Qld) s 4(3)(m), (n); *Juries Act 1967* (ACT) s 10(a); *Jury Act 1977* (NSW) s 6, sch 1 cl 1–4 to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act* (NT) s 10(3)(a), (b); *Juries Act 1927* (SA) s 12(1)(a)–(f); *Juries Act 2003* (Tas) s 6(2), sch 1; *Juries Act 2000* (Vic) s 5(2), sch 1; *Juries Act 1957* (WA) s 5(b)(i), (ii).

³⁸⁰ *Juries Act 1981* (NZ) s 7(a), (b); *Juries Act 1974* (Eng) s 1(1)(d), (3), sch 1 pt II; *Juries Act 1976* (Ireland) s 8; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt II. In Hong Kong, a person must be 'of good character' in order to qualify for jury service: *Jury Ordinance, Cap 3* (HK) s 4(1)(b).

...

- (m) a person who has been convicted of an indictable offence,³⁸¹ whether on indictment or in a summary proceeding;
- (n) a person who has been sentenced (in the State or elsewhere) to imprisonment. (note added)

6.48 There is no provision for such a person to become eligible again after a certain period has elapsed after being convicted or completing the term of imprisonment; nor is a minimum sentence length required to trigger ineligibility. Any sentence of imprisonment is sufficient to exclude the person from jury service.

6.49 In contrast, in most of the other Australian jurisdictions, absolute disqualification from jury service applies in relation to certain types of convictions or periods of imprisonment only. For other convictions or periods of imprisonment, most jurisdictions put a time limit on the disqualification. These provisions are summarised at [6.53] below.

6.50 Some jurisdictions also disqualify people who are subject to community service, parole, good behaviour or other such orders.³⁸²

6.51 In addition, although the wording differs, some jurisdictions disqualify people who are remanded in custody or released on bail pending trial or sentencing, or who have been charged with an indictable offence or an offence punishable by imprisonment that has not yet been determined.³⁸³

6.52 However, the current exclusionary provision in Queensland does not clarify what is meant by a sentence of imprisonment and whether, for example, this would include a suspended sentence or imprisonment by means of an intensive correction order. Nor does it expressly exclude a person who is currently serving a term of imprisonment (although this is implied) or a person who is currently subject to a community-based or other court order imposed as a result of a criminal charge or conviction.

6.53 The following table summarises the criminal record disqualifications that apply in Queensland and the other Australian jurisdictions. It also includes a

381

An indictable offence 'includes an act or omission committed outside Queensland that would be an indictable offence if it were committed in Queensland': *Acts Interpretation Act 1954* (Qld) s 36. Under the *Penalties and Sentences Act 1992* (Qld) s 12(3), except for particular purposes and in certain circumstances, a conviction that is not recorded is not taken to be a conviction for any purpose.

382

For example, *Jury Act 1977* (NSW) s 6, sch 1 cl 4, to be inserted by *Jury Amendment Act 2010* (NSW), disqualifies a person currently bound by an apprehended violence order, a community service order, or an order disqualifying the person from driving a motor vehicle for 12 months or more. See also *Juries Act 1927* (SA) s 12(1)(e); *Juries Act 2003* (Tas) s 6(2), sch 1 cl 2.

383

See *Jury Act 1977* (NSW) s 6, sch 1 cl 4(2)(b); *Juries Act 1927* (SA) s 12(1)(f); *Juries Act 2003* (Tas) s 6(2), sch 1 cl 4; *Juries Act 2000* (Vic) s 5(2), sch 1 cl 6, 7. See also *Juries Act 1974* (Eng) s 1(1)(d), (3), sch 1 pt II cl 5 which disqualifies persons who are on bail in criminal proceedings. In recommending the disqualification of persons on bail, the Runciman Royal Commission commented that without such disqualification it is 'possible for a person to sit on a jury while on bail for an offence that is similar to the one for which the defendant is to be tried': The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO (1993) 132 [58].

summary of the provisions recently recommended by the NSW Law Reform Commission and the Law Reform Commission of Western Australia.

	Permanent disqualification	7 to 10 year disqualification	2 to 5 year disqualification	Disqualification while serving a sentence or subject to an order
Qld	Convicted of an indictable offence, or sentenced to imprisonment.	—	—	—
ACT	Convicted of an offence punishable by 1 year of imprisonment.	—	—	—
NSW	Sentenced to imprisonment for an offence for which life imprisonment is the maximum penalty, an offence constituting a terrorist act, a public justice offence, or a sexual offence as defined in section 7 of the <i>Criminal Records Act 1991</i> (NSW).	Has served a sentence/s of imprisonment of 3 months or more and <u>10 years since completion</u> of the sentence have not passed. ³⁸⁴ Has served a sentence of less than 3 consecutive months and <u>7 years since completion</u> of sentence have not passed. ³⁸⁵	Has served a period of detention and <u>3 years since completion</u> of the sentence have not passed.	Is serving a sentence of imprisonment (including periodic or home detention and suspended sentences) or a period of detention, in custody or awaiting trial or sentence, or bound by an order pursuant to or consequent upon a criminal charge or conviction, ³⁸⁶ including a driving disqualification of 12 months or more.
NSWLRC	Sentenced to imprisonment for an offence for which life imprisonment is the maximum penalty, an offence constituting a terrorist act, or a public justice offence.	Has served a sentence/s of imprisonment aggregating 3 years or more and <u>10 years since completion</u> of the sentence have not passed.	Has served a sentence/s of imprisonment aggregating less than 3 years but more than 6 months and <u>5 years since completion</u> of the sentence have not passed. Has served a sentence of detention and <u>3 years since completion</u> of the sentence have not passed. Has served a sentence/s of imprisonment aggregating less than 3 years for a summary offence or less than 6 months for an indictable offence and <u>2 years since completion</u> of sentence have not passed.	Is serving a sentence of imprisonment (including periodic or home detention and suspended sentences), subject to limiting terms under the <i>Mental Health (Criminal Procedure) Act 1990</i> (NSW), or bound by an order pursuant to or consequent upon a criminal charge or conviction including a driving disqualification for a period of 12 months or more.

³⁸⁴ Under the *Jury Act 1977* (NSW) sch 1 cl 2(4), to be inserted by *Jury Amendment Act 2010* (NSW), this disqualification does not apply to a sentence of imprisonment that has been quashed or converted to a non-custodial sentence on appeal; was imposed in respect of a conviction that has been quashed or annulled or for which a pardon has been granted; or was imposed for failure to pay a fine.

³⁸⁵ Ibid.

³⁸⁶ A number of specific orders and disqualifications are listed: *Jury Act 1977* (NSW) sch 1 cl 4 to be inserted by *Jury Amendment Act 2010* (NSW).

	Permanent disqualification	7 to 10 year disqualification	2 to 5 year disqualification	Disqualification while serving a sentence or subject to an order
NT	Sentenced to a term of imprisonment for a capital offence.	Sentenced to imprisonment (other than for a capital offence) and <u>less than 7 years have elapsed</u> since completion of the sentence.	—	Sentenced to imprisonment (other than for a capital offence) and has not yet completed the sentence.
SA	Convicted of an offence for which death or life imprisonment is the mandatory or maximum penalty, or sentenced to imprisonment for a term exceeding 2 years.	<u>Within the last 10 years</u> has served the whole or part of a term of imprisonment or detention or been on parole or probation.	<u>Within the last 5 years</u> has been convicted of an offence punishable by imprisonment, or disqualified for a period exceeding 6 months from holding or obtaining a driver licence.	Is subject to a bond to be of good behaviour or charged with an offence punishable by imprisonment and the charge has not yet been determined.
Tas	Convicted of one or more indictable offences and sentenced to imprisonment for a term/s in the aggregate of 3 years or more. ³⁸⁷	—	Convicted of an indictable offence and sentenced to imprisonment for a term not less than 3 months, and <u>5 years since completion</u> of the sentence have not passed.	Is subject to a community service order, probation order or undertaking to appear, undergoing a term of imprisonment whether or not wholly or partly suspended, or remanded in custody.
Vic	Has been convicted of treason or an indictable offence and sentenced to a term/s of imprisonment for an aggregate of 3 years or more. ³⁸⁸	<u>Within the last 10 years</u> has been sentenced to imprisonment for 3 months or more (excluding a suspended sentence). ³⁸⁹	<u>Within the last 5 years</u> has been sentenced to a term of imprisonment of less than 3 months, served a sentence by way of intensive correction in the community, a suspended sentence or a sentence of detention in a youth justice centre, or been subject to a community based order. <u>Within the last 2 years</u> has been sentenced and released on an undertaking.	Is charged with an indictable offence and released on bail or is remanded in custody in respect of an alleged offence.

387

Juries Act 2003 (Tas) s 6(2), sch 1 also provides that a person is disqualified from jury service if the person has been convicted of one or more indictable offences and sentenced to a period of detention for three years or more under a restriction order made under s 75 of the *Sentencing Act 1997* (Tas) or an equivalent order in another jurisdiction.

388

Juries Act 2000 (Vic) s 5(2), sch 1 also provides that a person is disqualified from jury service if the person has been convicted of treason or one or more indictable offences and ordered to be detained for a period of three months or more under a hospital security order made under s 93A of the *Sentencing Act 1991* (Vic) or an equivalent order in another jurisdiction.

389

Juries Act 2000 (Vic) s 5(2), sch 1 also provides that a person is disqualified from jury service if, in the last 10 years, the person has been ordered to be detained for a period of three months or more under a hospital security order made under s 93A of the *Sentencing Act 1991* (Vic) or an equivalent order in another jurisdiction.

	Permanent disqualification	7 to 10 year disqualification	2 to 5 year disqualification	Disqualification while serving a sentence or subject to an order
WA	Has been convicted of an offence and sentenced to death, strict security life imprisonment, life imprisonment, or a term exceeding 2 years or for an indeterminate period.	—	<u>Within the last 5 years</u> has been sentenced to imprisonment or released on parole, found guilty of an offence and detained in a juvenile justice centre, or subject to a probation order or a community order.	—
LRCWA	Has been convicted of an indictable offence and sentenced to death, strict security life imprisonment, or imprisonment for a term exceeding 2 years or for an indeterminate period.	<u>In the last 10 years</u> has been convicted of an indictable offence and sentenced to imprisonment.	<u>In the last 5 years</u> has been convicted of an offence on indictment or sentenced to imprisonment or to a period of detention of 12 months or more in a juvenile detention centre. <u>In the last 3 years</u> has been subject to a community order or a sentence of detention. <u>In the last 2 years</u> has been subject to a youth community-based, intensive supervision or conditional release order.	Is currently on bail or in custody, subject to imprisonment for unpaid fines, or subject to an ongoing court-imposed order following conviction for an offence ³⁹⁰ including a driver licence disqualification of 12 months or more.

Table 6.1: Criminal record disqualifications from jury service in Australia³⁹¹

6.54 The Queensland provision differs from the approach taken under the former *Jury Act 1929* (Qld) which had provided that:³⁹²

- conviction on indictment for a crime resulted in disqualification ‘absolutely’;
- conviction on indictment for an offence other than a crime resulted in disqualification for 10 years from the date of conviction, reduced to five years if probation was granted; and
- conviction in summary proceedings for an indictable offence resulted in disqualification for five years from the date of conviction, reduced to two years if probation was granted.

³⁹⁰ The LRCWA also listed some other specific orders intended to be covered by this provision: see [6.126] below.

³⁹¹ See n 379 above; and New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 3; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 82–93.

³⁹² See *Jury Act 1929* (Qld) s 7(1)(b), (2), (3), (4) later repealed by *Jury Act 1995* (Qld) s 75, sch 1. That Act also disqualified undischarged bankrupts and ‘anyone who is of bad fame or repute’: s 7(1)(c), (e).

6.55 The present exclusions also contrast with those that apply to voters and Members of Parliament. For ease of comparison, these are set out in the following table.

	Permanent disqualification	7 to 10 year disqualification	2 to 5 year disqualification	Disqualification while serving a sentence or subject to an order
Disqualification from enrolment to vote ³⁹³	Has been convicted of treason or treachery and has not been pardoned.	—	—	Is serving a sentence of imprisonment of 3 years or more.
Disqualification from election to parliament ³⁹⁴	Has been convicted of treason, sedition or sabotage and has not been pardoned.	<p><u>Within 7 years</u> of nomination has been convicted of an offence against ss 59 or 60 of the Criminal Code (Qld).³⁹⁵</p> <p><u>Within 10 years</u> has been convicted of a disqualifying electoral offence.³⁹⁶</p>	<p><u>Within 2 years</u> of nomination has been convicted of an offence and sentenced to imprisonment for more than 1 year.³⁹⁷</p>	Is subject to a term of imprisonment or detention, periodic or otherwise. ³⁹⁸

Table 6.2: Criminal record disqualifications for voting and eligibility for election to Parliament in Queensland

6.56 In addition to the disqualification provision, section 24(8) of the *Juries Act 1967* (ACT) allows the Sheriff to remove a person's name from the jury list if it appears to the Sheriff that the person is not disqualified but has been convicted of an offence punishable on summary conviction and that, having regard to the nature and number of the offences committed, when they were committed and any penalties imposed for them, the person would be unable to exercise the functions of a juror adequately. In that event, the person is to be notified of the removal of his or her name from the jury list and of the person's right to object to the removal by written application to the judge. No similar provision applies in Queensland.

³⁹³ *Commonwealth Electoral Act 1918* (Cth) ss 93(8)(b), (c), 93(8AA). See [6.9]–[6.10] above.

³⁹⁴ *Parliament of Queensland Act 2001* (Qld) s 64(2); *Constitution of Queensland Act 2001* (Qld) s 21(1)(c).

³⁹⁵ The offences under ss 59 and 60 of the Criminal Code (Qld) deal with bribery of a member of the Legislative Assembly.

³⁹⁶ A 'disqualifying electoral offence' means an offence, for which the person has been convicted and sentenced to a term of imprisonment (other than imprisonment for non-payment of a fine, restitution or other amount), relating to an election of a member of the Australian Parliament; an election to the office of chairperson, mayor, president, councillor or member of a local government, or to an equivalent office in another State; a referendum conducted under a law of the State, another State or the Commonwealth; or the enrolment of a person on an electoral roll: *Parliament of Queensland Act 2001* (Qld) s 64(6); *Electoral Act 1992* (Qld) s 3 (definition of 'disqualifying electoral offence').

³⁹⁷ This does not apply if the sentence of imprisonment is suspended, unless the person is ordered to actually serve more than one year of the suspended term of imprisonment: *Parliament of Queensland Act 2001* (Qld) s 64(5).

³⁹⁸ A person is subject to a term of imprisonment or detention for this provision if the person is released on parole, leave of absence or otherwise without being discharged from all liability to serve all or part of the term, but not if the person is at liberty because the term of imprisonment has been suspended: *Parliament of Queensland Act 2001* (Qld) s 64(4).

6.57 It has been noted that the criminal record disqualification for jury service may disproportionately affect Indigenous people because of their over-representation in the criminal justice system.³⁹⁹

The *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)*

6.58 For the purpose of keeping a jury roll and excluding from it the names of those people who are not qualified for jury service, the Sheriff may make arrangements with the Commissioner of the Police Service to make whatever inquiries are reasonably required.⁴⁰⁰

6.59 Section 12 of the *Jury Act 1995 (Qld)* provides that the *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)* does not apply to those inquiries.⁴⁰¹ That Act provides a scheme for the notional removal of certain types of convictions from a person's criminal history after a prescribed rehabilitation period has elapsed. This does not apply, however, if the person's criminal history is expressly required to be disclosed or had regard to by law,⁴⁰² as is the case under the *Jury Act 1995 (Qld)*.

6.60 Under the *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)*, the only convictions in relation to which a rehabilitation period is capable of running are convictions on which:⁴⁰³

- (a) the offender is not ordered to serve any period in custody; or
- (b) the offender is ordered to serve a period not exceeding 30 months in custody (including ordered by way of default), whether or not in the event the offender is required to actually serve any part of that period in custody. (emphasis added)

6.61 The Act provides for two different rehabilitation periods depending on whether the offender was convicted on indictment and on whether, in relation to the conviction, the offender was dealt with as an adult or as a child:⁴⁰⁴

- For a conviction of an adult on indictment, the rehabilitation period is 10 years commencing on the date the conviction is recorded or, if an order of the court made in relation to the conviction has not been satisfied within that period of 10 years, a period ending on the date the order is satisfied.

³⁹⁹ See, for example, Australian Institute of Judicial Administration (M Findlay et al), *Jury Management in New South Wales* (1994) 5–6. At 30 June 2010, Indigenous prisoners represented 26% of the total prisoner population in Australia and Indigenous Australians were 14 times more likely than non-Indigenous Australians to be in prison: Australian Bureau of Statistics, *Prisoners in Australia* (2010) Cat No 4517.0, 8.

⁴⁰⁰ *Jury Act 1995 (Qld)* ss 10(3), 12(1)–(3).

⁴⁰¹ Similarly, *Jury Act 1995 (Qld)* s 68(6) provides that the *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)* does not apply to the disclosure of information in response to questions asked by the Sheriff to find out whether the person is qualified for jury service.

⁴⁰² *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)* s 9(1). See also ss 4, 7.

⁴⁰³ *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)* s 3(2).

⁴⁰⁴ *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)* s 3(1) (definition of 'rehabilitation period').

- For a conviction other than on indictment,⁴⁰⁵ or a conviction recorded against a person who was dealt with as a child,⁴⁰⁶ the rehabilitation period is five years commencing on the date the conviction is recorded or, if an order of the court made in relation to the conviction has not been satisfied within that period of five years, a period ending on the date the order is satisfied.

6.62 When the Act was introduced, it was intended to ‘encourage offenders to rehabilitate themselves’ and ‘to cast aside the social stigma associated with a criminal conviction’.⁴⁰⁷

6.63 Under the *Jury Act 1995* (Qld), however, a conviction may still have the effect of excluding the person from jury service, even if it is one to which the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) applies and in respect of which the rehabilitation period has expired.

6.64 The Irish jury legislation also contains disqualifications for people who have been sentenced to particular terms of imprisonment.⁴⁰⁸ The Law Reform Commission of Ireland has recently proposed that those disqualifications should be consistent with the approach taken to spent convictions:⁴⁰⁹

The rationale behind reform of the law on jury disqualification and the introduction of a system of spent convictions has the integration of persons convicted of criminal offences at the heart of the issue. As such the Commission considers it is appropriate to adopt a consistent approach in its recommendations by recommending reform of section 8 of the *Juries Act 1976* to reflect the recommendations made in the *Report on Spent Convictions* and invites submissions as to what ... period would be appropriate.

6.65 The Law Reform Commission of Hong Kong also recently considered this issue, and recommended that spent convictions should not be regarded as a criminal conviction for the purpose of jury disqualification:⁴¹⁰

We said in our consultation paper that our inclination was to err on the side of caution when deciding whether or not a criminal conviction should bar the individual from subsequent jury service and we therefore recommended that a person with a criminal conviction record, regardless of its nature, should be excluded from jury service. We considered that this recommendation would safeguard the integrity of the jury system.

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The rehabilitation period for convictions made otherwise than on indictment was reduced to five years by an amendment in 1990 in recognition that some offences are less serious than others and should therefore have a shorter rehabilitation period: see *Criminal Law (Rehabilitation of Offenders) Act Amendment Act 1990* (Qld) s 2; Queensland, *Parliamentary Debates*, Legislative Assembly, 16 May 1990, 1580–1 (Dean Wells, Attorney-General).

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Children are sentenced under the *Youth Justice Act 1992* (Qld). ‘Child’ for the purpose of that Act generally means a person who has not yet turned 17: *Youth Justice Act 1992* (Qld) s 4, Dictionary (definition of ‘child’).

407

Queensland, *Parliamentary Debates*, Legislative Assembly, 12 March 1986, 4110 (Neville Harper, Minister for Justice and Attorney-General).

408

Juries Act 1976 (Ireland) s 8.

409

Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [5.21]. See also Law Reform Commission of Ireland, *Spent Convictions*, Report 84 (2007).

410

Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.30]–[5.31], Rec 3.

It would, however, be against the spirit of the *Rehabilitation of Offenders Ordinance* (Cap 297) if a person whose criminal conviction was regarded as ‘spent’ under the Ordinance were to be excluded from jury service.

Graduated periods of exclusion

6.66 Disqualification from jury service on the basis of a criminal record is based on the risk of actual or perceived bias and the need to maintain public confidence in the jury system. In England and Wales, the rationale for disqualification on the basis of a person’s criminal record was considered by the Morris Committee in 1965:⁴¹¹

There seem to us to be two reasons for excluding from juries persons with criminal records. First, we think it probable that a person who has been convicted, especially if a sentence of imprisonment has been imposed, will find it difficult to regard the police dispassionately ... Second, it seems to us that confidence in the administration of justice is bound to suffer if a person with a recent and serious criminal record is allowed to serve as a juror.

6.67 It has been noted, however, that:⁴¹²

given the emphasis of modern penological theory on rehabilitation and recent legislation which provides that criminal records shall be expunged after a certain time, it may be that people who have served their sentence or paid their fine should not now have their right to serve on a jury taken away from them altogether.

6.68 The Queensland provision renders any person who has ever been convicted of an indictable offence or sentenced to imprisonment ineligible for jury service. As a result, it makes no room at all for people who may have been convicted of less serious indictable offences or sentenced to relatively short periods of imprisonment ever to become eligible for jury service again.

6.69 Indictable offences — crimes and misdemeanours — are distinguished from, and are generally more serious than, simple and regulatory offences.⁴¹³ However, they cover a wide range of different offences from misdemeanours punishable by up to one or two years imprisonment (such as affray, prize fighting, forcible entry and common nuisances) to crimes attracting maximum periods of imprisonment of 14 or more years or life imprisonment (such as judicial corruption,

⁴¹¹ *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the ‘Morris Report’) [134]. See also, for example, Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [179]; New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.3]. The Runciman Royal Commission, however, considered that the scope of the criminal record disqualification should be determined only after research had been conducted into the possible influence on jury verdicts of such persons: The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO (1993) 132 [59].

⁴¹² Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 11. The CJC was discussing the former *Jury Act 1929* (Qld).

⁴¹³ Criminal Code (Qld) s 3. Indictable offences (distinguished from summary offences) against the laws of the Commonwealth are those that attract a period of imprisonment exceeding 12 months: *Crimes Act 1914* (Cth) ss 4G, 4H.

indecent treatment of children under 16, torture, kidnapping for ransom, robbery, burglary, sabotage, piracy, arson, incest, murder and manslaughter).⁴¹⁴

6.70 Unless otherwise provided, indictable offences are to be tried on indictment by a judge and jury in the Supreme Court or the District Court.⁴¹⁵ However, the Criminal Code (Qld) makes provision for a number of indictable offences to be heard and decided summarily.⁴¹⁶ As a result of amendments made to the Code by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld), the range of indictable offences that either may, or must, be heard and decided summarily has been enlarged.⁴¹⁷

6.71 Under the *Jury Act 1995* (Qld), a conviction for any indictable offence (in Queensland or elsewhere), whether on an indictment or in a summary proceeding, no matter how long ago, and whatever penalty was imposed, is sufficient to exclude that person from jury service in Queensland permanently. Any sentence of imprisonment will have the same effect.

6.72 As noted above, this contrasts with the position in the other Australian jurisdictions and in relation to voters and Members of Parliament.

6.73 The use of graduated or differentiated categories of exclusion recognises the possibility and opportunity for the rehabilitation and reintegration of offenders. Such an approach would also be consistent with the recent recommendations and proposals of the NSW Law Reform Commission and the Law Reform Commission of Western Australia.⁴¹⁸

6.74 The Law Reform Commission of Hong Kong has also recently recommended the use of graduated categories:⁴¹⁹

We recommend that a person, otherwise fully eligible, should be barred for life from jury service if he has (in Hong Kong or any other place) been convicted of an offence for which he has been sentenced to imprisonment, whether suspended or not, for a term exceeding three months without the option of a fine. If his sentence of imprisonment was for three months or less, he should be

414 Criminal Code (Qld) ss 70, 72, 73, 80, 120, 210, 222, 230, 302, 305, 310, 320A, 354A, 409, 411, 419, 461, 469A.

415 Criminal Code (Qld) s 3(3); *Supreme Court Act 1995* (Qld) s 203; *District Court of Queensland Act 1967* (Qld) ss 60–61A.

416 See Criminal Code (Qld) ch 58A.

417 See Criminal Code (Qld) ss 552A, 552B, 552BA. These include assaults, offences relating to escape from lawful custody, unlawful drink spiking, dangerous operation of a vehicle, unlawful stalking without a circumstance of aggravation, prostitution, and offences relating to improper practices at Legislative Assembly and Brisbane City Council elections and referendums. Section 552BA provides that certain indictable offences *must* be heard and determined summarily — an offence for which the maximum term of imprisonment is not more than three years, and an offence against Part 6 of the Criminal Code (Qld) (Offences relating to property and contracts), but not an offence against ch 42A (Secret commissions) or an offence that is an excluded offence under s 552BB.

418 These are discussed below and are summarised, together with the provisions that currently apply in all Australian jurisdictions, in Table 6.1 above.

419 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.33], Rec 3.

qualified to serve as a juror if the conviction took place more than five years before he is summonsed to serve as a juror.

NSWLRC's recommendations

6.75 The current position in New South Wales (which will change on the commencement of the *Jury Amendment Act 2010 (NSW)*) is that a person who has served any part of a sentence of imprisonment at any time in the last 10 years is excluded from jury service.

6.76 The NSW Law Reform Commission noted that the breadth of this provision gives rise to a number of practical difficulties by failing to differentiate between the seriousness of the range of offences that would be caught by it.⁴²⁰

The reach of the current provision is somewhat broad, and could possibly allow people to serve as jurors who should be excluded for life. At the same time, it may unnecessarily exclude those who need not be excluded for as long as 10 years, for example, those sentenced to a short term of imprisonment for some minor summary offence, and who have not re-offended.

6.77 In particular, the NSWLRC noted the following concerns arising from the broad scope of the provision:⁴²¹

- it applies irrespective of the seriousness of the offence which led to the sentence, or to the length of the sentence, and would therefore apply as much to a defendant who was convicted in a Local Court of a minor offence that resulted in a very short prison sentence as it would to a person convicted in the Supreme Court of a very serious offence and sentenced to a lengthy term of imprisonment for murder;
- if construed literally, it does not cater for the situation where, on appeal, the conviction and sentence were each set aside, or where a non-custodial sentence was substituted for a custodial sentence, yet pending the appeal the juror had been held in custody;
- similarly, it does not apply to the situation, which is addressed in other States,⁴²² where, subsequent to the person commencing to serve a sentence, he or she is given a free pardon;
- it is not entirely clear whether the 10-year period of disqualification runs from the time of release on parole or probation, or from the date of expiry of the balance of the term;
- it is not clear whether a person serving a limiting term imposed after a special hearing⁴²³ would fall within its ambit, and if so what would be the position of any such person who, at a later date, recovered his or

420 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.23].

421 Ibid [3.13].

422 *Juries Act 2003 (Tas)* sch 1 cl 1(2); *Juries Act 2000 (Vic)* Sch 1 cl 1; *Juries Act 1957 (WA)* s 5(b)(i); *Juries Act 1967 (ACT)* s 10(a).

423 Pursuant to *Mental Health (Criminal Procedure) Act 1990 (NSW)* s 23.

her mental health, was found fit to be tried, and then acquitted after a regular trial;⁴²⁴ and

- it is also not clear whether the exclusion would apply to a person charged with an offence under Commonwealth laws who was found unfit to be tried and subject to a detention determination.⁴²⁵ (notes in original)

6.78 The NSWLRC observed that what is required is a balance between the need for impartial juries in which the public has confidence and recognition of the capacity and opportunity for offender rehabilitation and reintegration.⁴²⁶

The validity of these competing principles was recognised by those with whom we consulted or who provided submissions. Our attention was also drawn to the concern that the existing criterion results in the effective exclusion from jury service of a substantial number of Indigenous people who receive short-term sentences for minor offences, and who, as a result, constitute a disproportionate part of the prison population. (notes omitted)

6.79 It recommended that the existing ground be replaced with a graduated set of criteria that provide for permanent exclusion for some offences, and exclusion for ten years, five years, and two years depending on the length of the sentence of imprisonment.⁴²⁷ In its view:⁴²⁸

What is required is a clear and workable set of criteria which potential jurors can understand, which is shorn of the anomalies or uncertainties which currently exist in relation to this item, and which could be detected by automated inquiry of the national criminal database, in similar fashion to that available in Victoria, or at least by extending to the Sheriff access to the criminal history database maintained by the NSW Police.

LRCWA's recommendations

6.80 The Law Reform Commission of Western Australia also noted that the exclusion of people with criminal convictions rests on the balancing of two competing notions. On the one hand, it is argued that people with criminal histories should be excluded because they may be more likely than others to be biased against the police or the prosecution case, although this assumption has not been demonstrated by empirical data. On the other hand, offenders who have paid their debt to society and have reformed should not be precluded from jury service, an important civic duty. Even so, some offences are so serious that public confidence in the system would be threatened if offenders were entitled to serve as jurors.⁴²⁹

424 *Mental Health (Criminal Procedure) Act 1990* (NSW) s 30.

425 Pursuant to *Crimes Act 1914* (Cth) s 20BB or s 20BC.

426 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.19].

427 Ibid [3.23], Rec 4. See [6.101] below.

428 Ibid [3.28].

429 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 82.

6.81 The LRCWA commented that the need to maintain public confidence in the system 'is the strongest argument' for disqualification.⁴³⁰

6.82 It also noted the need for clear legislative criteria in defining this category of disqualification, particularly in light of its proposal that the prosecution should not be authorised to make criminal history checks on prospective jurors; 'the degree of past criminality that renders a person unqualified for jury service should be determined by Parliament, not by the prosecution'.⁴³¹ It nevertheless cautioned that it is an 'impossible' exercise to ensure that every person who might be considered unsuitable to serve as a juror is excluded while also including every person who is considered suitable.⁴³²

6.83 It recognised that the seriousness of a disqualifying offence can be assessed by reference to the offence classification (that is, whether it is indictable or summary), the sentence imposed for the offence, or the nature of the offence itself, but that each method involves its own difficulties. Relying solely on the sentence may lead to such anomalies as the disqualification of a person who was imprisoned for a driving offence but the eligibility of a person who was convicted of aggravated burglary but fined or given a community-based order rather than a sentence of imprisonment. Similar anomalies may arise when the nature of the offence is relied on without any assessment of the seriousness of the penalty actually imposed.⁴³³

6.84 The LRCWA therefore preferred a combined approach and one that uses graduated categories:⁴³⁴

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).

Permanent exclusion

6.85 In Queensland and in almost all of the other Australian jurisdictions, provision is made for certain offenders to be excluded from jury service for life. Queensland's provision, however, is the most far-reaching.

430 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 84.

431 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 84.

432 Ibid 83.

433 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 84. See also Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 83.

434 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 84.

6.86 If permanent ineligibility in Queensland were reserved for specific types of more serious offences or longer periods of imprisonment, the question arises as to what those should be.

6.87 One marker of the seriousness of an offence is the offence classification: indictable offences are generally more serious than simple and regulatory offences. One of the current exclusions in Queensland applies to convictions for indictable offences, whether on indictment or in a summary proceeding.⁴³⁵ The other applies where a person has been sentenced to imprisonment, in Queensland or elsewhere.⁴³⁶ This latter exclusion is not limited by reference to the classification of the offence.

6.88 Another indicator of the seriousness of an offence is the maximum penalty that may be imposed in respect of it. The penalties set by legislation for an offence are generally proportionate to the offence, with higher penalties for offences of greater seriousness than for lesser offences.

6.89 Under the Criminal Code (Qld), the maximum penalties prescribed for indictable offences range from 1, 2, 3, 5, 7, 10, 12,⁴³⁷ 14,⁴³⁸ 20⁴³⁹ and 25⁴⁴⁰ years' imprisonment to life imprisonment⁴⁴¹ and, for murder, mandatory life imprisonment or imprisonment for an indefinite term.⁴⁴² Under the *Drugs Misuse Act 1986* (Qld), the maximum penalties prescribed for indictable offences range from 15⁴⁴³ and 20

435 *Jury Act 1995* (Qld) s 4(3)(m).

436 *Jury Act 1995* (Qld) s 4(3)(n).

437 Criminal Code (Qld) ss 408A, 408C.

438 Fourteen years' imprisonment is the maximum penalty prescribed for a range of serious crimes including certain types of sexual offences against children, certain types of prostitution offences, grievous bodily harm, torture, attempted rape, robbery, burglary and extortion: Criminal Code (Qld) ss 210, 215, 217, 218, 219, 229G, 229H, 229I, 229K, 229L, 320, 320A, 350, 351, 409, 411, 415, 419.

439 Criminal Code (Qld) s 210 (for indecent treatment of a child who is under 12 or who is a lineal descendant of the offender).

440 Criminal Code (Qld) s 469A (Sabotage and threatening sabotage). A maximum penalty of 25 years' imprisonment is also prescribed for a range of indictable offences under the Criminal Code (Cth), including espionage; manslaughter of an Australian citizen or resident outside Australia; certain types of terrorism offences, genocide offences, war crimes and crimes against humanity (such as torture and rape); trafficking in children; and various types of serious drug offences.

441 Life imprisonment is the maximum penalty for such crimes as attempted murder, accessory after the fact to murder, manslaughter, aiding suicide, killing an unborn child, disabling or stupefying in order to commit an indictable offence, rape, arson, piracy, incest, maintaining a sexual relationship with a child, and a range of other offences with particular aggravating circumstances such as armed robbery: Criminal Code (Qld) ss 80, 222, 229B, 306, 307, 310, 311, 313, 315, 316, 349, 409, 411, 461. Life imprisonment is also the maximum penalty prescribed for a range of offences under the Criminal Code (Cth), including treason; murder of an Australian citizen or resident outside Australia; and the most serious types of terrorism offences, genocide offences, war crimes, crimes against humanity and drug offences.

442 Criminal Code (Qld) ss 302, 305.

443 Fifteen years' imprisonment is the maximum penalty prescribed for a range of crimes such as possessing, supplying, or producing relevant substances or things, possessing things for use in connection with the commission of a crime or that the person has used in connection with such a purpose, and permitting use of place: *Drugs Misuse Act 1986* (Qld) ss 9A–9C, 10(1), 11.

years,⁴⁴⁴ to 25 years' imprisonment.⁴⁴⁵

6.90 As noted in Chapter 2 of this Report, the Criminal Code (Qld) makes provision for a number of indictable offences to be heard and decided summarily.⁴⁴⁶ Where an indictable offence is heard and determined summarily in accordance with sections 552A, 552B or 552BA of the Code, the maximum penalty is generally 100 penalty units or three years' imprisonment.⁴⁴⁷ In contrast, simple offences do not generally attract a penalty greater than two years' imprisonment.⁴⁴⁸

6.91 Another means of identifying offenders who ought to be permanently ineligible for jury service is by reference to the nature of the offence. It might be thought, for example, that the sorts of offences that ought to disqualify a person from acting as a juror should be referable to the nature of the role and duties of a juror. Part 3 of the Criminal Code (Qld) contains, for example, a number of offences against the administration of law and justice such as disclosure of official secrets, abuse of office, interfering at elections, perjury, fabricating evidence, attempting to pervert justice, false declarations, and resisting public officers.⁴⁴⁹ The *Jury Act 1995* (Qld) also contains offences relating specifically to jury service, including impersonation of a juror and publication of jury information.⁴⁵⁰

444 See, for example, *Drugs Misuse Act 1986* (Qld) s 7 (Receiving or possessing property obtained from trafficking or supplying). Twenty years' imprisonment is also the maximum penalty for a number of crimes relating to drugs specified in Schedule 2 of the *Drugs Misuse Regulation 1987* (Qld): see *Drugs Misuse Act 1986* (Qld) ss 5, 6, 8A.

445 Twenty-five years' imprisonment is the maximum penalty for such crimes as trafficking in, supplying or producing a dangerous drug: *Drugs Misuse Act 1986* (Qld) ss 5, 6, 9. The maximum penalty applies to drugs specified in Schedule 1 of the *Drugs Misuse Regulation 1987* (Qld), including amphetamine, cocaine and heroin.

446 See Criminal Code (Qld) ch 58A. In particular, if the maximum term of imprisonment for an indictable offence is not more than three years, the offence must be heard and decided summarily: s 552BA.

447 Criminal Code (Qld) s 552H. The section contains two exceptions. If the Magistrates Court is constituted by a magistrate performing functions as a drug court magistrate under the *Drug Court Act 2000* (Qld) and consent has been obtained under s 20(2) of that Act, the maximum penalty is 100 penalty units or four years' imprisonment: Criminal Code (Qld) s 552H(1)(b)(i). Further, if the Magistrates Court is constituted by justices under s 552C(1)(b), the maximum penalty is 100 penalty units or 6 months' imprisonment: Criminal Code (Qld) s 552H(1)(c).

448 See, for example, Criminal Code (Qld) ss 56A (Disturbance in House when Parliament not sitting), 56B (Going armed to Parliament House), 103 (Providing money for illegal payments), 104 (Election notices to contain particular matters), 207 (Disturbing religious worship), 233 (Possession of thing used to play unlawful games), 234 (Conducting or playing unlawful games), 359F (Court may restrain unlawful stalking), 408E (Computer hacking and misuse), 590AX (Unauthorised copying of sensitive evidence); *Drugs Misuse Act 1986* (Qld) ss 10(2)–(4A) (Possessing things), 10A (Possessing suspected property), 41(7) (Restraining order), 121(5) (Power to prohibit publication of proceedings).

An offence against a law of the Commonwealth that is punishable by imprisonment for a period exceeding 12 months is an indictable offence, unless the contrary appears: *Crimes Act 1914* (Cth) s 4G. An offence against a law of the Commonwealth that is punishable by less than 12 months' imprisonment, or that is not punishable by imprisonment, is a summary offence, unless the contrary appears: *Crimes Act 1914* (Cth) s 4H.

449 Criminal Code (Qld) ss 85, 92, 108, 123, 124, 126, 140, 194, 199. The maximum penalty prescribed for these offences (which include summary offences, misdemeanours and crimes) ranges from fines of three penalty units (\$300) to imprisonment for 14 years.

450 Breaches and penalties under the Act are discussed in Chapter 14 of this Report.

NSWLRC's recommendations

6.92 The NSW Law Reform Commission considered that some offences are so serious or of such a nature that a person who has served a sentence of imprisonment⁴⁵¹ with respect to any of them should be permanently disqualified from jury service. It therefore recommended exclusion for life of any person who has been sentenced to imprisonment for:⁴⁵²

- any offence for which life imprisonment is the maximum available penalty;
- any offence constituting a 'terrorist act' punishable under State or Federal law;⁴⁵³ and
- any public justice offence under Part 7 of the *Crimes Act 1900* (NSW), which includes offences relating to interference with the administration of justice, judicial officers, witnesses and jurors, perjury and false statements.⁴⁵⁴ (notes in original)

6.93 These recommendations are implemented by the *Jury Amendment Act 2010* (NSW). In addition, that Act permanently disqualifies from jury service a person who has been convicted of a sexual offence within the meaning of section 7 of the *Criminal Records Act 1991* (NSW).⁴⁵⁵

LRCWA's recommendations

6.94 The Law Reform Commission of Western Australia also considered that some past convictions — such as those for which an offender has been sentenced to imprisonment for life or to an otherwise relatively lengthy period of imprisonment for a serious crime — justify permanent disqualification. It recommended:⁴⁵⁶

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.

6.95 The LRCWA considered whether the current cut off of two years' imprisonment should be extended, but concluded that 'there is not sufficient

⁴⁵¹ The NSWLRC also made recommendations to clarify what is meant by a 'sentence of imprisonment': see [6.103] below.

⁴⁵² New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.23], and see Rec 4.

⁴⁵³ See *Criminal Code* (Cth) Part 5.3.

⁴⁵⁴ *Crimes Act 1900* (NSW) Part 7.

⁴⁵⁵ *Jury Act 1977* (NSW) s 6, sch 1 cl 1(1) to be inserted by *Jury Amendment Act 2010* (NSW).

⁴⁵⁶ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 86, Rec 40.

justification at present for increasing the period of imprisonment that will trigger permanent disqualification'.⁴⁵⁷

6.96 The LRCWA also considered whether a conviction for offences relating to the administration of justice should permanently disqualify a person from participating in jury service, irrespective of the penalty imposed. The LRCWA did not agree that a person should be '*permanently* disqualified on the basis of conviction alone'.⁴⁵⁸ It noted that convictions for serious offences such as perjury or attempt to pervert the course of justice generally result in sentences of more than two years' imprisonment:⁴⁵⁹

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.

Temporary exclusion

6.97 The legislation in other jurisdictions tends to differentiate between people who are serving or who have served a sentence of imprisonment, juvenile offenders who have served a period of detention, and people who are currently subject to a range of non-custodial orders imposed as a result of a criminal charge or conviction.

People who are serving or have completed a term of imprisonment

6.98 People who are serving sentences of imprisonment of three years or more are removed from the electoral roll,⁴⁶⁰ and will therefore be omitted from the initial pool of potential jurors. People who are serving lesser sentences are entitled to remain on the electoral roll and, consequently, potentially in the pool for jury service. However, section 4(3)(n) of the *Jury Act 1995* (Qld), which excludes a person who has at any time been sentenced to imprisonment, will have the effect of rendering them ineligible to serve.

6.99 The question arises as to what is meant by, or should be covered by, a 'sentence of imprisonment' and from when it should be taken to be completed. In Queensland, sentencing options include probation or conditional release orders, intensive correction orders and suspended sentences of imprisonment; some offenders may be released from imprisonment on parole;⁴⁶¹ and some may be held

457 Ibid 85.

458 Ibid.

459 Ibid 86.

460 *Commonwealth Electoral Act 1918* (Cth) ss 109–110, pt IX.

461 See *Penalties and Sentences Act 1992* (Qld); *Youth Justice Act 1992* (Qld).

in detention under a continuing detention or supervision order even though their sentence of imprisonment has ended.⁴⁶²

NSWLRC's recommendations

6.100 The NSW Law Reform Commission recommended that people who are currently serving a sentence of imprisonment should be excluded from jury service. It also recommended that this should include sentences served by way of periodic or home detention and suspended sentences.⁴⁶³ Both of these recommendations are implemented by the *Jury Amendment Act 2010* (NSW).⁴⁶⁴

6.101 Having regard to the notion that disqualifications on the basis of criminal record 'should be as limited as is consistent with the proper administration of justice and the maintenance of public confidence in the jury system',⁴⁶⁵ the NSWLRC also recommended the following graduated exclusions of ten, five and two years respectively for people who have served terms of imprisonment of varying lengths:⁴⁶⁶

A person should be excluded from jury service for 10 years from the date of expiry of any sentence or sentences of imprisonment aggregating three years or longer.

A person should be excluded from jury service for five years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years, but exceeding six months, imposed in respect of an indictable offence.

A person should be excluded from jury service for two years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years in respect of a summary offence, and aggregating less than six months in respect of any indictable offence.

6.102 The *Jury Amendment Act 2010* (NSW) will replace the current ten year exclusion after any term of imprisonment with a graduated scheme of exclusions of ten and seven years. Under the new Schedule 1, a person will be excluded from jury service for seven years after serving a sentence of imprisonment of less than three consecutive months and for ten years after serving a sentence of imprisonment of three consecutive months or more.⁴⁶⁷

6.103 The NSWLRC also considered that the legislation should clarify what is meant by a 'sentence of imprisonment', and recommended the following:⁴⁶⁸

⁴⁶² See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

⁴⁶³ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.9]–[3.11], Rec 3.

⁴⁶⁴ *Jury Act 1977* (NSW) sch 1 cl 2(2), (5) to be inserted by *Jury Amendment Act 2010* (NSW) sch 1 cl [22].

⁴⁶⁵ *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the 'Morris Report') [140] quoted in New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.20].

⁴⁶⁶ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.23], Rec 4.

⁴⁶⁷ *Jury Act 1977* (NSW) sch 1 cl 2(3) to be inserted by *Jury Amendment Act 2010* (NSW).

⁴⁶⁸ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.23], Rec 4.

A 'sentence of imprisonment' should include: home detention, periodic detention, a sentence of imprisonment that has been suspended, and a sentence of imprisonment by way of compulsory drug treatment detention; and should not include a sentence of imprisonment that has subsequently been quashed on appeal, either wholly, or converted to a non-custodial sentence, or become the subject of a pardon.

A person on parole or released on probation after serving part of a sentence of imprisonment should be taken to be serving the sentence until expiry of the overall term.

6.104 This recommendation is implemented by the *Jury Amendment Act 2010* (NSW).⁴⁶⁹

6.105 The NSWLRC also considered the position of people who are subject to 'limiting terms' under the *Mental Health (Forensic Procedure) Act 1990* (NSW).⁴⁷⁰ In its view, they should be excluded from jury service only while they are subject to such terms given that they are not imposed after a conviction but only after a provisional finding that is subject to change.⁴⁷¹ This recommendation is also implemented by the *Jury Amendment Act 2010* (NSW).⁴⁷²

LRCWA's recommendations

6.106 The Law Reform Commission of Western Australia observed that the current disqualification of people who have at any time in the previous five years been sentenced to imprisonment, detained in a juvenile detention centre following conviction, or subject to probation or a community order,⁴⁷³ gives rise to a number of anomalies by treating juvenile and adult offenders the same way and by applying to some, but not all, types of sentencing orders.⁴⁷⁴

6.107 With respect to adult offenders, the LRCWA proposed a more differentiated sliding scale of disqualifications arising from criminal convictions or sentences of imprisonment. It recommended that a person should be disqualified from jury service if he or she:⁴⁷⁵

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)

⁴⁶⁹ *Jury Act 1977* (NSW) sch 1 cl 2(4)–(6) to be inserted by *Jury Amendment Act 2010* (NSW).

⁴⁷⁰ This Act was formerly known as the *Mental Health (Criminal Procedure) Act 1990* (NSW).

⁴⁷¹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.25], Rec 5.

⁴⁷² *Jury Act 1977* (NSW) sch 1 cl 4(2)(f) to be inserted by *Jury Amendment Act 2010* (NSW).

⁴⁷³ See *Juries Act 1957* (WA) s 5(b)(iii).

⁴⁷⁴ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 86; Final Report (2010) 83 — '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'.

⁴⁷⁵ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 87, Rec 41.

imposed in relation to a conviction for an indictable offence (that was dealt with either summarily or on indictment).⁴⁷⁶

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
 - ...
3. Has in the *past 3 years*:
 - (a) been subject to a community order under the *Sentencing Act 1995* (WA); or
 - ... (note in original)

6.108 Although the Juries Legislation Amendment Bill 2010 (WA) proposes a number of amendments to section 5 of the *Juries Act 1957* (WA), which deals with liability to serve as a juror (including disqualifications), it does not implement the LRCWA's recommendations in relation to graduated temporary exclusion.

Juvenile offenders

6.109 The present exclusion from jury service in Queensland based on a person's criminal history makes no distinction between adult and juvenile offenders, and does not specifically refer to people who have been sentenced to detention in a youth detention centre. This contrasts with the position in some other jurisdictions.

6.110 The Law Reform Commission of Western Australia has recently recommended that juvenile offenders should be subject to shorter periods of exclusion from jury service than adults. Similarly, the Law Reform Commission of Ireland has proposed that the present ten-year exclusion period for juvenile offenders is excessive and should be reduced.⁴⁷⁷ A shorter period of exclusion for juvenile offenders would also be consistent with the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).⁴⁷⁸

⁴⁷⁶ Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

⁴⁷⁷ Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [5.29].

⁴⁷⁸ See [6.61] above.

NSWLRC's recommendations

6.111 The NSW Law Reform Commission considered the present period of ineligibility for people who have been detained in a juvenile detention centre of three years is appropriate and should continue. It recommended that:⁴⁷⁹

A person should be excluded from jury service for three years from the date of expiry of any sentence or control order served in a detention centre or other institution for juvenile offenders.

The exclusion should not apply where the sentence or control order is later quashed on appeal or converted to a non-custodial sentence, or becomes the subject of a pardon.

A person on parole or released on probation after serving part of a sentence or control order should be taken to be serving the sentence until expiry of the overall term.

'Detention centre or other institution for juvenile offenders' should include Juvenile Justice Centres.

6.112 These recommendations are implemented by the *Jury Amendment Act 2010* (NSW).⁴⁸⁰

6.113 In considering whether the period of ineligibility for juvenile offenders should be reduced from three years, the NSWLRC commented that this basis of disqualification is likely to apply to a relatively small group of people who often tend to exhibit 'anti-social attitudes' and to be repeat offenders:⁴⁸¹

This head of disqualification is likely to apply to a relatively small group of offenders. In the 2005/2006 financial year, 468 young people were admitted to detention centres or other institutions for juvenile offenders under control orders.⁴⁸²

...

We recognise the force of the argument that the rehabilitation of young offenders, and their reintegration into society as quickly as possible, and with full rights, is important. However, the rate of recidivism for young offenders is high. A study of 5476 young people aged between 10 and 18 years who made their first appearance in the Children's Court in 1995 showed that, by the end of 2003, 68% of them had reappeared at least once in a criminal court.⁴⁸³

479 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.39]–[3.39], Rec 6.

480 *Jury Act 1977* (NSW) sch 1 cl 3 to be inserted by *Jury Amendment Act 2010* (NSW).

481 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.32]–[3.38].

482 Information supplied [to the NSWLRC] by Jennifer Mason, Director General, Department of Juvenile Justice, 1 May 2007.

483 S Chen, T Matrugiou, D Weatherburn, and J Hua, *The Transition from Juvenile to Adult Criminal Careers*, Crime and Justice Bulletin, No 86 (NSW Bureau of Crime Statistics and Research, 2005), 2.

To a significant extent, regrettably, those young people who fall foul of the criminal justice system tend to come from dysfunctional and deprived backgrounds, to have low levels of literacy and to have substance abuse problems. Moreover, many are likely to be living on the streets, disinterested in registering as electors, and difficult to trace because of their itinerant lifestyle.⁴⁸⁴ While these factors may mean that it is impractical for such young persons to serve as jurors, we also recognise that a rehabilitated offender with a background of offending in adolescent years may be better placed than others to understand or interpret offending by similarly situated defendants.

While we have considered whether the three years disqualification is excessive, particularly for those who may have offended once and been subjected to a short term control order, we have concluded that any variation in that period would involve little more than tokenism. Such a change would have little impact on the jury pool, and would overlook the pragmatic considerations relative to juvenile offending and the associated anti-social attitudes. (notes in original)

LRCWA's recommendations

6.114 The Law Reform Commission of Western Australia expressed the view that young offenders should not be disqualified for as long as adult offenders, taking into account the importance of their rehabilitation and reintegration into society as quickly as possible.⁴⁸⁵ In relation to juvenile offenders, the LRCWA recommended that a person should be disqualified if he or she:⁴⁸⁶

3. Has in the *past 5 years*:

...

(c) been subject to a sentence of detention in a juvenile detention centre (including a supervised release order) of 12 months or more.⁴⁸⁷

4. Has in the *past 3 years*:

...

(b) been subject to a sentence of detention in a juvenile detention centre (including a supervised release order).⁴⁸⁸

484

See, eg, D Weatherburn and B Lind, *Social and Economic Stress Child Neglect and Juvenile Delinquency* (NSW Bureau of Crime Statistics and Research, 1997); J Baker, *Juveniles in Crime — Part 1: Participation Rates and Risk Factors* (NSW Bureau of Crime Statistics and Research, 1998).

485

Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 84.

486

Ibid 91, Rec 46.

487

Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

488

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)*. (notes and emphasis in original)

6.115 These recommendations are not reflected in the Juries Legislation Amendment Bill 2010 (WA).

People who are subject to a criminal court order

6.116 A range of non-custodial court orders may be imposed in relation to a criminal conviction or other criminal conduct. These include non-contact orders, fine option orders, probation orders, community service orders, driving licence disqualifications, restraining orders to prevent stalking, and, in some circumstances, domestic violence orders.⁴⁸⁹ Persons charged with an offence may also be subject to orders in relation to bail.⁴⁹⁰

6.117 The NSW Law Reform Commission and the Law Reform Commission of Western Australia have recommended that disqualification from jury service should be extended to people who are subject to non-custodial orders. The Law Reform Commission of Ireland, however, has taken a different view in its recent Consultation Paper on jury service:⁴⁹¹

The Commission considers that persons subject to non-custodial orders have been considered suitable to be resident in and part of their community; as such they should continue to be eligible for jury service. In reaching this conclusion the Commission balanced the need to broaden and make more representative the jury pool against the possible bias of a person serving even a non-custodial sentence.

6.118 It sought submissions, however, on whether persons subject to non-custodial orders should be required to disclose that fact to the court prior to empanelment.⁴⁹²

6.119 In its recent report, the Law Reform Commission of Hong Kong recommended that persons awaiting trial for an indictable offence or remanded in custody pending trial for any offence should be ineligible:⁴⁹³

while due regard must be accorded to the principle of presumed innocence, there would be cases where the nature of the alleged offence and the evidence known to exist would demand exclusion of persons awaiting trial for an

⁴⁸⁹ See *Penalties and Sentences Act 1992* (Qld) pt 3A, pt 4 div 2, pt 5; *Criminal Code* (Qld) s 359F; *Domestic and Family Violence Protection Act 1989* (Qld) s 30. A peace and good behaviour order might also be made in circumstances where the conduct the subject of the complaint amounts to criminal conduct: see generally *Peace and Good Behaviour Act 1982* (Qld).

⁴⁹⁰ See *Bail Act 1980* (Qld).

⁴⁹¹ Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [5.49]. The Law Reform Commission of Ireland did not reach a provisional view in relation to persons released on bail pending trial or sentence, but sought submissions on whether they should be disqualified: [5.30]–[5.33].

⁴⁹² Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [5.50].

⁴⁹³ Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.34]–[5.37], Rec 3.

indictable offence. It would be impossible to examine each case separately. We appreciated that it would be wrong automatically to classify persons falling within this category as anti-social but there was an inherent risk that they might be perceived as sympathetic to the defendant, which might undermine public confidence in the administration of justice.

...

We think that persons charged with an offence and remanded in custody should be excluded from jury service for the same reasons ... , with the additional practical reason that jury service by a person in custody would present considerable logistical difficulties.

NSWLRC's recommendations

6.120 The NSW Law Reform Commission expressed the view that people who are bound by an order of a criminal court pursuant to a criminal conviction, such as a parole or community service order, should continue to be excluded from jury service during the currency of that order. In its view, this is justified on the basis that such people are 'very close to the criminal justice system' while the order is in force and will in some cases 'be under continuing supervision' by probation and parole services or similar bodies.⁴⁹⁴

6.121 The NSWLRC was persuaded of the need to maintain the exclusion of people who are awaiting trial or sentencing because, even recognising the importance of the presumption of innocence, 'it is difficult to see how they could give a completely detached consideration to the question of guilt of others'.⁴⁹⁵ For similar reasons, it considered that people subject to the restrictions of a good behaviour bond should also be maintained. The NSWLRC was concerned that, if such people were eligible for jury service, public confidence in the system may be at risk.⁴⁹⁶

6.122 It also noted that the exclusion in relation to apprehended violence orders should be confined to those orders that are made when the person has either been charged with, or convicted of, an offence.⁴⁹⁷

6.123 The NSWLRC considered that the exclusion based on a driving disqualification was more 'problematic' because of the various circumstances in which such an order can be made. It recommended that the exclusion be limited to disqualifications of 12 months or more as a means of capturing only those instances that involve the most serious offending.⁴⁹⁸

By reason of the range of circumstances giving rise to disqualification, the existence of automatic disqualification provisions, and the number of people potentially affected, we are of the view that this head of disqualification should

⁴⁹⁴ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.43].

⁴⁹⁵ *Ibid* [3.66].

⁴⁹⁶ *Ibid* [3.69].

⁴⁹⁷ *Ibid* [3.52].

⁴⁹⁸ *Ibid* [3.59].

only apply where the disqualification is for 12 months or more, regardless of the method by which the disqualification is imposed. That is, whether imposed by reason of a formal court order, or by reason of an automatic disqualification following upon a conviction, the majority of people convicted for high range prescribed content of alcohol and negligent driving causing death or grievous bodily harm are disqualified from driving for at least 12 months. This recommendation will not include people whose licences are suspended for accrued demerit points, as the maximum period of suspension available is only five months. (notes omitted)

6.124 The NSWLRC also considered that the legislation should specify the range of other orders fitting the general description of court orders made pursuant to or consequent upon a criminal charge or conviction. It preferred that the legislation include a detailed, but non-exhaustive, list to assist potential jurors.⁴⁹⁹

6.125 The NSWLRC's recommendations are implemented by the *Jury Amendment Act 2010* (NSW).⁵⁰⁰ Clause 4 of the new Schedule 1 will exclude a person during any period in which the person:

- is bound by an order made in New South Wales or elsewhere pursuant to, or consequent on, a criminal charge or conviction, including the following orders:
 - an apprehended violence order within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);
 - a community service order;
 - an extended supervision order, a continuing detention order or an interim detention order under the *Crimes (Serious Sex Offenders) Act 2006* (NSW);
 - a non-association order or place restriction order;
 - a prohibition order or contact prohibition order under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW);
 - an order under section 7A of the *Drug Court Act 1998* (NSW);
 - an intervention program order;
- is in custody within the meaning of section 249 of the *Crimes (Administration of Sentences) Act 1999* (NSW), awaiting trial or sentence for an offence or the determination of appeal proceedings in relation to an offence for which the person has been found guilty or convicted, or detained in a hospital under Division 6 of Part 1B of the *Crimes Act 1914* (Cth), or is subject to:

⁴⁹⁹ Ibid [3.44]–[3.46], [3.72], Rec 7.

⁵⁰⁰ *Jury Act 1977* (NSW) sch 1 cl 4 to be inserted by *Jury Amendment Act 2010* (NSW).

- an order under anti-terrorism legislation;
 - a child protection registration requirement;
 - a requirement to participate in pre-trial diversionary programs, intervention programs, circle sentencing or other forms of conferencing under the *Pre-Trial Diversion of Offenders Act 1985* (NSW);
 - a limiting term under the *Mental Health (Forensic Provisions) Act 1990* (NSW); or
- is disqualified from holding a driver licence for a period of 12 months or more.

LRCWA's recommendations

6.126 The Law Reform Commission of Western Australia recommended that a person should be disqualified from jury service if the person:⁵⁰¹

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.

6.127 The LRCWA noted that, while unconvicted defendants who are on bail or remanded in custody are presumed innocent until proven guilty, the immediacy of

⁵⁰¹

Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 91, Rec 46.

their association with the criminal justice process, and the need to maintain public confidence in the jury system, warrants their exclusion:⁵⁰²

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.

6.128 It also considered that convicted defendants who are currently on bail or remanded in custody awaiting sentence, and people subject to a court order such as a community-based order or a good behaviour bond, should be disqualified because of their close connection with the criminal justice system.⁵⁰³ The Juries Legislation Amendment Bill 2010 (WA) proposes an amendment to section 5 of the *Juries Act 1957* (WA) to disqualify a person from serving as a juror 'if he or she is on bail or in custody awaiting trial on a charge of an offence of sentence for an offence'.⁵⁰⁴

6.129 The LRCWA also expressed the view that, in order to ensure that serious traffic offenders are disqualified, people who are currently subject to a drivers licence disqualification of 12 months or more should be disqualified from jury service. While noting that jury trials do not often involve consideration of driving behaviour, trials may occasionally involve driving offences such as dangerous driving causing death.⁵⁰⁵ The Juries Legislation Amendment Bill (WA) proposes an amendment to section 5 of the Act to disqualify a person from jury service if 'he or she has, in the relevant period in Western Australia, been convicted of 3 or more offences against the *Road Traffic Act 1975* (WA)'.⁵⁰⁶

Discussion Paper

6.130 In its Discussion Paper, the Commission expressed the provisional view that the criminal history exclusion in section 4(3) of the *Jury Act 1995* (Qld) is too broad and should be amended so that spent convictions and convictions for indictable offences that involved relatively minor criminal behaviour are no longer captured. The Commission also suggested that the provision should be amended to exclude persons who are currently subject to a non-custodial sentence or are serving a sentence of imprisonment. The Commission therefore put forward the following proposals on which it sought submissions.⁵⁰⁷

502 Ibid 88.

503 Ibid 87–88, Rec 46.

504 Juries Legislation Amendment Bill 2010 (WA) cl 10(2)(h).

505 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 90, Rec 44.

506 Juries Legislation Amendment Bill 2010 (WA) cl 10(2)(g).

507 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [6.115]–[6.120], Proposals 6-2 to 6-4.

- 6-2 Sections 4(3)(m) and (n) of the *Jury Act 1995* (Qld) should be amended to provide that a person who has been convicted of an indictable offence or sentenced (in the State or elsewhere) to imprisonment is ineligible for jury service, but that this does not apply to:
- (1) a conviction on a summary proceeding; or
 - (2) a conviction, or sentence imposed upon a conviction, to which the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) applies and for which the rehabilitation period under Act has expired.
- 6-3 Sections 12(4) and 68(6) of the *Jury Act 1995* (Qld), which exclude the operation of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) for the purpose of determining whether a person is ineligible for jury service, should be repealed.
- 6-4 The *Jury Act 1995* (Qld) should be amended to provide that a person who is currently serving a sentence of imprisonment, is on parole, is on bail awaiting trial or sentence, or is subject to a non-custodial sentence such as a suspended sentence of imprisonment or a community service order is ineligible for jury service.

6.131 The Commission also sought submissions on the following question:⁵⁰⁸

- 6-5 Should a sentence of imprisonment, for the purpose of the criminal history disqualification, be taken to include a sentence of detention under the *Youth Justice Act 1992* (Qld)?

Consultation

Summary convictions

6.132 The Queensland Law Society supported the Commission's proposal for offenders dealt with summarily to be eligible to serve:⁵⁰⁹

This proposal also allows minor offenders who have been dealt with in the lower courts to continue to be eligible to serve. We remind the Commission s 123 of the *Drugs Misuse Act 1986* deems every conviction for a drug related offence to be indictable, notwithstanding that the person may have been sentenced by a Magistrates Court. This may create unfairness as a person who was charged with possession of a small quantity of drugs (and perhaps is even granted a diversion by the Court) would be ineligible. Perhaps a third category covering a conviction for a possession charge completed in the Magistrates Court should also be considered.

6.133 The Department of Justice and Attorney-General expressed some qualified support for the Commission's proposals. The Department supported

508 Ibid, Question 6-5.

509 Submission 52.

changes that would increase the number of potential jurors, but noted that they would have significant administrative and, therefore, funding implications:⁵¹⁰

[We] are supportive of any initiative to increase the number of potential jurors able to serve in the community. It should be noted however that should changes be made to the disqualification provisions on the basis of criminal history there will be a resulting administrative impact upon court staff.

In the pre-summons vetting process a court staff member (in Brisbane the Sheriff) is required to evaluate criminal histories provided from authorities nationwide to determine whether a potential juror should be disqualified. At times this can be a complex and time consuming task given the variances in legislation over many decades and the differing means by which jurisdictions record criminal court outcomes. The proposal to amend the criteria will exacerbate this process, accordingly it is likely that further funding/resourcing would be required to administer this.

6.134 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd considered that high incarceration rates contribute to the under-representation of Aboriginal and Torres Strait Islander peoples on juries. It therefore agreed that the criminal history exclusion is too broad and should be amended so that convictions for indictable offences that involve relatively minor criminal behaviour are no longer captured.⁵¹¹

Due to the high rate of criminal records for Aboriginal and Torres Strait Islander peoples, the exclusions in s 4(3)(m) and (n) of the *Jury Act 1995* (Qld) need to be amended to enable more Aboriginal and Torres Strait Islander people to become jurors. We agree that the present exclusion is far too broad and requires narrowing so as not to include people who have committed the more minor indictable offences. Even in the situation where Aboriginal and Torres Strait Islander people have spent time incarcerated for minor offences, they should not be excluded from jury service. The same might be said in respect of young people. Until there is change to the broader criminal justice system, it needs to be acknowledged that Aboriginal and Torres Strait Islander people are more likely to be incarcerated than the wider population for minor offences.

Convictions for which the rehabilitation period has expired

6.135 The Queensland Law Society supported the Commission's proposal for a person who was otherwise ineligible to serve on a jury because of a conviction to become eligible for jury service after the rehabilitation period has expired.⁵¹²

6.136 To that end, the Queensland Law Society also agreed with the Commission's proposal to repeal sections 12(4) and 68(6) of the *Jury Act 1995* (Qld), which exclude the operation of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) for the purpose of determining whether a person is ineligible for jury service.⁵¹³

510 Submission 56.

511 Submission 43.

512 Submission 52.

513 Ibid.

6.137 The Department of Justice and Attorney-General again expressed some support for this proposal, but explained that the increase in administrative complexity would impact on resources.⁵¹⁴

As noted above, the greater the complexity of the criteria, the more onerous the task of evaluating suitability becomes. As a general principle [we] are very supportive of the proposed changes however seek to note that any change will result in resourcing impacts.

6.138 The Queensland Police Service expressed some support for this proposal. It submitted that 'where a person has been sentenced to imprisonment for a simple offence, there would appear no good reason why, after the appropriate rehabilitation period in the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), such a person should not be eligible for jury service'. However, it also commented that:⁵¹⁵

Whilst the QPS supports the application of *Criminal Law (Rehabilitation of Offenders) Act 1986*, the QPS considers that offenders convicted of serious violent offences (declared under s 161B of the *Penalties and Sentences Act 1992*) or have been subject to provisions of *Child Protection (Offender Reporting) Act 2004* as a reportable offender, should not be eligible for jury service.

Similarly, persons convicted of offences involving the administration of justice, for example perjury and fabricating evidence, should not be considered for jury service. Whether persons convicted of offences involving dishonesty, for example stealing and fraud, should be eligible for jury service even after the rehabilitation period has terminated, requires further consideration and research.

6.139 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd considered that 'a person with a spent conviction should not be excluded from participating on a jury'. In its view:⁵¹⁶

such exclusion raises discrimination issues and ignores the philosophy behind sentencing a person to punishment and rehabilitation so that the person can return to the community and participate in all aspects of community life as a fully functional citizen.

People who are currently serving a sentence or are subject to a criminal court order

6.140 The Queensland Law Society expressed qualified support for the Commission's proposal for a person who is currently serving a sentence of imprisonment, is on parole, or is subject to a non-custodial sentence such as a suspended sentence of imprisonment or a community service order to be made ineligible for jury service. In its view, however, persons on bail for an outstanding

514 Submission 56.

515 Submission 59.

516 Submission 43.

matter, particularly in relation to a summary offence, should remain eligible for jury service:⁵¹⁷

The Society has no objection to these proposals, except where the person is on bail for an outstanding matter. The person is presumed to be innocent and continues to be innocent until a verdict of guilty is entered. The proposal relating to bail does not distinguish being on bail for summary or indictable matters. It is difficult to understand how a person who is bailed to appear for a summary offence is ineligible, yet if they are later convicted, then they would be eligible again.

6.141 The Queensland Police Service supported the Commission's proposal. It commented that a person on bail awaiting trial or sentence is 'unlikely to be considered as impartial for the purposes of jury duties'.⁵¹⁸

6.142 However, the Department of Justice and Attorney-General explained that it may be difficult to obtain information about whether a person is on parole or on bail, or is subject to a non-custodial sentence:⁵¹⁹

[We] are not presently in possession, nor do we have the means to readily acquire possession of, the information relevant to administer any change of this nature to any degree of certainty. Reliance upon external organisations to supply necessary information will likely result in delay.

Sentence of detention as a juvenile

6.143 The Department of Justice and Attorney-General submitted that a sentence of imprisonment, for the purpose of the criminal history disqualification, should be taken to include a sentence of detention under the *Youth Justice Act 1992* (Qld).⁵²⁰

6.144 Similarly, the Queensland Law Society expressed the view that 'the reasons that an adult should be ineligible to serve owing to a sentence of imprisonment also apply equally to a period of detention'. In its view, a person who has served a period of detention as a juvenile should be eligible to serve after the rehabilitation period for the conviction has expired.⁵²¹

6.145 However, the Department of Communities, which administers the *Youth Justice Act 1992* (Qld), considered that a sentence of detention under that Act should not ordinarily disqualify a person from jury service:⁵²²

International covenants and laws relating to young people and criminal justice practice recognise the vulnerability, and developmental stages, of children and young people. In Queensland, the *Youth Justice Act 1992* provides protections

517 Submission 52.

518 Submission 59.

519 Submission 56.

520 Ibid.

521 Submission 52.

522 Submission 35A.

for children and young people and these are enshrined in a Charter of Juvenile Justice Principles.⁵²³

The QLRC [Discussion Paper] (6.119) notes, that it is ‘especially important to recognise that an offence committed while a person is a juvenile ought not preclude the person from participating in civic society when the person has not subsequently engaged in criminal conduct’.

The department considers that a sentence of detention under the *Youth Justice Act 1992*, should not exclude a person from jury duty unless the offence warranted a ‘life sentence’ or the offence was determined by the court to be heinous. (note added)

6.146 The Queensland Police Service also expressed the view that a sentence of detention under the *Youth Justice Act 1992* (Qld) should not normally disqualify a person from jury service.⁵²⁴

Imprisonment under the *Penalties and Sentences Act 1992* and detention under the *Youth Justice Act 1992* (YJA) are not the same. A youth is not necessarily convicted because a detention order has been made under the YJA. Given that such detention relates to a sentence imposed on a child, it would seem sensible that after a suitable period, they should be considered for jury service.

The Commission’s view

6.147 To maintain public confidence in the jury system, juries need to be, and be seen to be, impartial. For that reason, the Commission is of the view that it is necessary to exclude certain people from jury service on the basis of their criminal history.

6.148 However, in recognition of the principles of offender rehabilitation and non-discrimination, and the desirability of maintaining representative juries, the grounds on which a person is excluded from jury service by reference to the person’s previous criminal history should not be unduly broad; further, the grounds should differentiate between serious and less serious offending. The breadth of the existing provisions is such that many people who have engaged in even relatively minor criminal behaviour, and many Indigenous people who are over-represented as criminal defendants, will be permanently excluded from the jury pool.

6.149 Many indictable offences involve minor criminal behaviour and attract relatively low penalties; this is recognised in the provision for some types of indictable offences to be dealt with summarily, rather than on indictment.⁵²⁵ At present, the disqualification in section 4(3)(m) of the *Jury Act 1995* (Qld) applies to a person who has been convicted of an indictable offence ‘whether on indictment or in a summary proceeding’. The Commission recommends that this be amended to

⁵²³ See *Youth Justice Act 1992* (Qld) s 3, sch 1. The Charter of youth justice principles in that Act provides, for example, that a child who commits an offence should be ‘dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways’, and a child should be dealt with under the Act ‘in a way that allows the child to be reintegrated into the community’: sch 1 cl 8, 16.

⁵²⁴ Submission 59.

⁵²⁵ See [6.70] above.

apply only to convictions made on indictment, excluding those convictions that are heard and determined summarily, which involve less serious criminal behaviour.

6.150 However, the Commission considers that spent convictions should not count against a person to render him or her ineligible for jury service. At present, the *Jury Act 1995* (Qld) specifically provides that the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) does not apply. The Commission recommends that this be altered so that, if the rehabilitation period in relation to a conviction has expired, and has not been revived.⁵²⁶

- the conviction (in the case of a conviction on indictment) will not render the person ineligible for jury service under section 4(3)(m); and
- any sentence of imprisonment imposed in respect of the conviction (whether or not the person was convicted on indictment) will not render the person ineligible for jury service under section 4(3)(n).

6.151 This change recognises that an offence committed while a person was a juvenile ought not to preclude the person from participating in civic society when the person has not subsequently engaged in criminal conduct; it is also important for adults who have previously offended but have subsequently been rehabilitated.

6.152 The Commission notes that the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) applies only to particular classes of convictions, and that a rehabilitation period cannot run in relation to a conviction if the offender was ordered to serve a period in custody exceeding 30 months.⁵²⁷ The effect of the Commission's recommendations is therefore that persons who are ordered to serve a period in custody of more than 30 months will be permanently ineligible for jury service under section 4(3)(n) of the *Jury Act 1995* (Qld) (and also under section 4(3)(m) if the conviction was on indictment). In the Commission's view, such persons might be perceived not to be impartial by reason of the nature of their conviction, and their disqualification is necessary to maintain public confidence in the criminal justice system.

6.153 However, in relation to persons who are not ordered to serve any period in custody, or who are ordered to serve a period not exceeding 30 months, the Commission's recommendations provide a graduated scheme of temporary exclusion based on the different rehabilitation periods that apply under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld):

- A person who is convicted of an offence (including a conviction on indictment) while he or she is a child and who is ordered to serve a period in custody of not more than 30 months will generally be eligible for jury service on the date that is five years from when the conviction is recorded.

⁵²⁶ See s 11 of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) in relation to the revival of convictions.

⁵²⁷ See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2), which is discussed at [6.60] above.

- An adult who is convicted of an offence that is heard and determined summarily (including an indictable offence that is dealt with summarily) and who is ordered to serve a period in custody of not more than 30 months will generally be eligible for jury service on the date that is five years from when the conviction is recorded.
- An adult who is convicted of an offence on indictment and who is ordered to serve a period in custody of not more than 30 months will generally be eligible for jury service on the date that is ten years from when the conviction is recorded.

6.154 The Commission is also of the view that the *Jury Act 1995* (Qld) should be amended to provide that a person is not eligible for jury service if the person is, in the State or elsewhere, serving a sentence of imprisonment, on bail awaiting trial or sentence, subject to a non-custodial sentence such as a suspended sentence of imprisonment or a community service order, or on parole.

6.155 Further, the *Jury Act 1995* (Qld) should be amended to clarify that, for the purpose of section 4(3)(n), a sentence of imprisonment includes a sentence of detention under the *Youth Justice Act 1992* (Qld). In so far as convictions as a child should have a different effect on eligibility from convictions as an adult, the Commission considers that this issue is best addressed by its recommendation that section 4(3)(m) and (n) are to be subject to the application of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), which provides a shorter rehabilitation period where an offender was dealt with as a child.

Recommendations

6.156 The Commission makes the following recommendations:

6-2 Section 4(3)(m) of the *Jury Act 1995* (Qld) should be amended to provide that a person who has been convicted of an indictable offence is ineligible for jury service but only if the person was convicted on indictment.

6-3 The *Jury Act 1995* (Qld) should be amended to provide that:

- (a) a person is not ineligible under section 4(3)(m) if, under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld):**
 - (i) the rehabilitation period has expired in relation to the conviction; and**
 - (ii) the conviction has not been revived; and**
- (b) a person is not ineligible under section 4(3)(n) if, under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld):**

- (i) the rehabilitation period has expired in relation to the conviction for which the sentence of imprisonment was imposed; and
- (ii) the conviction has not been revived.

6-4 Sections 12(4) and 68(6) of the *Jury Act 1995* (Qld), which exclude the operation of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) for the purpose of determining whether a person is ineligible for jury service, should be omitted.

6-5 The *Jury Act 1995* (Qld) should be amended to provide a person is not eligible for jury service if the person, in Queensland or elsewhere, is:

- (a) serving a sentence of imprisonment;
- (b) on bail awaiting trial or sentence;
- (c) subject to a non-custodial sentence, such as a suspended sentence of imprisonment or a community service order;
- (d) on parole.

6-6 The *Jury Act 1995* (Qld) should be amended to provide that, for the purpose of section 4(3)(n), a sentence of imprisonment should be taken to include a sentence of detention under the *Youth Justice Act 1992* (Qld).

Chapter 7

Exclusion on the Basis of Occupation

INTRODUCTION	117
CURRENT OCCUPATIONAL EXCLUSIONS	118
THE BASIS FOR OCCUPATIONAL EXCLUSION.....	119
Limiting the categories of exclusion	120
Discussion Paper	123
Consultation	123
The Commission's view	124
Recommendation	125
EXCLUSION WHILST HOLDING AN OFFICE OR POSITION	125
The Governor	125
Members of Parliament and officers of the parliamentary service.....	128
Directors-General of Government departments.....	132
Judges and magistrates	134
Members of other courts of record.....	138
Local government mayors and other councillors	141
Local government chief executive officers	145
Lawyers.....	147
Police officers.....	159
Detention centre employees, corrective services officers, and Parole Board members ..	163
Other public sector officers and people involved with the criminal justice system	168
Crime and Misconduct Commission	172
Court officers	175
Justices of the peace with power to constitute a court	178
EXCLUSION AFTER LEAVING AN OFFICE OR POSITION	181
Permanent exclusion.....	182
Exclusion for a limited period after leaving office.....	185
SPOUSES OF EXCLUDED PEOPLE	193
Discussion Paper	193
Consultation	194
The Commission's view	194
Recommendation	194
COMMONWEALTH EXCLUSIONS	194
Senior Commonwealth public servants.....	196
Discussion Paper	196
Consultation	197
The Commission's view	197
Recommendation	197

INTRODUCTION

7.1 The Terms of Reference direct the Commission to consider whether there are any categories of people who are currently ineligible for jury service that are no longer appropriate, and whether there are any categories of people who are

currently eligible who should be made ineligible for jury service, including, but not limited to:⁵²⁸

- people employed or engaged in the public sector in law enforcement, criminal investigation, the provision of legal services in criminal cases, and the administration of justice or penal administration; and
- local government chief executive officers.

7.2 This chapter considers ineligibility on the basis of occupation or profession. Exclusion on the basis of age, competence and religious or personal beliefs is considered in Chapter 8. Provisions for excusal from jury service are discussed in Chapter 9.

CURRENT OCCUPATIONAL EXCLUSIONS

7.3 The legislation in Queensland does not confer a right to voluntarily opt out of jury service on members of any occupational or professional groups. Section 4(3)(a)–(i) of the *Jury Act 1995* (Qld) provides, however, the following occupational categories of ineligibility:

- (3) The following persons are not eligible for jury service—
- (a) the Governor;
 - (b) a member of Parliament;⁵²⁹
 - (c) a local government mayor or other councillor;
 - (d) a person who is or has been a judge or magistrate (in the State or elsewhere);⁵³⁰
 - (e) a person who is or has been a presiding member of the Land and Resources Tribunal;
 - (f) a lawyer actually engaged in legal work;
 - (g) a person who is or has been a police officer (in the State or elsewhere);
 - (h) a detention centre employee;⁵³¹

⁵²⁸ See the Terms of Reference set out in Appendix A to this Report.

⁵²⁹ 'Member of parliament' means a member of the Legislative Assembly or a member of the Commonwealth Parliament: *Jury Act 1995* (Qld) s 3, sch 3 Dictionary.

⁵³⁰ 'Judge' means a Supreme Court judge, a District Court judge, a Childrens Court judge or another judicial officer with authority to preside at a trial, 'trial' meaning trial by jury: *Jury Act 1995* (Qld) s 3, sch 3 Dictionary.

⁵³¹ 'Detention centre employee' is defined in *Jury Act 1995* (Qld) s 3, sch 3 Dictionary to mean a person who:

(a) is or has been, in Queensland, a detention centre employee under the *Youth Justice Act 1992*; or

- (i) a corrective services officer;⁵³²

... (notes added)

7.4 These can be loosely divided into two categories of exclusion: exclusion based on executive, legislative or judicial function; and exclusion based on involvement in the administration of law and the criminal justice system.

7.5 The *Jury Act 1995* (Qld) removed a number of exclusions that previously applied under section 8(1) of the *Jury Act 1929* (Qld), including those for medical practitioners, academics, journalists, ambulance service and fire brigade members, aircraft pilots and ships' crew.

7.6 In the other Australian jurisdictions, a range of people are excluded from jury service on the basis of their occupation, profession or office. These include, as in Queensland, persons who perform executive, legislative or judicial functions or who are involved in the administration of law and criminal justice. In some jurisdictions, members of particular occupations are also entitled to excusal as of right, including medical and health professionals, emergency service personnel, academics, and newspaper editors.⁵³³ Excusals as of right are discussed in Chapter 9 below.

THE BASIS FOR OCCUPATIONAL EXCLUSION

7.7 In examining whether the occupational categories of ineligibility are appropriate, or should be changed, the Commission has had regard to the 'importance of ensuring and maintaining public confidence' in the criminal justice system of which the jury is an integral part,⁵³⁴ and has been guided by the following principles, identified and discussed in Chapter 5:

-
- (b) has been, in Queensland, a person with functions corresponding to those of a detention centre employee under the *Youth Justice Act 1992*; or
 - (c) is or has been, under a law of another State, a person with functions corresponding to those of a detention centre employee under the *Youth Justice Act 1992*.

532 'Corrective services officer' is defined in *Jury Act 1995* (Qld) s 3, sch 3 Dictionary to mean a person who:

- (a) is or has been, in Queensland, a corrective services officer under the *Corrective Services Act 2006*; or
- (b) has been, in Queensland, a person with functions corresponding to those of a corrective services officer under the *Corrective Services Act 2006*; or
- (c) is or has been, under a law of another State, a person with functions corresponding to those of a corrective services officer under the *Corrective Services Act 2006*.

533 *Juries Act 1967* (ACT) s 11, sch 2 pt 2.2; *Jury Act 1977* (NSW) s 7, sch 2 to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act 1957* (WA) s 5(c)(i), sch 2 pt II. See also *Juries Act 1967* (Ireland) s 9, sch 1 pt II; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(2), sch 1 pt III.

534 See the Terms of Reference set out in Appendix A of this Report.

- Jurors should be, and be seen to be, independent of all three branches of the government, namely, the legislature, the executive and the judiciary.⁵³⁵
- Jurors should be, and be seen to be, impartial; as the Terms of Reference note, it is essential that juries are ‘composed in a way that avoids bias or the apprehension of bias’.⁵³⁶
- Juries should be comprised of non-specialists: members of the community who do not have special professional functions, or legal expertise, in the criminal justice system.
- Juries should be broadly representative of the community, and wide participation in, and the fair sharing of, jury service should be encouraged and enabled. Individual juries, and the jury system as a whole, will benefit from having jurors with a diversity of backgrounds, qualifications, and employment experiences. The jury pool in smaller, regional areas will also benefit from the removal of unnecessary occupational exclusions.
- Being an important civic duty, jury service should be shared as equitably as possible among all members of the community. People should not be able to avoid their civic responsibility merely because they belong to ‘important’ or ‘busy’ professions.
- Being an important form of democratic and civic participation, jury service should not unfairly be denied to members of the community who are able and willing to participate.

Limiting the categories of exclusion

7.8 There is a tension between these principles that must be balanced.

7.9 On the one hand, the principles of representativeness, wide participation and non-discrimination point to the desirability of keeping occupational exclusions to a minimum, and underlie the trend in many jurisdictions, discussed in Chapter 3, toward reducing the number of occupational exclusions.

7.10 For example, in England and Wales, there are no longer *any* categories of automatic exclusion from jury service based on occupation, following amendments introduced in 2004.⁵³⁷

7.11 Both the NSW Law Reform Commission and the Law Reform Commission of Western Australia have also recommended the removal of a number of

⁵³⁵ As discussed in Chapter 5 above, the right to a fair trial enunciated in art 14(1) of the *International Covenant on Civil and Political Rights* encompasses the right to an independent tribunal: see [5.3] above.

⁵³⁶ The test to be applied in the case of a juror’s disqualification for apprehended bias is whether the incident or matter in question is such that it gives rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror or jury has not discharged or will not discharge their task impartially: see n 302 above. The need for impartiality is also recognised as part of the right to a fair trial in art 14(1) of the *International Covenant on Civil and Political Rights*: see [5.3] above.

⁵³⁷ See *Criminal Justice Act 2003* (Eng) sch 33.

categories of occupational ineligibility,⁵³⁸ and recent amendments introduced in New South Wales will streamline some of the occupational categories of ineligibility to limit the number of persons who are excluded.⁵³⁹

7.12 On the other hand, the principles of independence, non-specialist composition, and impartiality suggest that some occupational exclusions are necessary and should be retained.

7.13 The English approach of total occupational eligibility has, therefore, been rejected in a number of jurisdictions, including Scotland and Ireland,⁵⁴⁰ as well as New South Wales and Western Australia.

7.14 The Law Reform Commission of Western Australia expressed the view that the protection of the independence, impartiality and 'lay composition' of the jury, and thus of public confidence in the jury system, requires the continued exclusion of occupations connected to law enforcement, the administration of justice and the legislative arm of government:⁵⁴¹

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.

7.15 Similarly, the NSW Law Reform Commission concluded that occupational ineligibility should be governed by the 'desirability of preserving community confidence in the impartiality of the criminal justice system' and:⁵⁴²

should be confined to those who have an integral and substantially current connection with the administration of justice, most particularly criminal justice, or with the formulation of policy affecting its administration, and to those who perform special or personal duties to the State.

7.16 Recent amendments in New South Wales will also retain the exclusion, 'for legitimate reasons',⁵⁴³ of certain office-holders and public sector employees who are connected with the administration of justice.⁵⁴⁴

⁵³⁸ See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) 79, 88, Rec 14 and 18; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 57–8, 63, 65, 67, 76, Rec 23, 24, 27, 29, 33 and 38.

⁵³⁹ For example, the exclusion that used to apply to all public sector employees engaged in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice, or penal administration in *Jury Act 1977* (NSW) s 6, sch 2 cl 8 will be removed and replaced with more specific exclusions for particular persons in those fields. See *Jury Act 1977* (NSW) s 6, sch 1 cl 6 to be inserted by *Jury Amendment Act 2010* (NSW). It was also recently suggested in Victoria that a number of occupational exclusions, such as those of non-practising lawyers and employees of law firms, could be removed without infringing the principles of 'maintaining the separation of powers, ensuring a fair trial and maintaining public confidence in the administration of justice': Victoria, Department of Justice, *Jury Service Eligibility*, Discussion Paper (2009) 5.

⁵⁴⁰ Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [6]; Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.28], [3.29]–[3.99].

⁵⁴¹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 49.

⁵⁴² New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.2]–[4.3].

7.17 This is reflective of the conclusion that had been reached many years earlier in England and Wales by a Departmental Committee chaired by Lord Morris:⁵⁴⁵

If juries are to continue to command public confidence it is essential that they should manifestly represent an impartial and lay element in the workings of the courts. It follows that all those whose work is connected with the detection of crime and the enforcement of law and order must be excluded, as must those who professionally practise the law, or whose work is concerned with the functioning of the courts.

7.18 In reaching an appropriate balance between all of the relevant principles, however, it must be borne in mind that juries are principally used in criminal, rather than civil, trials⁵⁴⁶ and that it is the jury's independence and impartiality within the *criminal* justice system that should be the focus.

7.19 There is a significant body of opinion that, although the overall pool of potential jurors should be widened as far as possible, police officers, judges, lawyers and others involved in the administration of the criminal justice system should continue to be excluded.⁵⁴⁷

7.20 Not only are there concerns that, for example, judges and criminal lawyers may unduly influence jury deliberations, and police officers may be biased or prejudiced to a greater extent than other jurors, there is a concern that the participation on juries of such persons would undermine the non-specialist composition and independence of the institution of the jury: 'judgment by peers rather than by professionals is what the jury provides'.⁵⁴⁸

7.21 It has also been noted that, if people in certain occupations are invariably likely to be excused from jury service, there may be little real benefit to the jury pool in making them eligible.⁵⁴⁹

7.22 In light of the foregoing discussion, the Commission has sought to enunciate a clear basis against which to evaluate the categories of occupational exclusion in Queensland.

543 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2010, 23675 (Barry Collier, Parliamentary Secretary).

544 See *Jury Act 1977* (NSW) s 6, sch 1 to be inserted by *Jury Amendment Act 2010* (NSW).

545 *Report of the Departmental Committee on Jury Service*, Cmnd 2627, HMSO (1965) (the 'Morris Report') [103].

546 Juries are rarely used in civil cases; there are generally no more than one or two civil jury trials held each year in Queensland: see Chapter 13 below.

547 Eg Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 77. A similar view was expressed by a member of the Criminal Law Section of the Queensland Law Society in a preliminary consultation with the Commission: Submissions 26, 26A.

548 Lord P Devlin, 'The conscience of the jury' (1991) 107 *Law Quarterly Review* 398, 402.

549 Eg Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials*, Consultation Paper (2008) [4.13]. The Scottish Government also noted, at [4.10], that case-by-case consideration may involve greater 'administrative costs' compared with automatic exclusion.

Discussion Paper

7.23 In its Discussion Paper, the Commission expressed the provisional view that, while unnecessary occupational exclusions from jury service should be removed, some exclusions are necessary, and should be retained, because of the need for juries to be, and be seen to be, independent and impartial and to maintain public confidence in the jury system. It therefore made the following proposal on which it sought submissions:⁵⁵⁰

- 7-1 Occupational ineligibility should be confined to those categories of people whose presence on a jury would, or could be seen to, compromise:
- (1) the independence of the jury from the executive, legislative and judicial arms of government because of their special or personal duties to the state; or
 - (2) the impartiality and lay composition of the jury because of their employment or engagement in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of criminal justice or penal administration.

7.24 Accordingly, the Commission considered that, except to the extent that they are justified or warranted on the basis of a real risk to the need for juries to be, and be seen to be, impartial and independent, no new categories of occupational ineligibility should be introduced and none of the categories of ineligibility that have already been removed from the legislation in Queensland should be re-introduced.⁵⁵¹

Consultation

7.25 Several respondents, including the Queensland Law Society, the Department of Justice and Attorney-General, the Queensland Police Service and the Ipswich City Council expressed support for Proposal 7-1 in the Discussion Paper.⁵⁵² The Ipswich City Council submitted, for example:⁵⁵³

Council agrees with this proposition. A defendant has a right to be judged by their peers. Juries therefore should be representative of all members of community, regardless of occupation, except insofar as a person's occupation could compromise, or be seen to compromise, the independence or impartiality of the jury.

⁵⁵⁰ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.16]–[7.17], Proposal 7-1.

⁵⁵¹ *Ibid* [7.187]–[7.188].

⁵⁵² Submissions 51, 52, 55, 56, 59.

⁵⁵³ Submission 55.

7.26 The Queensland Law Society expressed general support for the idea that occupational ineligibility should be limited to persons who are engaged in ‘work concerning the criminal justice system’.⁵⁵⁴

7.27 The Queensland Police Service expressed the view that Proposal 7-1 is consistent with the principle that justice should not only be done, but should be seen to be done, and is reflected in paragraphs (a) to (i) of section 4(3) of the Queensland Act.⁵⁵⁵

7.28 Another respondent commented on the need for the number of exclusions to be kept low in order to ensure a wide pool of potential jurors:⁵⁵⁶

To be able to choose juries from a wide selection of the community exemptions need to be minimal — except for those in emergency services etc and if their occupation would find it difficult if they had to take unlimited time from work.

7.29 That respondent also commented that ‘It is fair that people involved in law enforcement and related areas are exempt from jury service’.

The Commission’s view

7.30 The Commission agrees with the general position adopted by the NSW Law Reform Commission and the Law Reform Commission of Western Australia that, while unnecessary occupational exclusions from jury service should be removed, some should be retained given the need for juries to be, and be seen to be, independent and impartial and for public confidence in the jury system to be maintained. However, mere inconvenience or importance of profession is an inappropriate basis for occupational exclusion.

7.31 Consistent with the Commission’s focus in this review on the use of juries in criminal trials, the Commission considers that occupational ineligibility should be confined to those categories of people whose presence on a jury would compromise, or be seen to compromise:

- the independence of the jury from the executive, legislative and judicial arms of government because of their special or personal duties to the state; or
- the impartiality and non-specialist composition of the jury because of their employment or engagement in law enforcement, criminal investigation, the provision of legal services in criminal cases, or the administration of criminal justice or penal administration.

7.32 Throughout the rest of this chapter, the Commission has sought to evaluate the categories of occupational ineligibility on this basis, and with reference to the principles discussed at [7.7] above.

⁵⁵⁴ Submission 52.

⁵⁵⁵ Submission 59. *Jury Act 1995* (Qld) s 4(3)(a)–(i) is set out at [7.3] above.

⁵⁵⁶ Submission 12 responding to Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

7.33 In Chapter 9 of this Report, the Commission has also recommended that, in general and with some limited exceptions,⁵⁵⁷ there should be no separate categories of excusal as of right on the basis of occupation (as distinct from certain categories of people who are ineligible for jury service).⁵⁵⁸

Recommendation

7.34 The Commission makes the following recommendation:

7-1 Occupational ineligibility should be confined to those categories of people whose presence on a jury would, or could be seen to, compromise:

- (a) the independence of the jury from the executive, legislative and judicial arms of government because of their special or personal duties to the state; or**
- (b) the impartiality and non-specialist composition of the jury because of their employment or engagement in law enforcement, criminal investigation, the provision of legal services in criminal cases, or the administration of criminal justice or penal administration.**

EXCLUSION WHILST HOLDING AN OFFICE OR POSITION

7.35 This part of the chapter considers the circumstances in which persons should be ineligible on the basis that they are currently employed or engaged in a particular occupation or hold a particular office. The question whether former members of any of those occupations should also be excluded, either permanently or for a specified period of time, is considered separately in a later part of the chapter.

The Governor

7.36 Under section 4(3)(a) of the *Jury Act 1995* (Qld), the Governor is ineligible for jury service.⁵⁵⁹ The Governor-General of Australia is also excluded from serving as a juror in all Federal, State and Territory courts.⁵⁶⁰

⁵⁵⁷ See Recommendations 7-13 and 13-1 below.

⁵⁵⁸ See Recommendation 9-1 below.

⁵⁵⁹ 'Governor' does not include the Deputy Governor or Acting Governor: *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'Governor' para (a)); *Constitution Act 1867* (Qld) s 11A(3).

⁵⁶⁰ *Jury Exemption Act 1965* (Cth) s 4(1), sch.

7.37 The holders of vice-regal office are also excluded from jury service in the other Australian jurisdictions and in New Zealand.⁵⁶¹ Those exclusions are extended in some jurisdictions to:

- the Lieutenant Governor;⁵⁶²
- the official secretary to the Governor-General or Administrator;⁵⁶³
- household officers and members of staff of the Governor-General;⁵⁶⁴ and
- spouses or domestic partners of the Governor and Lieutenant Governor.⁵⁶⁵

7.38 Under section 8(1)(a), (p) of the former *Jury Act 1929* (Qld), household officers and servants of the Governor and members of the Executive Council also used to be excluded from jury service in Queensland.

7.39 The Governor is the Queen's representative in Queensland, appointed under the signature or royal sign of the Queen, and exercises all of the powers and functions of the Sovereign in Queensland. The Governor presides over the Executive Council and, acting as the Governor-in-Council, assents to legislation and other instruments and approves certain expenditures of government funds. The Governor is also responsible for summoning, proroguing and dissolving parliament, appointing Ministers, judges, magistrates and other public officials, and exercising the royal prerogative of mercy for offenders.⁵⁶⁶

7.40 The Governor's powers can also be exercised, in certain circumstances such as absence, illness or vacancy, by the Deputy Governor, to whom the Governor has delegated his or her powers, or by the Acting Governor.⁵⁶⁷ The person to whom the Governor's powers may be delegated as Deputy Governor, or who must govern the State as Acting Governor, is:⁵⁶⁸

⁵⁶¹ *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6, sch 1 cl 5 to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2; *Juries Act 1981* (NZ) s 8(aa). See also *Juries Act 1957* (WA) s 5(3)(ba), sch 1 div 1 cl 1 as is proposed to be inserted by *Juries Legislation Amendment Bill 2010* (WA) cl 10, 36 which will provide that a person who is the Governor, the Lieutenant-Governor, an Administrator administering the government of the State, or a deputy of the Governor is ineligible for jury service.

⁵⁶² *Juries Act 1927* (SA) s 13(c), sch 3.

⁵⁶³ *Jury Exemption Regulations 1987* (Cth) reg 7(2)(a); *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Juries Act* (NT) s 11(1), sch 7; *Juries Act 2000* (Vic) s 5(3), sch 2.

⁵⁶⁴ *Juries Act 1967* (ACT) s 11(2), sch 2 pt 2.2.

⁵⁶⁵ *Juries Act 1927* (SA) s 13(c), sch 3.

⁵⁶⁶ See *Australia Act 1986* (Cth) s 7(1); *Constitution Act 1867* (Qld) ss 2A, 11A, 11B; *Constitution of Queensland 2001* (Qld) ss 27–39. See generally Queensland Department of Premier and Cabinet, *Executive Council Handbook*, 'The Governor' [1.1]–[1.3].

⁵⁶⁷ *Constitution of Queensland 2001* (Qld) ss 40, 41.

⁵⁶⁸ *Constitution of Queensland 2001* (Qld) ss 40(2), 41(3).

- (a) the Lieutenant-Governor; or
- (b) if there is no Lieutenant-Governor in the State and able to act—the Chief Justice; or
- (c) if there is no Chief Justice in the State and able to act—the next most senior judge of the Supreme Court of Queensland who is in the State and able to act.

7.41 A Lieutenant-Governor has not been appointed in Queensland for several years.⁵⁶⁹ Accordingly, either the Chief Justice or the next most senior judge of the Supreme Court fulfils the role of Deputy or Acting Governor.

7.42 Under recent amendments to the legislation in New South Wales, the Governor (and members of the Executive Council) will continue to be excluded from jury service while holding office.⁵⁷⁰ This gives effect to a recommendation of the NSW Law Reform Commission. The NSWLRC had considered that the Governor, and any person acting as the Governor, should be excluded 'because the holder of that office represents the Crown, in whose name prosecutions are conducted'.⁵⁷¹ It had also recommended that members and officers of the Executive Council should be excluded because of their direct involvement in the promotion and passage of legislation and the enforcement and administration of laws.⁵⁷²

Discussion Paper

7.43 In its Discussion Paper, the Commission proposed that the provision making the Governor ineligible for jury service should remain unchanged:⁵⁷³

- 7-4 The Governor should be ineligible for jury service while holding that office. Section 4(3)(a) of the *Jury Act 1995* (Qld) should therefore be retained without amendment.
- 7-5 Household and other staff of the Governor should remain eligible for jury service.

Consultation

7.44 The Queensland Law Society agreed that the Governor should continue to be ineligible for jury service. It also agreed that the household and other staff of the Governor should remain eligible for jury service.⁵⁷⁴

⁵⁶⁹ See Queensland Department of Premier and Cabinet, *Executive Council Handbook*, 'Absence of Governor' [3.3].

⁵⁷⁰ See *Jury Act 1977* (NSW) s 6, sch 1 cl 5 to be inserted by *Jury Amendment Act 2010* (NSW).

⁵⁷¹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.6], Rec 9.

⁵⁷² *Ibid* [4.15]–[4.16], Rec 11.

⁵⁷³ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.40]–[7.43], Proposals 7-4, 7-5.

⁵⁷⁴ Submission 52.

The Commission's view

7.45 The Governor should continue to be ineligible for jury service in Queensland during the currency of his or her appointment.

7.46 A person who is exercising the Governor's powers as Deputy Governor or Acting Governor should also be ineligible for jury service. However, because there is presently no appointed Lieutenant-Governor in Queensland, this will be either the Chief Justice or the next most senior judge of the Supreme Court. Those persons are ineligible as 'judges',⁵⁷⁵ and it is therefore unnecessary at this time to make separate provision for the ineligibility of the Deputy Governor or Acting Governor.

7.47 Ineligibility should not, however, be extended to cover the Governor's household or other staff.⁵⁷⁶

7.48 Members of the Executive Council should also be ineligible as they are Members of Parliament; they are discussed below.

Recommendations

7.49 The Commission makes the following recommendations:

7-2 The Governor should be ineligible for jury service while holding that office. Section 4(3)(a) of the *Jury Act 1995 (Qld)* should therefore be retained without amendment.

7-3 The Governor's household and other staff should remain eligible for jury service.

Members of Parliament and officers of the parliamentary service

7.50 Under section 4(3)(b) of the *Jury Act 1995 (Qld)*, a person who is a 'member of Parliament' is ineligible for jury service in Queensland. A 'member of Parliament' is defined to mean a member of the Legislative Assembly or a member of the Commonwealth Parliament.⁵⁷⁷ Members of the Federal Executive Council, Members of the Australian House of Representatives, and Senators of the Australian Parliament are also excluded from jury service in Federal, State and Territory courts.⁵⁷⁸

⁵⁷⁵ See [7.79] below.

⁵⁷⁶ Later in this chapter, the Commission has also recommended that the spouses of people who are ineligible on the basis of occupation, office or profession should remain eligible for jury service: see [7.343] and Recommendation 7-24 below.

⁵⁷⁷ *Jury Act 1995 (Qld)* s 3, sch 3 Dictionary.

⁵⁷⁸ *Jury Exemption Act 1965 (Cth)* s 4(1), sch.

7.51 Parliamentarians are also excluded from jury service in all of the other Australian jurisdictions and in New Zealand.⁵⁷⁹

7.52 Queensland has only one house of parliament — the Legislative Assembly — from whose members the Speaker, members of Parliamentary Committees, Parliamentary Secretaries, and Ministers are drawn. The Ministers comprise the Cabinet, the ‘principal decision-making body of the government’.⁵⁸⁰ The Ministers also collectively form the Executive Council which advises and is presided over by the Governor.⁵⁸¹ The Queensland Parliament also exercises the legislative power of the State.⁵⁸²

7.53 The ‘parliamentary service’ in Queensland, which is responsible for providing administrative and support services to the members of the Legislative Assembly, comprises:⁵⁸³

- (a) officers of the Legislative Assembly being—
 - (i) the Clerk who shall be the chief executive of the parliamentary service; and
 - (ii) other officers required to sit at the table of the House; and
 - (iii) the parliamentary librarian; and
 - (iv) the chief reporter; and
- (b) other officers of and employees in the parliamentary service.

7.54 These officers and employees are currently eligible for jury service, although officers of Parliament used to be excluded under section 8(1)(p) of the former *Jury Act 1929* (Qld).

7.55 In some jurisdictions, exclusions are extended to parliamentary officers and employees such as the clerks of the chambers, sergeants-at-arms, committee secretaries,⁵⁸⁴ and ministerial advisers and private secretaries.⁵⁸⁵

⁵⁷⁹ *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6, sch 1 cl 5 to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1; *Juries Act 1981* (NZ) s 8(a), (b). See also *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(2), sch 1 pt III; *Jury Ordinance, Cap 3* (HK) s 5(1)(a).

⁵⁸⁰ Queensland Department of Premier and Cabinet, *Cabinet Handbook*, ‘The cabinet and collective responsibility’ [1.2].

⁵⁸¹ See *Constitution Act 1867* (Qld) ss 2A, 11A; *Constitution of Queensland 2001* (Qld); *Parliament of Queensland Act 2001* (Qld). See generally Queensland Department of Premier and Cabinet, *Cabinet Handbook*; *Executive Council Handbook*; *Parliamentary Procedures Handbook*.

⁵⁸² See *Australian Constitution* s 107; *Constitution Act 1867* (Qld) s 2.

⁵⁸³ *Parliamentary Service Act 1988* (Qld) s 23(3), and see ss 18, 24. See generally Queensland Parliament, Parliament Overview, ‘Elected Officers’ <http://www.parliament.qld.gov.au/view/education/overview.asp?SubArea=structure_officers> at 7 February 2011.

⁵⁸⁴ *Jury Exemption Regulations 1987* (Cth) reg 7(2)(f), (g), (k); *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1. See also *Jury Act 1977* (NSW) s 6(b), sch 2 cl 6 to be repealed by *Jury Amendment Act 2010* (NSW); and *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II.

7.56 The importance of parliamentarians' duties is recognised in the ancient common law parliamentary privilege that prevents Members of Parliament from being compelled to withdraw from parliament to attend at court, although this would seem to support an argument for discretionary excusal (or deferral) rather than total ineligibility.⁵⁸⁶

7.57 Parliamentarians' functions are arguably no more pressing or urgent than, say, those of an emergency service worker, a health professional, or a small business operator. This prompted Lord Justice Auld to recommend the removal of the entitlement of parliamentarians and others (including Peers and Peeresses and medical professionals) to automatic excusal:⁵⁸⁷

there may be a good reason for excusing them where it is vital that they are available to perform their important duties over the period covered by the summons. But I see no reason why that should entitle them to excusal as of right simply by virtue of their position. ... it is extremely difficult to draw a line between those whose work is and is not so crucial that it would be against the public interest to compel them to serve as jurors. (note omitted)

7.58 However, parliamentarians constitute the legislative and executive arm of government and their involvement in debating and passing laws should arguably preclude them from sitting in judgment, as jurors, of people accused of breaking those laws.

NSWLRC's recommendations

7.59 Under recent amendments to the legislation in New South Wales, members of the Executive Council, the Legislative Council and the Legislative Assembly will continue to be excluded from jury service.⁵⁸⁸ Parliamentary officers and staff will, however, become eligible to serve.

7.60 The NSW Law Reform Commission had recommended the continued exclusion of Ministers of the Crown, as members of the Executive Council, on the basis of:⁵⁸⁹

- their direct involvement in the promotion and passage of legislation affecting the criminal law;
- their responsibility for the enforcement or the administration of laws of the State; and
- their need to attend the regular meetings of the Executive Council.

585 *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Exemption Regulations 1987* (Cth) reg 7(2)(c).

586 See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.17]–[4.20].

587 Lord Justice Auld, *Review of Criminal Courts in England and Wales*, Report (2001) [37].

588 *Jury Act 1977* (NSW) s 6, sch 1 to be inserted by *Jury Amendment Act 2010* (NSW).

589 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.15].

7.61 It considered, however, that other Members of Parliament should be made eligible (but subject to excusal or challenge in individual cases), although it left this matter to Parliament's consideration.⁵⁹⁰ It also recommended that parliamentary officers and other staff should be made eligible for jury service, noting that they would be able to apply for excusal in appropriate circumstances.⁵⁹¹

LRCWA's recommendations

7.62 Amendments to reduce the number of occupational exclusions from jury service in Western Australia have recently been introduced into parliament. Under the proposed amendments, Members of Parliament will continue to be ineligible, but parliamentary officers will become eligible.⁵⁹² This is consistent with the recommendations of the Law Reform Commission of Western Australia.

7.63 The LRCWA had recommended that members of the Legislative Assembly and Legislative Council should remain ineligible for jury service⁵⁹³ in order 'to preserve public confidence in the independence and impartiality of the criminal justice system'.⁵⁹⁴

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.

7.64 The LRCWA expressed concern, however, that the exclusion of parliamentary officers may cast the net too wide. In its view, concerns about the absence of those persons from parliament could be adequately met by deferral or excusal. It therefore recommended that those people should be made eligible for jury service.⁵⁹⁵

Discussion Paper

7.65 In its Discussion Paper, the Commission proposed that Members of Parliament should continue to be ineligible for jury service.⁵⁹⁶

7-6 Section 4(3)(b) of the *Jury Act 1995* (Qld), which provides that a Member of Parliament is ineligible for jury service, should be retained without amendment.

⁵⁹⁰ Ibid [4.30], and see [4.31], Rec 12.

⁵⁹¹ Ibid [4.34], Rec 13.

⁵⁹² See *Juries Legislation Amendment Bill 2010* (WA) cll 10, 36.

⁵⁹³ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 66, Rec 32.

⁵⁹⁴ Ibid 66.

⁵⁹⁵ Ibid 66–7, Rec 33.

⁵⁹⁶ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.61]–[7.63], Proposal 7-6.

Consultation

7.66 The Queensland Law Society agreed that Members of Parliament should remain ineligible for jury service.⁵⁹⁷

The Commission's view

7.67 Members of Parliament should continue to be ineligible for jury service in Queensland while they hold office.

7.68 The Commission concurs with the view expressed by the Law Reform Commission of Western Australia that the continued ineligibility of parliamentarians is necessary to preserve public confidence in the jury system. It is consistent with Recommendation 7-1 at [7.34] above for the retention of categories of occupational ineligibility that are required to ensure the independence of the jury from the executive and legislative arms of government.

7.69 The ineligibility should not, however, be extended to cover officers and employees of the parliamentary service.

Recommendations

7.70 The Commission makes the following recommendations:

7-4 Section 4(3)(b) of the *Jury Act 1995 (Qld)*, which provides that a Member of Parliament is ineligible for jury service, should be retained without amendment.

7-5 Officers and employees of the Queensland parliamentary service should remain eligible for jury service.

Directors-General of Government departments

7.71 In a preliminary consultation with the Commission, a member of the Criminal Law Section of the Queensland Law Society suggested that the exclusion of Members of Parliament should be extended to Directors-General of Queensland Government Departments and senior criminal justice policy advisors.⁵⁹⁸

7.72 At present in Queensland, such persons are eligible for jury service, although chief executives of government departments used to be excluded under section 8(1)(i) of the former *Jury Act 1929 (Qld)*. Senior public servants of the Commonwealth are excluded from jury service in all Federal, State and Territory

⁵⁹⁷ Submission 52.

⁵⁹⁸ Submission 26A.

courts, and chief executives of government departments are also excluded from jury service in the ACT.⁵⁹⁹

7.73 One argument for the exclusion of Directors-General from jury service is their apparent connection with the interests and policies of the government of the day and thus their being in a similar position to Members of Parliament. On the other hand, public servants, even senior ones, are independent of the government and do not hold a privileged office or constitutional position that would preclude them from performing jury service.

Discussion Paper

7.74 In its Discussion Paper, the Commission expressed the provisional view that there is no compelling reason to make Directors-General of Queensland government departments, or other senior public servants, ineligible for jury service, and accordingly proposed that:⁶⁰⁰

7-7 Directors-General of Queensland Government departments and other senior public servants should remain eligible for jury service.

Consultation

7.75 The Queensland Law Society agreed that Directors-General and senior public servants of Queensland Government departments should remain eligible for jury service.⁶⁰¹

The Commission's view

7.76 In the Commission's view, Directors-General of Queensland government departments, and other senior public servants, should remain eligible for jury service in Queensland. Having regard to Recommendation 7-1 at [7.34] above, there does not appear to be any justification for altering the existing position and the Commission is concerned to avoid unnecessarily restricting the pool of potential jurors.

7.77 Concerns that may arise on a case-by-case basis about a particular person's suitability for jury service can be accommodated by the provisions for excusal (or deferral), challenge and discharge.

Recommendation

7.78 The Commission makes the following recommendation:

599 *Jury Exemption Regulations 1987* (Cth) reg 4; *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1. See [7.349] below.

600 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.67], Proposal 7-7.

601 Submission 52.

7-6 Directors-General of Queensland Government departments and other senior public servants in Queensland should remain eligible for jury service.

Judges and magistrates

7.79 Under section 4(3)(d) of the *Jury Act 1995* (Qld), a person who is a judge or magistrate⁶⁰² (in this State or elsewhere) is ineligible for jury service in Queensland. The Act defines 'judge' as a Supreme Court, District Court or Childrens Court judge 'or another judicial officer with authority to preside at a trial', being defined as a trial by jury.⁶⁰³ The Supreme Court, District Court, Childrens Court and Magistrates Courts are all courts of record.⁶⁰⁴

7.80 In addition, justices of the High Court and of the courts created by the Australian Parliament are excluded from jury service in any Federal, State or Territory court.⁶⁰⁵

7.81 Judges and magistrates are also excluded from jury service in the other Australian jurisdictions and in New Zealand.⁶⁰⁶ In some jurisdictions, other similar office-holders are expressly excluded, including coroners,⁶⁰⁷ Masters,⁶⁰⁸ and justices performing court duties.⁶⁰⁹

⁶⁰² A 'magistrate' means a magistrate appointed under the *Magistrates Act 1991* (Qld): *Acts Interpretation Act 1954* (Qld) s 36.

⁶⁰³ *Jury Act 1995* (Qld) s 3, sch 3 Dictionary. This would include members of the Mental Health Court (who are Supreme Court judges) and the Planning and Environment Court (who are District Court judges), both courts of record: see *Mental Health Act 2000* (Qld) ss 381(1), 385; *Sustainable Planning Act 2009* (Qld) ss 435(2), 443.

⁶⁰⁴ *Constitution of Queensland 2001* (Qld) s 58(2)(a); *District Court of Queensland Act 1967* (Qld) s 8; *Magistrates Courts Act 1921* (Qld) s 14(1); *Childrens Court Act 1992* (Qld) s 4(2). See also *Australian Constitution* s 118 which provides that full faith and credit shall be given throughout the Commonwealth to the judicial proceedings of every State.

⁶⁰⁵ *Jury Exemption Act 1965* (Cth) s 4(1), sch.

⁶⁰⁶ *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6, sch 1 cl 5 to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1; *Juries Act 1981* (NZ) s 8(c). In the Northern Territory and South Australia, the exemption extends to spouses or domestic partners of judicial officers. See also *Juries Act 1976* (Ireland) s 7, sch 1 pt 1; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt 1; *Jury Ordinance, Cap 3* (HK) s 5(1)(ab), (b)(i).

⁶⁰⁷ *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6, sch 1 cl 5 to be inserted by *Jury Amendment Act 2010* (NSW). Members of other courts of record, which include members of the Coroners Court, are discussed later in this chapter.

⁶⁰⁸ *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1; *Juries Act 1981* (NZ) s 8(c). In Queensland, a master has the powers, jurisdiction and functions of the Supreme Court as may be prescribed in the rules of court. At present, however, no provision is made in the rules and there are no masters appointed. See *Supreme Court Act 1995* (Qld) s 211.

⁶⁰⁹ *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1; *Juries Act 1981* (NZ) s 8(e). Justices of the peace are discussed later in this chapter.

7.82 In England and Wales, the automatic exclusion of judges from jury service was, however, removed in 2004. In his 2001 Report, Lord Justice Auld suggested that potential difficulties of bias could be dealt with 'as and when they arise by discretionary excusal rather than a blanket ineligibility'.⁶¹⁰ The Guidelines issued by the Courts Service provide that:⁶¹¹

Members of the judiciary or those involved in the administration of justice who apply for excusal or deferral on grounds that they may be known to a party or parties involved in the trial should normally be deferred or moved to an alternative court where the excusal grounds may not exist. If this is not possible, then they should be excused.

7.83 Judges in England and Wales were advised that, in performing jury service, they would be doing so in their capacity as private citizens and should expect to be treated as equal members of the jury. Judge-jurors were also advised that they should 'be mindful of the fact that jurors play a different role in the trial from the judge', and should 'avoid the temptation to correct guidance they perceive to be inaccurate'.⁶¹²

7.84 The Law Reform Commission of Ireland has proposed that holders of judicial office should remain ineligible. It noted that the deferral approach that applies now in England and Wales would not be successful in Ireland to deal with the problem of judges' familiarity with counsel because of the geographic concentration of the courts and the small size of the Irish legal profession.⁶¹³ The Scottish Government has also declined to remove the ineligibility of judges.⁶¹⁴

7.85 As members of the judicial arm of government who constitute and exercise the jurisdiction of courts of record, judges and magistrates occupy a special constitutional position. Their exclusion from jury service is primarily justified, therefore, by the principle that jurors should be, and be seen to be, independent from government. Several other arguments, based on the principles of impartiality and non-specialist composition, have also been advanced for the ineligibility of judges.⁶¹⁵

- Although Lord Justice Auld disagreed,⁶¹⁶ judge-jurors may hold sway in the jury room because of their specialist legal knowledge and occupational (and social) position of authority.⁶¹⁷

610 Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [32].

611 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' (2009) [18].

612 Lord Chief Justice Woolf, 'Observations for judges on being called for jury service: Lord Chief Justice letter to the judiciary' (15 June 2004) <<http://www.judiciary.gov.uk/publications-and-reports/guidance/observations-judges-jury-service>> at 22 February 2011.

613 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.32]–[3.41].

614 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [6].

615 See Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.72]–[7.77].

616 Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [29].

- Judges may bring with them extrinsic knowledge that would not ordinarily be before the jury.⁶¹⁸ On the other hand, a judge's experience could prove beneficial to jury deliberations. Judges may be more adept, for example, at not pressing prematurely for a result.
- There is an increased likelihood, compared with other prospective jurors, that judge-jurors would know the trial participants and need to be excused because of an actual or a perceived conflict of interest. In Queensland (unlike the United Kingdom perhaps) all judges are known to one another.
- The inclusion of judges in the pool of potential jurors would blur the distinction between the institutions of judge and jury, the jury commonly being thought of as the non-specialist, rather than the professional legal, element of the trial system.⁶¹⁹

7.86 Aside from these arguments, there may be little real benefit to the representativeness of juries from the eligibility of judges given that they comprise so small a group.⁶²⁰

NSWLRC's recommendations

7.87 Under recent amendments to the *Jury Act 1977* (NSW), judicial officers in New South Wales will continue to be excluded from jury service.⁶²¹ This gives effect to the recommendations made by the NSW Law Reform Commission, which had considered the exclusion of judicial officers appropriate because:⁶²²

- Judicial officers are likely to know the trial judge and to be known by the lawyers in the trial, particularly given the small size of the profession and geographic concentration of the courts, and are therefore highly likely to be excused or challenged;

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There is a well-documented tendency for people to defer to those in perceived positions of authority or expertise. The appearance of authority, through symbolic triggers, is enough, even if the person is not, in fact, an expert: see generally A Nowack, RR Vallacher and ME Miller, 'Social Influence and Group Dynamics' in T Millon, MJ Lerner and IB Weiner, *Handbook of Psychology* (2003) vol 5 (Personality and Social Psychology) 383, 386–7. In the specific context of juries, there is evidence that jurors of high social status (marked, for example, by occupation and education) and jurors who more heavily participate in discussion are more influential in the jury room: see, for example, E York and B Cornwell, 'Status on Trial: Social Characteristics and Influence in the Jury Room' (2006) 85(1) *Social Forces* 455. See also the discussion in Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.72].

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See, for example, Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [29].

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Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1 [3.75].

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As at 30 June 2010, there were 24 judges of the Supreme Court, 38 judges of the District Court, 87 magistrates and 30 acting magistrates, numbering only 179 in total: Supreme Court of Queensland, *Annual Report 2009–2010* (2010) 8; District Court of Queensland, *Annual Report 2009–2010* (2010) 11–12; Magistrates Court of Queensland, *Annual Report 2009–2010* (2010) 12–14.

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Jury Act 1977 (NSW) s 6, sch 1 cl 5(1)(b) to be inserted by *Jury Amendment Act 2010* (NSW).

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New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.11]–[4.12].

- The calling away of judicial officers for jury service (even if excused or challenged) would result in undesirable disruption of the business of the courts; and
- Supreme Court judges would also have to stand aside from the Court of Appeal in appeals arising from trials in which they have served as jurors.

LRCWA's recommendations

7.88 In its Report, the Law Reform Commission of Western Australia also recommended that judges and magistrates, and masters of the Supreme Court, should continue to be ineligible for jury service.⁶²³ As well as noting the concerns that judicial officers may compromise the 'lay' composition of juries, may unduly influence other jurors and may be 'unable to divorce themselves from their judicial role',⁶²⁴ the LRCWA noted some 'practical difficulties' in making judicial officers eligible to serve as jurors:⁶²⁵

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.⁶²⁶ 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. (note in original)

7.89 The LRCWA also recommended that State Coroners should be made ineligible for jury service.⁶²⁷

7.90 Proposed amendments giving effect to these recommendations have recently been introduced into parliament.⁶²⁸

Discussion Paper

7.91 In its Discussion Paper, the Commission proposed that judges and magistrates should continue to be ineligible for jury service whilst holding office.⁶²⁹

623 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 54–5, Rec 20, 21.

624 Ibid 53–4.

625 Ibid 53.

626 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>; NSWLRC, *Jury Selection*, Report No 117 (2007) 64.

627 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 55, Rec 22.

628 See Juries Legislation Amendment Bill 2010 (WA) cll 10, 36.

629 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.84]–[7.86], Proposal 7-8.

Consultation

7.92 The Queensland Law Society agreed that judges and magistrates should be ineligible for jury service.⁶³⁰

7.93 Another respondent commented, however, that concerns of possible bias arising from a judge- (or lawyer-) juror's prior relationship or connection with a person involved in the trial could be dealt with by discretionary excusal. In this respondent's view, this could be achieved by requiring that conflicts of interest be disclosed, and by making express provision for excusal on the basis of conflict.⁶³¹

The Commission's view

7.94 In the Commission's view, judges and magistrates, and acting judges and magistrates, should be ineligible for jury service during the currency of their office. In constituting and exercising the jurisdiction of courts of record, they hold a special constitutional position such that their involvement as jurors would compromise the independence of the jury from the government. This is consistent with the Commission's general position, enunciated in Recommendation 7-1 at [7.34] above.

Recommendation

7.95 The Commission makes the following recommendation:

7-7 Section 4(3)(d) of the *Jury Act 1995* (Qld) should be amended to provide that a person who is (in the State or elsewhere) a judge or magistrate, or an acting judge or magistrate, is ineligible for jury service.

Members of other courts of record

7.96 The Commission has recommended the continued exclusion of judges and magistrates from jury service on the basis of their special constitutional position in constituting and exercising the jurisdiction of courts of record.⁶³²

7.97 The Land and Resources Tribunal is the only other court of record⁶³³ in Queensland that presently attracts an exclusion from jury service. Under section

⁶³⁰ Submission 52.

⁶³¹ Submission 34. This respondent supported the inclusion, as a criterion for discretionary excusal under s 21 of the *Jury Act 1995* (Qld), of the provision recommended by the NSW Law Reform Commission to the effect that excusal for good cause includes the situation 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'. In Chapter 9 of this Report, the Commission has recommended against the inclusion of a similar provision.

⁶³² See [7.94]–[7.95] above.

⁶³³ See *Land and Resources Tribunal Act 1999* (Qld) s 54(1).

4(3)(e) of the *Jury Act 1995* (Qld), a person who is a presiding member of the Land and Resources Tribunal is ineligible for jury service; other members remain eligible.

7.98 In 2007, the jurisdiction of the Land and Resources Tribunal was removed to the Land Court, and the Tribunal is to be abolished with effect from 31 December 2011.⁶³⁴

7.99 Although its members are not judges, the Land Court is a court of record⁶³⁵ and many of its members are lawyers.⁶³⁶ Except to the extent that they are ineligible under the Act as lawyers who are 'engaged in legal work',⁶³⁷ members of the Land Court are not presently excluded from jury service in Queensland.⁶³⁸

7.100 In addition to the Land Court, there are a number of other courts of record in Queensland whose membership is not exclusively comprised of judges and would not therefore be excluded from jury service. This includes the Queensland Civil and Administrative Tribunal,⁶³⁹ the Industrial Court of Queensland,⁶⁴⁰ and the Industrial Relations Commission of Queensland.⁶⁴¹

7.101 Under Commonwealth legislation, the members and staff of the Administrative Appeals Tribunal and the National Native Title Tribunal are excluded from jury service in any Federal, State or Territory court, including in Queensland courts.⁶⁴²

7.102 Members of the Industrial Relations Commission of New South Wales, and the President and Commissioners of the Industrial Relations Commission of Western Australia are also excluded from jury service in those jurisdictions.⁶⁴³

⁶³⁴ See *Land Court and Other Legislation Amendment Act 2007* (Qld); *Land and Resources Tribunal Act 1999* (Qld) s 82A.

⁶³⁵ *Land Court Act 2000* (Qld) s 4(2).

⁶³⁶ *Land Court Act 2000* (Qld) s 16(4)(a).

⁶³⁷ *Jury Act 1995* (Qld) s 4(3)(f). The Commission has recommended, however, that the ineligibility of lawyers should be limited to particular persons who work in criminal law in the public sector or perform special legal services for the state: see [7.184] and Recommendation 7-12 below.

⁶³⁸ Section 8(1)(c) of the former *Jury Act 1929* (Qld) excluded judges and members of the Land Court from jury service.

⁶³⁹ See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 164(1), 183(4)–(5).

⁶⁴⁰ See *Industrial Relations Act 1999* (Qld) ss 242, 243(1), 246(2).

⁶⁴¹ See *Industrial Relations Act 1999* (Qld) ss 255, 257, 258(2), 258A(2), 259(2). The Coroners Court is also a court of record and although most of its members are magistrates, provision is made for the appointment of others as 'appointed coroners': *Coroners Act 2003* (Qld) ss 64(1), 83.

⁶⁴² *Jury Exemption Regulations 1987* (Cth) reg 5(k), (l).

⁶⁴³ *Jury Act 1977* (NSW) s 6, sch 1 cl 5(1)(b) to be inserted by *Jury Amendment Act 2010* (NSW); *Judicial Officers Act 1986* (NSW) s 3 (definition of 'judicial officer'); *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt I cl 1(c) which is proposed to be retained by *Juries Legislation Amendment Bill 2010* (WA) cll 10, 36.

Discussion Paper

7.103 In its Discussion Paper, the Commission expressed the provisional view that presiding members of the Land and Resources Tribunal, members of the Land Court, and members of the Queensland Civil and Administrative Tribunal should be eligible for jury service. The Commission considered that this was appropriate because their functions do not involve the exercise of criminal jurisdiction. The Commission therefore made the following proposals:⁶⁴⁴

- 7-12 Section 4(3)(e) of the *Jury Act 1995* (Qld), which provides that a person who is or has been a presiding member of the Land and Resources Tribunal is ineligible for jury service, should be repealed.
- 7-13 Except to the extent that they fall within another category of ineligibility, members of the Queensland Civil and Administrative Tribunal should remain eligible for jury service.

Consultation

7.104 A submission from a member of the Land Court expressed the view that members of the Land Court should be eligible, particularly if lawyers are also to be made eligible for jury service.⁶⁴⁵

Members of the Land Court are not presently exempted from or ineligible for jury service simply because they hold that appointment.

The relevant question is when eligibility for jury service may be broadened to include working lawyers, would there be any good reason to exempt Land Court Members from jury service.

In this Court the areas of jurisdiction are very diverse but quite separate from the concerns of the criminal law. Often, matters falling for resolution in the Land Court are what would generally be described as civil disputes. Although there may be scope for debate about the desirability of having a judicial officer who decides civil disputes on a jury in a civil case the relative rarity of jury trials in civil proceedings in this State renders the point somewhat moot. I note that 12.10 of the discussion paper canvasses this and 12.11 discloses that there are no more than one or two such trials per year.⁶⁴⁶

For my part, I can see no reason why the current situation should not be continued and do not suggest that there be an exemption or exclusion of Members of the Land Court from jury service. The comment also pertains to former members of the Land and Resources Tribunal... (note added)

7.105 The Queensland Law Society agreed that members of the Land and Resources Tribunal and members of QCAT should be eligible for jury service.⁶⁴⁷

⁶⁴⁴ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.106]–[7.109], Proposals 7-12, 7-13.

⁶⁴⁵ Submission 34.

⁶⁴⁶ See Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [12.10]–[12.11]. See also Chapter 13 of this Report.

⁶⁴⁷ Submission 52.

The Commission's view

7.106 Although the Commission was initially attracted to retaining the eligibility of members of the Land Court and the Queensland Civil and Administrative Tribunal ('QCAT'), the Commission is persuaded that those persons, and members of any other court of record in Queensland, should be excluded from jury service.

7.107 Members of a court of record, including the Land Court, QCAT, the Industrial Court of Queensland, and the Industrial Relations Commission of Queensland hold the same constitutional position as judges and magistrates and, as such, should be excluded from jury service in order to ensure the independence of the jury from the government. In reaching this view, the Commission has applied Recommendation 7-1(a) at [7.34] above.

7.108 This would apply to a presiding (or other) member of the Land and Resources Tribunal until that Tribunal is abolished on 31 December 2011.⁶⁴⁸

7.109 The Commission notes that this exclusion would apply to a relatively small number of people at any one time and that the representativeness of the jury pool should not be significantly impacted.⁶⁴⁹

Recommendation

7.110 The Commission makes the following recommendation:

7-8 Section 4(3)(e) of the *Jury Act 1995 (Qld)*, which provides that a person who is a presiding member of the Land and Resources Tribunal is ineligible for jury service, should be amended to provide that a person who is a member of a court of record in Queensland is ineligible for jury service.

Local government mayors and other councillors

7.111 In Queensland, section 4(3)(c) of the Act provides that 'a local government mayor or other councillor' is ineligible for jury service.⁶⁵⁰

7.112 No other Australian jurisdiction currently has a similar exclusion. In Victoria, for example, the previous entitlement to excusal as of right for 'mayors,

⁶⁴⁸ See [7.98] above.

⁶⁴⁹ At 30 June 2010, there were six members of the Land Court; 113 members of QCAT, one member of the Industrial Court of Queensland, and eight members of the Industrial Relations Commission: Land Court of Queensland, *Annual Report 2009–10* (2009) 5; Queensland Civil and Administrative Tribunal, *Annual Report 2009–10* (2009) 36–8; President of the Industrial Court of Queensland, *Annual Report 2009–10* (2009) 7, 14.

⁶⁵⁰ 'Local councillors' do not include local government chief executive officers or other local government employees: see generally *Local Government Act 2009* (Qld) ss 12, 13; *City of Brisbane Act 2010* (Qld) ss 14, 15. Section 8(1)(q) of the former *Jury Act 1929* (Qld) also used to exempt 'members of local governments'.

presidents, councillors, town clerks and secretaries of municipalities' was repealed in 2000 along with a number of other occupational categories.⁶⁵¹

7.113 The basis for granting this exclusion in Queensland — which was inserted into the Act in 1996 — was that it put local government councillors 'on a similar level to that occupied by Members of Parliament, with whom they share many significant characteristics'.⁶⁵²

7.114 Local governments are not recognised at a federal constitutional level as part of the executive or legislative branch of government, and their power to make local laws is derived from State legislation.⁶⁵³

7.115 Under the *Local Government Act 2009* (Qld), councillors must 'represent the current and future interests of the residents of the local government area'. Councillors' other responsibilities include providing high quality leadership to the council and the community and participating in council meetings, policy development, and decision making, for the benefit of the local government area. Mayors have additional responsibilities which include leading and managing council meetings, leading and directing the chief executive officer, and representing the local government at ceremonial or civic functions.⁶⁵⁴ Similar responsibilities are conferred on the mayor and other councillors of the Brisbane City Council under the *City of Brisbane Act 2010* (Qld).⁶⁵⁵

Discussion Paper

7.116 In its Discussion Paper, the Commission proposed that local government mayors and other councillors should no longer be ineligible for jury service:⁶⁵⁶

7-10 Section 4(3)(c) of the *Jury Act 1995* (Qld), which provides that a local government mayor or other councillor is ineligible for jury service, should be repealed.

Consultation

7.117 The Ipswich City Council supported the proposal for local councillors to be made eligible for jury service.⁶⁵⁷

⁶⁵¹ *Juries Act 1967* (Vic) s 4, sch 4 cl 13 later repealed and replaced by *Juries Act 2000* (Vic). See also Law Reform Committee of Victoria, *Jury Service in Victoria*, Final Report (1996) vol 1 [3.161]; and Victoria, *Parliamentary Debates*, Legislative Council, 22 March 2000, 418 (Marsha Thomson, Minister for Small Business).

⁶⁵² Explanatory Notes, *Jury Amendment Bill 1996* (Qld) 1–2.

⁶⁵³ See *Constitution of Queensland 2001* (Qld) s 70; *Local Government Act 2009* (Qld) ss 8, 28; *City of Brisbane Act 2010* (Qld) ss 11, 29. See generally LexisNexis, *Halsbury's Laws of Australia*, Local Government, 'Introduction' [265–1] (at 7 February 2011).

⁶⁵⁴ *Local Government Act 2009* (Qld) s 12. Under s 258(2) of that Act, a mayor must not delegate the power to give directions to the chief executive officer.

⁶⁵⁵ *City of Brisbane Act 2010* (Qld) s 14.

⁶⁵⁶ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.92]–[7.93], Proposal 7-10.

Council agrees with this proposition. Councillors represent their local communities and therefore should be eligible to participate on juries. Councillors do not have a constitutional role like Members of Parliament. Further, offences against local laws, which Councillors have a role in debating and making, are heard before a Magistrate, not a jury, so there is no issue of Councillors sitting in judgement on those who allegedly break those laws.

7.118 A member of the public also queried why ‘local government officers’ should be excluded from jury service.⁶⁵⁸

7.119 However, all of the other respondents who addressed this issue, namely, the Local Government Association of Queensland Ltd, the Brisbane City Council, the Cassowary Coast Regional Council, the Central Highlands Regional Council, the Gympie Regional Council, the Lockyer Valley Regional Council, the McKinlay Shire Council, the Moreton Bay Regional Council, the Southern Downs Regional Council, the Toowoomba Regional Council, and the Queensland Law Society, considered that local government mayors and councillors should remain ineligible for jury service.⁶⁵⁹

7.120 A number of these respondents submitted that local government mayors and councillors should remain ineligible on the basis that, like Members of Parliament, they are popularly elected and responsible to their constituents, and are involved in the making of laws, albeit at the local level.⁶⁶⁰ For example, the Toowoomba Regional Council submitted:⁶⁶¹

The fundamental principle and reason to exclude the mayor and councillors is founded in the Westminster doctrine of the ‘Separation of the Powers’ — where the Executive, Legislative and Judicial arms of government are kept separate to maintain independence, objectivity and the integrity of the legal system. Council as a law-making body, albeit only at the local level, should be separate from the judicial process.

7.121 Some respondents also considered that local councillors should be ineligible on the basis of their standing in the community. For example, the Local Government Association of Queensland Ltd submitted that, although councillors do not share the same constitutional position as state parliamentarians, the emphasis on community engagement in the *Local Government Act 2009* (Qld), and the standing of local councillors and mayors in the local community, is such as to pose ‘a significant problem of perceived confidence’ if local councillors were to serve on juries.⁶⁶²

657 Submission 55.

658 Submission 12 responding to Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

659 Submissions 37, 38, 39, 40, 41, 45, 46, 48, 49, 50, 52.

660 Submissions 37, 40, 41, 45, 46, 48, 50.

661 Submission 46.

662 Submission 45. See also *Local Government Act 2009* (Qld) s 4 (Local government principles underpin this Act).

Local government councillors and mayors are widely regarded as representing their communities and the wider public as a whole. Particularly in the regional and remote areas of Queensland, local government councillors and mayors also have substantial involvement in their communities.

7.122 The Central Highlands Regional Council submitted that, at the very least, mayors and councillors in smaller, regional areas should be ineligible for, or otherwise automatically excluded from, jury service because of their ‘substantial involvement in the community’ and their role in ‘representing the general public and the community as a whole’.⁶⁶³

7.123 Several respondents also commented on the risk that local councillors, because of their standing in the community, may unduly influence other members of a jury, even unwittingly.⁶⁶⁴ The Queensland Law Society considered that, while local councillors ‘do not share the same constitutional position as members of parliament, there remains a risk, particularly in smaller regional areas, that such elected members of Local Government command great influence’.⁶⁶⁵

7.124 Several other respondents referred to the risk of ‘conflicts of interest’.⁶⁶⁶ The Lockyer Valley Regional Council and the Gympie Regional Council each suggested, for example, that because of councillors’ interaction with their constituents, there is a risk that they would be known to the defendant.⁶⁶⁷ The Brisbane City Council also submitted that its ‘cooperation with the Queensland Police Service on matters which relate to issues of public safety within Brisbane’ could raise potential conflicts of interest.⁶⁶⁸

7.125 Finally, several respondents, including the Brisbane City Council, submitted that jury service would ‘impact on the ability of local government representatives to carry out their duties as councillors’,⁶⁶⁹ and that council duties, ‘including attendance at formal committee and ordinary meetings’, should ‘come before any other obligations’.⁶⁷⁰ The Gympie Regional Council noted that councillors are expected to be available to their constituents ‘at all times’ and that some of the mayor’s responsibilities are not delegable.⁶⁷¹

663 Submission 38.

664 Submissions 38, 45, 52.

665 Submission 52.

666 Submissions 39, 40, 41, 46, 48.

667 Submissions 40, 49.

668 Submission 37.

669 Ibid citing *City of Brisbane Act 2010* (Qld) s 14. See also the similar provisions in the *Local Government Act 2009* (Qld) s 12 cited in Submission 45.

670 Submission 46. See also Submissions 37, 46, 48, 49, 50.

671 Submission 49. See n 654 above.

The Commission's view

7.126 The Commission has considered the arguments raised in the submissions in light of its general position, set out in Recommendation 7-1 at [7.34] above. With respect, the Commission is not persuaded that the continued automatic exclusion of local councillors and mayors is justified.

7.127 Local government mayors and councillors do not share the same constitutional position as Members of Parliament. They perform an important role in the community, but their responsibilities are not more important than those of any number of other office-holders or professionals who are not (and should not be) automatically excluded from jury service. Neither are local councillors' law-making powers of such a nature as to warrant automatic exclusion; as one respondent noted, offences against local laws are dealt with before Magistrates, not juries.

7.128 No other Australian jurisdiction excludes local councillors from jury service.

7.129 In the Commission's view, concerns about a particular individual's presence on a jury, for instance where the person knows or is well-known to the trial participants or has significant prior commitments that cannot be broken, can be adequately dealt with by the provisions for excusal (or deferral), discharge or challenge.

7.130 In the interests of increasing the pool of prospective jurors and ensuring that the duty of jury service is shared more fairly, the Commission considers that local government mayors and other councillors should no longer be ineligible for jury service or otherwise automatically excluded from jury service.

Recommendation

7.131 The Commission makes the following recommendation:

7-9 Section 4(3)(c) of the *Jury Act 1995* (Qld), which provides that a local government mayor or other councillor is ineligible for jury service, should be repealed.

Local government chief executive officers

7.132 Local government chief executive officers are specifically referred to in the Commission's Terms of Reference as a class of people who might be considered for ineligibility.⁶⁷² They do not fall into the existing category of ineligibility for local government councillors.⁶⁷³

⁶⁷² The Terms of Reference are set out in Appendix A to this Report.

⁶⁷³ See generally *Local Government Act 2009* (Qld) s 13; *City of Brisbane Act 2010* (Qld) s 15.

7.133 People holding these or similar positions are not excluded in any other Australian jurisdiction.

7.134 In Ireland, chief officers of local authorities, health boards and harbour authorities are entitled to be excused as of right.⁶⁷⁴ However, the Law Reform Commission of Ireland has recently proposed the removal of that provision, along with all the other categories of excusal as of right in that jurisdiction.⁶⁷⁵

Discussion Paper

7.135 In its Discussion Paper, the Commission expressed the provisional view that there is no justification for making local government chief executive officers ineligible for jury service, and proposed that they remain eligible.⁶⁷⁶

Consultation

7.136 Both the Queensland Law Society and the Ipswich City Council agreed that local government chief executive officers should remain eligible for jury service.⁶⁷⁷

7.137 Neither did the Local Government Association of Queensland Ltd oppose the continued eligibility of local government chief executive officers.⁶⁷⁸

As jury selections exemptions do not cover parliamentary officers and employees, no matter the office, the Association is not opposed to the continuing eligibility of local government chief executive officers.

The Commission's view

7.138 The ineligibility of local government chief executive officers might be thought a logical extension of the current ineligibility of local government mayors and councillors. The Commission has recommended, however, that local government mayors and councillors should no longer be ineligible for jury service.⁶⁷⁹

7.139 In any case, the relevant comparison is with parliamentary officers and employees, who are not (and are not recommended by the Commission to be) ineligible in Queensland.

⁶⁷⁴ *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II. In addition, employees of local authorities, health boards and harbour authorities are excusable as of right on the basis of a certificate from their chief officer that it would be contrary to the public interest for them to have to serve as jurors because they perform essential and urgent services of public importance that cannot reasonably be performed by another, or be postponed.

⁶⁷⁵ Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.107], [3.115]–[3.116].

⁶⁷⁶ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.97]–[7.100], Proposal 7-11.

⁶⁷⁷ Submissions 52, 55.

⁶⁷⁸ Submission 45.

⁶⁷⁹ See [7.131] and Recommendation 7-9 above.

7.140 No doubt local government chief executive officers play a critical role in the public services delivered by local governments. Their public duties would not seem, however, to be any more pressing or significant than those of any number of other professionals who remain liable for jury service unless excused on an individual basis. It is unclear why local government chief executive officers should be singled out as a class for special treatment.

7.141 Having regard to the Commission's position in Recommendation 7-1 at [7.34] above, the Commission does not consider that there is any basis for local government chief executive officers to be made ineligible or otherwise automatically excluded from jury service.

Recommendation

7.142 The Commission makes the following recommendation:

7-10 Local government chief executive officers should remain eligible for jury service in Queensland.

Lawyers

7.143 At present, lawyers who are 'actually engaged in legal work' are ineligible to serve as jurors in Queensland under section 4(3)(f) of the Act.⁶⁸⁰ Officers and employees of the Office of the Commonwealth Director of Public Prosecutions 'whose duties involve the provision of legal professional services' are also excluded from performing jury service in any Federal, State or Territory court.⁶⁸¹

7.144 Lawyers are also excluded in the other Australian jurisdictions, and in New Zealand.⁶⁸²

7.145 In some jurisdictions, public sector employees engaged in the provision of professional legal services, or involved in the administration of justice, are

⁶⁸⁰ Under the *Acts Interpretation Act 1954* (Qld) s 36, 'lawyer' means 'a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State'. See also *Legal Profession Act 2007* (Qld) ss 5, 6.

⁶⁸¹ *Jury Exemption Regulations 1987* (Cth) reg 5(2)(a)(iii). Officers and employees of the Office of Parliamentary Counsel or a Commonwealth Department whose duties involve the provision of legal professional services are also excluded: reg 5(2)(a)(i)–(ii).

⁶⁸² *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1; *Juries Act 1981* (NZ) s 8(f). See also *Jury Act 1977* (NSW) s 6(b), sch 2 cl 7 to be repealed by *Jury Amendment Act 2010* (NSW).

excluded.⁶⁸³ In some cases, this expressly covers people employed by the Department of the Attorney-General or Justice, the Office of the Director of Public Prosecutions and Legal Aid (or their equivalent organisations). In Victoria, it applies to persons employed or engaged in the public sector in the 'provision of legal services in criminal cases'.⁶⁸⁴

7.146 Lawyers' employees and articled clerks or graduate clerks are also excluded in some jurisdictions.⁶⁸⁵ The Law Reform Commission of Hong Kong recently recommended the exclusion of such persons on the basis of 'the nature of their work and their necessarily intimate involvement in the preparation and supervision of criminal cases'.⁶⁸⁶

7.147 As noted in Chapter 3, the automatic exclusion of lawyers, and their clerks and legal executives, has been removed in England and Wales, although not without some concern. One of the first lawyers to serve on a jury after the introduction of those reforms was reported as saying, for instance, that:⁶⁸⁷

The system worked on the basis that the lawyers ran the trial and a judge presided over it, but the ultimate decision-making was left to the layman. That's a very important feature that's been overlooked.

7.148 Subsequent appeal cases have challenged the presence on juries of lawyers from the Crown Prosecution Service ('CPS'),⁶⁸⁸ and the Courts Service Guidelines on excusal provide that an employee of the CPS should not serve on a trial that is prosecuted by the CPS.⁶⁸⁹ As was explained by Lord Bingham in *R v Abdroikof*, for instance, 'justice is not seen to be done if one discharging the very

683 *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6, sch 1 cl 6(1) to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2. See also *Juries Act 1981* (NZ) s 8(h)(i), (haa); *Juries Act 1976* (Ireland) s 7, sch 1 pt I; *Jury Ordinance, Cap 3* (HK) s 5(1)(b)(v). The exclusion of employees of the Legal Services Agency under s 8(haa) of the *Juries Act 1981* (NZ) is proposed to be repealed by Legal Services Bill 2010 (NZ) cl 144, sch 4. Prior to the 2004 amendments in England and Wales, the Director of Public Prosecutions and his or her staff, and civil servants concerned wholly or mainly with the day-to-day administration of the legal system, were automatically excluded from jury service. That exclusion has now been removed. The Law Reform Commission of Ireland has recently proposed, however, that the Director of Public Prosecutions and his or her staff, and the Attorney General and those of his or her staff who undertake work of a legal nature, should continue to be ineligible in Ireland: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.44]–[3.49]; *Juries Act 1976* (Ireland) s 7, sch 1 pt I.

684 *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(f). See also, in similar terms, *Jury Act 1977* (NSW) s 6, sch 1 cl 6(1) to be inserted by *Jury Amendment Act 2010* (NSW).

685 *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Juries Act 2000* (Vic) s 5(3), sch 2. See also *Juries Act 1967* (Ireland) s 7, sch 1 pt I; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt I; and *Jury Ordinance, Cap 3* (HK) s 5(1)(d). Section 8(1)(e) of the former *Jury Act 1929* (Qld) also used to exempt 'barristers-at-law, solicitors, and conveyancers, and their clerks'.

686 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.121], Rec 8(1)(d). Cf Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.59]–[3.62].

687 J Robins, 'Judge and jury', *The Lawyer* (online), 23 August 2004 <<http://www.thelawyer.com/judge-and-jury/111658.article>> at 25 February 2011.

688 See *R v Abdroikof*, *R v Green*, *R v Williamson* [2007] 1 WLR 2697; *R v Khan* [2008] EWCA Crim 531; *R v Samuels* [2008] EWCA Crim 701.

689 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' (2009) [18].

important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor'.⁶⁹⁰

7.149 After consideration of the English position, the Scottish Government has indicated that it intends to retain the exclusion of advocates and solicitors.⁶⁹¹

7.150 According to the most recent legal practices survey conducted by the Australian Bureau of Statistics, in 2007–08, there were 570 practising barristers and 5317 practising solicitors and barristers employed in other legal services businesses in Queensland. This does not include those employed as government solicitors or public prosecutors or by legal aid commissions or community legal centres, which together account for almost 10% of all legal services across Australia.⁶⁹²

7.151 At May 2010, there were 8649 members of the Queensland Law Society (of whom 7971 held practising certificates)⁶⁹³ and 1233 members of the Bar Association of Queensland (of whom 1001 held practising certificates)⁶⁹⁴ — a total of 9882 solicitors and barristers, of whom 8972 (90.8%) held practising certificates. This equates to about 0.37% of the population of Queensland on the electoral roll.⁶⁹⁵ However, *criminal* lawyers comprise a relatively small subset of all practising solicitors and barristers.

7.152 The Queensland Law Society maintains a 'referral list' of solicitors who self-identify as practising in certain areas of law. Although the identification of a solicitor's area of practice 'does not represent specialisation in that area of law', it provides an 'indication the practitioner has substantial involvement in that area of law'.⁶⁹⁶ A search of the Queensland Law Society's online referral system returned a list of 98 solicitors whose self-identified area of practice includes criminal law, and only 19 solicitors who identified that they had attained specialist accreditation in criminal law.⁶⁹⁷

690 [2007] 1 WLR 2697, [27]. See also Baroness Hale at [51].

691 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [6].

692 Australian Bureau of Statistics, *Legal Practices 2007–08*, Cat No 8667.0.

693 Correspondence from Queensland Law Society to Queensland Law Reform Commission, 20 May 2010.

694 Correspondence from Bar Association of Queensland to Queensland Law Reform Commission, 20 May 2010.

695 Based on an enrolled population of 2 640 895 at November 2008: see Electoral Commission of Queensland, *Statistical Profiles: Queensland State Electoral Districts*, Research Report 1/2009 (2009) 5. That percentage would increase, however, if it included government legal officers who are not required to have practising certificates: see *Legal Profession Act 2007* (Qld) ss 12, 44.

696 See Queensland Law Society, Find a Solicitor, 'Find a Solicitor by Online Referral' <<http://www.qls.com.au/lwp/wcm/connect/QLS/QLS+for+Qld/You+and+Your+Solicitor/Find+a+Solicitor/Find+a+Solicitor+by+Online+Referral>> at 7 February 2011.

697 Queensland Law Society, 'Find a Solicitor by Online Referral' <<http://www.qls.com.au/lwp/wcm/connect/QLS/QLS+for+Qld/You+and+Your+Solicitor/Find+a+Solicitor/Find+a+Solicitor+by+Online+Referral>> at 6 January 2011. The Queensland Law Society was not able to provide the Commission with information about the number of its members who practise in criminal law. According to the Australian Bureau of Statistics, at the end of June 2001, criminal work accounted for 1.7% of income from solicitor practices across Australia: Australian Bureau of Statistics, *Legal Practices 2001–02*, Cat No 8667.0, 6, [1.1], [2.3].

7.153 The Bar Association of Queensland also maintains a directory of practising Queensland barristers who have agreed to the inclusion of their details. The directory includes barristers' self-identified 'major areas of practice'.⁶⁹⁸ Only some 439 members of the Bar Association of Queensland identified themselves as specialising, among other things, in criminal law.⁶⁹⁹

7.154 The Queensland Law Society also provides a program for specialist accreditation of lawyers in certain areas of practice, including criminal law. Accreditation is given on the basis of performance-based assessment to individual practitioners. It is a voluntary scheme and is open to persons who:⁷⁰⁰

- are members of the Queensland Law Society or an equivalent body in another Australian jurisdiction, or the Bar Association of Queensland;
- hold a current practising certificate,⁷⁰¹ or are engaged in legal work as a government employee or acting in a judicial or quasi-judicial capacity;
- have been engaged in full time legal work for a total period of no less than five years; and
- had a 'substantial involvement' in the area of practice in which accreditation is sought in each of the immediately preceding three years.

7.155 The Specialist Accreditation Scheme Guidelines provide that:⁷⁰²

Substantial involvement shall mean legal work in the area of practice for which accreditation is sought, which is equivalent to at least 25% of the total work load of a practitioner engaged in full time practice. The length of involvement may be measured by time engaged in work relevant to the area of practice, by the number and nature of matters handled, or by a combination of these and other relevant factors at the discretion of the [Specialist Accreditation] Board.

7.156 Participation by ordinary members of the community who are not legal specialists in the system is an important aspect of the notion of the jury system as a form of direct community participation in civic society and in the justice system in particular. The primary justification for excluding lawyers, or certain classes of lawyers, from jury service is that their presence on juries may erode the notion of non-specialist participation and, with it, public confidence in the jury system.

7.157 Additional arguments that have been advanced for the exclusion of lawyers relate to this principle and the principle of impartiality. Some of these arguments would seem to apply more strongly to some types of lawyers than

⁶⁹⁸ See Bar Association of Queensland, 'Barristers Directory' <http://www.qldbar.asn.au/index.php?option=com_content&task=view&id=19&Itemid=43> at 7 February 2011.

⁶⁹⁹ Correspondence from Bar Association of Queensland to Queensland Law Reform Commission, 20 May 2010.

⁷⁰⁰ Queensland Law Society, *Specialist Accreditation Handbook* (2010) [4.1]–[4.3].

⁷⁰¹ From the Queensland Law Society or an equivalent body in another Australian jurisdiction or from the Bar Association of Queensland.

⁷⁰² See Queensland Law Society, *Specialist Accreditation Handbook* (2010) [4.3.2].

others (for instance, lawyers who work in criminal law, rather than exclusively in civil matters). There are also counter-arguments to be considered:

- Because of lawyers' assumed expertise, there is a concern that lawyers would unduly influence a jury's deliberations. Any given jury may contain individual jurors with dominant or overbearing personalities. Regardless of personality or conviction, however, lawyer-jurors may exert a disproportionate influence on other jurors because of their perceived authority on matters of law.
- Lawyer-jurors may bring with them extrinsic knowledge that would not ordinarily be before the jury. All jurors are expected, however, to put aside personal leanings that might unfairly influence their thinking. Lawyers might in fact find it easier to uphold their duty as jurors by analogy with their professional duty to the court.
- Because of the relatively small size of the legal profession, there is an increased chance that a lawyer-juror would be perceived to have an interest in, a connection with, or extraneous information relevant to the participants in the trial, and may not be impartial. As a result, there is an increased likelihood that lawyer-jurors may seek excusal or be challenged or discharged. It could also lead to further appeal points were such persons to serve.⁷⁰³ If lawyers were expressly made eligible for jury service, however, something more than the fact of being a lawyer would be needed to show an apprehension of bias.⁷⁰⁴

NSWLRC's recommendations

7.158 The *Jury Act 1977* (NSW) has recently been amended to exclude a person who is: a Crown Prosecutor; the Senior Public Defender, a Deputy Senior Public Defender, or a Public Defender; the Director of Public Prosecutions, a Deputy Director of Public Prosecutions, or the Solicitor for Public Prosecutions; the Solicitor General; the Crown Advocate; the Crown Solicitor; employed or engaged (other than as clerical, administrative or support staff) by the Office of the Director of Public Prosecutions, or the Crown Solicitor's Office; or an Australian lawyer or paralegal employed or engaged in the public sector in the provision of legal services in criminal cases.⁷⁰⁵

7.159 This gives effect to the recommendations of the NSW Law Reform Commission and replaces the existing provision which simply excludes 'an Australian lawyer (whether or not an Australian legal practitioner)'.⁷⁰⁶

703 Submissions 26, 26A.

704 See, for example, the House of Lords decisions in *R v Abdroikof*, *R v Green*, *R v Williamson* [2007] 1 WLR 2679 discussed in Chapter 3 of this Report.

705 *Jury Act 1977* (NSW) s 6, sch 1 cl 5(1)(g)–(l), 6(1)–(2) to be inserted by *Jury Amendment Act 2010* (NSW).

706 *Jury Act 1977* (NSW) s 6(b), sch 2 cl 7 to be repealed by *Jury Amendment Act 2010* (NSW).

7.160 The NSWLRC considered that the exclusion of those persons is appropriate because of their close connection, through the prosecution of individual cases and policy development, with the administration of the criminal justice system and the appearance of bias that would attend their presence on a jury.⁷⁰⁷

7.161 However, the NSWLRC considered that other lawyers should be made eligible for jury service:⁷⁰⁸

The contention that lawyers would overawe or control the jury is unsupported by experience elsewhere, ignores the obligation of jurors to decide cases in accordance with the directions of the trial judge, and fails to take account of the role of the jury, which is to find facts. Moreover, there seems to be no reason in principle or otherwise to exclude lawyers who do not have any professional contact with the administration of the criminal law. (note omitted)

7.162 The NSWLRC also considered the position of lawyers in private practice who have a substantial involvement in the practice of criminal law but ultimately concluded that they should be eligible for jury service. It noted that a test based on such a criterion 'would potentially raise questions of degree' and may give rise to doubt about a person's eligibility 'and consequently about the regularity of the empanelment of the jury'. This could lead to the discharge of the jury, or to an appeal against a conviction on the basis that a juror was empanelled improperly.⁷⁰⁹ Nevertheless, it noted that lawyers who specialise or practise substantially in criminal law 'are readily identifiable, and will be likely to self-identify' such as to allow those persons to seek excusal on a case-by-case basis.⁷¹⁰

LRCWA's recommendations

7.163 At present in Western Australia, the legislation excludes all Australian lawyers.⁷¹¹

7.164 The Law Reform Commission of Western Australia considered that 'the risk of prejudice to an accused by allowing lawyers to serve as jurors is too high', even if they are non-criminal lawyers.⁷¹²

7.165 It observed the practical difficulties of empanelling lawyer-jurors that have arisen in England where there is a potential for bias because lawyer-jurors are known to the advocates or trial judge or have specialist legal knowledge that could

⁷⁰⁷ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.43], [4.48], and see [4.46]–[4.51].

⁷⁰⁸ Ibid [4.42], and see Rec 14–16. The Law Reform Commission of Ireland considered such an approach but expressed the view that it 'lacks certainty and would result in administrative difficulties': Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.59].

⁷⁰⁹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.54].

⁷¹⁰ Ibid [4.57].

⁷¹¹ *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1 cl 1(f).

⁷¹² Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 59–60.

be prejudicial to the defendant. It also noted the possibility that lawyer-jurors may, even unwittingly, unduly influence other jurors:⁷¹³

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. (note omitted)

7.166 The LRCWA also noted that this danger 'may well increase' should a non-criminal lawyer-juror 'give advice or guidance to fellow jurors on an area of law that is not within his or her specialty'.⁷¹⁴ It recommended that, while in practice, Australian legal practitioners should be ineligible for jury service.⁷¹⁵

7.167 Under recently proposed amendments to the *Juries Act 1957* (WA), however, the ineligibility of lawyers is to be restricted. Under the Bill, an Australian legal practitioner is to be ineligible, for a criminal trial, only if the person is an officer or member of staff under the *Director of Public Prosecutions Act 1991* (WA), the director of Legal Aid, a member of staff of the Legal Aid Commission, employed under a contract by the Aboriginal Legal Service, a member of staff of the Corruption and Crime Commission, or a public sector employee in the department that administers the *Police Act 1892* (WA). However, an Australian legal practitioner who 'practises criminal law' may seek excusal from service in a criminal trial, and an Australian legal practitioner who 'practises civil law' may seek excusal from serving in a civil trial.⁷¹⁶

Discussion Paper

7.168 In its Discussion Paper, the Commission proposed that, as a general class, lawyers should be made eligible for jury service, but that lawyers and paralegals who work in criminal law or who provide special legal services to the state should be ineligible to serve. The Commission proposed that:⁷¹⁷

- 7-14 Lawyers as a general class should be eligible for jury service, subject to Proposal 7-15 below.
- 7-15 Section 4(3)(f) of the *Jury Act 1995* (Qld) should be amended to provide that:
 - (1) a person who is a Director or Deputy Director of Public Prosecutions or a Crown Prosecutor is ineligible for jury service;

⁷¹³ Ibid 59. See also Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 68–9.

⁷¹⁴ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 60.

⁷¹⁵ Ibid 61, Rec 25.

⁷¹⁶ See proposed new *Juries Act 1957* (WA) ss 5, 34K, sch 1 div 2 to be inserted by Juries Legislation Amendment Bill 2010 (WA).

⁷¹⁷ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.147]–[7.150], Proposals 7-14, 7-15.

- (2) a person who is a Crown Solicitor, Deputy Crown Solicitor, Crown Counsel, or Assistant Crown Solicitor is ineligible for jury service; and
- (3) a lawyer or paralegal employed or engaged in the public or private sector in the provision of legal services in criminal cases is ineligible for jury service.

Consultation

7.169 The Department of Justice and Attorney-General agreed that lawyers as a general class should be eligible for jury service, subject to the exclusion of the people listed in Proposal 7-15. In addition, the Department considered that the Public Defender and Deputy Public Defender should be ineligible:⁷¹⁸

[We] noted the omission of the Public and Deputy Public Defender and their staff from the proposed list. Arguably the principles for exclusion of the DPP and Crown solicitor would equally apply.

7.170 The Queensland Law Society generally agreed with the principle that a person should not be entitled to 'claim exemption or excusal solely on the basis of occupation unless the person engages in work concerning the criminal justice system'. However, it considered that lawyers, as a general class, should remain ineligible. In its view, it is too difficult to fashion a test that would exclude lawyers who practise in criminal law, and all lawyers, whether or not they work in criminal law, may be perceived to hold a position of influence on a jury:⁷¹⁹

For example although some of our members specialise, many are still general practitioners who may just one time per year appear in the criminal courts. We also submit that a lawyer is also a person who may be seen by members of the public as having an overwhelming influence on a jury, regardless of whether they practice in the criminal justice system. The Law Degree itself provides extensive training into the criminal justice system. It should not be assumed that a lawyer does not have knowledge of the criminal justice system simply because they do not practice regularly in that area.

7.171 The Queensland Law Society generally agreed that the 'persons working in Government offices of the criminal justice system' listed in Proposal 7-15 should be made ineligible. It did not consider, however, that paralegals should be made ineligible:⁷²⁰

Paralegals have many roles which may include tasks such as filing documents in a criminal matter in court registries or simply arranging appointments for clients rather than active participation in cases. Paralegals are not lawyers and would be no different to any other member of the public selected on a jury panel claiming some knowledge of the legal system.

718 Submission 56.

719 Submission 52.

720 Ibid.

7.172 A member of the Land Court suggested that concerns about having lawyers serve on a jury in cases where they have a connection with a person involved in the trial could be 'countered with a requirement that a member of the judiciary or legal profession must disclose any conflict of interest that could result in bias or perceived bias' and by providing for such circumstances to form the basis for discretionary excusal.⁷²¹

The Commission's view

7.173 Having regard to Recommendation 7-1 at [7.34] above, the Commission considers that lawyers who work in criminal law or who provide special legal services to the state should be excluded from jury service. This is necessary in order to ensure the non-specialist composition and impartiality of the jury.

7.174 The Commission is not persuaded, however, that *all* lawyers should be excluded from jury service. The objectives of representativeness and wide participation in, and a fair sharing of the obligation to perform, jury service suggest that, with some specific exceptions, lawyers as a general class should be made eligible for jury service. The Commission also agrees with the submission from the Queensland Law Society that it is unnecessary for paralegals, who are not lawyers, to be made ineligible.

7.175 In formulating the categories of exclusion, the Commission has had regard to the need for clear and objective criteria. At present, the *Jury Act 1995* (Qld) provides that a person who is a 'lawyer actually engaged in legal work' is ineligible.⁷²² 'Legal work' is not defined, leaving some doubt whether a particular person falls within the category. Such uncertainty is not merely inconvenient, but could lead to the inclusion on a jury of an arguably ineligible person.⁷²³

7.176 Lawyers in the public sector who work in criminal law or who provide special legal services to the state are readily identifiable by their office or job description and their appointment or employment under specific legislation. Consistent with its Proposal in the Discussion Paper, which was supported by most of the submissions, the Commission considers, therefore, that the following persons should be ineligible for jury service:

721 Submission 34. This respondent supported the inclusion, as a criterion for discretionary excusal under s 21 of the *Jury Act 1995* (Qld), of the provision recommended by the NSW Law Reform Commission to the effect that excusal for good cause includes the situation 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'. In Chapter 9 of this Report, the Commission has recommended against the inclusion of a similar provision.

722 'Lawyer' is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) to mean 'a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State'.

723 See [7.162], [7.170] above. Participation on a jury by a person who is not eligible to serve is certainly undesirable and may put public confidence in the jury at risk, even if it does not necessarily provide a ground for questioning the verdict: see *Jury Act 1995* (Qld) s 6 which provides that 'the fact that a person who is not qualified for jury service serves on a jury is not a ground for questioning the verdict'.

- a person who holds the office of Director of Public Prosecutions, Acting Director of Public Prosecutions, or Deputy Director of Public Prosecutions;⁷²⁴
- a person who is an Australian lawyer and who is appointed or employed by the Office of Director of Public Prosecutions, including a person who is appointed as a Crown Prosecutor;⁷²⁵
- a member of the Legal Aid Board appointed under the *Legal Aid Queensland Act 1997* (Qld);⁷²⁶
- the Chief Executive Officer of Legal Aid appointed under the *Legal Aid Queensland Act 1997* (Qld);⁷²⁷
- an Australian lawyer who is employed or engaged by Legal Aid, including as a Public Defender;⁷²⁸
- an Australian lawyer who is employed or engaged by Crown Law, including as a Crown Solicitor, Senior Deputy Crown Solicitor, Deputy Crown Solicitor, Assistant Crown Solicitor, or Crown Counsel.⁷²⁹

7.177 The Commission also notes that officers and employees of the Office of the Commonwealth Director of Public Prosecutions ‘whose duties involve the provision of legal professional services’ are also already excluded from serving as jurors in Queensland by virtue of Commonwealth legislation.⁷³⁰

7.178 Formulating a suitably objective criterion of ineligibility for criminal lawyers in private practice is somewhat more difficult. As the Queensland Law Society noted in its submission, some lawyers may specialise in criminal law, but many others who undertake criminal work may do so infrequently. Identification of criminal lawyers in private practice will invariably rely, at least to some extent, on self-identification.

⁷²⁴ See *Director of Public Prosecutions Act 1984* (Qld) ss 5, 17, 23, 34.

⁷²⁵ See *Director of Public Prosecutions Act 1984* (Qld) s 23; *Legal Profession Act 2007* (Qld) s 5(1) (definition of ‘Australian lawyer’).

⁷²⁶ See *Legal Aid Queensland Act 1997* (Qld) ss 48, 49.

⁷²⁷ See *Legal Aid Queensland Act 1997* (Qld) s 64.

⁷²⁸ See *Legal Aid Queensland Act 1997* (Qld) ss 4, 46(4), 70, sch Dictionary (definitions of ‘Legal Aid lawyer’, ‘Legal Aid agent’); *Legal Profession Act 2007* (Qld) s 5(1) (definition of ‘Australian lawyer’).

⁷²⁹ See generally Crown Law, ‘About Crown Law’ and ‘Lawyers’ <<http://crownlaw.govnet.qld.gov.au/home/>> at 7 February 2011; and *Legal Profession Act 2007* (Qld) s 5(1) (definition of ‘Australian lawyer’).

⁷³⁰ The *Jury Exemption Regulations 1987* (Cth) reg 5(2)(a) excludes officers and employees of the Office of the Commonwealth Director of Public Prosecutions, the Office of Parliamentary Counsel or a Commonwealth Department, whose duties involve the provision of legal professional services, from performing jury service in any Federal, State or Territory court.

7.179 In the Commission's view, the specialist accreditation program and public listings of solicitors and barristers,⁷³¹ although relying on voluntary participation and self-identification, provide the best, most objective means of defining those criminal lawyers in private practice who should be ineligible for jury service. The Commission considers, therefore, that ineligibility should apply to a person who is an Australian legal practitioner and who has:⁷³²

- attained specialist accreditation in criminal law; or
- nominated criminal law as an area of practice with a publicly accessible database or directory held by the Queensland Law Society or the Bar Association of Queensland.

7.180 Although the Commission does not consider that a test based on being employed or engaged in the provision of legal services in criminal cases, as was proposed in the Discussion Paper, is sufficiently clear for the purpose of defining a category of *ineligibility*, such a test is appropriate as a ground for *excusal*.

7.181 In the Commission's view, therefore, the *Jury Act 1995* (Qld) should be amended to provide that a person who is otherwise eligible for jury service is entitled to be excused from jury service on written notice to the Sheriff if the Sheriff is satisfied that the person is a government legal officer or an Australian legal practitioner⁷³³ and is employed or engaged in the provision of legal services in criminal cases.

7.182 The guidelines for excusal that the Commission has recommended in Chapter 9 below should provide for the sort of evidence that would be required to support a claim for excusal on this basis.

7.183 The Commission also considers that the *Jury Act 1995* (Qld) should provide that, if a person on a jury could have claimed excusal on this basis but did not, the person's presence on the jury does not, by itself, invalidate the jury's verdict.

Recommendations

7.184 The Commission makes the following recommendations:

7-11 Lawyers as a general class should be eligible for jury service, subject to Recommendation 7-12 below.

⁷³¹ See [7.152]–[7.155] above.

⁷³² See *Legal Profession Act 2007* (Qld) s 6(1) (definition of 'Australian legal practitioner').

⁷³³ See *Legal Profession Act 2007* (Qld) ss 6(1), 12(1) (definitions of 'Australian legal practitioner' and 'government legal officer').

7-12 Section 4(3)(f) of the *Jury Act 1995* (Qld) should be amended to provide that the following persons are ineligible for jury service:

- (a) a person who holds the office of Director of Public Prosecutions, Acting Director of Public Prosecutions, or Deputy Director of Public Prosecutions;
- (b) a person who is an Australian lawyer and who is appointed or employed by the Office of Director of Public Prosecutions, including a person who is appointed as a Crown Prosecutor;
- (c) a member of the Legal Aid Board appointed under the *Legal Aid Queensland Act 1997* (Qld);
- (d) the Chief Executive Officer of Legal Aid appointed under the *Legal Aid Queensland Act 1997* (Qld);
- (e) an Australian lawyer who is employed or engaged by Legal Aid, including as a Public Defender;
- (f) an Australian lawyer who is employed or engaged by Crown Law, including as a Crown Solicitor, Senior Deputy Crown Solicitor, Deputy Crown Solicitor, Assistant Crown Solicitor, or Crown Counsel;
- (g) a person who is an Australian legal practitioner and who has attained specialist accreditation in criminal law;
- (h) a person who is an Australian legal practitioner and who has nominated criminal law as an area of practice with a publicly accessible database or directory held by the Queensland Law Society or the Bar Association of Queensland.

7-13 The *Jury Act 1995* (Qld) should be amended to provide that:

- (a) a person who is otherwise eligible for jury service is entitled to be excused from jury service, on written notice to the Sheriff, if the Sheriff is satisfied that the person is a government legal officer or an Australian legal practitioner and is employed or engaged in the provision of legal services in criminal cases; and
- (b) if a person on a jury could have claimed excusal on that basis but did not, the person's presence on the jury does not, by itself, invalidate the verdict.

Police officers

7.185 In Queensland, section 4(3)(g) of the Act provides that a person who is a police officer, in this State or elsewhere, is ineligible for jury service.⁷³⁴ Commonwealth legislation also excludes members of the Australian Federal Police from serving as jurors in any Federal, State or Territory court.⁷³⁵

7.186 Police officers are also excluded in all of the other Australian jurisdictions and in New Zealand.⁷³⁶ In addition, a number of the jurisdictions exclude other people whose duties are connected with criminal investigation or law enforcement.⁷³⁷

7.187 As discussed in Chapter 3 of this Report, the automatic exclusion of police from jury service was removed in England and Wales by the *Criminal Justice Act 2003* (Eng). This has led to a number of appeals against convictions in cases involving police jurors,⁷³⁸ and the Guidelines issued by the Courts Service for dealing with excusals now provide that:⁷³⁹

serving police officers summoned to a court which receives work from their police station or who are likely to have a shared local service background with police witnesses in the trial ... should be excused from jury service unless there is a suitable alternative court/trial to which they can be transferred. ... a serving police officer can serve where there is no particular link between the court and the station where the police juror serves.

7.188 The Scottish Government has recently indicated that it intends to retain the ineligibility of police officers.⁷⁴⁰ The Law Reform Commission of Ireland has also noted that ‘confidence in trial by jury will be called into question’ if police officers are made eligible for selection as jurors.⁷⁴¹

⁷³⁴ In Queensland, ‘police officers’ include constables, non-commissioned and commissioned police officers, executive police officers and the commissioner of police, but do not include police recruits or staff members of the Queensland Police Service: *Acts Interpretation Act 1954* (Qld) s 36 (definition of ‘police officer’); *Police Service Administration Act 1990* (Qld) ss 1.4 (definition of ‘police officer’), 2.2(2).

⁷³⁵ *Jury Exemption Act 1965* (Cth) s 4(1), sch. See also *Jury Exemption Regulations 1987* (Cth) reg 5(2)(g).

⁷³⁶ *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6, sch 1 cl 6(3) to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1; *Juries Act 1981* (NZ) s 8(g). See also *Juries Act 1976* (Ireland) s 7, sch 1 pt 1; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt 1; and *Jury Ordinance, Cap 3* (HK) s 5(1)(b)(vi), (x), (c)(m).

⁷³⁷ This applies in New South Wales, South Australia, Tasmania and Victoria. Also, in the Northern Territory, the exclusion applies to public sector employees who are under the direct control of the Commissioner of Police. See n 736 above. Commonwealth legislation also excludes employees of the Commissioner of the Australian Federal Police, the Australian Police Staff College and the National Police Research Institute: *Jury Exemption Regulations 1987* (Cth) reg 5(2)(g), (j).

⁷³⁸ See *R v Abdoukoff*, *R v Green*, *R v Williamson* [2007] 1 WLR 2697; *R v I* [2007] EWCA Crim 2999; *R v Pintori* [2007] EWCA Crim 1700; *R v Khan* [2008] EWCA Crim 531; *R v Ali* [2009] EWCA Crim 1763; *R v Burdett* [2009] EWCA Crim 543; *R v J* [2009] EWCA Crim 1638; *R v Yemoh* [2009] EWCA Crim 930.

⁷³⁹ Her Majesty’s Courts Service (United Kingdom), ‘Guidance for summoning officers when considering deferral and excusal applications’ (2009) [18].

⁷⁴⁰ Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [6].

⁷⁴¹ Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.82]–[3.83].

7.189 Several arguments, based on the principles of impartiality and non-specialist composition, are advanced for the continued ineligibility of police officers:

- Where police officers have a connection with the case at hand, or are known to the witnesses, prosecutors, defendant or other participants in the trial, their presence on a jury would constitute a clear case of potential bias. This could arguably be dealt with by way of excusal (or deferral), challenge or discharge. However, there would be little benefit in making those persons eligible if they were likely to be excluded in virtually every case.
- Although Lord Justice Auld disagreed,⁷⁴² police officers may not merely be prone, like everyone else, to any number of a range of personal prejudices or biases but predisposed, by virtue of their profession, to assume guilt.⁷⁴³ This is not a criticism of police, but a reflection of the nature of their profession and training.
- The presence of police officers on juries may undermine the independence and non-specialist composition of the jury. Police officers are not merely employed in the administration of justice but are 'professionally committed' to the investigation and prosecution of crimes.⁷⁴⁴ It would seem to be inimical to include those identified with one of the two opposing sides of the adversarial contest in the pool of ordinary community members whose task is to judge — with impartiality and independence — the contest between those two sides.

7.190 At 30 June 2010, the Queensland Police Service employed 10 458 police officers.⁷⁴⁵ This equates to approximately 0.4% of the total number of adult Queenslanders on the electoral roll.⁷⁴⁶

NSWLRC's recommendations

7.191 Prior to amendments made by the *Jury Amendment Act 2010* (NSW), the legislation in New South Wales provided for the ineligibility of police officers and of persons:⁷⁴⁷

⁷⁴² Lord Justice Auld, *Review of Criminal Courts in England and Wales*, Report (2001) [30].

⁷⁴³ A significant body of research has demonstrated that 'police as a group are generally suspicious and primed to see deception in other people' and 'tend to make prejudgments of guilt, with confidence, that are frequently in error': respectively, SM Kassin and GH Gudjonsson, 'The psychology of confessions: A review of the literature and issues' (2004) 5(2) *Psychological Science in the Public Interest* 33, 58; and SM Kassin, 'The psychology of confessions' (2008) 4 *Annual Review of Law and Social Science* 193, 198. See also the discussion in Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.159].

⁷⁴⁴ *R v Abdroikof* [2007] 1 WLR 2679, [23] (Lord Bingham).

⁷⁴⁵ Queensland Police Service, *Annual Report 2009–2010* (2010) 6. In the same period, the Service employed 244 police recruits and 4109 staff members.

⁷⁴⁶ Based on an enrolled population of 2 640 895 people at November 2008: see Electoral Commission of Queensland, *Statistical Profiles: Queensland State Electoral Districts*, Research Report 1/2009 (2009) 5.

⁷⁴⁷ *Jury Act 1977* (NSW) s 6(b), sch 2 cl 8, 10 to be repealed by *Jury Amendment Act 2010* (NSW).

employed or engaged (except on a casual or voluntary basis) in the public sector in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration.

7.192 The NSW Law Reform Commission considered the latter category of ineligibility to be too wide. It expressed the view, however, that the exclusion of members of the agencies that are centrally involved in the investigation and prosecution of crime — namely, the NSW Police Force, the Australian Federal Police, the Australian Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption — is appropriate and should continue.⁷⁴⁸

This follows from the fact that the vast majority of jury trials are criminal, and from the further fact that the primary job of these officers is the detection and charging of crime, so that it is likely that they would be aware of, or have access to, information concerning suspects that would not be available to private citizens and could not be adduced in evidence. In our view, it is important to maintain the community confidence in the impartiality and fairness of the jury system, which might be threatened if police or those centrally involved in criminal law enforcement were permitted to serve as jurors.

7.193 The NSWLRC did not consider, however, that ineligibility should extend to clerical or administrative staff of those agencies.⁷⁴⁹

7.194 These recommendations have been implemented by the *Jury Amendment Act 2010* (NSW).⁷⁵⁰

LRCWA's recommendations

7.195 The Law Reform Commission of Western Australia recommended that police officers should continue to be excluded from jury service, and that this should be extended to the Commissioner of Police:⁷⁵¹

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. (note omitted)

7.196 The LRCWA observed that, because of their intimate involvement with law enforcement, criminal investigation and prosecution, the presence of police officers on the jury 'would seem to militate against the underlying rationale that a jury be

⁷⁴⁸ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.71], and see Rec 17.

⁷⁴⁹ Ibid [4.77].

⁷⁵⁰ See *Jury Act 1977* (NSW) s 6, sch 1 cl 6(3)–(4) to be inserted by *Jury Amendment Act 2010* (NSW).

⁷⁵¹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 69, and see Rec 34.

independent from government as the prosecuting authority', and that police-jurors 'might be seen to have a bias toward the prosecution case':⁷⁵²

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.

7.197 It also observed that, in England, the presence of police-jurors has led to a number of successful appeals against conviction which has in turn led the English Court of Appeal to instruct that trial judges are to be informed at the time of juror selection whether any potential juror is or has been a police officer, member of a prosecuting authority, or prison officer.⁷⁵³

7.198 Under proposed amendments that have recently been introduced into parliament in Western Australia, the Commissioner and officers of the police are to be ineligible for jury service, but only for criminal trials.⁷⁵⁴

Discussion Paper

7.199 In its Discussion Paper, the Commission proposed that serving police officers should remain ineligible for jury service:⁷⁵⁵

7-17 Section 4(3)(g) of the *Jury Act 1995* (Qld) should be amended to provide that a person who is a police officer (in the State or elsewhere) is ineligible for jury service.

Consultation

7.200 The Queensland Police Service, the Queensland Law Society, and the Department of Justice and Attorney-General each agreed that serving police officers should be ineligible for jury service.⁷⁵⁶

7.201 The Queensland Police Service submitted that the exclusion of serving police officers is appropriate in light of the principle that justice should not only be done, but be seen to be done.⁷⁵⁷

7.202 The Queensland Law Society considered that police officers should be ineligible for the same reasons as lawyers.⁷⁵⁸

⁷⁵² Ibid 67.

⁷⁵³ Ibid 68. See also Chapter 3 of this Report.

⁷⁵⁴ See Juries Legislation Amendment Bill 2010 (WA) cl 10, 36. The Bill provides for the ineligibility, in criminal trials, of the Commissioner of Police, a member of the Police Force of Western Australia, a special constable, an Aboriginal police liaison officer, a police auxiliary officer, and a police cadet employed by the Commissioner of Police.

⁷⁵⁵ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.172], Proposal 7-17, Question 7-18.

⁷⁵⁶ Submissions 52, 56, 59.

⁷⁵⁷ Submission 59.

The Commission's view

7.203 Having regard to the position set out in Recommendation 7-1 at [7.34] above, and the need to ensure public confidence in the jury system, the Commission is of the view that serving police officers should continue to be ineligible for jury service.

Recommendation

7.204 The Commission makes the following recommendation:

7-14 Section 4(3)(g) of the *Jury Act 1995 (Qld)* should provide that a person who is a police officer (in the State or elsewhere) is ineligible for jury service.

Detention centre employees, corrective services officers, and Parole Board members

7.205 Under section 4(3)(h) and (i) of the Queensland Act, detention centre employees and corrective services officers, in this State or elsewhere, are ineligible for jury service.⁷⁵⁹ Provisions in all of the other Australian jurisdictions also exclude correctional service and detention centre officers from jury service.⁷⁶⁰

7.206 Corrective services officers have a number of functions in the supervision and management of adult prisoners who are detained in corrective services facilities or who are released on parole.⁷⁶¹ Detention centre employees exercise a number of functions in the supervision of children in detention centres.⁷⁶² The supervision of young people who are subject to probation, community service, intensive supervision, conditional release, or supervised release orders is the responsibility of the Chief Executive of the Department of Communities and the

⁷⁵⁸ Submission 52. See [7.170]–[7.171] above for this respondent's comments in relation to the ineligibility of lawyers.

⁷⁵⁹ See nn 531 and 532 above for the definitions of 'corrective services officer' and 'detention centre employee' in *Jury Act 1995 (Qld)* s 3, sch 3 Dictionary.

⁷⁶⁰ *Juries Act 1967 (ACT)* s 11(1), sch 2 pt 2.1; *Jury Act 1977 (NSW)* s 6, sch 1 cl 7 to be inserted by *Jury Amendment Act 2010 (NSW)*; *Juries Act (NT)* s 11(1), sch 7; *Juries Act 1927 (SA)* s 13(c), sch 3; *Juries Act 2003 (Tas)* s 6(3), sch 2; *Juries Act 2000 (Vic)* s 5(3), sch 2; *Juries Act 1957 (WA)* s 5(a)(i), sch 2 pt 1. See also *Juries Act 1981 (NZ)* s 8(h)(ii), (ha), (hb); *Juries Act 1967 (Ireland)* s 7, sch 1 pt 1; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt 1; *Jury Ordinance, Cap 3 (HK)* s 5(1)(b)(vii), (x), (xii). In South Australia, Tasmania and Victoria, the exclusion applies to people whose duties are connected with penal administration or the punishment of offenders. In New South Wales, it applies to persons with direct access to, or information about, inmates.

⁷⁶¹ See generally *Corrective Services Act 2006 (Qld)* ss 4, 275, 276, ch 2 (Prisoners), ch 5 (Parole), sch 4 Dictionary (definition of 'corrective services officer').

⁷⁶² See generally *Youth Justice Act 1992 (Qld)* s 4, sch 4 Dictionary (definition of 'detention centre employee'), pt 8 (Detention administration).

public service officers to whom those functions are delegated.⁷⁶³ At present, those public service officers are not specifically excluded from jury service.

7.207 Some jurisdictions also exclude parole board members from jury service.⁷⁶⁴ Members of Parole Boards, who decide applications for parole of prisoners, are not, however, ineligible in Queensland.⁷⁶⁵

7.208 Recent amendments in England and Wales have removed the previous automatic exclusion of probation and penal establishment officers from jury service.⁷⁶⁶ In contrast, the ineligibility of prison officers and parole board members is to be retained in Scotland,⁷⁶⁷ and the Law Reform Commission of Ireland has proposed that prison officers and probation officers should remain ineligible.⁷⁶⁸

NSWLRC's recommendations

7.209 Recent amendments made to the *Jury Act 1977* (NSW) will provide that members, officers and employees of the Department of Justice and Attorney General, the Department of Human Services, the State Parole Authority, the Serious Offenders Review Council, the Probation and Parole Service, Justice Health or the Mental Health Review Tribunal, who have direct access to inmates or information about inmates, are excluded from jury service.⁷⁶⁹

7.210 This is consistent with the recommendations of the NSW Law Reform Commission. In its view, the ineligibility of people employed or engaged in the public sector in penal administration⁷⁷⁰ is appropriate but should be confined to certain specific groups of people who have direct and regular contact with offenders.⁷⁷¹ The NSWLRC considered that these exclusions are required because of the risks of perceived bias, identification and possibly even personal harm that

⁷⁶³ See *Youth Justice Act 1992* (Qld) ss 312 (Delegation), 193, 196, 204, 221, 228. See generally Community Services Queensland, Youth Justice, 'Types of sentences' <<http://www.communityservices.qld.gov.au/youth/youth%2Djustice/sentences/>> at 22 February 2011.

⁷⁶⁴ This applies in the Northern Territory and Western Australia: see n 760 above.

⁷⁶⁵ The President and Deputy Presidents of a Parole Board may be ineligible by virtue of being, respectively, a retired judge or a lawyer of five years standing. Other Parole Board members will, not, however, fall into any other category of ineligibility. See *Corrective Services Act 2006* (Qld) ss 218, 232. The Parole Boards that operate in Queensland are the Queensland Parole Board, Queensland Regional Parole Board and Central and Northern Queensland Regional Parole Board: see Department of Community Safety (Queensland), Queensland Corrective Services, 'Parole Boards' <http://www.correctiveservices.qld.gov.au/About_Us/Community_Corrections_Board/index.shtml> at 22 February 2011.

⁷⁶⁶ See Chapter 3 of this Report.

⁷⁶⁷ Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [6].

⁷⁶⁸ Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.89]–[3.91], [3.92]–[3.94].

⁷⁶⁹ *Jury Act 1977* (NSW) s 6, sch 1 cl 7 to be inserted by *Jury Amendment Act 2010* (NSW).

⁷⁷⁰ See *Jury Act 1977* (NSW) s 6(b), sch 2 cl 8 to be repealed by *Jury Amendment Act 2010* (NSW).

⁷⁷¹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.86]–[4.88], Rec 19.

may result from having them serve on juries.⁷⁷² It did not consider that clerical or support staff without direct access to offenders should be ineligible.

LRCWA's recommendations

7.211 Because of their connection with the criminal justice system and the risk that they would not be perceived to be impartial, the Law Reform Commission of Western Australia also recommended the continued ineligibility of members of review boards involved in the release of prisoners, detainees or mentally impaired accused, and persons whose work involves the 'management, transport or supervision of offenders' or the 'security or administration of the criminal courts or custodial facilities'.⁷⁷³

7.212 Amendments have recently been introduced into parliament, however, to remove a number of occupational exclusions from jury service, including the exclusion of prison officers and members of prisoner review boards.⁷⁷⁴ The amendments instead propose a new provision allowing a person to be excused from service if he or she 'would not be indifferent as between the parties in a trial'.⁷⁷⁵

Discussion Paper

7.213 In its Discussion Paper, the Commission proposed that detention centre employees, corrective services officers, and members of a Parole Board should be ineligible for jury service.⁷⁷⁶

- 7-19 Section 4(3)(h) and (i) of the *Jury Act 1995* (Qld) should be amended to provide that a person who is a member of a Parole Board or who is a detention centre employee or corrective services officer is ineligible for jury service.

Consultation

7.214 The Queensland Law Society submitted that detention centre employees, corrective services officers and Parole Board members should be ineligible for jury service. In its view, this is consistent with the exclusion of other occupations that 'directly touch and concern the criminal justice system'.⁷⁷⁷

⁷⁷² Ibid [4.87].

⁷⁷³ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 72–4, Rec 36 and 37.

⁷⁷⁴ See Juries Legislation Amendment Bill 2010 (WA) cll 10, 36.

⁷⁷⁵ See proposed new *Juries Act 1957* (WA) s 34I to be inserted by Juries Legislation Amendment Bill 2010 (WA).

⁷⁷⁶ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.179]–[7.181], Proposal 7-19, Question 7-20.

⁷⁷⁷ Submission 52.

7.215 The Department of Community Safety, which administers the *Corrective Services Act 2006* (Qld),⁷⁷⁸ expressed the view that corrective services officers should remain ineligible for jury service. In its view, this is required not only to preserve the integrity of the correctional and criminal justice systems, but to ensure the personal security of corrective services officers. It noted that corrective services officers ‘work closely with prisoners’ and ‘possess intimate knowledge’ of prisoners’ criminal histories. It also noted that corrective services officers ‘represent a very small portion of the community’.⁷⁷⁹

7.216 Similarly, the Department of Communities, which administers the *Youth Justice Act 1992* (Qld), expressed the view that detention centre employees should continue to be ineligible for jury service. This respondent commented that:⁷⁸⁰

detention centre employees have privileged information regarding young offenders detained within a centre and these young people may become adult offenders.

7.217 The Department of Communities also submitted that the ineligibility of detention centre employees should be extended to cover other youth justice officers providing services under the *Youth Justice Act 1992* (Qld), such as those officers who supervise children on community based orders. This would be consistent with the ineligibility of corrective services officers who supervise adults on community based orders:⁷⁸¹

there appears to be an anomaly because the corrective services officers supervising adults on community based orders are ineligible for jury duty, but youth justice officers supervising community based orders and providing other services such as convening youth justice conferences are eligible for jury duty.

The department therefore requests that the QLRC considers excluding officers providing services under the *Youth Justice Act 1992* such as youth justice officers supervising community based orders and conference convenors from jury duty.

7.218 However, the Department of Community Safety supported the continued eligibility of Parole Board members. In its view, the existing provisions for individual jurors to be challenged by the parties or discharged by the judge are adequate to accommodate concerns that a Parole Board member should not serve on a jury.⁷⁸²

778 Among other things, the *Corrective Services Act 2006* (Qld) provides for the appointment of corrective services officers: see *Corrective Services Act 2006* (Qld) ch 6 pt 4.

779 Submission 54.

780 Submission 35. Among other things, the *Youth Justice Act 1992* (Qld) provides for the establishment and operation of detention centres in Queensland: see *Youth Justice Act 1992* (Qld) pt 8.

781 Submission 35A.

782 Submission 54 referring to ss 35, 43, 45, 46 of the *Jury Act 1995* (Qld) which are discussed in Chapter 10 of this Report. The Department of Community Safety administers the *Corrective Services Act 2006* (Qld) which provides, among other things, for the appointment of Parole Board members: see *Corrective Services Act 2006* (Qld) ch 5 pt 2.

7.219 The Department of Justice and Attorney-General did not express a view about whether or not detention centre employees, corrective services officers, or members of Parole Boards should be ineligible for jury service, but noted that such exclusions would depend on self-identification:⁷⁸³

As a matter of practice the Sheriff's office advises that it would be necessary for a potential juror employed in this capacity to identify as such on their reply to the initial notice. As a general comment for all exclusionary categories, the Sheriff's office does not presently require written evidence of employment nor are any checks as to validity made.

The Commission's view

7.220 In the Commission's view, detention centre employees and corrective services officers, as they are presently defined in the Act, should continue to be ineligible for jury service during the currency of their employment or appointment given their specialist role in the criminal justice system. The Commission also considers that those public service officers who supervise young people on probation, community service, intensive supervision, conditional release, or supervised release orders under the *Youth Justice Act 1992* (Qld) should be ineligible, as was suggested by the Department of Communities. These exclusions are consistent with the Commission's approach under Recommendation 7-1 at [7.34] above.

7.221 Because of their professional involvement in corrective services and criminal justice, the Commission also considers that members of a Parole Board should be made ineligible for jury service while holding that position. The Commission considers that the ineligibility of Parole Board members is preferable to case-by-case excusal or discharge and would be consistent with the position in some other jurisdictions and with the recommendations of the Law Reform Commission of Western Australia.

Recommendation

7.222 The Commission makes the following recommendation:

7-15 Section 4(3)(h) and (i) of the *Jury Act 1995* (Qld) should be amended to provide that a person is ineligible for jury service if the person is:

- (a) a detention centre employee under the *Youth Justice Act 1992* (Qld);**
- (b) a corrective services officer under the *Corrective Services Act 2006* (Qld);**

⁷⁸³

Submission 56. The Commission notes that it is an offence under the Act to state something the person knows is false in response to a prospective juror questionnaire, or to fail to answer truthfully a question from the Sheriff to find out whether the person is qualified for jury service: *Jury Act 1995* (Qld) ss 18(6), 68(3). Offences under the Act are discussed in Chapter 14 of this Report.

- (c) a public service employee whose functions under the *Youth Justice Act 1992* (Qld) involve the supervision of a young person who is subject to a supervised, non-custodial court order; or
- (d) a member of a Parole Board.

Other public sector officers and people involved with the criminal justice system

7.223 As noted above, some jurisdictions provide a general category of exclusion for public sector employees involved in the administration of justice. The width of those provisions encompasses many of the specific categories already discussed in this chapter, such as public sector lawyers who work in criminal law and corrective services officers.

7.224 For example, the Victorian legislation provides the following 'catch-all' category of ineligibility:⁷⁸⁴

a person employed or engaged (whether on a paid or voluntary basis) in the public sector within the meaning of the *Public Administration Act 2004* in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration.

7.225 Similar provisions apply Tasmania, the Northern Territory and South Australia.⁷⁸⁵ For example, the legislation in the Northern Territory makes the following ineligible:

an employee as defined in the *Public Sector Employment and Management Act* who is employed in an Agency primarily responsible for law and the administration of justice, prisons and correctional services or the administration of courts or who is under the direct control of the Commissioner of Police.

7.226 A similarly wide exclusion also applies in New South Wales.⁷⁸⁶ Amendments made by the *Jury Amendment Act 2010* (NSW), however, will limit this to public sector officers and employees of particular bodies only.⁷⁸⁷

7.227 The Western Australian legislation excludes a person who is:⁷⁸⁸

⁷⁸⁴ *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(f).

⁷⁸⁵ *Juries Act 2003* (Tas) s 6(3), sch 2 cl 4; *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 3 cl 2.

⁷⁸⁶ *Jury Act 1977* (NSW) s 6(b), sch 2 cl 8 to be repealed by *Jury Amendment Act 2010* (NSW).

⁷⁸⁷ See *Jury Act 1977* (NSW) s 6, sch 1 cl 6, 7 to be inserted by *Jury Amendment Act 2010* (NSW).

⁷⁸⁸ *Juries Act 1957* (WA) s 5, sch II pt 1 cl 2(o); *Jury Pools Regulations 1982* (WA) reg 10. See also *Public Sector Management Act 1994* (WA) s 34 for the meaning of 'public service'.

- employed in a department of the public service that principally assists the Attorney General to administer Acts administered by the Attorney General (other than those employed or contracted for services under the *Births, Deaths and Marriages Registration Act 1998* (WA) or the *Public Trustee Act 1941* (WA));
- 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
- a contract worker under the *Court Security and Custodial Services Act 1999* (WA) or the *Prisons Act 1981* (WA).

7.228 The Law Reform Commission of Western Australia recommended that this provision be confined to cover only those people whose work is ‘integrally connected with the administration of criminal justice’, namely, those whose work involves:⁷⁸⁹

- 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.

7.229 Under amendments recently introduced into the Western Australia parliament, police officers and public service employees in the department that administers the *Police Act 1892* (WA) are to continue to be excluded from jury service, but those involved with the security or administration of prisons, or who work in the Attorney-General’s department are to be made eligible.⁷⁹⁰ The amendments provide, however, for excusal from jury service on the basis that the person ‘would not be indifferent as between the parties in a trial’.⁷⁹¹

7.230 The Queensland legislation does not presently contain any similar provisions. However, section 8(1) of the former *Jury Act 1929* (Qld) used to exclude chief executive officers of all government departments and all people employed in the Department of Justice, the Department of the Attorney-General and the Police Department.⁷⁹²

⁷⁸⁹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 73–4, Rec 37.

⁷⁹⁰ See Juries Legislation Amendment Bill 2010 (WA) cll 10, 36.

⁷⁹¹ See proposed new *Juries Act 1957* (WA) s 34I to be inserted by Juries Legislation Amendment Bill 2010 (WA).

⁷⁹² See *Jury Act 1929* (Qld) s 8(1)(i), (j), (l), (m) later repealed by *Jury Act 1995* (Qld).

7.231 During the financial year 2009–10, the Department of Justice and Attorney-General employed 3470 full-time equivalent staff across service areas ranging from court and tribunal services to workplace health and safety services.⁷⁹³ That Department's Annual Report for 2009 explained that:⁷⁹⁴

Department staff work across Queensland in many diverse roles, including as judicial officers, lawyers, court and tribunal registrars, court services officers and depositions clerks, inspectors (workplace health and safety, electrical safety and industrial relations), policy officers, researchers, project officers, industrial relations negotiators, court reporters, guardians, prosecutors, investigators, mediators, bailiffs, cleaners, accountants and finance officers, systems analysts and information technology officers, human resource officers, training officers, communications and marketing officers and administrators.

7.232 Also in the financial year ending in June 2010, Queensland Corrective Services employed 3469 full-time equivalent staff including almost as many non-custodial as custodial staff (such as trade instructors, operational support, corporate service and probation and parole personnel);⁷⁹⁵ and the Queensland Police Service employed 14 811 personnel, including 4109 general staff members in addition to the 10 458 police officers and 244 police recruits.⁷⁹⁶

7.233 In addition to these 'catch-all' provisions, some additional categories of ineligibility, consistent with the exclusion of persons involved with the administration of justice, have been identified, namely:

- members of, and people employed or engaged by, crime and corruption commissions⁷⁹⁷ or other commissions and boards of inquiry;⁷⁹⁸
- court officers, including court reporters;⁷⁹⁹ and
- justices of the peace with particular court duties.⁸⁰⁰

⁷⁹³ Department of Justice and Attorney-General, *Annual Report 2009–10* (2010) 85. A full-time equivalent employee represents the sum of people whose hours, when added together, are the equivalent of full-time hours as specified in the relevant award or agreement: see, for example, Queensland Government, *Queensland Public Service Workforce Characteristics 2009–2010*, 3.

⁷⁹⁴ Department of Justice and Attorney-General, *Annual Report 2008–09* (2009) 67.

⁷⁹⁵ Department of Community Safety, *Annual Report 2009–10* (2010) 136, 137.

⁷⁹⁶ Queensland Police Service, *Annual Report 2009–10* (2010) 6.

⁷⁹⁷ *Jury Exemption Regulations 1987* (Cth) regs 5(h), 7(2)(b); *Jury Act 1977* (NSW) s 6, sch 1 cl 6(3) to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(la)–(ld); *Juries Act 1957* (WA) s 5(a)(1), sch 2 pt 1.

⁷⁹⁸ Eg *Juries Act 1967* (ACT) s 11(1), sch 1 pt 2.1 cl 23, 24; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1.

⁷⁹⁹ *Juries Act 1967* (ACT) s 11(1), sch 1 pt 2.1 cl 16; *Juries Act 1927* (SA) s 13(c), sch 3 cl 2; *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(m); *Juries Act 1957* (WA) s 5(a)(1), sch 2 pt 1 cl 2(e)–(g); *Juries Act 1981* (NZ) s 8(h)(iv).

⁸⁰⁰ *Juries Act 1927* (SA) s 13(c), sch 3 cl 2; *Juries Act 2003* (Tas) s 6(3), sch 2 cl 2(c); *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(d); *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1 cl 2(d); *Juries Act 1981* (NZ) s 8(e).

Discussion Paper

7.234 In its Discussion Paper, the Commission expressed the provisional view that it would be inappropriate to re-introduce a broadly-based category of ineligibility for public sector officers and employees involved with the administration of justice. It preferred that ineligibility be limited to specific categories of employees and officers who are involved in the criminal justice system in particular ways.⁸⁰¹

7-21 The *Jury Act 1995* (Qld) should not be amended to introduce a general category of ineligibility or exclusion for persons employed or engaged in the Department of Justice and Attorney-General, Queensland Corrective Services or the Queensland Police Service.

7.235 The Commission sought submissions on whether there are any specific office-holders or persons engaged or employed in the public sector in the administration of criminal justice who should be made ineligible for jury service.

Consultation

7.236 The Queensland Law Society agreed that there should not be a general category of ineligibility for persons employed by the Department of Justice and Attorney-General.⁸⁰²

The Commission's view

7.237 In the Commission's view, it is unnecessary and unduly restrictive of the jury pool to re-introduce a broadly-based category of ineligibility for officers and employees of government departments and agencies involved with the administration of criminal justice. There are already exclusions (and the Commission has recommended the continuation of exclusions) for judges and magistrates, police officers, and corrective services and detention centre officers. The Commission has also recommended the exclusion of certain groups of public sector and criminal lawyers, public sector employees who supervise young people who are subject to supervised, non-custodial orders under the *Youth Justice Act 1992* (Qld), and Parole Board members.

7.238 As noted above, the Department of Justice and Attorney-General, Queensland Corrective Services, and the Queensland Police Service employ thousands of staff in a diverse number of roles. The exclusion of all of those people would thus have a significant impact on the jury pool.

7.239 Additionally in the Commission's view, many of those staff would have little, if any, connection with the administration of *criminal* justice and the connection of many others to the work of the criminal courts, and the State's

⁸⁰¹ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.197]–[7.204], Proposal 7-21.

⁸⁰² Submission 52.

interests in prosecuting crimes, would not be so direct as to make those persons absolutely unsuitable for jury service.⁸⁰³

7.240 Provisions for excusal (and deferral), challenge and discharge are adequate to accommodate any concerns that arise with a particular individual's suitability for jury service on a case-by-case basis.

7.241 The Commission is not aware of any systemic difficulties associated with the present eligibility of those persons and does not, therefore, consider the re-introduction of such a wide class of exclusion to be justified.

7.242 The Commission does consider, however, that it is appropriate to nominate some further specific categories of exclusion for particular public service officers and employees who are more intimately involved in the administration of criminal justice, and who can be identified with some precision and thus with less risk of casting the net of exclusion too wide. These are examined below.

Recommendation

7.243 The Commission makes the following recommendation:

7-16 The *Jury Act 1995 (Qld)* should not be amended to introduce a general category of ineligibility or exclusion for persons employed or engaged in the Department of Justice and Attorney-General, Queensland Corrective Services or the Queensland Police Service.

Crime and Misconduct Commission

7.244 By virtue of Commonwealth legislation, the Chief Executive Officer, examiners and staff of the Australian Crime Commission are excluded from performing jury service in Queensland courts.⁸⁰⁴ In Western Australia, a person who is a Commissioner, officer or parliamentary inspector under the *Corruption and Crime Commission Act 2003 (WA)* is also ineligible to serve as a juror.⁸⁰⁵

7.245 At present, however, commissioners, officers and employees of the Crime and Misconduct Commission of Queensland remain eligible for jury service (except to the extent that they fall within another category of ineligibility, for example, as 'lawyers engaged in legal work').

7.246 The Crime and Misconduct Commission in Queensland performs three major functions: the prevention and investigation of major crime; dealing with matters of integrity and misconduct in public administration; and undertaking research and intelligence on a range of matters including criminal activity, the

⁸⁰³ See [7.34] and Recommendation 7-1 above.

⁸⁰⁴ *Jury Exemption Regulations 1987 (Cth)* reg 5(2)(h).

⁸⁰⁵ *Juries Act 1957 (WA)* s 5(a)(i), sch 2 pt 1.

administration of criminal justice, and public misconduct.⁸⁰⁶ It is headed by a body of Commissioners, and includes Assistant Commissioners, senior officers and a range of other staff.⁸⁰⁷

7.247 As discussed at [7.191]–[7.193] above, the NSW Law Reform Commission recently recommended that, as members of law enforcement and criminal investigation agencies, people employed or engaged by the NSW Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption (other than clerical, administrative or support staff) should be ineligible for jury service.⁸⁰⁸ That recommendation is implemented by the *Jury Amendment Act 2010* (NSW).⁸⁰⁹

7.248 The Law Reform Commission of Western Australia also considered that the Commissioner and the Parliamentary Inspector of the Corruption and Crime Commission and officers and seconded employees of the 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’ should be ineligible.⁸¹⁰ It considered that ‘[l]ike police, such officers may be perceived as lacking impartiality’.⁸¹¹

7.249 Under amendments recently introduced into the Western Australia parliament, authorised officers of the Corruption and Crime Commission, the Parliamentary Inspector, or acting Parliament Inspector, of the Corruption and Crime Commission, and officers of the Parliamentary Inspector are to be ineligible to serve on criminal trials.⁸¹²

Discussion Paper

7.250 In its Discussion Paper, the Commission expressed the provisional view that the Commissioner and officers of the Crime and Misconduct Commission should be made ineligible for jury service on the basis of their close connection with the administration of the criminal justice system and the interests of the State in prosecuting crime:⁸¹³

7-22 The *Jury Act 1995* (Qld) should be amended to provide that a person who is a Commissioner of the Crime and Misconduct Commission, or employed or engaged by the Crime and Misconduct Commission other

806 *Crime and Misconduct Act 2001* (Qld) ss 4, 5, ch 2.

807 *Crime and Misconduct Act 2001* (Qld) ss 223, 239, 245, 254.

808 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.71], Rec 17.

809 See *Jury Act 1977* (NSW) s 6, sch 1 cl 6(3)–(4) to be inserted by *Jury Amendment Act 2010* (NSW).

810 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 70–71, Rec 35.

811 *Ibid* 70.

812 See *Juries Legislation Amendment Bill 2010* (WA) cl 10, 36.

813 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.211]–[7.212], Proposal 7-22.

than in a clerical, administrative or support staff role, is ineligible for jury service.

Consultation

7.251 The Queensland Law Society agreed that ‘employees of the Crime and Misconduct Commission engaged in legal services other than [in] clerical, administrative or support staff roles’ should be ineligible for jury service.⁸¹⁴

7.252 The Crime and Misconduct Commission also agreed that Commissioners and staff of that Commission should be ineligible for jury service.⁸¹⁵ In this respondent’s view, the ineligibility should cover all staff of the Commission, including clerical, administrative and support staff, because of their close connection with the administration of the criminal justice system.⁸¹⁶

7.253 The Department of Justice and Attorney-General noted that, if Commissioners and staff of the Crime and Misconduct Commission were to be made ineligible for jury service, it would be necessary for them to self-identify.⁸¹⁷

The Commission’s view

7.254 In the Commission’s view, the Commissioners of the Crime and Misconduct Commission, and officers and employees of the Crime and Misconduct Commission (other than those who are engaged or employed in a clerical, administrative or support staff role), because of their role in the investigation of crime, and by analogy with police officers, are so closely connected with the administration of the criminal justice system and the interests of the State in prosecuting crime as to justify their exclusion from jury service. Their exclusion is consistent with the Commission’s position set out in Recommendation 7-1 at [7.34] above.

7.255 It is unnecessary and unduly restrictive, however, to extend ineligibility to clerical, administrative or support staff of that Commission.

Recommendation

7.256 The Commission makes the following recommendation:

814 Submission 52.

815 Submission 51.

816 Ibid.

817 Submission 56. See [7.219] above.

7-17 The *Jury Act 1995* (Qld) should be amended to provide that a person who is a Commissioner of the Crime and Misconduct Commission, or is employed or engaged by the Crime and Misconduct Commission other than in a clerical, administrative or support staff role, is ineligible for jury service.

Court officers

7.257 Under Commonwealth legislation, an officer or employee of the High Court of Australia, Federal Court of Australia, Family Court of Australia, or Federal Magistrates Court is excluded from performing jury service in any Federal, State or Territory court.⁸¹⁸ At present, officers and employees of Queensland courts who are responsible for court administration remain eligible for jury service.

7.258 Officers of the Supreme, District and Magistrates Courts in Queensland (those courts having criminal, as well as civil, jurisdiction) include:⁸¹⁹

- Registrars, deputy registrars, and judicial registrars who are responsible for administrative and, in some cases, judicial matters including certain interlocutory civil applications and (in their dual capacity as justices of the peace) actions and orders in relation to simple offences and the hearing and determination of such charges;⁸²⁰
- Sheriffs, Deputy Sheriffs, bailiffs and assistant bailiffs who are responsible for the service and execution of court process and the management of the jury system;⁸²¹
- Shorthand reporters and recorders who are charged with reporting and recording proceedings of the court;⁸²² and

⁸¹⁸ *Jury Exemption Regulations 1987* (Cth) reg 5(2)(b). Members of staff of the Administrative Appeals Tribunal or the National Native Title Tribunal are also excluded from jury service: reg 5(2)(k), (l).

⁸¹⁹ An 'officer of the court' is 'an individual involved in the administration of the affairs of the court': LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 16 February 2011). The expression typically refers to a registrar, clerk, bailiff, sheriff, usher or the like: see JB Saunders (ed), *Words and Phrases Legally Defined* (1989) vol 3 ('Officer of court') 270; BA Garner (ed), *Black's Law Dictionary* (8th ed, 2004) ('officer of the court') 1119. Although a person who is admitted to the legal profession in Queensland is also an officer of the Supreme Court (*Legal Profession Act 2007* (Qld) s 38), the Commission's discussion of court officers in this chapter is not intended to refer to lawyers but is limited to those office-holders and employees who are responsible for aspects of the court's administration and, in some cases, may exercise judicial or quasi-judicial powers.

⁸²⁰ See *Supreme Court Act 1995* (Qld) ss 210(1), 210A, 273(1); *Supreme Court of Queensland Act 1991* (Qld) s 73; *District Court of Queensland Act 1967* (Qld) ss 35A, 36, 36A, 37; *Uniform Civil Procedure Rules 1999* (Qld) ch 12; *Justices Act 1886* (Qld) ss 22C, 22D; *Magistrates Courts Act 1921* (Qld) ss 3, 3A.

⁸²¹ See *Supreme Court Act 1995* (Qld) ss 212, 213, 232, 233, 238, 273, 273A; *District Court of Queensland Act 1967* (Qld) ss 41, 43; *Magistrates Courts Act 1921* (Qld) s 17; *Jury Act 1995* (Qld) ss 8, 9, 15, 18, 19, 24, 26, 27, 29, 36, 72. See also, for example, *Supreme Court of Queensland Act 1991* (Qld) pt 7 div 5 subdiv 2 (Enforcement warrants), s 2 sch 2 Dictionary (definition of 'enforcement officer').

⁸²² *Recording of Evidence Act 1962* (Qld) ss 5–8.

- Judges' associates who have a range of clerical, administrative and procedural functions, including the taking of arraignments and the empanelling of juries in criminal cases.⁸²³

7.259 Other courts of record in Queensland are also supported by registrars and other officers who are responsible for court administration.⁸²⁴ Registrars in some of those courts, such as the principal registrar of the Queensland Civil and Administrative Tribunal, may also exercise certain judicial or quasi-judicial powers.⁸²⁵

7.260 In a number of jurisdictions, court officers are specifically excluded from jury service:

- In South Australia and Victoria, court reporters are expressly excluded.⁸²⁶
- In Western Australia, the legislation specifically excludes a person who is a Sheriff or an officer of the Sheriff; a bailiff or an assistant bailiff; or an associate or usher of a judge of the Supreme Court, Family Court or District Court.⁸²⁷
- More generally, the legislation in the ACT excludes 'public servant[s] in the staff of the Supreme Court or Magistrates Court',⁸²⁸ the South Australian legislation excludes 'persons employed in the administration of courts',⁸²⁹ and the New Zealand legislation excludes 'officers' of the High Court or District Court.⁸³⁰

7.261 No similar provisions are made in Queensland.

7.262 The Law Reform Commission of Western Australia considered that the exclusion of court officers is warranted because of their connection to the administration of the criminal justice system: a range of judicial and quasi-judicial functions in the criminal jurisdiction are delegated to registrars; associates, ushers and personal staff of judges are 'intimately involved in the criminal trial process'; the

⁸²³ *Supreme Court Act 1995* (Qld) s 210; *District Court of Queensland Act 1967* (Qld) s 36; *Criminal Practice Rules 1999* (Qld) ch 10 (Trial proceedings).

⁸²⁴ Eg *Coroners Act 2003* (Qld) ss 84–86; *Industrial Relations Act 1999* (Qld) ch 8 pt 4 divs 1, 2; *Land and Resources Tribunal Act 1999* (Qld) pt 3, s 87(5); *Land Court Act 2000* (Qld) ss 28–32, 48–51; *Mental Health Act 2000* (Qld) ch 11 pt 4; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 4 pt 5.

⁸²⁵ For example, in certain circumstances, the principal registrar of the Queensland Civil and Administrative Tribunal may give procedural directions, direct the parties to attend a compulsory conference, hear a compulsory conference, refer a matter to mediation, and conduct a mediation: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 62(7), 67, 70(1), 75, 79(1), 210. See also, for example, *Industrial Relations Act 1999* (Qld) ss 299–302, 323, 326–329; *Land Court Act 2000* (Qld) s 29; *Land Court Rules 2000* (Qld) pt 6.

⁸²⁶ *Juries Act 1927* (SA) s 13(c), sch 3 cl 2; *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(m).

⁸²⁷ *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1 cl 2(e)–(g).

⁸²⁸ *Juries Act 1967* (ACT) s 11(1), sch 1 pt 2.1 cl 16.

⁸²⁹ *Juries Act 1927* (SA) s 13(c), sch 3 cl 2.

⁸³⁰ *Juries Act 1981* (NZ) s 8(h)(iv).

Sheriff and Sheriff's officers have 'overt law enforcement' and jury management duties; and the Sheriff's law enforcement duties can be delegated to bailiffs.⁸³¹ The LRCWA recommended, however, that the current ineligibility of registrars, associates and ushers of the Family Court should be removed as the same arguments for exclusion did not apply in this (non-criminal) context.⁸³²

7.263 An amending Bill that has recently been introduced into parliament in Western Australia proposes to limit the exclusion of court officers to the Sheriff, summoning officers, and registrars, and to remove the ineligibility of associates and ushers.⁸³³

Discussion Paper

7.264 In its Discussion Paper, the Commission proposed that court officers associated with the administration of the criminal courts should be made ineligible for jury service.⁸³⁴

7-24 The *Jury Act 1995* (Qld) should be amended to provide that officers of the Supreme Court, District Court, or Magistrates Court who are associated with the administration of the criminal courts, including shorthand reporters and recorders, Sheriffs, registrars and judges' associates, are ineligible for jury service.

Consultation

7.265 The Queensland Law Society agreed that officers of the Supreme Court, District Court or Magistrates Court who are associated with the administration of the criminal courts, including shorthand reporters and recorders, Sheriffs, registrars and judges' associates, should be ineligible for jury service.⁸³⁵

7.266 The Department of Justice and Attorney-General could 'foresee no difficulties' with the proposal for court officers to be made ineligible for jury service. The Department suggested that, in addition to the persons mentioned in the proposal, Supreme and District Court bailiffs should also be ineligible 'given their proximity to Judges and legal practitioners'.⁸³⁶

831 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 61–6, Rec 26, 28, 30 and 31.

832 Ibid 63, 65, Rec 27 and 29. The Law Reform Commission of Ireland has also queried whether court reporters and officers attached to a court are sufficiently connected to the criminal justice system to warrant their continued ineligibility from jury service: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.63]–[3.66].

833 See Juries Legislation Amendment Bill 2010 (WA) cll 10, 36.

834 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.219], Proposal 7-24.

835 Submission 52.

836 Submission 56.

The Commission's view

7.267 Having regard to the need for the jury to be, and be seen to be, independent of the judicial arm of government, the Commission considers that the officers of any court of record in Queensland, including the Supreme Court, District Court and Magistrates Courts, should be ineligible for jury service for the duration of their office.⁸³⁷ This would include Sheriffs, bailiffs, shorthand reporters and recorders, and judges' associates. It would also include registrars who, in some courts, may exercise certain judicial or quasi-judicial powers. This is consistent with Recommendation 7-1 at [7.34] above and with the exclusion of officers of the High Court, Federal Court, Family Court and Federal Magistrates Court.

Recommendation

7.268 The Commission makes the following recommendation:

7-18 The *Jury Act 1995 (Qld)* should be amended to provide that officers of a court of record in Queensland,⁸³⁸ including registrars, Sheriffs, bailiffs, shorthand reporters and recorders, and judges' associates, are ineligible for jury service.

Justices of the peace with power to constitute a court

7.269 Under the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)*, a person may be appointed as either a justice of the peace (magistrates court) or a justice of the peace (qualified).⁸³⁹ Those justices have limited powers to constitute a court for the purpose of a proceeding.

7.270 Justices of the peace (magistrates court) may:⁸⁴⁰

- Hear and determine a charge of a simple offence or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886 (Qld)* in a case where the defendant pleads guilty;
- Conduct an examination of witnesses in relation to an indictable offence under the *Justices Act 1886 (Qld)*; and

⁸³⁷

The Commission's recommendation is not intended to refer to a person who is admitted to the legal profession in Queensland and who is thereby made an officer of the Supreme Court, but is limited to those office-holders and employees who are responsible for aspects of the court's administration, including registrars who are conferred with judicial or quasi-judicial powers: see n 819 above. The exclusion of lawyers from jury service is discussed earlier in this chapter.

⁸³⁸

This does not refer to a person who is admitted to the legal profession in Queensland and is an officer of the Supreme Court under s 38(1)–(2) of the *Legal Profession Act 2007 (Qld)*.

⁸³⁹

Justices of the Peace and Commissioners for Declarations Act 1991 (Qld) s 15(2).

⁸⁴⁰

Justices of the Peace and Commissioners for Declarations Act 1991 (Qld) s 29(1), (4), (7).

- Take or make a procedural action or order, such as charging a defendant, issuing a warrant, or granting bail.⁸⁴¹

7.271 Additionally, justices of the peace (magistrates court) in Indigenous and remote communities, who are appointed under Chapter 58A of the Criminal Code (Qld), may hear and determine certain indictable offences summarily where the defendant pleads guilty.⁸⁴²

7.272 Justices of the peace (qualified) are limited to taking or making a procedural action or order.⁸⁴³

7.273 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) also confers powers on ex-officio justices of the peace.

7.274 By virtue of their judicial office, judges and magistrates hold office under that Act as justices of the peace without further appointment and have all of the powers that are conferred on justices of the peace and commissioners for declarations under the *Justices Act 1886* (Qld) or any other Act.⁸⁴⁴

7.275 Registrars of the Supreme Court, District Court and Magistrates Courts also hold office as justices of the peace without further appointment. A registrar who is an Australian lawyer holds office, and has the same powers, as a justice of the peace (magistrates court). A person who is a registrar but who is *not* an Australian lawyer holds office, and has the same powers, as a justice of the peace (qualified).⁸⁴⁵

7.276 Justices of the peace are excluded from jury service in a number of Australian jurisdictions. Justices of the peace who perform court duties are excluded in South Australia, justices who may constitute a court of summary jurisdiction under the *Justices Act 1959* (Tas) are excluded in Tasmania, and bail justices are excluded in Victoria.⁸⁴⁶

841 A 'procedural action or order' is defined in *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 3 to mean:

an action taken or order made for, or incidental to, proceedings not constituting a hearing and determination on the merits of the matter to which the proceedings relate, for example the charging of a defendant, the issue of a warrant, the granting of bail, the remand of a defendant or the adjournment of proceedings.

842 Criminal Code (Qld) s 552C.

843 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (3), (7). A 'procedural action or order' is defined in s 3 of that Act to include, for example, the charging of a defendant, the issue of a warrant, the granting of bail, the remand of a defendant or the adjournment of proceedings: see n 841 above.

844 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 19(1), 29(1), (2), (6)(c). Judges and magistrates continue as ex-officio justices of the peace after they have retired or resigned from judicial office: s 19(1A). The Commission has recommended that judges and magistrates should be ineligible for jury service while in office (see [7.95] above) and for three years thereafter (see [7.336] below).

845 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 19(2), 29(3), (4), (7).

846 *Juries Act 1927* (SA) s 13(c), sch 3 cl 2; *Juries Act 2003* (Tas) s 6(3), sch 2 cl 2(c); *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(d). See also *Juries Act 1981* (NZ) s 8(e) which excludes justices who are available from time to time to exercise the summary jurisdiction of District Courts.

7.277 At present, the legislation in Western Australia also excludes ‘justices of the peace’. Amendments have recently been proposed, however, to remove that exclusion.⁸⁴⁷ The Law Reform Commission of Western Australia had earlier recommended that, although justices of the peace should generally become eligible for jury service, those who have exercised the jurisdiction of the magistrates court in the five years prior to being summoned should continue to be excluded.⁸⁴⁸

7.278 Except where they fall within another category of ineligibility, justices of the peace are not excluded from jury service in Queensland.

7.279 At present, there are 34 014 justices of the peace (qualified) and 726 justices of the peace (magistrates court) appointed in Queensland.⁸⁴⁹ This does not include those persons who hold office as justices of the peace ex-officio.

Discussion Paper

7.280 In its Discussion Paper, the Commission noted that some justices of the peace have jurisdiction, among other things, to deal with simple offences under the *Justices Act 1886* (Qld).⁸⁵⁰ The Commission sought submissions on the possible exclusion of court officers,⁸⁵¹ but did not specifically seek submissions on the exclusion of justices of the peace. None of the respondents to the Discussion Paper commented on this issue.

The Commission’s view

7.281 In light of Recommendation 7-1 at [7.34] above, the Commission generally considers that justices of the peace who perform judicial functions should not be permitted to serve on a jury.

7.282 Because of the nature and extent of their powers, the Commission considers that persons who are appointed as justices of the peace (magistrates court) under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), including those who are appointed under Chapter 58A of the Criminal Code (Qld), should be ineligible for jury service. Since they comprise a relatively small number of people, their exclusion would not have a significant impact on the jury pool. Registrars who are ex-officio justices of the

⁸⁴⁷ See *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1 cl 2(d) which is proposed to be repealed by Juries Legislation Amendment Bill 2010 (WA) cl 10, 36.

⁸⁴⁸ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 57–58, Rec 24.

⁸⁴⁹ Information provided by the Justices of the Peace Branch, Department of Justice and Attorney-General, 19 January 2011.

⁸⁵⁰ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.214].

⁸⁵¹ *Ibid* [7.219], Proposal 7-24.

peace (magistrates court) will also be ineligible under the Commission's recommendation for court officers to be excluded.⁸⁵²

7.283 Justices of the peace (qualified) may exercise more limited judicial powers. Ex-officio justices of the peace (qualified), who work as court registrars and are perhaps more likely to exercise those judicial powers, will be excluded under the Commission's recommendation to make court officers ineligible for jury service.⁸⁵³

7.284 As noted above, appointed justices of the peace (qualified) comprise a vast number of people. At approximately 34 000, the number of appointed justices of the peace (qualified) in the community exceeds the number of Queensland judges, magistrates, practising solicitors, practising barristers and police officers combined.⁸⁵⁴ The automatic exclusion of those persons would therefore significantly diminish the size and diversity of the jury pool. On balance, the Commission considers that appointed justices of the peace (qualified) should remain eligible for jury service. Concerns about a person's appropriateness to serve because of his or her activities as an appointed justice of the peace (qualified) can be adequately dealt with on a case-by-case basis by the provisions for excusal, challenge and discharge.

Recommendation

7.285 The Commission makes the following recommendation:

7-19 The *Jury Act 1995 (Qld)* should be amended to provide that a person who is a justice of the peace (magistrates court) appointed under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* is ineligible for jury service.

EXCLUSION AFTER LEAVING AN OFFICE OR POSITION

7.286 The preceding part of this chapter examined the circumstances in which persons should be ineligible on the basis that they are currently employed or engaged in a particular occupation or hold a particular office. This part of the chapter considers whether former members of any of those occupations or offices should also be ineligible.

⁸⁵² A registrar of the Supreme Court, District Court or Magistrates Court who is an Australian lawyer holds office as a justice of the peace (magistrates court) without further appointment: *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* s 19(2)(a)–(c). The Commission has recommended, at [7.268] above, that officers of a court of record in Queensland, including registrars, should be ineligible for jury service.

⁸⁵³ See n 852 above.

⁸⁵⁴ This comparison is based on figures quoted throughout this chapter: see [7.86], [7.151], [7.190] above.

Permanent exclusion

7.287 At present in Queensland, section 4(3) of the Act permanently excludes former judges and magistrates, former presiding members of the Land and Resources Tribunal, and former police officers from jury service:

(3) The following persons are not eligible for jury service—

...

(d) a person who is or has been a judge or magistrate (in the State or elsewhere);

(e) a person who is or has been a presiding member of the Land and Resources Tribunal;

...

(g) a person who is or has been a police officer (in the State or elsewhere);

...

7.288 Section 4(3)(h) and (i) of the Act also provides that a ‘detention centre employee’ or ‘corrective services officer’ is ineligible for jury service. As noted earlier, the definitions of those categories in Schedule 3 of the Act extend this to former detention centre employees and former corrective services officers in Queensland or another State.⁸⁵⁵

7.289 The remaining categories of occupational ineligibility under section 4(3) of the Act apply only during the currency of the person’s office or occupation.

7.290 Few of the other jurisdictions provide any categories of permanent ineligibility, and the trend has been away from lifetime exclusions.

7.291 At present in Western Australia, lifetime exclusions apply to judicial officers, lawyers and certain other office-holders.⁸⁵⁶ The Law Reform Commission of Western Australia has recommended, however, that ‘no occupation or office should render a person permanently ineligible for jury service’,⁸⁵⁷ and amendments have been introduced into parliament to remove all lifetime exclusions.⁸⁵⁸ In the LRCWA’s view, the need for jurors to be, and be seen to be, independent does not require permanent ineligibility.

⁸⁵⁵ See nn 531 and 532 above.

⁸⁵⁶ *Juries Act 1957* (WA) s 5, sch 2 pt 1. Persons who have at any time held judicial office are also ineligible in Ireland: *Juries Act 1976* (Ireland) s 7, sch 1 pt 1.

⁸⁵⁷ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 51, Rec 18.

⁸⁵⁸ See *Juries Legislation Amendment Bill 2010* (WA) cl 10, 36.

7.292 The legislation in New South Wales also provides for the permanent exclusion of certain persons, including judicial officers, coroners, and police officers.⁸⁵⁹ Amendments made by the *Jury Amendment Act 2010* (NSW) will, however, remove these lifetime exclusions in favour of shorter periods of ineligibility,⁸⁶⁰ giving effect to the recommendations of the NSW Law Reform Commission.⁸⁶¹

Discussion Paper

7.293 In its Discussion Paper, the Commission expressed the provisional view that, in general, no category of occupational ineligibility should be permanent.⁸⁶²

7-3 No occupation, office or profession should render a person permanently ineligible for jury service.

7.294 The Commission also proposed that former presiding members of the Land and Resources Tribunal should no longer be ineligible.⁸⁶³

Consultation

7.295 Most of the respondents who commented on this issue suggested that permanent exclusion should be removed for all or some categories of occupation.

7.296 The Department of Justice and Attorney-General agreed that no occupation, office or profession should render a person permanently ineligible for jury service. With respect to the eligibility of retired judges, the Department queried whether the receipt of a judicial pension by a retired judge would 'potentially lead to a suggestion of potential bias by the parties'.⁸⁶⁴

7.297 Two respondents, including the Queensland Retired Police Association Inc, also submitted that the permanent exclusion of former police officers should be removed.⁸⁶⁵ One of those respondents, who left the police service more than thirty years ago, questioned why he should be 'automatically suspected of bias over [his] occupation so many years ago'.⁸⁶⁶ The Queensland Police Service did not comment on whether former police officers should continue to be excluded.

859 See *Jury Act 1977* (NSW) s 6(b), sch 2 cl 10 to be repealed by *Jury Amendment Act 2010* (NSW).

860 *Jury Act 1977* (NSW) s 6, sch 1 to be inserted by *Jury Amendment Act 2010* (NSW). The amendments also provide for a limited number of excusals as of right that particular persons may claim when summoned, but these apply only while the person is actually practising, employed or engaged in the relevant occupation or profession: *Jury Act 1977* (NSW) s 7, sch 2 to be inserted by *Jury Amendment Act 2010* (NSW).

861 See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 4.

862 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.31], Proposal 7-3.

863 Ibid [7.106], Proposal 7-12.

864 Submission 56.

865 Submission 53. This respondent submitted that a person who has been, in the preceding three years, a police officer should be ineligible.

866 Submission 29.

7.298 A submission from a member of the Land Court expressed the view that former members of the Land and Resources Tribunal should be made eligible.⁸⁶⁷ The Queensland Law Society also agreed that former members of the Land and Resources Tribunal should be eligible.⁸⁶⁸

7.299 The Department of Communities submitted, however, that former detention centre employees should continue to be ineligible.⁸⁶⁹ Similarly, the Department of Community Safety expressed the view that former corrective services officers should remain ineligible.⁸⁷⁰

The Commission's view

7.300 In the Commission's view, permanent or lifetime exclusion from jury service is too extreme a response to concerns about the need for juries to be, and be seen to be, independent and impartial. Those ends need to be balanced against the goals of ensuring wide participation in jury service and increasing the pool of potential jurors. Having regard to the Commission's general position in Recommendation 7-1 at [7.34] above, the Commission considers that it is unnecessary to exclude persons in certain occupations for life. People may change careers and may be employed in an ineligible occupation for a short time only. It is arguably unfair to exclude those persons permanently from the civic obligation of jury service as a consequence of their former employment.

7.301 The Commission considers that the permanent ineligibility of former judges and magistrates, former presiding members of the Land and Resources Tribunal,⁸⁷¹ former police officers, and former detention centre employees and corrective services officers should be removed, and that no other categories of occupational exclusion should be made permanent.

7.302 Although permanent exclusion goes too far, the Commission has nonetheless reached the view that, in order to maintain the independence, impartiality and non-specialist composition of the jury, persons in some ineligible occupations should continue to be ineligible for a limited period after leaving their office or position: see the discussion beginning at [7.327] below.

Recommendations

7.303 The Commission makes the following recommendations:

867 Submission 34.

868 Submission 52.

869 Submission 35.

870 Submission 54.

871 The Land and Resources Tribunal has been abolished with effect from 31 December 2011: see [7.98] above.

7-20 No occupation, office or profession should render a person permanently ineligible for jury service.

7-21 The *Jury Act 1995 (Qld)* should be amended to remove the ineligibility of former presiding members of the Land and Resources Tribunal and to remove the permanent ineligibility of former judges and magistrates, former police officers, former detention centre employees, and former corrective services officers.

Exclusion for a limited period after leaving office

7.304 In some jurisdictions, ineligibility, whilst not permanent, may persist for a certain time after the person has left the particular office or profession.

7.305 For example, in Victoria, most of the categories of occupational exclusion apply to a person who 'is or, within the last 10 years, has been' in an excluded occupation. This applies, among others, to judicial officers, lawyers and police officers, as well as to the Governor and Members of Parliament.⁸⁷² A post-job extension of ineligibility for 10 years also applies in the Northern Territory, to holders of judicial office,⁸⁷³ and in Tasmania, to judicial officers and police officers.⁸⁷⁴

7.306 At present in Western Australia, several of the occupational categories of exclusion continue to apply for five years after the person has left the occupation. Thus, for example, 'a person who is or has been, within a period of five years before being summoned to serve as a juror', a police officer, a justice of the peace, a Sheriff or bailiff, an officer of the Corruption and Crime Commission, a member of the Prisoners Review Board, or a Member of Parliament, is ineligible for service.⁸⁷⁵

7.307 The Law Reform Commission of Western Australia recommended that, in order to 'preserve public confidence in the impartiality of the criminal justice system' and the independence of the jury, the additional five year period should continue to apply to certain groups — including parliamentarians, judicial officers, legal

⁸⁷² *Juries Act 2000 (Vic)* s 5(3), sch 2 cl 1. The Juries Amendment (Reform) Bill 2010 (Vic) was introduced into parliament on 22 June 2010. It proposed to reduce the additional period of exclusion that applies to some occupational categories from 10 years to five years, but the Bill lapsed before it was considered by the Legislative Council. The introduction of the Bill was preceded by a Discussion Paper: Victoria, Department of Justice, *Jury Service Eligibility*, Discussion Paper (2009).

⁸⁷³ *Juries Act (NT)* s 11(1), sch 7. Former members of the judiciary are also excluded for 10 years in Scotland: *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt 1. The Hong Kong Law Reform Commission has also recommended the exclusion of judges and judicial officers while they hold office and for 10 years thereafter: Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.98]–[5.102], Rec 8(2).

⁸⁷⁴ *Juries Act 2003 (Tas)* s 6(3), sch 2.

⁸⁷⁵ *Juries Act 1957 (WA)* s 5(a)(i), sch 2 pt 1 cl 2. The remaining categories of occupational exclusion in Western Australia, which include judicial officers, presently apply permanently: s 5(a)(i), sch 2 pt 1 cl 1. Similarly, in Scotland, persons who are excluded because of their connection with the administration of justice (other than judicial officers who are ineligible for 10 years after leaving office) are excluded for five years after leaving office: *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt 1.

practitioners, police officers, members of prisoner review boards, persons whose work involves the supervision of offenders or security of custodial facilities, the Corruption and Crime Commissioner, registrars and Sheriffs.⁸⁷⁶

7.308 Under the Juries Legislation Amendment Bill 2010 (WA), however, people who are excluded from jury service because of their office or occupation will be excluded only whilst they hold that office or remain in that occupation.⁸⁷⁷ In combination with a reduction in the number of occupational exclusions, this is intended to ‘increase community representation on juries’.⁸⁷⁸

7.309 The NSW Law Reform Commission also recommended that, although occupational ineligibility should no longer be permanent, it should apply to former members of some excluded occupations for a period of three years — namely, former judicial officers and certain public sector lawyers, persons in law enforcement and criminal investigation and persons with access to, or information about, inmates.⁸⁷⁹ Subsequent amendments made by the *Jury Amendment Act 2010* (NSW) will provide for all persons who are excluded on the basis of their office or occupation to become eligible after three years of leaving the position.⁸⁸⁰

7.310 The extension of ineligibility for a given time after a person has left an occupation or office represents an intermediate position between lifetime exclusion, and exclusion only for the time a person holds office. It highlights the tension between the need for juries to be, and be seen to be, independent and impartial on the one hand, and the goals of representativeness and wide participation in jury service on the other.

7.311 The NSW Law Reform Commission noted that removing the categories of permanent exclusion in favour of an additional three year period of exclusion would improve representativeness whilst allowing ‘a reasonable period of absence’ from a person’s former direct contact with the criminal justice system.⁸⁸¹

7.312 The Law Reform Commission of Western Australia was also concerned to allow a period of time following employment for people to become ‘sufficiently removed’ from their former occupation and to ‘overcome any perceptions of

⁸⁷⁶ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 50–51.

⁸⁷⁷ See Juries Legislation Amendment Bill 2010 (WA) cll 10, 36. The Bill also proposes to insert *Juries Act 1957* (WA) s 34I which will provide for a person to be excused on the basis that the person ‘would not be indifferent as between the parties in a trial’.

⁸⁷⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 9709 (Charles Porter, Attorney General).

⁸⁷⁹ See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 4.

⁸⁸⁰ See *Jury Act 1977* (NSW) s 6, sch 1 to be inserted by *Jury Amendment Act 2010* (NSW). The amendments also provide for a limited number of excusals as of right that particular persons may claim when summoned, but these will apply only while the person is actually practising, employed or engaged in the relevant occupation or profession: *Jury Act 1977* (NSW) s 7, sch 2 to be inserted by *Jury Amendment Act 2010* (NSW).

⁸⁸¹ Eg New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.13]–[4.14], [4.45], [4.72].

partiality attaching to an occupation'.⁸⁸² In its view, public confidence in the system, and the appearance of independence and impartiality, require an additional period of exclusion.⁸⁸³

7.313 It is argued that, for a time after leaving office, people will retain the expertise, knowledge, relationships and potential biases (or appearance of bias) that gave rise to their initial exclusion, and only after a sufficient period will people's connection and association with their former roles have diminished. Of particular concern is the need for juries not only to be, but to be seen to be, independent and impartial.⁸⁸⁴

7.314 In the context of judges and lawyers, for example, the LRCWA commented:⁸⁸⁵

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', the Commission cannot see how this perception would necessarily lose validity for lawyers immediately upon ceasing of practice.

7.315 It was also noted, for instance, that an additional exclusionary period (of five years) would allow time for former lawyers 'to regain more of a layperson's approach', to 'remove lawyers from current knowledge of counsel and judicial officers' and to 'reduce the potential for client conflict'.⁸⁸⁶

7.316 The NSWLRC similarly noted, in the context of police officers, that:⁸⁸⁷

It is a fact that many members of the core law enforcement agencies, and particularly the NSW Police Force, hold such positions for relatively short periods, and that career change is now very common. After a sufficient period, such people should be free of the attitudes, associations and access to information that could lead to actual or perceived bias. (note omitted)

882 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 54, 72.

883 Ibid 50.

884 See generally New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.13]–[4.14], [4.45], [4.72]; and Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 50, 54, 72, 60–61, 65, 66, 68–9. See also Department of Justice (Victoria), *Jury Service Eligibility*, Discussion Paper (2009) 12; Legislation Review Committee (Parliament of New South Wales), *Legislation Review Digest No 8 of 2010* (2010) [43].

885 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 60.

886 Ibid 61 quoting from Submission 39 made to that Commission.

887 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.72].

7.317 There does not appear to be any ‘obvious rationale’⁸⁸⁸ for deciding on the particular length of the exclusionary period and, as noted above, jurisdictions have variously adopted three, five and ten year periods. The period should be sufficient to address concerns about the perception of independence and impartiality, and not so long as to restrict the jury pool unnecessarily.

Discussion Paper

7.318 In its Discussion Paper, the Commission noted that, for some occupational categories, there may be cause to extend ineligibility for a short time after a person has retired from the occupation, and sought submissions on whether a person should be ineligible for jury service if, in the preceding three years, the person has been:⁸⁸⁹

- a judge or magistrate;
- a Director or Deputy Director of Public Prosecutions, Crown Prosecutor, Crown Solicitor, Deputy Crown Solicitor, Crown Counsel, Assistant Crown Solicitor or a lawyer or paralegal employed or engaged in the public or private sector in the provision of legal services in criminal cases;
- a police officer or a detention centre employee or corrective services officer; or
- a Commissioner of the Crime and Misconduct Commission, or a person employed or engaged by the Crime and Misconduct Commission other than in a clerical, administrative or support staff role.

Consultation

7.319 The submissions were divided on the issue of whether ineligible persons who have held certain offices or been in certain occupations should also be ineligible for jury service for a limited period after leaving the office or occupation.

7.320 The Queensland Law Society submitted that ineligibility should be extended for *five* years for a number of occupational groups. In its view, this should apply to judges and magistrates, police officers, detention centre employees, corrective services officers, Parole Board members, Commissioners and officers of the Crime and Misconduct Commission and those persons ‘working in Government offices of the criminal justice system’ who are listed in Proposal 7-15 of the Discussion Paper,⁸⁹⁰ including Crown prosecutors and Crown solicitors.⁸⁹¹ In relation to former judges and magistrates, this respondent explained that:⁸⁹²

⁸⁸⁸ Department of Justice (Victoria), *Jury Service Eligibility*, Discussion Paper (2009) 12.

⁸⁸⁹ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.32], [7.86], [7.149], [7.172], [7.180], [7.212], Questions 7-9, 7-16, 7-18, 7-20 and 7-23.

⁸⁹⁰ See [7.168] above.

⁸⁹¹ Submission 52.

⁸⁹² *Ibid.*

the period of three years is an insufficient period of time for a retired judge or magistrate to return to jury service. The risk that such an experienced person may overwhelm deliberations of a jury does not fade quickly and we submit that a period of not less than five years is more appropriate.

7.321 The Crime and Misconduct Commission also submitted that former Commissioners and staff of that Commission should be ineligible for jury service for *five* years after leaving that role. In this respondent's view, the proposed period of three years is 'too short an exclusion period' for people who have previously been employed or engaged by the Crime and Misconduct Commission. It noted in this regard that criminal investigations and proceedings may take longer than three years to resolve.⁸⁹³

7.322 As noted above, the Department of Justice and Attorney-General queried whether the receipt of a judicial pension by a retired judge would 'potentially lead to a suggestion of potential bias by the parties', although it did not otherwise comment on whether former judges should be ineligible for a particular time. It submitted, however, that the persons listed in Proposal 7-15, including Crown prosecutors and Crown solicitors, as well as the Public Defender and Deputy Public Defender, should be ineligible for jury service for at least three years after they have left the particular office or role:⁸⁹⁴

as a number of criminal prosecutions may potentially be active before the courts for in excess of three years there is the potential for conflicts to arise.

7.323 In its submission to the Discussion Paper, the Queensland Retired Police Association Inc expressed the view that former police officers should become eligible for jury service after three years of ceasing to hold such office:⁸⁹⁵

Further to, and consistent with, our preliminary submissions, this Association is of the view that former police officers should be eligible for jury service where the person has ceased to perform policing duties for a period of three (3) years.

In this regard, this Association supports the proposal at 7-17 limiting ineligibility for jury service in section 4(3)(g) of the *Jury Act 1995* to servicing police officers (in Queensland and elsewhere) and further agrees with the question posed at 7-18 limiting the period of ineligibility as it applies to former police officers to three years. (emphasis in original)

7.324 In its preliminary submission to the Commission, that respondent noted that many police officers leave the police service after serving for only a few years, the training and experience of former police officers would make them effective jurors, and it is discriminatory against, and an affront to, former police officers to prevent them from serving on juries if they wish.⁸⁹⁶ As noted above, the Queensland Police Service did not comment on whether former police officers should continue to be ineligible.

893 Submission 51.

894 Submission 56.

895 Submission 53.

896 Submission 17.

7.325 However, two other respondents considered that certain offices or occupations should render a person permanently ineligible.

7.326 The Department of Communities did not support the proposal to remove the permanent ineligibility of former detention centre employees in favour of a shorter period of exclusion. It submitted that former detention centre employees should continue to be ineligible for jury service.⁸⁹⁷ The Department of Community Safety also considered that former corrective services officers should remain ineligible, commenting that:⁸⁹⁸

detention centre employees have privileged information regarding young offenders detained within a centre and these young people may become adult offenders. However, a detention centre employee would retain this information into retirement and this potentially hinders their ability to be impartial during proceedings.

The Commission's view

7.327 The Commission considers that permanent or lifetime exclusion goes beyond what is necessary and works against the opening up of jury service to a wider, more representative pool of people.

7.328 The Commission is concerned, however, that some excluded persons are so directly and integrally connected with the administration of the criminal justice system or the judicial arm of government that, upon leaving office, they would continue to be seen as specialists in the system until some reasonable period of time has passed.

7.329 In the Commission's view, this applies to judges and magistrates and members of other courts of record, those public sector and criminal lawyers who are to be excluded while in office, police officers, commissioners and officers of the Crime and Misconduct Commission, the penal administration officers and employees who are to be excluded while in office, court officers, and appointed justices of the peace (magistrates court).

7.330 The association in the public mind of those persons with their former roles would not disappear immediately upon their retirement. As a consequence, their presence on a jury before a reasonable period has elapsed would undermine the non-specialist composition, and perceived independence and impartiality, of the jury. A person who is a retired judge today will be no less seen by other jurors and members of the public as being a judicial and legal specialist than when the person was in office the day before.

7.331 It is anticipated that, in practice, if all people belonging to an excluded occupation were to become eligible for jury service immediately upon leaving that occupation, much time would be spent in dealing with objections to their service. Even if not challenged, it would be expected that such persons would disclose the

897 Submission 35.

898 Submission 54.

fact of their recent occupation or office to the court and would be discharged because of concerns about their ability to be, and be seen to be, impartial.

7.332 On the other hand, if the automatic exclusion of those persons continued for some limited period of time after they have left the office or occupation, their connection and association with their former roles would have diminished and there would be less concern about their presence on a jury. Given the relatively small numbers of people affected, the Commission does not consider that an additional exclusionary period would have a significant detrimental impact on the jury pool, provided it applied for a short time only.

7.333 Fixing a particular period of exclusion is partly an arbitrary exercise, but the principles of representativeness and wide participation suggest that the shortest appropriate period should be chosen. In the Commission's view, the critical period is those few years immediately after the person has left the office or occupation.

7.334 On balance, the Commission considers that an additional period of exclusion for three years is appropriate and should apply to a person who has been a member of a court of record, including a judge or magistrate, a public sector or criminal lawyer who is excluded while in office, a police officer, a commissioner or officer of the Crime and Misconduct Commission, a penal administration officer or employee who is excluded while in office, or an appointed justice of the peace (magistrates court).

7.335 The Commission also considers that the excusal provision it has recommended at [7.181] above for criminal lawyers who are not otherwise ineligible should also apply for three years after the person has ceased to be employed or engaged in the provision of legal services in criminal cases.

Recommendations

7.336 The Commission makes the following recommendations:

- 7-22 The *Jury Act 1995* (Qld) should be amended to provide that a person is ineligible for jury service if, in the preceding three years, the person has been:**
- (a) a judge or magistrate, an acting judge or magistrate, or a member of another court of record, in Queensland or elsewhere;**
 - (b) the holder of the office of Director of Public Prosecutions, Acting Director of Public Prosecutions, or Deputy Director of Public Prosecutions;**

- (c) an Australian lawyer appointed or employed by the Office of Director of Public Prosecutions, including a person appointed as a Crown Prosecutor;
- (d) a member of the Legal Aid Board appointed under the *Legal Aid Queensland Act 1997* (Qld);
- (e) the Chief Executive Officer of Legal Aid appointed under the *Legal Aid Queensland Act 1997* (Qld);
- (f) an Australian lawyer employed or engaged by Legal Aid, including as a Public Defender;
- (g) an Australian lawyer employed or engaged by Crown Law, including as a Crown Solicitor, Senior Deputy Crown Solicitor, Deputy Crown Solicitor, Assistant Crown Solicitor, or Crown Counsel;
- (h) an Australian legal practitioner with specialist accreditation in criminal law;
- (i) an Australian legal practitioner who has nominated criminal law as an area of practice with a publicly accessible database or directory held by the Queensland Law Society or the Bar Association of Queensland;
- (j) a police officer, in Queensland or elsewhere;
- (k) a detention centre employee, or a person with corresponding functions under a law of another State;
- (l) a public service employee whose functions under the *Youth Justice Act 1992* (Qld) involve the supervision of a young person who is subject to a supervised, non-custodial court order, or a person with corresponding functions under a law of another State;
- (m) a corrective services officer under the *Corrective Services Act 2006* (Qld) or a person with corresponding functions under a law of another State;
- (n) a Commissioner of the Crime and Misconduct Commission, or person employed or engaged by the Crime and Misconduct Commission other than in a clerical, administrative or support staff role, or a person with corresponding functions under a law of another State;

- (o) an officer of a court of record in Queensland or elsewhere,⁸⁹⁹ including a registrar, Sheriff, bailiff, shorthand reporter or recorder, or judge's associate;
- (p) a justice of the peace (magistrates court) appointed under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

7-23 The *Jury Act 1995* (Qld) should be amended to provide that a person who is otherwise eligible for jury service is entitled to be excused from jury service, on written notice to the Sheriff, if the Sheriff is satisfied that the person has been, in the preceding three years, a government legal officer or an Australian legal practitioner employed or engaged in the provision of legal services in criminal cases.

SPOUSES OF EXCLUDED PEOPLE

7.337 In the Northern Territory, the 'spouse or a de facto partner' of a judge is excluded from jury service, and in South Australia, the 'spouses or domestic partners' of the Governor or Lieutenant Governor, Ministers of the Crown, judges and magistrates, justices of the peace who perform court duties, and police officers are ineligible for jury service.⁹⁰⁰

7.338 The NSW Law Reform Commission recommended that spouses should not be made ineligible for jury service, noting that any concerns that such a person would be unable to act impartially can be adequately dealt with by way of excusal for good cause or challenge during empanelment.⁹⁰¹ However, any such challenge could only take place if the challenging party were aware of the prospective juror's status in this regard.

Discussion Paper

7.339 In its Discussion Paper, the Commission proposed that:⁹⁰²

- 7-25 The spouses of people who are ineligible on the basis of occupation, office or profession should remain eligible for jury service.

⁸⁹⁹ This does not refer to a person who has been an officer of the Supreme Court under s 38(1)–(2) of the *Legal Profession Act 2007* (Qld) by virtue of his or her admission to the legal profession in Queensland.

⁹⁰⁰ *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 2.

⁹⁰¹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.99]–[4.104], Rec 21. Spouses are not excluded under the *Jury Act 1977* (NSW).

⁹⁰² Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.222], Proposal 7-25.

Consultation

7.340 The Queensland Law Society agreed that any spouse of a person who is ineligible on the basis of occupation, office or profession should remain eligible for jury service.⁹⁰³

7.341 Another respondent, who is a former legal secretary and the spouse of a former police officer, submitted, however, that spouses of police officers should be ineligible for jury service because of her perception that they would not be impartial.⁹⁰⁴

The Commission's view

7.342 In the Commission's view, a spouse (including a de facto partner)⁹⁰⁵ of a person who is ineligible on the basis of occupation, office or profession should continue to be eligible for jury service. It should not be presumed that a person is endowed with the views, prejudices or biases of his or her spouse or partner. If there is a matter of hardship or inconvenience for the person, or legitimate concern about the person's lack of impartiality, this can be dealt with on a case-by-case basis by way of excusal (or deferral), challenge or discharge.⁹⁰⁶

Recommendation

7.343 The Commission makes the following recommendation:

7-24 A spouse⁹⁰⁷ of a person who is ineligible on the basis of occupation, office or profession should remain eligible for jury service.

COMMONWEALTH EXCLUSIONS

7.344 Under Commonwealth legislation, a number of Commonwealth office-holders and employees are excluded from serving on any jury whether in a Federal, State or Territory court. Many of these exclusions are similar to the categories of occupational ineligibility that apply in some of the states and territories of Australia, and have been noted throughout this chapter.

⁹⁰³ Submission 52.

⁹⁰⁴ Submission 57.

⁹⁰⁵ Under the *Acts Interpretation Act 1954* (Qld) s 36, 'spouse' is defined to include 'de facto partner'.

⁹⁰⁶ As is explained in Chapter 10 below, the usual procedure after a jury has been sworn (but before the remainder of the jury panel has been discharged) is for the judge to ask the jurors whether there is any reason any of them feels that they cannot be, and by all fair-minded people be seen to be, impartial. If there is reason to doubt the impartiality of a juror, the judge may discharge the juror under s 46 of the *Jury Act 1995* (Qld).

⁹⁰⁷ See n 905 above.

7.345 The *Jury Exemption Act 1965* (Cth) excludes the following people.⁹⁰⁸

The Governor-General

Members of the Federal Executive Council

Justices of the High Court and of the courts created by the Parliament

Senators

Members of the House of Representatives

Members of Fair Work Australia

Members and special members of the Australian Federal Police

Members of the Defence Force other than members of the Reserves

Members of the Reserves who are rendering continuous full time service

7.346 Regulations 5 and 7 of the *Jury Exemption Regulations 1987* (Cth) also contain exclusions for people in occupations relating to the administration of justice and public administration, such as officers and employees of the Office of the Commonwealth Director of Public Prosecutions or Commonwealth government departments who are involved in the provision of legal professional services; officers and employees of the High Court, the Federal Court, the Family Court or the Federal Magistrates Court; Private Secretaries and advisors to Ministers of State; and Clerks of the Senate or the House of Representatives.

7.347 Regulation 4 also excludes *all* Commonwealth public servants of sufficiently senior rank:

4 Exemption of certain Commonwealth employees

A person holding, or for the time being performing the duties of, an employment as a Commonwealth employee in respect of which the rate of salary equals or exceeds the rate of salary for the time being payable to an officer of the Australian Public Service occupying an office classified as Senior Executive Band 3 is exempt from liability to serve as a juror:

- (a) in Federal courts; and
- (b) in the courts of a specified Territory; and
- (c) in the courts of the States.

7.348 Commonwealth legislation also excludes masters and seamen of all ships,⁹⁰⁹ airline operating crew,⁹¹⁰ and employees of the Department of Primary Industries and Energy dealing with exotic disease outbreaks in Australia.⁹¹¹

⁹⁰⁸ *Jury Exemption Act 1965* (Cth) s 4, sch.

⁹⁰⁹ *Navigation Act 1912* (Cth) s 147.

⁹¹⁰ *Air Navigation Regulations 1947* (Cth) reg 150. See also s 8(1)(n), (u) of the former *Jury Act 1929* (Qld).

Senior Commonwealth public servants

7.349 Senior public servants of the Commonwealth are excluded from jury service in Queensland by Commonwealth legislation.⁹¹² Chief executives in the public service are also excluded in the Australian Capital Territory,⁹¹³ but, other than those employed in the criminal justice system,⁹¹⁴ public servants are not generally excluded under the legislation in any other Australian jurisdictions.

7.350 The exclusion of public servants under the Commonwealth legislation has been criticised as being unnecessarily broad.⁹¹⁵ The NSW Law Reform Commission expressed the view that ‘there is a compelling case for Commonwealth Public Servants sharing, with their State and Territory counterparts, the civic responsibilities of jury service’.⁹¹⁶ It recommended that the exclusion be reviewed to limit it ‘to those who have an integral and substantial connection with the administration of justice or who perform special or personal duties to the government’.⁹¹⁷

7.351 In Ireland, for example, a civil servant is entitled to be excused:⁹¹⁸

on a certificate from the head of his Department or Office that it would be contrary to the public interest for the civil servant to have to serve as a juror because he performs essential and urgent services of public importance that cannot reasonably be performed by another or postponed.

Discussion Paper

7.352 In its Discussion Paper, the Commission noted that the exclusion of senior Commonwealth public servants is very wide and proposed that:⁹¹⁹

7-26 The Queensland Government should press for a review of the exemption of all senior Commonwealth public servants under regulation 4 of the *Jury Exemption Regulations 1987* (Cth) to determine whether it can be narrowed or confined, having regard to the desirability of

911 *Jury Exemption Regulations 1987* (Cth) reg 6(2).

912 *Jury Exemption Regulations 1987* (Cth) reg 4. See also *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II.

913 *Juries Act 1967* (ACT) s 11(1) sch 2 pt 2.1.

914 See [7.223]–[7.229] above.

915 Eg New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986) [4.23]; A Freiberg, ‘Jury selection in trials of Commonwealth offences’ in M Findlay and P Duff (eds), *The Jury Under Attack* (1988) 112, 120; Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [2.11]; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1 [3.205].

916 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.23].

917 *Ibid* 5, Rec 27.

918 *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II. Under that provision, Heads of Government Departments and Offices are also entitled to be excused as of right.

919 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.232], Proposal 7-26.

keeping juries as representative as possible and that the burden of jury service be shared fairly.

Consultation

7.353 The Queensland Law Society agreed that ‘a review should be made of the exemption of senior Commonwealth Public Servants as suitable jurors’.⁹²⁰ The Department of Justice and Attorney-General also agreed with this proposal, expressing support for ‘any initiative to increase the number of potential jurors able to serve in the community’.⁹²¹

The Commission’s view

7.354 It is not within the Commission’s Terms of Reference to review the provisions of Commonwealth legislation dealing with liability to perform jury service. The Commission has, however, had regard to the occupational exclusions that apply under the Commonwealth legislation as part of its examination of the categories of occupational ineligibility that should apply in Queensland. It agrees with the view expressed by the NSW Law Reform Commission that the exclusion of all senior Commonwealth public servants from jury service in Australia is undesirably broad and should be reviewed.

Recommendation

7.355 The Commission makes the following recommendation:

7-25 The Queensland Government should press for a review of the exclusion of all senior Commonwealth public servants under regulation 4 of the *Jury Exemption Regulations 1987 (Cth)* to determine whether it can be narrowed or confined, having regard to the desirability of keeping juries as representative as possible, sharing the burden of jury service fairly among the community, and not unnecessarily restricting the right to serve on a jury.

920 Submission 52.

921 Submission 56.

Chapter 8

Exclusion on the Basis of Personal Attributes

INTRODUCTION	200
CURRENT GROUNDS OF INELIGIBILITY	200
THE BASIS FOR EXCLUSION	200
Competence	201
Non-discrimination	201
The need for balance	203
PERSONS 70 YEARS OR OLDER	203
NSWLRC's recommendations	205
LRCWA's recommendations	206
Discussion Paper	206
Consultation	207
The Commission's view	208
Recommendations	208
PERSONS WHO ARE UNABLE TO READ OR WRITE ENGLISH	209
NSWLRC's recommendations	213
LRCWA's recommendations	214
Discussion Paper	215
Consultation	216
The Commission's view	217
Recommendations	219
PERSONS WITH A PHYSICAL DISABILITY	220
Reasonable accommodation	223
NSWLRC's recommendations	225
LRCWA's recommendations	227
Discussion Paper	228
Consultation	229
The Commission's view	232
Recommendations	233
PERSONS WITH A MENTAL DISABILITY	234
NSWLRC's recommendations	237
LRCWA's recommendations	237
Discussion Paper	239
Consultation	239
The Commission's view	241
Recommendations	243
PERSONS OF RELIGIOUS VOCATION OR BELIEF	243
Discussion Paper	246
Consultation	246
The Commission's view	248
Recommendation	248

INTRODUCTION

8.1 As part of this review, the Commission is required to consider whether there are any categories of people currently eligible for jury service who should be made ineligible, and whether there are any categories of people currently ineligible where this is no longer appropriate. In relation to the latter, the Terms of Reference specifically ask the Commission to consider whether:⁹²²

the ineligibility of a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror remains appropriate, particularly in the context of persons who are profoundly deaf or have a significant hearing or sight impairment, having regard to the *Anti-Discrimination Act 1991* (Qld), the *Disability Discrimination Act 1992* (Cth), and the need to maintain confidence in the administration of justice in Queensland.

8.2 This chapter considers ineligibility (or other exclusion) on the basis of age, lack of understanding of English, physical disability and mental disability. It also considers whether there should be a specific excusal provision on the basis of religious vocation or belief. Chapter 9 considers the grounds for case-by-case excusal.

CURRENT GROUNDS OF INELIGIBILITY

8.3 At present, section 4(3)(j)–(l) of the *Jury Act 1995* (Qld) provides the following categories of ineligibility on the basis of personal attributes:

(3) The following persons are not eligible for jury service—

...

- (j) a person who is 70 years or more, if the person has not elected to be eligible for jury service under subsection (4);
- (k) a person who is not able to read or write the English language;
- (l) a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror;

...

THE BASIS FOR EXCLUSION

8.4 In Chapter 5 of this Report, the Commission identified a number of principles that should guide the review and reform of the rules of juror eligibility and selection. Of particular importance in this chapter are the principles of competence and non-discrimination.

⁹²²

See the Terms of Reference set out in Appendix A to this Report.

Competence

8.5 The right to a fair trial encompasses the right to a competent tribunal.⁹²³ Exclusions from jury service may thus be justified if a person is not capable of discharging the duties of a juror.

Non-discrimination

8.6 All people, regardless of disability, age or other distinction are entitled to participate in public and political life.⁹²⁴ Jury service is a basic civil obligation, and has even been characterised as a civil right. It follows that people ought not to be discriminated against in the opportunity to perform jury service by being excluded, without justification, on the basis of an attribute such as age, disability or religious belief.

8.7 The principles of non-discrimination and equality of opportunity are well established. The *Universal Declaration of Human Rights* expressly recognises, for example, that all people, 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', are equal before the law and are entitled to the same human rights and freedoms, including the right of equal access to public service and the right to take part in government.⁹²⁵ Freedom from discrimination on the basis of age, race, disability or religion is also upheld by a number of other specific United Nations declarations and conventions, which provide, among other things, that:⁹²⁶

- Older persons should remain integrated in society and should be able to seek and develop opportunities for service to the community.
- Persons belonging to national or ethnic, religious and linguistic minorities have the right to participate effectively in public life.
- Reasonable accommodation should be provided to promote equality and eliminate discrimination against people with disabilities.

⁹²³ Eg *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14(1) (entered into force 23 March 1976; entered into force in Australia 13 November 1980).

⁹²⁴ Ibid art 25. See also, for example, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12, art 29 (entered into force 3 May 2008; entered into force in Australia 16 August 2008).

⁹²⁵ *Universal Declaration of Human Rights*, arts 2, 6, 21, GA Res 217 (III) (10 December 1948). See also n 924 above.

⁹²⁶ Eg *United Nations Principles for Older Persons*, GA Res 46/91 (16 December 1991); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135 (18 December 1992); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969; entered into force in Australia 30 October 1975); *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI) (20 December 1971); *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX) (9 December 1975); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12, art 29 (entered into force 3 May 2008; entered into force in Australia 16 August 2008); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55 (25 November 1981). See generally Office of the United Nations High Commissioner for Human Rights, 'International Law' <<http://www2.ohchr.org/english/law/>> at 8 February 2011.

- If it is necessary, because of the severity of the disability, to restrict the rights of persons with a mental disability, proper legal safeguards against abuse must be used.
- Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

8.8 The *Anti-Discrimination Act 1991* (Qld) also prohibits unfair discrimination on the basis of age, race, impairment, or religious belief or activity.⁹²⁷ The Act's purpose is to promote equality of opportunity.⁹²⁸ Its focus is unfavourable and unreasonable treatment in certain areas of activity, such as work, accommodation and education, and including the administration of State laws and programs.⁹²⁹ Section 101 of the Act provides:

101 Discrimination in administration of State laws and programs area

A person who—

- (a) performs any function or exercises any power under State law or for the purposes of a State Government program; or
- (b) has any other responsibility for the administration of State law or the conduct of a State Government program;

must not discriminate in—

- (c) the performance of the function; or
- (d) the exercise of the power; or
- (e) the carrying out of the responsibility.

8.9 There are also some exemptions. For example, an act done for the benefit or welfare, or the promotion of equal opportunity, of a group of persons who are otherwise protected under the Act, is permissible,⁹³⁰ as is discrimination on the basis of a legal incapacity that is relevant to the transaction at hand.⁹³¹ For example, 'it is not unlawful for a bus operator to give travel concessions to pensioners or to give priority in seating to people who are pregnant or frail'.⁹³²

⁹²⁷ *Anti-Discrimination Act 1991* (Qld) ss 6, 7(f)–(i). See also, for example, *Disability Discrimination Act 1992* (Cth).

⁹²⁸ *Anti-Discrimination Act 1991* (Qld) s 6(1).

⁹²⁹ *Anti-Discrimination Act 1991* (Qld) ss 6, 9–11, 101.

⁹³⁰ *Anti-Discrimination Act 1991* (Qld) ss 104, 105.

⁹³¹ *Anti-Discrimination Act 1991* (Qld) s 112.

⁹³² *Anti-Discrimination Act 1991* (Qld) s 104, Example 1.

The need for balance

8.10 In considering the appropriateness of exclusions from jury service on the basis of personal attributes like age or disability, the principles of competence and non-discrimination must be balanced. The principle of representativeness, and the need for a fair sharing of the task of jury service, will also be relevant.

8.11 Throughout this chapter, the Commission has considered the grounds of ineligibility with these principles in mind, and has sought to strike the appropriate balance between them in each case.

8.12 In general, exclusion arising from a personal attribute should be based not on the possession of the attribute alone, but should only be based on the person's inability, because of that attribute and having regard to the assistance that can reasonably be provided to the person, to perform jury service competently. A right of excusal might also be justified, however, if it is for the benefit or assistance of the persons to whom it applies.

PERSONS 70 YEARS OR OLDER

8.13 In Queensland, a person who is 70 years or older is ineligible for jury service, *unless* he or she has elected to remain eligible.⁹³³ This is, uniquely, an 'opt-in' system, and is the only provision for voluntary jury service in Queensland.

8.14 People aged 70 years or more may elect, at any time, to be eligible for service by sending a signed notice to the Sheriff stating their full name, age and address, and that they elect to be eligible for service.⁹³⁴ The Commission understands that the number of people currently on the jury roll who are over 70 years and who have elected to be eligible for jury service is four.⁹³⁵

8.15 Alternatively, if a person receives a *Notice to Prospective Juror*, they may indicate on the return form that they are 70 years or older and do not wish to serve.⁹³⁶

8.16 The age of 70 years may have been chosen because it accords with the age of judicial retirement.⁹³⁷ A fixed upper age limit may also be easier to administer.

⁹³³ *Jury Act 1995* (Qld) s 4(3)(j), (4).

⁹³⁴ *Jury Regulation 2007* (Qld) s 4. The Commission understands that once a person reaches 70 years of age, the person is recorded on the courts' jury administration database as 'never available' for jury service, but that the system is updated if the Sheriff receives notice of the person's election to remain eligible: Information provided by the Department of Justice and Attorney-General, 25 February 2011.

⁹³⁵ Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

⁹³⁶ See generally *Jury Act 1995* (Qld) s 18. Ordinarily, if it appears that the person will be 70 years or older at the relevant sitting date, the person will not be sent a jury notice: Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

8.17 The Queensland provision was inserted in the Act in 1996. The explanatory notes to the amending legislation explained the reasoning in the following way:⁹³⁸

Automatic exemption of persons aged 70 years or over was recommended by the Litigation Reform Commission in its August 1993 Report on the Reform of the Jury System in Queensland. The qualification contained in this Bill allowing for such persons to elect to become eligible recognises that there are persons in that category who may wish to volunteer for, and are capable of undertaking, jury service. In this way, appropriate acknowledgment is accorded persons in this age category in the community.

8.18 The provision goes some way to addressing concerns about unfair discrimination and unnecessary reductions of the jury pool. However, it begins with an assumption of ineligibility, where people must take an active step to include themselves in the pool, rather than starting with an assumption of inclusion, with provision for people to seek to be taken out of the pool.

8.19 Previously in Queensland, all people over 70 were excluded from service under section 6(1) of the *Jury Act 1929* (Qld). Section 8(3) of that Act provided, however, that any 'senior male person' (defined to be between 65 and 70 years) could apply for 'exemption' by informing the Sheriff in writing that he 'desired to be exempt' from jury service.⁹³⁹

8.20 The position with respect to older people differs across the other Australian jurisdictions.

8.21 In South Australia, and now also in England and Wales, there is a fixed upper age limit of 70 years on jury service.⁹⁴⁰ If an older person under 70 years, who is not yet ineligible, does not wish to serve, he or she would need to apply for case-by-case excusal for reasonable, or good, cause. This was the approach preferred by Lord Justice Auld who noted that persons over 65 are of 'increasing number and better health'.⁹⁴¹

8.22 At present, Western Australia also has a fixed upper age limit of 70 years on jury service.⁹⁴² It also provides that persons 65 years or older are entitled to be excused as of right, although this is proposed to be repealed.⁹⁴³

937 Eg Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [2.9]. The compulsory retirement age for judges of the Supreme Court and District Court and magistrates is 70 years: see *Supreme Court of Queensland Act 1991* (Qld) s 23; *District Court of Queensland Act 1967* (Qld) s 14; *Magistrates Act 1991* (Qld) s 42.

938 Explanatory Notes, Jury Amendment Bill 1996 (Qld) 1.

939 Women of any age were similarly entitled to claim exemption under s 8(3) of the former *Jury Act 1929* (Qld).

940 *Juries Act 1927* (SA) s 11(b); *Juries Act 1974* (Eng) s 1(1)(a). See also *Jury Ordinance, Cap 3* (HK) s 4(1) (65 years). An upper age limit of 70 years has been recommended in Hong Kong: Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.12]–[5.15], Rec 1.

941 Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [36], and see [21].

942 *Juries Act 1957* (WA) s 5(a)(ii). This is proposed to be increased from 70 to 75 years: see Juries Legislation Amendment Bill 2010 (WA).

8.23 None of the other Australian jurisdictions provide for the automatic exclusion of persons over a certain age. Instead, most confer an entitlement on older persons to claim excusal on the basis of age alone. In Victoria, this applies to persons of ‘advanced age’.⁹⁴⁴ In the other jurisdictions, it applies, variously, to persons who are 60,⁹⁴⁵ 65,⁹⁴⁶ or 70⁹⁴⁷ years or older.

8.24 This approach is generally consistent with the recommendation of the Victorian Law Reform Committee that there be no upper age limit but a provision for persons over 70 years to claim excusal as of right. It noted that while persons over 65 years constituted a relatively small proportion of those summoned for service, they accounted for half of all applications for excusal. In its view, older people should not be automatically excluded from service — age and ability are only related in a minor way, and like others in the community older people should be represented in the jury system — but an exemption for older people is important to reduce inconvenience, anxiety and distress.⁹⁴⁸

8.25 The United Kingdom Ministry of Justice has also recently considered whether the upper age limit should be raised or abolished and whether to provide, in either case, a ‘right of self-excusals’ for people over 70 years, noting that some people will see the consequence of jury service as an unreasonable imposition while others may see a fixed age limit as an unfair exclusion.⁹⁴⁹

NSWLRC’s recommendations

8.26 Prior to amendments made by the *Jury Amendment Act 2010* (NSW), people 70 years or older were entitled as of right to be excused from jury service. That provision has now been removed, following the recommendation of the NSW Law Reform Commission.⁹⁵⁰

943 See *Juries Act 1957* (WA) s 5(c)(i), sch 2 pt 2 which is proposed be repealed by Juries Legislation Amendment Bill 2010 (WA).

944 *Juries Act 2000* (Vic) ss 8(3)(i), 9(4)(c). Prior to the enactment of the *Juries Act 2000* (Vic), the *Juries Act 1967* (Vic) provided that people over 65 years of age could be excused as of right.

945 *Juries Act 1967* (ACT) s 11(2), sch 2 pt 2.2.

946 *Juries Act* (NT) s 11(2); *Juries Act 1981* (NZ) s 15(2)(aa), 16(a). See also *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II; and the recommendation for a similar provision in Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.12]–[5.15], Rec 1. The NZ provision replaced the automatic disqualification of people over 65 and was introduced in 2000 following the recommendation of the Law Commission of New Zealand: see *Juries Amendment Act 2000* (NZ) s 9(2); Law Commission of New Zealand, *Juries in Criminal Trials: Part One*, Discussion Paper 32 (1998) [337].

947 *Juries Act 2003* (Tas) s 11(1). See also *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* ss 1(1A), 1A(3), sch 1 pt III which provide, pursuant to recent amendments, that there is no upper age limit on jury service for criminal trials but that a person who is 71 years or older is entitled to be excused as of right from service on a criminal jury.

948 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.165]–[3.167].

949 Ministry of Justice (United Kingdom), Office for Criminal Justice Reform, *The Upper Age Limit for Jury Service in England and Wales*, Consultation Paper CP05/10 (March 2010) [37]–[39].

950 See *Jury Act 1977* (NSW) s 7, sch 3 cl 8 to be repealed by *Jury Amendment Act 2010* (NSW).

8.27 The NSWLRC noted that ‘we have an active aging population, and there are many people in the community aged more than 70 years who are able to serve as jurors’. It considered it more appropriate for older people to be required to seek excusal for good cause, ‘for example, on the grounds of illness or other incapacity’. It also considered, however, that if most people over 75 would successfully apply for excusal, guidelines to facilitate excusal could be developed.⁹⁵¹

LRCWA’s recommendations

8.28 The Law Reform Commission of Western Australia also recommended the removal of the age-based entitlement to excusal; indeed, it expressed the view that there should be no excusals as of right on any basis.⁹⁵² However, it recommended the retention of an upper age limit (increased from 70 to 75 years) for jury service.⁹⁵³ In its view:⁹⁵⁴

an upper age limit can be applied (as is the case currently) at the time of compilation of jury lists from the electoral roll. This means that there is no increased administrative burden placed on the sheriff’s office and no distress caused to very elderly people who might otherwise receive a summons for jury duty. (note omitted)

8.29 The LRCWA argued that raising the age limit to 75 years may open opportunities to serve as jurors for retirees in regional areas and those who are barred from jury service for a certain period after retirement on the basis of their occupation, thus expanding the jury pool.⁹⁵⁵

8.30 Amendments have subsequently been introduced into parliament in Western Australia to give effect to these recommendations by increasing the upper age limit for jury service to 75 years⁹⁵⁶ and removing age as a basis for excusal as of right.⁹⁵⁷

Discussion Paper

8.31 In its Discussion Paper, the Commission expressed the provisional view that there should no longer be an upper age limit on jury service but that people who are 70 years or older should be entitled to opt out of jury service if they want

⁹⁵¹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.45]–[6.46].

⁹⁵² Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 45, 111, Rec 16(1) and 59.

⁹⁵³ *Ibid* 45, Rec 16(2).

⁹⁵⁴ *Ibid* 45.

⁹⁵⁵ *Ibid*.

⁹⁵⁶ See proposed new *Juries Act 1957* (WA) s 5(3)(a) to be inserted by Juries Legislation Amendment Bill 2010 (WA).

⁹⁵⁷ See *Juries Act 1957* (WA) s 5(c)(i), sch 2 pt 2 which is proposed to be repealed by Juries Legislation Amendment Bill 2010 (WA) cl 10, 36.

to, and without having to demonstrate a special reason. The Commission therefore made the following proposals on which it sought submissions:⁹⁵⁸

- 8-1 Section 4(3)(j) of the *Jury Act 1995* (Qld), which provides that a person who is 70 years or more is ineligible for jury service unless the person has elected to be eligible for jury service, should be repealed.
- 8-2 Section 4(4) of the *Jury Act 1995* (Qld) should be amended to provide that people who are 70 years of age or older may exempt themselves from serving as a juror for the jury service period or permanently by written notice to the Sheriff and without having to demonstrate any particular disability or other reason why they should be excused.
- 8-3 Section 4 of the *Jury Regulation 2007* (Qld) should be repealed.

Consultation

8.32 Several respondents agreed with the Commission's proposals for people who are 70 years or older to be made eligible for jury service but entitled to claim excusal as of right if they wish.⁹⁵⁹ The Ipswich City Council submitted that:⁹⁶⁰

Persons over the age of 70 should be eligible for jury service as of right. Juries should be representative of all members of the community, including the elderly.

8.33 Another respondent commented:⁹⁶¹

I am 71 and was dismayed and annoyed when I read earlier this year that I was ineligible for jury service. The article did not mention the opt-in provision.

8.34 Vision Australia agreed that persons over the age of 70 should be able to excuse themselves from service 'without having to demonstrate any particular disability or other grounds for seeking excusal'.⁹⁶²

8.35 The Queensland Law Society also agreed that persons over 70 years should be eligible for service but submitted that they should be required to 'show cause' why they should be excused, rather than entitled to claim automatic excusal solely on the basis of age.⁹⁶³

958 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [8.40]–[8.44], Proposals 8-1 to 8-3.

959 Submissions 36, 55, 58.

960 Submission 55.

961 Submission 36.

962 Submission 58.

963 Submission 52.

8.36 The Department of Justice and Attorney-General noted that ‘minor system changes to the Queensland Jury Administration System (QJAS) will be required’ to effect the proposed changes to the eligibility of people who are 70 years or older.⁹⁶⁴

The Commission’s view

8.37 In the Commission’s view, there should be no upper age limit on jury service. To impose an arbitrary cut-off on the basis of age is to fail to recognise the variation in abilities and willingness of older persons to serve as jurors. This is presently addressed, in part, by allowing older people to opt in for jury service. However, the Commission prefers that, as a matter of principle, they should be prima facie eligible, rather than ineligible, and entitled to seek excusal without the need to prove any particular disability or other condition that prevents them from carrying out the duties of a juror.

8.38 While it is not true to say that all, or even most, people over a certain age are likely to be frail or otherwise unsuitable for jury service, the Commission does consider that advanced age, and the inconvenience and possible difficulties associated with jury service for people of advanced age, should be recognised and accommodated.

8.39 On balance, the Commission is of the view that people who are 70 years or older should be entitled to claim excusal as of right from jury service for the whole or part of a jury service period or permanently. Those persons should not be required to show any particular disability or other reason why they should be excused. Whatever age is chosen for this exemption will be arbitrary; 70 years accords, however, with the retirement age of judges and magistrates and is preferable to an amorphous designation such as ‘advanced age’.

8.40 This is consistent with the position in most of the other Australian jurisdictions and in New Zealand. It can also be characterised as a form of favourable discrimination that is designed to assist and benefit older people and accord proper respect to the position of older people in the community. It would certainly not require that older people be excluded from jury service, and so would not infringe their rights and opportunity to participate in jury service, but it would allow people who have contributed to society for many years the opportunity to opt out of further service.

8.41 This approach also has the advantage that, once a person has claimed permanent excusal, his or her name can be removed from the relevant lists and the person will not be called for jury service again.

Recommendations

8.42 The Commission makes the following recommendations:

964

Submission 56.

- 8-1 Section 4(3)(j) of the *Jury Act 1995* (Qld), which provides that a person who is 70 years or more is ineligible for jury service unless the person has elected to be eligible for jury service, should be repealed.**
- 8-2 Part 4, Division 4 of the *Jury Act 1995* (Qld), which deals with excusals from jury service, should be amended to include a provision to the effect that a person who is 70 years or more is entitled to be excused from jury service for the jury service period or permanently on written notice to the Sheriff and without having to demonstrate any particular disability or other reason why the person should be excused.**
- 8-3 Section 4(4) of the *Jury Act 1995* (Qld) and section 4 of the *Jury Regulation 2007* (Qld) are unnecessary and should be repealed.**

PERSONS WHO ARE UNABLE TO READ OR WRITE ENGLISH

8.43 In Queensland, people who are ‘not able to read or write the English language’ are ineligible to serve as jurors.⁹⁶⁵

8.44 Similarly, to be eligible (or qualified) for service in other Australian jurisdictions, jurors must be able to ‘read and speak’,⁹⁶⁶ ‘communicate in or understand’,⁹⁶⁷ ‘understand’,⁹⁶⁸ or have ‘sufficient command of’⁹⁶⁹ English.

8.45 In contrast to Queensland, some jurisdictions require that jurors be able to understand English ‘adequately’ or sufficiently to carry out the duties of a juror.⁹⁷⁰ This links eligibility with a person’s actual ability to perform the functions of a juror and helps ensure that people from non-English speaking backgrounds are not unfairly excluded.

8.46 In Queensland, if a person receives a *Notice to Prospective Juror*, the person may indicate in the return form that he or she is unable to read or write English and is therefore ineligible for service.⁹⁷¹ Although telephone translation and interpretation services are available to members of the public, the juror forms are

⁹⁶⁵ *Jury Act 1995* (Qld) s 4(3)(k).

⁹⁶⁶ *Juries Act 1967* (ACT) s 10(c). See also *Juries Act 1967* (Ireland) s 7, sch 1 pt I which provides that a person is ineligible if he or she has an incapacity to ‘read’. It has recently been proposed that ‘fluency in English’ should be a requirement for jury service: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.93].

⁹⁶⁷ *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2.

⁹⁶⁸ *Juries Act 1957* (WA) s 5(b)(iii).

⁹⁶⁹ *Juries Act 1927* (SA) s 13(b).

⁹⁷⁰ *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 1927* (SA) s 13(b); *Juries Act 2000* (Vic) s 5(3), sch 2. See also *Jury Ordinance, Cap 3* (HK) s 4(1)(c).

⁹⁷¹ See generally *Jury Act 1995* (Qld) s 18.

presently written in English only and do not refer to translation or interpretation facilities.⁹⁷²

8.47 In contrast, material provided to prospective jurors in the Northern Territory, South Australia and Victoria includes translated statements, in numerous languages, of the need for jurors to understand English.⁹⁷³ In Victoria, for example, the following statement is included on the 'notice of selection' in English and in seven other languages.⁹⁷⁴

If you do not speak or read English...

Unfortunately you cannot serve on a jury. But you must return the Jury Questionnaire by the due date, or else you may be fined. Ask someone who reads English to help you to complete it.

8.48 In practice in Queensland, claims of ineligibility (or for excusal) because of a poor command of English are assessed on a case-by-case basis.⁹⁷⁵

8.49 In England and Wales, English language difficulties are specifically dealt with by discretionary excusal or discharge, rather than automatic ineligibility. Jury summonses are accompanied by information in other languages:⁹⁷⁶

You will also receive a language addendum, which ensures no juror is disadvantaged by information being given solely in English and Welsh. The language addendum explains why you have received a summons and what you should do next. The addendum is available in seven languages and is aimed at people who cannot read English very well but those who can speak English so would be able to serve on a jury.

8.50 Summoning officers are encouraged to grant applications for excusal made 'on the grounds of insufficient understanding of English'.⁹⁷⁷ In addition, if there is doubt about a person's capacity to act effectively as a juror 'on account of insufficient understanding of English', section 10 of the *Juries Act 1974* (Eng) provides for the person to be brought before the judge to determine whether or not

972 Information about the availability of telephone translation and interpretation facilities is provided on the Queensland Government website in a number of languages including Chinese, Greek, Indonesian, Korean, Russian and Vietnamese. A link to that information appears on the Queensland Courts website. Information on that site about jury service is not, however, provided in languages other than English. See Queensland Courts, 'Information for Jurors' <<http://www.courts.qld.gov.au/103.htm>>; and Queensland Government, 'Other Languages' <<http://www.qld.gov.au/languages/>> at 8 February 2011.

973 See Supreme Court of the Northern Territory, 'For Jurors: Ineligibility through English language difficulty' <<http://www.supremecourt.nt.gov.au/jurors/index.htm>>; Courts Administration Authority South Australia, Sheriff's Office, 'Jury Service Information' 5 <http://www.courts.sa.gov.au/pdf/Jury_review/brochure_for_jurors.pdf>; Courts and Tribunals Victoria, Jury Service, Publications & Related Links, 'Notice of Selection Melbourne' <<http://www.courts.vic.gov.au/jury-service/publications-related-links>> at 8 February 2011.

974 See the sample Notice of Selection for Melbourne available at Courts and Tribunals Victoria, Jury Service, Publications & Related Links <<http://www.courts.vic.gov.au/jury-service/publications-related-links>> at 8 February 2011.

975 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

976 Her Majesty's Courts Service (United Kingdom), Jury Service, 'Jury summons and leaflet' <http://www.hmcourts-service.gov.uk/infoabout/jury_service/summons_leaflet.htm> at 8 February 2011.

977 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [6].

he or she should act as a juror and, if not, to discharge the summons.⁹⁷⁸ Lord Justice Auld considered this approach ‘probably the best that can be achieved’.⁹⁷⁹

8.51 The Law Commission of New Zealand expressed a similar view⁹⁸⁰ and provision is made in New Zealand for the judge to discharge a person if satisfied the person is not capable of acting effectively as a juror because of ‘difficulties in understanding or communicating in the English language’.⁹⁸¹ Similar provision is made in the ACT and in Hong Kong.⁹⁸²

8.52 The ineligibility of people who cannot understand English is premised on the principle of competence and the fact that court proceedings are conducted in English:⁹⁸³

- The jury must be able to follow the evidence on which it will decide its verdict;
- Jurors also need to understand the parties’ addresses and the judge’s directions, which are predominantly given orally, and to participate in jury deliberations;
- There is an increasing trend toward the use of written materials and aids in criminal trials which has developed on the premise that jurors are able to use, and thereby benefit from, such aids;⁹⁸⁴
- Translation or interpretation services would add to the cost, complexity and length of jury trials, and the presence of a non-juror in the jury room may cause difficulties in jury deliberations.

8.53 A number of concerns have been raised, however, about the automatic exclusion of people with English language difficulties:

- It may unfairly discriminate against people from linguistic minorities who are otherwise willing and able to serve, or who could serve with the assistance of translation or interpretation services;⁹⁸⁵

⁹⁷⁸ Similar provision is made in *Juries Act 1981* (NZ) s 16AA; *Juries Act 1967* (ACT) s 16. See also *Juries Act* (NT) s 27A(3)–(4).

⁹⁷⁹ Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [50].

⁹⁸⁰ Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [197]–[200].

⁹⁸¹ *Juries Act 1981* (NZ) s 16AA(1). The application for discharge of the summons must be made by the registrar and is to be heard in private: s 16AA(3), (4).

⁹⁸² *Juries Act 1967* (ACT) s 16; *Jury Ordinance, Cap 3* (HK) s 4(1)(c), (2). See also *Juries Act* (NT) s 27A(3)–(4) which provides that, at any time before the person is called during empanelment, the Sheriff or Deputy Sheriff may question a person who has been summoned for jury service ‘to ascertain whether that juror is able to read, write and speak the English language’ and, if not satisfied that the person can read, write and speak the English language, shall ‘thereupon report the fact to a Judge or the Master’.

⁹⁸³ See generally New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.9], Rec 23; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.141]–[3.142], Rec 34.

⁹⁸⁴ See generally Queensland Law Reform Commission, *A Review of Jury Directions*, Report (2009) vol 1, [3.65]–[3.66], ch 10.

- It may dilute the representativeness of juries by excluding people from non-English speaking backgrounds and may be a factor in the under-representation of Indigenous people on juries;
- To the extent that it imposes a literacy requirement, it may unfairly exclude people who have developed other skills to compensate for their illiteracy, particularly in trials that do not rely heavily on documentary evidence,⁹⁸⁶
- To the extent that it requires that jurors are able to read on paper, as opposed to reading with electronic assistance, it may unjustifiably disadvantage those who, because of blindness or vision impairment, rely on electronic adaptive technologies for reading.⁹⁸⁷

8.54 The most common languages other than English spoken at home in Queensland are Mandarin (0.6%), Italian (0.6%), Cantonese (0.5%), Vietnamese (0.4%) and German (0.4%).⁹⁸⁸ Of those who speak languages other than English at home in Queensland, 15% speak English not well or not at all.⁹⁸⁹ Most Indigenous Queenslanders (84.45%) also speak only English at home, although 1.9% speak English 'not well' or 'not at all'.⁹⁹⁰ There is also a significant gap in literacy skills between Indigenous and non-Indigenous Australians.⁹⁹¹

8.55 The Commission is not aware of any studies conducted in Queensland on the impact of the English language ineligibility on the ethnic or cultural diversity of juries. However, a study of jurors on Victorian civil trials in 2001 found that, despite the ineligibility of people with inadequate English, the proportion of jury-eligible citizens born outside Australia in the Victorian population was generally reflected in the composition of civil juries.⁹⁹²

985 Eg Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.12]; J Horan and D Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 195; New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.6].

986 Eg Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [208]. A literacy test may also be time consuming and embarrassing: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.87].

987 This concern was raised by Vision Australia, Submission 19. See generally Vision Australia, Resources, 'Adaptive Technology Guide' <<http://www.visionaustralia.org.au/info.aspx?page=1230>> at 8 February 2011.

988 Australian Bureau of Statistics, *2006 Census QuickStats: Queensland*, 'Person Characteristics: Language Spoken at Home'.

989 Department of Immigration and Citizenship (Commonwealth of Australia), *The People of Queensland – Statistics from the 2006 Census*, (2008) vol 2, 3, Table 1.16 (English language proficiency by age: Selected language groups, 2006 Census).

990 Australian Bureau of Statistics, *2006 Census Tables: Queensland*, 'Language Spoken at Home by Proficiency in Spoken English/Language for Indigenous Persons – Queensland'. A more recent survey by the ABS also shows that many Indigenous people speak an Aboriginal or Torres Strait Islander language as their main language at home, especially in remote areas: see Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2008*, 'Language and Culture' cat no 4714.0.

991 Eg Australian Council for Educational Research (L De Bortoli and S Thomson), *The Achievement of Australia's Indigenous Students in PISA 2000–2006* (2009).

992 J Horan and D Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 195.

Birthplace	Jury-eligible population	Civil juries
Australia	82.2%	82.1%
English-speaking countries	5.5%	5.1%
Other Europe	6.0%	6.3%
Asia	4.5%	4.3%
Other	1.8%	2.3%

Table 8.1: Jury-eligible population and civil jurors in Victoria, by birthplace⁹⁹³

8.56 A similar overall result was found in the United Kingdom. The diversity study conducted for the United Kingdom Ministry of Justice⁹⁹⁴ found that 21% of all 'black and minority ethnic'⁹⁹⁵ people summoned for jury service who did not serve were excused for language reasons.⁹⁹⁶ Even with such excusals, however, in courts with a high ethnic population from which to summon potential jurors, actual juries were still found to be 'racially mixed'.⁹⁹⁷

NSWLRC's recommendations

8.57 The *Jury Act 1977* (NSW) presently provides that a person who is 'unable to read or understand English' is ineligible to serve.⁹⁹⁸ The *Jury Amendment Act 2010* (NSW) will, however, remove that ground of ineligibility and such persons will need to seek excusal on a case-by-case basis.⁹⁹⁹

8.58 In contrast, the NSW Law Reform Commission recommended that English language difficulty should continue to disqualify a person from jury service, but that the test should be changed so that it applies to persons who are unable 'sufficiently to read and communicate in English to enable them properly to carry out the duties of a juror'.¹⁰⁰⁰ In its view, this would underline the importance of being able to communicate in English, and would be appropriate since jurors will in many cases be 'required to view and read written documents'.¹⁰⁰¹

⁹⁹³ These figures were extracted from J Horan and D Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 195, Table 4 (Birthplace of civil jurors and estimated jury-eligible population, Victoria, 2001).

⁹⁹⁴ Ministry of Justice (United Kingdom) (C Thomas and N Balmer), *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (2007). See [4.59]–[4.60] above.

⁹⁹⁵ The Commission uses the expression 'black and minority ethnic' because it is the expression used in the UK Ministry of Justice report.

⁹⁹⁶ Ministry of Justice (United Kingdom) (C Thomas and N Balmer), *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (2007) 102–3, Fig 4.20.

⁹⁹⁷ *Ibid* 199–200.

⁹⁹⁸ *Jury Act 1977* (NSW) s 6(b), sch 2 cl 11 to be repealed by *Jury Amendment Act 2010* (NSW).

⁹⁹⁹ See *Jury Act 1977* (NSW) ss 14(3), 14A to be inserted by *Jury Amendment Act 2010* (NSW).

¹⁰⁰⁰ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.9], Rec 23.

¹⁰⁰¹ *Ibid* [5.9].

8.59 The NSWLRC also considered that the judge should have the power to discharge a person who lacks the necessary ability. It also proposed that the Sheriff 'be able to detect and discharge' those who do not meet the test and recommended that guidelines be developed for that purpose.¹⁰⁰²

LRCWA's recommendations

8.60 The Law Reform Commission of Western Australia observed that 'jurors must be competent to discharge their duties'¹⁰⁰³ and accordingly recommended that people who are 'unable to understand and communicate in the English language' should be excluded from jury service.¹⁰⁰⁴

8.61 In its view, literacy requirements for a trial that involves a significant amount of written evidence can be accommodated on a case-by-case basis during the pre-empanelment process when prospective jurors can apply to the judge to be excused from jury service.¹⁰⁰⁵

8.62 Recognising that '[t]he system essentially relies on self-reporting',¹⁰⁰⁶ the LRCWA also made a number of other recommendations:

- Translated versions of the jury summons and 'juror information sheet' should be available, online and by telephone request, in the 10 most commonly spoken languages in Western Australia (other than English), and the standard jury summons and juror information sheet should state that translated copies are available.¹⁰⁰⁷
- Guidelines for assessing English language capability, which include standardised questions, should be developed to assist sheriff's office staff, summoning officers and judicial officers in identifying jurors who underestimate their capacity to serve.¹⁰⁰⁸
- Jury awareness strategies targeting people from culturally and linguistically diverse backgrounds should be conducted, to overcome the possible

1002 Ibid [5.8], Rec 23. A similar approach was proposed by the Law Reform Commission of Ireland: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.86]–[4.94].

1003 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 94.

1004 Ibid 96, Rec 49.

1005 Ibid 94–5. The LRCWA observed that, in Western Australia, prospective jurors are advised 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' and that 'sheriff's office staff provide assistance to prospective jurors who wish to record their reasons in writing'.

1006 Ibid 98.

1007 Ibid 98, Rec 52.

1008 Ibid 99, Rec 53.

misconception that jurors need the ability to *read*, and not just to understand, English.¹⁰⁰⁹

- The juror feedback questionnaire given to people who have completed jury service should be revised to collect more complete statistics in this regard.¹⁰¹⁰

8.63 Amendments have subsequently been introduced into parliament to remove the automatic exclusion of people who are unable to understand English¹⁰¹¹ in favour of a provision allowing a person to be excused if the person 'does not understand spoken or written English, or cannot speak English, well enough to be capable of serving effectively as a juror'.¹⁰¹²

Discussion Paper

8.64 In its Discussion Paper, the Commission expressed the provisional view that persons who are unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively should be ineligible to serve as jurors, and that the Sheriff and the judge should have express power to excuse or discharge a person on that basis. It therefore made the following proposals:¹⁰¹³

- 8-4 Section 4(3)(k) of the *Jury Act 1995* (Qld) should be amended to provide that a person who is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively is ineligible for jury service.
- 8-5 The *Jury Act 1995* (Qld) should be amended to provide that if it appears to the Sheriff that a prospective juror is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively, the Sheriff may excuse the person from further attendance.
- 8-6 The *Jury Act 1995* (Qld) should be amended to provide that if it appears to a judge that a prospective juror, or juror, is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively, the judge may excuse or discharge the person from further attendance.

¹⁰⁰⁹ Ibid 97, Rec 51. The LRCWA also observed that, while Census data show that only 1.7% of people in Western Australian do not speak English well or very well, 2.6% of people summoned for jury service are excused on this basis.

¹⁰¹⁰ Ibid 97, Rec 50.

¹⁰¹¹ See *Juries Act 1957* (WA) s 5(b)(iii) which is proposed to be repealed by Juries Legislation Amendment Bill 2010 (WA) s 10.

¹⁰¹² See proposed new *Juries Act 1957* (WA) s 34G(2)(e) to be inserted by Juries Legislation Amendment Bill 2010 (WA).

¹⁰¹³ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [8.85]–[8.92], Proposals 8-4 to 8-7.

- 8-7 The *Notice to Prospective Juror, Questionnaire for Prospective Juror*, and juror summons should include relevant information for people from non-English speaking backgrounds in community languages, including a statement about the availability of translated copies or translation services for the *Notice*.

Consultation

8.65 The Queensland Law Society expressed the view that ‘any person who is unable to understand and communicate in English should be ineligible for jury service’. It generally agreed with the Commission’s other proposals to allow the Sheriff or the judge to excuse or discharge a prospective juror who does not appear to have sufficient skills in English, and for information given to prospective jurors to be given in other languages, although it submitted that:¹⁰¹⁴

it should be made clear in the document that if the person is unable to read or speak the English language very well then they should make that matter known to the Sheriff and the Judge if applicable.

8.66 Vision Australia agreed with the Commission’s proposals and noted that:¹⁰¹⁵

The current Act makes no distinction between a person’s ability to understand the English language, and to write and read English as opposed to a person, for example who is blind and understands English, but cannot read or write on paper due solely to their lack of vision.

In the latter circumstance, it would be reasonable to expect that the Courts would make adjustments in providing the support necessary (either in adaptive technology, interpreters, readers etc) to assist jurors to carry out their duties.

8.67 Queensland Advocacy Incorporated submitted that the reading requirement should be changed to a requirement of ‘understanding’ English:¹⁰¹⁶

This amendment would benefit not only people with disability but would also incorporate people who understand English but may have not been taught to write or read and may feel embarrassed to admit this fact.

8.68 The Department of Justice and Attorney-General expressed qualified support for the Commission’s proposed provisions for the ineligibility, and excusal or discharge of, persons who are unable to understand, and communicate in, English well enough to enable them to discharge the duties of a juror effectively. The Department noted, however, that they may involve some practical difficulties:¹⁰¹⁷

1014 Submission 52.

1015 Submission 58.

1016 Submission 60.

1017 Submission 56.

[We are] supportive of this change however notes that the only means to effect the change is through self identification by potential jurors. [We] acknowledge that this may be an embarrassing issue for an individual as it would in many cases require the assistance of another person to communicate this on their behalf.

So as to prevent any perception of discrimination [we] would encourage the inclusion of definitions of 'understand' and 'communicate'. By way of example a member of the community may well possess language skills sufficient to understand and communicate in daily interactions with others however may struggle with comprehension of complex legal, medical or technical issues that may arise during the course of a trial.

8.69 The Department agreed with the proposal for juror notices and summonses to include information in languages other than English. It suggested that:¹⁰¹⁸

all juror documentation be amended to contain a 'language' area (or box) at the commencement of the document directing potential jurors to the Courts website for translated versions and advising of relevant phone translation services.

8.70 The Queensland Police Service submitted that, because the right to a fair trial encompasses the right to a competent tribunal, the current requirement in section 4(3)(k) of the Act should be retained. It commented, however, that 'consideration may be given to use of interpreters if the accuracy of the communications can be guaranteed'.¹⁰¹⁹

8.71 However, the Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd was of the view that the current requirement in the *Jury Act 1995* (Qld) for jurors to be able to read and write English was outweighed by the importance of having Indigenous people represented on juries.¹⁰²⁰

We suggest that because of the injustices that can occur through jury members being unable to understand the cultural nuances of Aboriginal and Torres Strait Islander defendants and witnesses, in practical terms the presence of Aboriginal and Torres Strait Islander peoples on juries far outweighs the requirement of English proficiency.

The Commission's view

8.72 In the Commission's view, as a matter of principle, English language proficiency should continue to be a requirement of eligibility to serve as a juror. Jurors must be competent to follow proceedings and, since they are conducted in English, a basic qualification for jury service is sufficient understanding of English.

8.73 The Commission considers that the essential requirement is that jurors can understand, and communicate in, English well enough to enable them to discharge their duties properly. Whether this requires, in a given trial, an ability to

¹⁰¹⁸ Ibid.

¹⁰¹⁹ Submission 59.

¹⁰²⁰ Submission 43.

comprehend written as well as spoken English will depend on the circumstances and, for example, whether assistance, in the form of translation, interpretation or adaptive technologies, can reasonably and appropriately be provided. The Commission notes that it is likely that an ability to comprehend written material will be a requirement in many trials, although not in every case.¹⁰²¹

8.74 The existing formulation — that jurors must be able to ‘read or write’ in English — should be changed. It fails to take into account the importance of spoken English, its emphasis on writing seems misplaced, and it does not directly link people’s inability to read or write to their inability to serve as jurors. Arguably, it is discriminatory. What is required is a flexible test that is not restricted to particular skills, such as reading or writing, but is capable of capturing the range of skills that are likely to be required.

8.75 The Commission therefore prefers the following formulation: that people who are unable to understand, and communicate in, English well enough to enable them to discharge the duties of a juror effectively should be ineligible for jury service. This accords with the test recommended by the Law Reform Commission of Western Australia. It will require that jurors are able to understand what is said to them and what is given to them to consider, and to communicate with the court and with the other jurors during deliberations.

8.76 In practice, this requires case-by-case assessment and will inevitably rely, to some extent, on self-identification.¹⁰²² The Commission considers that the current practice in this regard is the best approach to this issue. To facilitate it, the Commission considers that the Sheriff should be given express power to excuse a person who appears to be ineligible on this basis, and that consideration should be given to the development of guidelines for the assessment of prospective jurors’ abilities to understand, and communicate in, English.¹⁰²³ The Commission also considers that the judge should have express power to excuse or discharge a prospective juror, or juror, on this basis, as is provided for in the ACT, New Zealand and England and Wales.¹⁰²⁴ The Commission does not consider it necessary or desirable to attempt a legislative definition of ‘understand’ or ‘communicate’ for this purpose.

¹⁰²¹ The Commission notes that in its recent Report on jury directions, it made recommendations for the greater use of pre-trial disclosure and the provision of written and other assistance to jurors. If adopted, the judge, and the prosecution and defence, will have the opportunity to consider the extent to which the trial will involve special written or technical evidence and whether any special assistance or aids may need to be provided for the jury: see Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) vol 1, ch 8, 10.

¹⁰²² The Act provides that a person must not state something the person knows is false in response to a prospective juror *Questionnaire*, and, when asked a reasonable question by the Sheriff to find out whether the person is qualified for jury service, must not fail to answer the question, and must answer the question truthfully: *Jury Act 1995* (Qld) ss 18(6), 68. The Act also provides that ‘the fact that a person who is not qualified for jury service serves on a jury is not a ground for questioning the verdict’: *Jury Act 1995* (Qld) s 6.

¹⁰²³ In Chapter 9 of this Report, the Commission has recommended that excusal and deferral guidelines should be developed and published: see [9.115] and Recommendation 9-7 below.

¹⁰²⁴ The judge already has power to discharge a juror *after the trial has started* if there is a reason the juror should not continue to serve. The judge’s power to excuse a person during the empanelment and selection process, however, is limited to discharge on the basis of an inability to be impartial. See *Jury Act 1995* (Qld) ss 46, 56. The judge’s discretion to discharge a juror is discussed further in Chapter 10 of this Report.

8.77 Both the Sheriff and the judge are in a position to assess the availability and viability of interpretation or translation services to assist a juror who has difficulty understanding English. The Commission's view is that, if reasonable accommodations can be provided, they should be. However, this needs to be assessed on a case-by-case basis taking into account all relevant considerations, including the defendant's right to a fair trial by a jury that is competent¹⁰²⁵ and the cost of providing such facilities.

8.78 The Commission also considers that the relevant parts of the *Notice to Prospective Juror* and accompanying *Questionnaire*, and the juror summons, should be written in community languages. The Commission is attracted to the sort of statement that appears on the Victorian 'notice of selection': see [8.47] above. At a minimum, the Notice should contain a statement, in other languages, about the availability of translated copies or translation services for the Notice.

Recommendations

8.79 The Commission makes the following recommendations:

8-4 Section 4(3)(k) of the *Jury Act 1995* (Qld) should be amended to provide that a person who is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively is ineligible for jury service.

8-5 The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to the Sheriff that a prospective juror is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively, the Sheriff may excuse the person from further attendance.

8-6 The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to a judge that a prospective juror, or juror, is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively, the judge may excuse or discharge the person from further attendance.

8-7 The *Notice to Prospective Juror, Questionnaire for Prospective Juror* and juror summons should include relevant information for people from non-English speaking backgrounds in community languages, including a statement about the availability of translated copies or translation services for the *Notice*.

1025

See [8.5] above.

PERSONS WITH A PHYSICAL DISABILITY

8.80 In Queensland, ‘a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror’ is ineligible for jury service.¹⁰²⁶

8.81 Claims of ineligibility made on the basis of disability are to be supported by a medical certificate specifying ‘the exact nature of the condition or illness’,¹⁰²⁷ and are assessed on a case-by-case basis by the Sheriff, relying on potential jurors to self-identify. If the Sheriff cannot make a determination, the claim may be referred to the presiding judge.¹⁰²⁸

8.82 Similar categories of exclusion — on the basis of ‘physical disability’,¹⁰²⁹ ‘disease or infirmity’,¹⁰³⁰ ‘disease or infirmity of the ... body, including defective hearing’,¹⁰³¹ or of being ‘physically unfit’ for jury service¹⁰³² — apply in other Australian jurisdictions. Like Queensland, those provisions generally operate only if the disability renders the person incapable of discharging the duties of a juror. Significantly, therefore, people who are capable of serving on a jury will be able to do so.

8.83 Physical disability is also a basis for excusal in some jurisdictions. This applies, variously, to persons who are ‘totally or partially blind or deaf’,¹⁰³³ and persons with ‘disability’.¹⁰³⁴

8.84 In England and Wales, physical disability is not a basis for automatic exclusion. Instead, it is dealt with as a matter for discretionary excusal or discharge.

8.85 Lord Justice Auld expressed support for this approach because it presumes that people with disabilities can serve on juries, and considered that people with disabilities who are summoned for service should be given positive encouragement in that regard.¹⁰³⁵ As discussed at [8.96] below, potential jurors in England and Wales are now specifically asked about any disabilities or special needs they have in order to facilitate their service. Nevertheless, applications for

¹⁰²⁶ *Jury Act 1995* (Qld) s 4(3)(l). Section 8(1)(s) of the former *Jury Act 1929* (Qld) used to exclude persons who were ‘blind, deaf, or dumb’, and people ‘of unsound mind’ or who were otherwise ‘incapacitated by disease or infirmity’.

¹⁰²⁷ See generally *Jury Act 1995* (Qld) s 18. This requirement is specified on the *Notice to Prospective Juror*.

¹⁰²⁸ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁰²⁹ *Juries Act 1967* (ACT) s 10(d); *Juries Act 2003* (Tas) s 6(3), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2.

¹⁰³⁰ *Juries Act* (NT) s 11(1), sch 7. That provision also excludes people who are ‘blind, deaf or dumb’.

¹⁰³¹ *Juries Act 1957* (WA) s 5(b)(iv).

¹⁰³² *Juries Act 1927* (SA) s 13(a).

¹⁰³³ *Juries Act 1967* (ACT) s 11(2), sch 2 pt 2.2.

¹⁰³⁴ *Juries Act 2003* (Tas) ss 10(3)(b), 12; *Juries Act 2000* (Vic) ss 9(4)(b), 11. See also *Juries Act 1981* (NZ) ss 14B(3)(b), 15(1A)(a).

¹⁰³⁵ Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [41]–[48].

discretionary excusal in that jurisdiction are to be ‘considered sympathetically’ and usually without requiring a medical certificate.¹⁰³⁶

8.86 In addition, section 9B of the *Juries Act 1974* (Eng) provides that if there is doubt about a person’s capacity to act effectively as a juror ‘on account of physical disability’, the person may be brought before the judge to determine whether or not the person should act as a juror and, if not, to discharge the summons. Similar discharge provisions apply in the ACT and in New Zealand.¹⁰³⁷

8.87 The Law Reform Commission of Ireland has also recently proposed that no one should be prohibited from jury service ‘on the basis of physical disability alone’ and that ‘capacity should be recognised as the only appropriate requirement for jury service’. In its view, ‘it should be open to the trial judge to ultimately make this decision having regard to the nature of the evidence that will be presented during the trial’.¹⁰³⁸

8.88 Much of the debate about the exclusion of people with physical disabilities has focused on prospective jurors who are blind or deaf. The arguments for their automatic exclusion from jury service are largely pragmatic:¹⁰³⁹

- Jurors need to be able to consider the demeanour of witnesses;
- Jurors need to be able to examine exhibits such as maps, diagrams, sketches, and physical objects;
- Jurors need to be able to participate fully in deliberations;
- Although some people may be assisted by computer technologies or interpreters (such as sign language interpreters), some difficulties cannot be compensated for at all or except at great expense and disruption;
- There may be difficulties, given the obligations of juror secrecy, in allowing the presence of interpreters in the jury room.

8.89 On the other hand, there are a number of reasons why people with physical disabilities, including people who have a vision or hearing impairment, should be eligible to serve:¹⁰⁴⁰

¹⁰³⁶ Her Majesty’s Courts Service (United Kingdom), ‘Guidance for summoning officers when considering deferral and excusal applications’ [6]–[21].

¹⁰³⁷ *Juries Act 1967* (ACT) s 16; *Juries Act 1981* (NZ) s 16AA.

¹⁰³⁸ Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.58]. Cf Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.66]–[5.74], Rec 5(1) in which it is recommended that persons who are blind or deaf should be ineligible but only to the extent that blindness or deafness prevents them from serving as a juror.

¹⁰³⁹ See, variously, for example Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.66]; Law Commission of New Zealand, *Juries in Criminal Trials: Part One*, Discussion Paper 32 (1998) [347]; Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [44].

- The automatic exclusion of people with physical disabilities undermines the representativeness and random selection of the jury;
- The automatic exclusion of people with physical disabilities is an affront to the principle of non-discrimination and may be seen as a violation of civil rights and opportunities;
- Physical disability alone is not determinative of a person's ability to serve as a juror — a person's ability to serve will vary depending on the nature of the disability, the nature of the trial, and the available facilities and support;
- The assumed value of observable demeanour in assessing witnesses' credibility is open to challenge — not only is there research to show that 'there is no such thing as a typical deceptive response' and that people 'are generally poor lie detectors',¹⁰⁴¹ but demeanour is only one of many considerations and jurors who are blind or deaf 'will, like most others, have found ways of encountering, and coping with, everyday life, including the attempt to assess the truthfulness of what people say to them';¹⁰⁴²
- Jurors who are blind or deaf will not necessarily be prevented from considering documentary and visual or audio evidence because 'in many cases there will be no issue as to its interpretation, and the content can be conveyed successfully through description or using technology';¹⁰⁴³ and
- As long as interpreters are made subject to the same secrecy requirements that apply to jurors and others, there is no obstacle to their being permitted in the jury room.¹⁰⁴⁴

1040 See, variously, for example, Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [43]; H Meekosha, 'Disability and Human Rights' (Paper presented at the Attorney General's NGO Forum on Domestic Human Rights, Canberra, 11 March 1999); J Horan and D Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 184; New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [3.8], [4.1]; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.134]–[3.135].

1041 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [3.12] quoting A Vrij and S Easton, 'Fact or fiction? Verbal and behavioural clues to detect deception' (2002) 70 *Medico-Legal Journal* 29. The ability to detect lies from non-verbal behaviour is generally no greater than chance and no greater for 'lie experts', like police officers, than the average person: A Vrij et al, 'Detecting deceit via analysis of verbal and nonverbal behavior' (2000) 24(4) *Journal of Nonverbal Behavior* 239, 240; A Vrij and GR Semin, 'Lie experts' beliefs about nonverbal indicators of deception' (1996) 20(1) *Journal of Nonverbal Behavior* 65. There is also some evidence that people make more accurate judgments when they rely on audio, rather than audio-visual, input: eg SM Kassin, CA Meissner and RJ Norwick, 'I'd know a false confession if I saw one: A comparative study of college students and police investigators' (2005) 29(2) *Law and Human Behavior* 211, 222.

1042 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [3.16].

1043 Ibid [3.8].

1044 Ibid 59, Rec 1(d)–(f). The Law Reform Commission of Ireland expressed a similar view: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.56], [4.60]–[4.61].

Reasonable accommodation

8.90 The assessment of a person's ability (or inability) to serve as a juror should consider the extent to which any difficulties the person may have might be overcome by the provision of reasonable adjustments, for example, the use of a wheelchair accessible court room, the provision of a sign-language interpreter, or allowances to accommodate a person's guide dog.¹⁰⁴⁵

8.91 The Commission understands that, at present in Queensland, prospective jurors who have a disability often contact the court to discuss the available facilities.¹⁰⁴⁶ Although the *Jury Act 1995* (Qld) makes no express provision for the use of interpreters, and most existing court buildings have limited facilities for mobility-impaired jurors,¹⁰⁴⁷ equitable access is a fundamental design feature of new and refurbished court buildings.¹⁰⁴⁸

8.92 The United Nations *Convention on the Rights of Persons with Disabilities*, which is the most recent international statement on disability rights (and to which Australia is a signatory), stipulates that 'reasonable accommodation' should be provided to ensure equality and non-discrimination.¹⁰⁴⁹ Article 5 of the Convention reads:

Article 5 Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

¹⁰⁴⁵ Specific provision to protect the right of persons with disabilities to be accompanied by their guide, hearing or assistance dog in public places is made in the *Guide, Hearing and Assistance Dogs Act 2009* (Qld).

¹⁰⁴⁶ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁰⁴⁷ Ibid.

¹⁰⁴⁸ For example, work has begun on the construction of a new Supreme and District Courts building in Brisbane which will include accommodation in court rooms for jurors in wheelchairs: see generally Department of Justice and Attorney-General (Queensland), 'New Brisbane Supreme Court and District Court' <<http://www.justice.qld.gov.au/justice-services/courts-and-tribunals/our-courthouses/new-brisbane-supreme-and-district-court>> at 8 February 2011; and Justice M Wilson, 'The Jury Environment' (Paper presented at the Jury Research and Practice Conference, Brisbane, 14 November 2008). See generally Australian Building Codes Board, 'Access for people with a disability' <<http://www.abcb.gov.au/index.cfm?objectid=73874801-28B9-11DE-835E001B2FB900AA>> at 8 February 2011; and Department of Public Works (Qld), *Disability Service Plan 2010–2011*.

¹⁰⁴⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12, art 5 (entered into force 3 May 2008; entered into force in Australia 16 August 2008). See generally this Commission's discussion of that Convention in Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) vol 1, ch 3.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

8.93 The Convention defines reasonable accommodation to mean:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

8.94 In 2009, the *Disability Discrimination Act* (Cth) was amended to reflect the obligation to make reasonable adjustments.¹⁰⁵⁰ That Act applies, among other things, to Commonwealth government service providers and the administration of Commonwealth government laws and programs.¹⁰⁵¹

8.95 As noted at [8.8] above, the *Anti-Discrimination Act 1991* (Qld) also prohibits discrimination in the performance of functions or exercise of powers under a State law, although it does not include specific obligations about the provision of reasonable adjustments or accommodations.

8.96 In England and Wales, public authorities are required to make reasonable accommodations under the *Disability Discrimination Act 1995* (Eng).¹⁰⁵² It is the practice in England and Wales to seek information from potential jurors at the time of issuing a summons about any disabilities and special needs they may have in order for them to be accommodated. Prospective jurors are advised that:¹⁰⁵³

- A pre-court visit can be arranged to assess and discuss any arrangements that might be required;
- Arrangements for jurors with a visual impairment may include comfort breaks for guide dogs or assistance from a designated member of staff;
- Options for jurors with a hearing impairment include the 'induction loop system' to minimise background noise for hearing aid users, and 'computer aided transcription' to relay what is spoken into written form;¹⁰⁵⁴
- If it is not possible to make the necessary adjustments, for example, because of the layout of the court building, the person's service may be transferred to a different court.

¹⁰⁵⁰ *Disability Discrimination Act* (Cth) ss 5(2), 6(2), 29A, 45 as amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

¹⁰⁵¹ *Disability Discrimination Act* (Cth) ss 12(7), 24, 29.

¹⁰⁵² *Disability Discrimination Act 1995* (Eng) ss 21B–21E; *Disability Discrimination Act 2005* (Eng) s 2.

¹⁰⁵³ Her Majesty's Courts Service (United Kingdom), Jury Service, 'Jurors with disabilities or special needs' <http://www.hmccourts-service.gov.uk/docs/infoabout/jury/service/special_needs_disabled_jurors.doc> at 8 February 2011.

¹⁰⁵⁴ Prospective jurors are advised, however, that they must be able to lip read because computer aided transcription is not permitted in the jury room.

NSWLRC's recommendations

8.97 At present in New South Wales, a person who is unable to discharge the duties of a juror because of 'sickness, infirmity or disability' is excluded from jury service.¹⁰⁵⁵ Under the *Jury Amendment Act 2010* (NSW), however, this exclusion will no longer apply but a person will be able to seek:¹⁰⁵⁶

- permanent exemption from jury service on the basis of having a permanent physical impairment that 'results in jury service being incompatible with the person's good health or that otherwise renders the person unable to perform jury service'; or
- exemption from a particular jury service period (or part of it) on the basis that the person's disability 'would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror'.

8.98 These changes will generally give effect to the recommendations of the NSW Law Reform Commission.

8.99 In its 2006 Report on jurors who are blind or deaf, the NSWLRC concluded that people who are blind or deaf should not be automatically excluded from jury service. Instead, their ability to serve should be considered on a case-by-case basis, having regard to the circumstances of the particular trial and the availability of 'reasonable adjustments'.¹⁰⁵⁷ Those adjustments might include the use of sign language interpreters, computer-aided real time transcription, conversion of documents into audio format, or the printing of documents in Braille.¹⁰⁵⁸ Potential jurors who are blind or deaf should be excluded only 'when the nature of the evidence is such that they cannot fulfil the functions of a juror or where they request exemption'.¹⁰⁵⁹

8.100 An empirical study on the use of Australian Sign Language interpreting in court, conducted as part of the NSWLRC's review, showed that legal facts and concepts can be accurately translated from English into Auslan, and that relying on sign language interpreters to access information in court does not disadvantage jurors who are deaf, and are able to understand the judge's summing up to the same extent as other jurors.¹⁰⁶⁰ Participants in the study also 'expressed the desire

¹⁰⁵⁵ *Jury Act 1977* (NSW) s 6(b), sch 2 cl 12 to be repealed by *Jury Amendment Act 2010* (NSW).

¹⁰⁵⁶ *Jury Act 1977* (NSW) ss 14(2), (3), 14A(b) to be inserted by *Jury Amendment Act 2010* (NSW).

¹⁰⁵⁷ New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [2.82], [3.18], [4.3]. The Law Reform Commission of Ireland made similar proposals: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.54]–[4.63].

¹⁰⁵⁸ New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [2.11]–[2.15], [3.3]–[3.6].

¹⁰⁵⁹ *Ibid* [4.10].

¹⁰⁶⁰ J Napier, D Spencer and J Sabolcec, *Deaf Jurors' Access to Court Proceedings via Sign Language Interpreting: An Investigation*, New South Wales Law Reform Commission Research Report 14 (2007) [7.2].

to carry out their civic duty, and participate in the judicial system on an equal footing with hearing people'.¹⁰⁶¹

8.101 The NSWLRC therefore recommended:¹⁰⁶²

- (a) that people who are blind or deaf should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone;
- (b) that people who are blind or deaf should have the right to claim exemption from jury service;
- (c) that the Court should have power to stand aside a blind or deaf person summoned for jury duty if it appears to the Court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge the duties of a juror in the circumstances of the trial for which that person is summoned. This power should be exercisable on the Court's own motion or on application by the Sheriff.

8.102 The NSWLRC considered that there would be no obstacle to stenographers and sign language interpreters being permitted in the jury room in order to assist jurors who are blind or deaf, provided that they were subject to the same secrecy requirements that apply to jurors and others.¹⁰⁶³

8.103 It also recommended the development of guidelines for the provision of sign language interpreters and other aids for jurors who are blind or deaf, and that professional awareness activities should be made available to judicial officers and court staff in relation to jurors who are blind or deaf.¹⁰⁶⁴

8.104 The NSWLRC expressed similar views in relation to the exclusion of people on the basis of other disabilities in its 2007 Report on jury selection. In that Report, it recommended the removal of 'sickness, infirmity or disability' as a ground of ineligibility and considered that it should instead be dealt with as a potential ground of excusal for good cause on either a permanent basis or for a particular trial.¹⁰⁶⁵ It recommended that the Sheriff should be able to excuse a person for good cause if 'some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror'.¹⁰⁶⁶

1061 Ibid [5.46].

1062 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 59, Rec 1(a)–(c). The NSWLRC also recommended, at 60 (Rec 3), that a person who is blind or deaf who receives a juror summons should be required to notify the Sheriff of the reasonable adjustments required by the person to participate as a juror, or claim exemption.

1063 Ibid 59, Rec 1(d)–(f).

1064 Ibid 60, 61, Rec 2, 4.

1065 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.16], Rec 24.

1066 Ibid [7.12], Rec 29, [7.14] (b), Rec 31.

LRCWA's recommendations

8.105 At present in Western Australia, a person who is 'incapacitated by any disease or infirmity of ... body, including defective hearing, that affects him or her in discharging the duty of a juror' is excluded from jury service.¹⁰⁶⁷

8.106 The Law Reform Commission of Western Australia noted that, unlike mental disability or illness, 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' and should not be a matter of automatic exclusion.¹⁰⁶⁸ However, in the circumstances of a particular trial, and despite the provision of facilities to assist, a person's physical disability may be such that he or she will be unable to properly discharge the duties of a juror:¹⁰⁶⁹

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, it may be inappropriate for a totally blind person to serve on the jury in that particular trial. (note omitted)

8.107 In those cases — where it appears that the person's disability in the particular circumstances, and despite the provision of facilities to assist, would 'render him or her unable to properly discharge the duties of a juror'¹⁰⁷⁰ — either the summoning officer or the judge should be able to excuse the person from serving:¹⁰⁷¹

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'.¹⁰⁷² 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. (note in original)

8.108 To allow the summoning officer to assess the adequacy of facilities, and to allow the court to determine whether a prospective juror would need to be excused, the LRCWA also proposed the following notice requirements:¹⁰⁷³

¹⁰⁶⁷ *Juries Act 1957* (WA) s 5(b)(iv).

¹⁰⁶⁸ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 100, 107, Rec 56(1), and see 117–18, Rec 60.

¹⁰⁶⁹ *Ibid* 105.

¹⁰⁷⁰ *Ibid* 106, and see 107, Rec 56(1).

¹⁰⁷¹ *Ibid* 107.

¹⁰⁷² Chief Justice Wayne Martin in Department of the Attorney General (WA), *Equality Before the Law Bench Book* (1st ed., 2009) Foreword, v.

¹⁰⁷³ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 107, Rec 56(2), (4).

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.
- ...
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, [of] the nature of the disability and the facilities provided to accommodate or assist in overcoming the disability.

8.109 It also recommended the development of guidelines on the provision of reasonable adjustments,¹⁰⁷⁴ and the provision of disability awareness training for jury officers and court staff.¹⁰⁷⁵

8.110 Amendments have subsequently been introduced into parliament to remove 'disease or infirmity' as a ground of exclusion¹⁰⁷⁶ and to introduce a provision for case-by-case excusal if a person 'is not capable of serving effectively as a juror because he or she has a physical disability'.¹⁰⁷⁷

Discussion Paper

8.111 In its Discussion Paper, the Commission proposed that physical disability should no longer be a basis for automatic exclusion from jury service. Its provisional view was that consideration should be given to the facilities that are required and can be made available to accommodate a person's disability. The Commission made the following proposals on which it sought submissions:¹⁰⁷⁸

- 8-8 Section 4(3)(l) of the *Jury Act 1995* (Qld) should be amended to remove the ineligibility of persons with a physical disability.
- 8-9 Provision should be made for prospective jurors to inform the Sheriff of any disabilities and special needs that they have as part of the *Questionnaire* issued with the *Notice to Prospective Juror*.
- 8-10 The *Jury Act 1995* (Qld) should be amended to provide that if it appears to a judge, after consideration of the facilities that are required and can be made available to accommodate the person's disability, that a prospective juror or juror is unable to discharge the duties of a juror

1074 Ibid 107, Rec 56(3).

1075 Ibid 108, Rec 57.

1076 See *Juries Act 1957* (WA) s 5(b)(iv) proposed to be repealed by Juries Legislation Amendment Bill 2010 (WA).

1077 See proposed new *Juries Act 1957* (WA) ss 34G(2)(f), 34H(2)(d) to be inserted by Juries Legislation Amendment Bill 2010 (WA).

1078 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [8.146]–[8.152], Proposals 8-8 to 8-11.

effectively, the judge may excuse or discharge the person from further attendance.

- 8-11 The Sheriff's Office should consult with peak advocacy organisations for people with physical disabilities on the types of accommodations and assistive technologies that may need to be made or provided by the courts to assist people with disabilities to perform jury service.

Consultation

8.112 The Queensland Law Society expressed support for the Commission's proposals to remove the automatic ineligibility of persons with a physical disability and for accommodations to be provided to assist such persons to serve as jurors:¹⁰⁷⁹

The Society does not object to the removal of the restriction for eligibility on persons with a physical disability.

The Society agrees that the questionnaire provided to prospective jurors should include any information for special needs or disabilities.

The Society agrees that the Judge should have power to excuse any juror suffering from a disability or having special needs if appropriate accommodations cannot be made for them.

The Society agrees that the Sheriff's office should make all attempts to have any technologies that may assist persons with physical disabilities to serve as jurors.

8.113 The Department of Communities also agreed that physical disability should no longer be a basis for automatic exclusion from jury service and expressed general support for Proposals 8-8 to 8-11 in the Discussion Paper. It noted that:¹⁰⁸⁰

the *Disability Services Act 2006* provides that all people with a disability have the same human rights as other members of society and should be empowered to exercise their rights including for their civic participation.¹⁰⁸¹ It is agreed that there should be an onus to provide reasonable accommodation / adjustments for people with a physical disability to enable them to participate. (note added)

8.114 The Department of Justice and Attorney-General also agreed with Proposals 8-8 and 8-9 for disability to be considered on a case-by-case basis,

1079 Submission 52.

1080 Submission 35A. Disability and Community Care Services is part of the Department of Communities. That Department administers, among other things, the *Disability Services Act 2006* (Qld) and the *Guide, Hearing and Assistance Dogs Act 2009* (Qld).

1081 See generally *Disability Services Act 2006* (Qld) pt 2 div 1 (Human rights principle). Section 19(1) of that Act provides that 'people with a disability have the same human rights as other members of society and should be empowered to exercise their rights'.

although it noted that there will be limitations on the extent to which a person's disability can be accommodated.¹⁰⁸²

From a practical perspective we note that the court facilities across the state may have a differing ability to cater for physically disabled jurors. The existing process for physically disabled jurors is that the Sheriff's office or relevant registrar will contact a potential juror who identifies as disabled to discuss the available facilities and whether it will meet their individual needs. [We] would suggest that this practice continue.

8.115 In relation to Proposal 8-10 for the excusal or discharge of a person whose disability cannot be accommodated, the Department of Justice and Attorney-General submitted that the discretion should be conferred not only on the judge but also on the Sheriff.¹⁰⁸³

for all other provisions there is a dual discretion for both the Sheriff and Judge to excuse jurors on certain grounds. This dual discretion is a reflection of the point in time at which the issues are raised by the potential juror. [We] would propose accordingly that in this instance the Sheriff and Judge possess identical discretions.

8.116 The Department of Justice and Attorney-General also supported Proposal 8-11 for consultation with disability advocacy organisations.¹⁰⁸⁴

8.117 Vision Australia also supported the Commission's proposals. It expressed the view that people who are blind or who have vision impairment have the same rights and obligations as others and, accordingly, ought not to be precluded from jury service on the basis of disability and should be given appropriate support to assist them to serve. It noted that, in most cases, the support that is required will be minimal and many people will have, and prefer to use, their own devices:¹⁰⁸⁵

the majority of jurors who are blind or vision impaired will not require large amounts of assistive technology to be provided. It may be the case that people with low vision will require devices to magnify written or visual evidence and to read personal notes. In addition, people who do not use magnification but rather use synthetic speech or Braille for reading text evidence or taking and reading personal notes will require assistive technology with Braille or synthetic speech.

Generally, people who require synthetic speech or Braille technology will prefer to use their own devices rather than using unfamiliar equipment. It is neither feasible nor practical for courts to hold a stock of these devices given that not all people who are blind can use such devices and the setting up of such devices is so individual that people do not usually change from one device to another with ease.

1082 Submission 56.

1083 Ibid.

1084 Ibid.

1085 Submission 58.

It would be advisable that courts access a pool or hire some of the more generic magnification devices such as closed circuit televisions, CCTVs. Given that these are not generally portable devices, it would be impractical for jurors to bring their own device into a court room or juror room situation.

The use of magnification, synthetic speech and/or Braille devices is only practical where the person already has the skill to use such devices. Hence it is unrealistic to expect a person to use an unfamiliar device or to have training to use such devices after they have been selected as a juror.

Given that, in our view, most people will prefer to use their own devices if they are Braille or synthetic speech user[s], the cost to the Courts may be negligible. There may be a cost for the purchase, maintenance and/or hire of some equipment such as CCTVs or braille embossers, however, given that people requiring these may only be selected from time to time as jurors the cost will not be significant. We would consider that the cost would be well justified in that it will eliminate a barrier that may prevent a person from functioning effectively as a juror.

8.118 Vision Australia also submitted that, as well as requiring prospective jurors to inform the Sheriff of any disabilities or special needs they may have, the Sheriff should be required to respond to prospective jurors 'with regard to the specific nature of the special needs to ensure that such needs will be met upon the juror being empanelled for jury service'.¹⁰⁸⁶

8.119 Queensland Advocacy Incorporated also supported the removal of the automatic exclusion of persons with disabilities from jury service. It referred to the United Nations *Convention on the Rights of Persons with Disabilities* ('CRPD').¹⁰⁸⁷

If [jury service] is a right, then it is easily comprehended by Article 1 [of the CRPD], which extends to all people with disability 'the full and equal enjoyment' of all human rights. If it is not a right, but a duty to the State, the performance of which is highly valued and commonly held to confer esteem upon the performer, then people with a disability must enjoy 'the full and equal' freedom possessed by others to perform this duty. To deny them on the basis of their disability the freedom to perform this important service to the State would directly interfere with their 'inherent dignity', the promotion of which Article 1 confirms as a distinct purpose of the CRPD.

8.120 In this respondent's view, the Act should include 'a rebuttable presumption' that all persons, including persons with a disability, have 'the capacity to perform jury service'. It submitted that:¹⁰⁸⁸

1086 Ibid.

1087 Submission 60 referring to *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12, art 1 (entered into force 3 May 2008; entered into force in Australia 16 August 2008). This respondent also referred to art 12 of the Convention (Equal recognition before the law) and the presumption of capacity in sch 1 pt 1 cl 1 of the *Guardianship and Administration Act 2000* (Qld). The CRPD and the presumption of capacity under the guardianship legislation are discussed in Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) vol 1, ch 3, 7.

1088 Submission 60.

where the presumption is challenged the incapacity must be demonstrated on a case-by-case basis according to the individual's ability to discharge their duties as a juror. Incapacity must in no way be presumed because of the existence or nature of the disability.

8.121 Queensland Advocacy Incorporated also submitted that reasonable accommodations that would enable people to serve, such as the provision of interpreters or alternative formats for material, must be made and that 'all efforts to identify and provide reasonable accommodation must be genuine'. It submitted that:¹⁰⁸⁹

positive steps must be taken to promote the cultural and procedural change that will actively include people with disability in the jury system. This will include such things as staff education, modification of facilities to accommodate the ... needs of people with disability, the provision of interpreters and adaptive technology to facilitate participation, and the allocation of funds and other resources to support this change.

8.122 The Commission also received a submission from a member of the public who commented that excusal should be available for persons who would find it difficult to serve on a jury because of a disability.¹⁰⁹⁰

The Commission's view

8.123 In the Commission's view, there should no longer be any automatic exclusion on the basis of physical disability. This should be dealt with on a case-by-case basis, as a matter of excusal or discharge, having regard to the availability of reasonable accommodations to assist people to serve.

8.124 The Commission understands that many of the facilities that could be offered to assist people with disabilities to serve are not presently available in all court houses. The ability of people to perform jury service will improve, however, as more accommodations become available, for example, as court house infrastructure is upgraded for wheelchair accessibility. This will require a continued investment of resources.

8.125 To accommodate the needs of prospective jurors on a case-by-case basis, the Commission recommends that provision be made for:

- prospective jurors to inform the Sheriff of any physical disabilities and special needs they may have as part of the *Questionnaire* issued with the *Notice to Prospective Juror*;
- where the Sheriff is informed of a prospective juror's special needs, the Sheriff to make such further inquiries as are necessary of the prospective juror to give consideration to the facilities that are required and can be made available to accommodate the person's disability; and

¹⁰⁸⁹ Ibid referring in part to art 5(3) of the Convention.

¹⁰⁹⁰ Submission 12 responding to Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

- the Sheriff or the judge to excuse a prospective juror, or the judge to discharge a juror, from jury service if it appears, after a consideration of the facilities that are required and can be made available to accommodate a person's physical disability, that the person is unable to discharge the duties of a juror effectively.¹⁰⁹¹

8.126 These excusal provisions are not intended to provide a means for the Sheriff to exclude people from jury service without making reasonable efforts to enable them to serve. The Commission considers that provision should be made for a prospective juror who has been excused from service on this basis to apply to the judge for a different decision.

8.127 Consideration should be given to the inclusion of these matters in the excusal guidelines that the Commission has recommended in Chapter 9 of this Report.¹⁰⁹²

8.128 The Commission also recommends that the branch of the Department of Justice and Attorney-General that has responsibility for the administration of the Queensland courts (being the branch located within the Brisbane Supreme Court and District Court complex) should undertake consultation with peak advocacy organisations for people with physical disabilities on the types of accommodations and assistive technologies that may need to be made or provided by the courts to assist people to perform jury service.

8.129 In addition, the Commission notes that a person with a physical disability may in some cases be excused from service, by the Sheriff or the judge, on the person's application on the basis of substantial hardship or inconvenience, under sections 19, 20 and 21 of the Act. The criteria for excusal are discussed in Chapter 9 of this Report.

Recommendations

8.130 The Commission makes the following recommendations:

8-8 Section 4(3)(l) of the *Jury Act 1995 (Qld)* should be amended to remove the ineligibility of persons with a physical disability.

8-9 Provision should be made for prospective jurors to inform the Sheriff of any physical disabilities and special needs that they have as part of the *Questionnaire* issued with the *Notice to Prospective Juror*, and for the Sheriff, after receiving such information, to make such further inquiries as are necessary to give consideration to the facilities that are required and can be made available to accommodate the person's disability.

¹⁰⁹¹

The particular nature of the trial/s for which the person may be selected may inform this assessment. The judge's discretion to discharge a juror is discussed further in Chapter 10 of this Report. See n 1024 above.

¹⁰⁹²

See [9.115] and Recommendation 9-7 below.

- 8-10** The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to the Sheriff, after consideration of the facilities that are required and can be made available to accommodate a person's physical disability, that a prospective juror is unable to discharge the duties of a juror effectively, the Sheriff may excuse the person from further attendance.
- 8-11** The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to a judge, after consideration of the facilities that are required and can be made available to accommodate a person's physical disability, that a prospective juror or juror is unable to discharge the duties of a juror effectively, the judge may excuse or discharge the person from further attendance.
- 8-12** The *Jury Act 1995* (Qld) should be amended to provide that a person who is excused from service by the Sheriff on the basis of physical disability may apply to the judge for a different decision.
- 8-13** The branch of the Department of Justice and Attorney-General that has responsibility for the administration of the Queensland courts (being the branch located within the Brisbane Supreme Court and District Court complex) should consult with peak advocacy organisations for people with physical disabilities on the types of accommodations and assistive technologies that may need to be made or provided by the courts to assist people with disabilities to perform jury service.

PERSONS WITH A MENTAL DISABILITY

8.131 Mental capacity is a threshold criterion of juror qualification in that people 'of unsound mind' are excluded from the electoral roll.¹⁰⁹³ Many people who would be ineligible for jury service because of a mental disability will thus already be excluded from the pool of prospective jurors.

8.132 If a person on the electoral roll becomes incapacitated,¹⁰⁹⁴ an application, with an accompanying medical certificate, will need to be made to remove the person's name from the roll.¹⁰⁹⁵

8.133 The proportion of people in the pool of prospective jurors who have diminishing capacity is also likely to increase if the upper age limit on jury service is removed and more people over 70 years opt to serve.

¹⁰⁹³ *Electoral Act 1992* (Qld) s 64(1)(a)(i); *Commonwealth Electoral Act 1918* (Cth) s 93(8)(a).

¹⁰⁹⁴ For example, a person might be found to have impaired capacity under the *Guardianship and Administration Act 2000* (Qld) for matters such as voting: *Guardianship and Administration Act 2000* (Qld) ss 10, 81, sch 2 pt 2 cl 3 (special personal matters). The right to vote in a Commonwealth, State or local government election or referendum is a 'special personal matter' under that Act.

¹⁰⁹⁵ See Australian Electoral Commission, 'Electoral Roll — Frequently Asked Questions' <http://www.aec.gov.au/FAQs/Electoral_Roll.htm> at 8 February 2011.

8.134 The principle of competence and the need for a fair trial requires that persons who do not have the mental competence to perform the duties of a juror should not serve on a jury. While some jurisdictions provide that ‘incapacity’¹⁰⁹⁶ or ‘disability’¹⁰⁹⁷ is a basis for excusal, most jurisdictions, including Queensland, include mental disability (variously defined) as a basis of automatic exclusion.

8.135 Exclusion variously applies to ‘mental disability’,¹⁰⁹⁸ ‘intellectual disability’,¹⁰⁹⁹ ‘intellectual or mental disability’,¹¹⁰⁰ ‘unsoundness of mind’,¹¹⁰¹ ‘disease or infirmity of the mind’,¹¹⁰² or on the basis of being ‘mentally unfit’ for jury service.¹¹⁰³ Those provisions generally apply, however, only to the extent that the disability or infirmity makes the person incapable of performing the functions of a juror.

8.136 In Queensland, a person who has a mental disability that makes the person incapable of effectively performing the functions of a juror is ineligible for jury service in Queensland.¹¹⁰⁴ Claims made on this basis are assessed on a case-by-case basis and generally require the support of a medical certificate.¹¹⁰⁵

8.137 In some jurisdictions, the exclusion applies to categories of people defined or dealt with under mental health legislation:

- In the Northern Territory, a person is not qualified for jury service if he or she is in a hospital or an approved treatment facility or undergoing treatment under the *Mental Health and Related Services Act* (NT), or is a protected person within the meaning of the *Aged and Infirm Persons’ Property Act* (NT).¹¹⁰⁶

1096 *Juries Act 2003* (Tas) ss 9(3)(b), 12; *Juries Act 2000* (Vic) ss 8(3)(b), 11. In the Northern Territory, a person who is ‘otherwise incapacitated by disease or infirmity from discharging the duties of a juror’ is excluded: *Juries Act* (NT) s 11(1), sch 7.

1097 *Juries Act 2003* (Tas) ss 10(3)(b), 12; *Juries Act 2000* (Vic) ss 9(4)(b), 11. See also *Juries Act 1981* (NZ) ss 14B(3)(b), 15(1A)(a).

1098 *Juries Act 1967* (ACT) s 10(d).

1099 *Juries Act 1981* (NZ) s 8(k).

1100 *Juries Act 2003* (Tas) s 6(3), sch 2.

1101 *Juries Act 1967* (ACT) s 10(d); *Juries Act* (NT) s 10(3)(d). The Law Reform Commission of Hong Kong has recently recommended that to be eligible for jury service, a person must be ‘of sound mind’: Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.64]–[5.65], Rec 5(1).

1102 *Juries Act 1957* (WA) s 5(b)(iv).

1103 *Juries Act 1927* (SA) s 13(a).

1104 *Jury Act 1995* (Qld) s 4(3)(l). Section 8(1)(s) of the former *Jury Act 1929* (Qld) used to exclude people ‘of unsound mind’ or who were otherwise ‘incapacitated by disease or infirmity’.

1105 Information provided by the Department of Justice and Attorney-General, 25 February 2011. See generally *Jury Act 1995* (Qld) s 18. The requirement for a medical certificate is specified on the *Notice to Prospective Juror*.

1106 *Juries Act* (NT) s 10(3)(d), (e).

- In Victoria, ineligibility applies to a person who is a patient within the meaning of the *Mental Health Act 1986* (Vic); a person who has an intellectual disability within the meaning of the *Disability Act 2006* (Vic); a person who is a represented person within the meaning of the *Guardianship and Administration Act 1986* (Vic); and a person who is subject to a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).¹¹⁰⁷

8.138 England and Wales have also retained the automatic exclusion of 'mentally disordered' people from jury service, namely:¹¹⁰⁸

- Persons with a mental disorder within the meaning of the *Mental Health Act 1983* (UK) and on account of which are resident in a hospital or similar institution or regularly attend for treatment by a medical practitioner;
- Persons under guardianship or subject to a community treatment order under the *Mental Health Act 1983* (UK); and
- Persons who lack capacity, within the meaning of the *Mental Capacity Act 2005* (UK), to serve as a juror.

8.139 Confining the categories of ineligible persons to those that are defined under other legislation may have the advantage of certainty.¹¹⁰⁹ It has the disadvantage, however, of operating without any inquiry about the person's actual ability to perform jury service. It would exclude people who, despite a finding of incapacity or mental disability in another context, are capable of performing jury service.¹¹¹⁰ It would also mean that persons who have impaired capacity, but do not have a formal court or tribunal order in place or do not regularly attend for treatment, remain eligible.

8.140 In the ACT, the ineligibility provision is supplemented and supported by a provision for the judge to discharge a person if satisfied the person does not sufficiently understand the course of judicial proceedings, or is incapacitated, because of a mental disability, in the proper discharge of the duties of a juror.¹¹¹¹

1107 *Juries Act 2000* (Vic) s 5(3), sch 2.

1108 *Juries Act 1974* (Eng) s 1(1)(c), sch 1 pt 1. Similar provision applies in Scotland: *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt 1.

1109 However, there is presently no mechanism in place for the Sheriff's Office to determine whether, for example, the Adult Guardian has been appointed as a substitute decision-maker for a potential juror: Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1110 This criticism has been made of the disqualification of 'mentally disordered persons' in the United Kingdom which applies, among other things, to persons who have, or have had, a mental disability for which they receive regular treatment: see, for example, Office of the Deputy Prime Minister (United Kingdom), Social Exclusion Unit, *Mental Health and Social Exclusion*, Report (June 2004) [27]–[28] <<http://www.socialinclusion.org.uk/publications/SEU.pdf>> at 8 February 2011; and Rethink, 'Government U-turn on jury service provokes urgent launch of charity campaign' (Press Release, 13 January 2010) <http://www.rethink.org/how_we_can_help/news_and_media/press_releases/government_urn_on.html> at 8 February 2011.

1111 *Juries Act 1967* (ACT) s 16. A similar provision applies in New Zealand: *Juries Act 1981* (NZ) s 16AA.

8.141 The Law Reform Commission of Ireland has provisionally recommended that, while persons with an intellectual disability should continue to be ineligible, impaired mental health should not otherwise automatically exclude persons from jury service but should be dealt with on an application for excusal.¹¹¹²

NSWLRC's recommendations

8.142 As noted above, the NSW Law Reform Commission recommended the removal of 'sickness, infirmity or disability' as a ground of ineligibility¹¹¹³ in its Report on jury selection. Instead, it considered that disability should be dealt with as a potential ground of excusal for good cause.¹¹¹⁴

8.143 Under recent amendments to the *Jury Act 1977* (NSW), a person may now apply for permanent exemption because of a permanent mental impairment 'that results in jury service being incompatible with the person's good health or that otherwise renders the person unable to perform jury service', or exemption from a particular jury service period (or part of it) on the basis of a disability that, without reasonable accommodation, would render the person unsuitable for or incapable of serving as a juror.¹¹¹⁵

LRCWA's recommendations

8.144 At present in Western Australia, a person who is 'incapacitated by any disease or infirmity of mind ... that affects him or her in discharging the duty of a juror' is excluded from jury service.¹¹¹⁶

8.145 The Law Reform Commission of Western Australia expressed the view that a mental or cognitive impairment — which 'may render a person incompetent to discharge the duties of a juror', particularly where it 'impacts upon the person's decision-making ability or the capacity to properly evaluate information' — should be a basis of exclusion from jury service.¹¹¹⁷ It noted that case-by-case assessment of incapacity by the summoning officer is a practical necessity since there is no objective means to identify prospective jurors from the jury lists who would be disqualified on this basis, and is an appropriate approach.¹¹¹⁸ The summoning officer may be able to assess this, however, only when prospective jurors identify themselves as being affected by incapacity and provide supporting medical evidence:¹¹¹⁹

¹¹¹² Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.73]–[4.75].

¹¹¹³ See *Jury Act 1977* (NSW) s 6(b), sch 2 cl 12 to be repealed by *Jury Amendment Act 2010* (NSW).

¹¹¹⁴ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.16].

¹¹¹⁵ *Jury Act 1977* (NSW) ss 14(2), (3), 14A(b) to be inserted by *Jury Amendment Act 2010* (NSW).

¹¹¹⁶ *Juries Act 1957* (WA) s 5(b)(iv).

¹¹¹⁷ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 100, and see 103, Rec 54.

¹¹¹⁸ *Ibid* 100.

¹¹¹⁹ *Ibid* 101.

If the person attends for jury service and fails to disclose a relevant mental impairment, there is little that the summoning officer can do to disqualify the person from jury service, even where a mental impairment is apparent. (notes omitted)

8.146 To improve this, the LRCWA recommended that the concept of mental incapacity should be tied to definitions contained in the relevant mental health legislation, as has been done in some other jurisdictions. In this way, prospective jurors and their family members, and summoning officers, can more clearly identify whether a person is, or is possibly, disqualified from serving; 'It also ensures that people who do not meet these criteria are not unfairly disqualified (as opposed to excused) from serving as a juror'.¹¹²⁰ The LRCWA therefore recommended that a person should not be qualified to serve as a juror if he or she:¹¹²¹

- (iv) is an involuntary patient within the meaning of the *Mental Health Act 1996*;¹¹²²
- (v) is a mentally impaired accused within the meaning of Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996*;¹¹²³ or
- (vi) is the subject of a guardianship order under section 43 of the *Guardianship and Administration Act 1990*.¹¹²⁴ (notes in original)

8.147 These recommendations are reflected in amendments that have since been introduced into parliament. Under the Juries Legislation Amendment Bill 2010 (WA), a person is to be excluded from jury service if the person is an involuntary patient under the *Mental Health Act 1966* (WA), a represented person under the *Guardianship and Administration Act 1990* (WA), or mentally unfit to stand trial or a mentally impaired accused pursuant to the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). The Bill also provides that a person may be excused from jury service if the person 'is not capable of serving effectively as a juror because he or she has a mental impairment'.¹¹²⁵

1120 Ibid 102.

1121 Ibid 103, Rec 54. The LRCWA also recommended, at 105 (Rec 55), that the juror summons and information sheet should notify carers, guardians and family members of the ability to request excusal on behalf of a mentally or intellectually impaired juror.

1122 *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.

1123 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* [WA] 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.

1124 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'.

1125 See proposed new *Juries Act 1957* (WA) ss 5(3)(d), 34G(2)(f), 34H(2)(c) to be inserted by Juries Legislation Amendment Bill 2010 (WA).

Discussion Paper

8.148 In its Discussion Paper, the Commission considered that persons with a mental disability that makes them incapable of effectively performing the functions of a juror should continue to be ineligible for jury service. It sought submissions on the way in which this ground of ineligibility should be expressed and whether specific provision should be made for the judge to discharge or excuse such a person from service:¹¹²⁶

- 8-12 Mental disability that makes the person incapable of effectively performing the functions of a juror should continue to be a ground of ineligibility for jury service under section 4(3)(l) of the *Jury Act 1995* (Qld).
- 8-13 Is the current formulation of the mental disability ground in section 4(3)(l) of the *Jury Act 1995* (Qld) — ‘a mental disability that makes the person incapable of effectively performing the functions of a juror’ — appropriate, or should it be changed in some way?
- 8-14 Should the *Jury Act 1995* (Qld) be amended to provide that, if it appears to the judge that a prospective juror or juror is ineligible for jury service because of a mental disability, the judge may excuse or discharge that person from further attendance?

Consultation

8.149 The Queensland Law Society expressed the view that ‘any mental disability that may affect a person’s ability to perform as a juror should continue to be a ground of ineligibility for jury service’. In its view, the existing formulation of this ground in section 4(3)(l) of the Act ‘is sufficient and has not presented any practical difficulties in its management’. This respondent agreed that a judge should be able to discharge a juror or prospective juror if the judge believes, in applying the test in section 4(3)(l) of the Act, that the person is unable to serve effectively because of their mental disability.¹¹²⁷

8.150 One respondent, the parent of a person with an intellectual disability, expressed the view that such persons should not be called on to perform jury service. That respondent noted that it would cause considerable distress to his son if he were to receive a jury service notice.¹¹²⁸

8.151 The Department of Communities expressed the view that this ground of exclusion should be reformulated. In its view, the term ‘mental disability’ is inappropriate and should be replaced with a reference to the specific types of impairments that the exclusion is meant to capture. It also considered that the

¹¹²⁶ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [8.167]–[8.174], Proposal 8-12, Questions 8-13, 8-14.

¹¹²⁷ Submission 52.

¹¹²⁸ Submission 29.

exclusion should operate only if the person's impairment results in the person being unable to discharge the duties of a juror:¹¹²⁹

The term 'mental disability' is not considered appropriate. It is unclear whether this term refers to persons with an intellectual disability, a cognitive impairment, or a mental illness.

The department agrees with the Commission's view that this ground of ineligibility will need to be assessed on a case-by-case basis, and that eligibility needs to be linked to a person's capacity to discharge their duties as a juror.

When considering the appropriate ground for exclusion, it should be considered whether the ground for exclusion should be two pronged and, as suggested in the [Discussion Paper] linked to any person's functional abilities and linked to both:

1. An intellectual, psychiatric, cognitive, or neurological impairment and
2. that impairment results in a person's inability to discharge their duties of a juror.

In this way, only people with impairments who cannot, without reasonable accommodation and adjustments from the court, discharge their duties as a Juror, would be excluded.

Such an approach would also (fairly) capture people who may be temporarily suffering from some kind of an impairment (due to [for] example a short term medical, or emotional issue). This approach would be less likely to be discriminatory as it would be based on any person's capacity. (emphasis in original)

8.152 The Department of Communities also expressed some support for the suggestion, in Question 8-14 in the Discussion Paper, that provision should be made for the judge to excuse or discharge a person on the basis of mental disability, although it commented that a medical assessment of capacity may be required:¹¹³⁰

The department is generally supportive of the proposed amendment to empower a judge to excuse or discharge a prospective juror from further attendance. However, as a judge may not have the appropriate qualifications to make a judgement on whether a person has capacity, a medical expert could be engaged to make an assessment, should the grounds for exclusion be impairment.

8.153 The Department of Justice and Attorney-General agreed that mental disability that makes the person incapable of effectively performing the functions of

1129 Submission 35A. Disability and Community Care Services is part of the Department of Communities. That Department administers, among other things, the *Disability Services Act 2006* (Qld).

1130 Submission 35A. The Commission notes that a requirement to obtain a medical assessment may have privacy implications.

a juror should continue to be a ground of ineligibility, although it considered that 'disability' should be further defined:¹¹³¹

[We are] supportive of further clarifying this section including an expanded definition of 'disability'. There is some concern that those who fall short of a formal guardianship order or similar yet who display clear symptoms of mental health issues may find themselves on a jury and thereby compromise the justice process.

8.154 The Department also noted that, at present, 'there are no positive checks performed by staff to determine whether a potential juror is subject to a guardianship order, forensic order or similar'.¹¹³²

8.155 As noted at [8.120] above, Queensland Advocacy Incorporated considered that all people, including people with disabilities, should be presumed to have the capacity necessary to perform jury service. In its view, this should apply 'to all people with disability not just people with a physical disability'. It submitted that a person's ability to serve as a juror should be determined 'on a case-by-case basis' and should not be 'presumed because of the existence or nature of the disability'. It also submitted that reasonable accommodation should be provided to enable a person with a disability to serve. It did not give examples, however, of the sorts of measures that might be taken to assist a person with a 'mental disability' to perform the duties of a juror.¹¹³³

The Commission's view

8.156 All adults are presumed to have capacity.¹¹³⁴ Exclusion on the basis of mental disability will need to be assessed on a case-by-case basis and will ordinarily depend on self-identification.

8.157 Sometimes, doubt about a person's capacity will arise only after the person has been empanelled on a jury, perhaps because the person denies the existence or extent of a psychological or psychiatric difficulty. In those cases, the person's difficulty may remain hidden unless and until it manifests in a disturbance during the trial or the jury's deliberations.¹¹³⁵ Depending on the nature of the difficulty and the way in which it comes to light, this may require the discharge of the jury before a verdict is given.¹¹³⁶ The difficulty of identification in such circumstances is not one that can easily be overcome, and is not one that is

1131 Submission 56.

1132 Ibid.

1133 Submission 60.

1134 Eg *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12, art 12(2) (entered into force 3 May 2008; entered into force in Australia 16 August 2008).

1135 Eg *R v Metius* [2009] QCA 3.

1136 Eg Transcript of Proceedings, *R v Ney* (Supreme Court of Queensland, Atkinson J, 3 June 2010).

confined to the selection of jurors; similar issues may also arise, for instance, with self-represented litigants in civil actions.¹¹³⁷

8.158 Although it will sometimes be difficult to administer in practice, the Commission is nevertheless of the view that the Act should continue to include a ground of ineligibility based on mental disability or impairment.¹¹³⁸ It is a necessary condition of jury service, and an integral part of the defendant's right to a fair trial, that jurors have the mental capacity to discharge the duties of a juror. Although this must be presumed of all potential jurors, there must also be a mechanism in the Act to deal with situations in which a person does not meet this threshold.

8.159 In the Commission's view, the existing formulation — that people who have a mental disability *that makes them incapable of effectively performing the functions of a juror* are ineligible to serve — appropriately links the ineligibility to the person's actual inability to carry out the functions of a juror and does not rest on the fact of disability or impairment alone.

8.160 The Commission does not consider, however, that the terminology of 'mental disability' is appropriate. It should be replaced with a reference to 'intellectual, psychiatric, cognitive, or neurological impairment', as suggested in the submission from the Department of Communities. This has the benefit of flexibility and improved clarity, and avoids the disadvantages associated with the alternative formulations the Commission has considered.

8.161 The Commission considered whether the formulation should, alternatively, be changed so that it applies to:

- people for whom a guardianship order is in place under the *Guardianship and Administration Act 2000* (Qld); and
- people who are involuntary patients under the *Mental Health Act 2000* (Qld).

8.162 However, although this may assist in determining whether a person is ineligible or not, it is too blunt an approach. It introduces the idea of a status approach for what is presently, and ought continue to be, a more functional standard.¹¹³⁹ This is at odds with the contemporary tenor of human rights principles for adults with mental disabilities. Further, many adults who have impaired capacity for a matter within the meaning of the *Guardianship and Administration Act 2000* (Qld) are not the subject of a guardianship order.

¹¹³⁷ Eg Queensland Public Interest Law Clearing House, *Incapable of Justice: Capacity and Self-Represented Civil Litigants*, Submission to the Public Trustee of Queensland (November 2009).

¹¹³⁸ *Jury Act 1995* (Qld) s 6 provides that 'the fact that a person who is not qualified for jury service serves on a jury is not a ground for questioning the verdict'.

¹¹³⁹ The functional approach to determining a person's decision-making capacity is to ask whether the person is able to understand the nature and effects of the decision at the time the decision needs to be made; the status approach to capacity determination is to ask whether the person has a certain status that is said to indicate a lack of capacity, such as the status of being under 18 years of age or of having a particular type of disability or illness. See generally Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [7.8].

8.163 The Commission also considered whether the ground should be reworded to the effect that a person who has impaired capacity, within the meaning of the *Guardianship and Administration Act 2000* (Qld),¹¹⁴⁰ is ineligible for jury service. This would confirm the functional nature of the criterion, but would be a very difficult standard to apply in practice in the absence of a formal order or ruling. On balance, therefore, the Commission preferred the formulation set out at [8.160] above.

8.164 To maximise the opportunity for the courts to deal appropriately and sensitively with prospective jurors who may be ineligible because of a mental impairment, the Commission considers that judges should be specifically empowered to excuse or discharge a prospective juror or juror from further attendance if it appears that the person is incapable of effectively performing the functions of a juror on this basis.¹¹⁴¹ Judges will develop different practices to ensure that this is done in a discreet fashion to avoid unnecessary embarrassment.

Recommendations

8.165 The Commission makes the following recommendations:

8-14 Section 4(3)(l) of the *Jury Act 1995* (Qld) should be amended to provide that a person who has an intellectual, psychiatric, cognitive, or neurological impairment that makes the person incapable of effectively performing the functions of a juror is ineligible for jury service.

8-15 The *Jury Act 1995* (Qld) should be amended to provide that, if it appears to the judge that a prospective juror or juror is incapable of effectively performing the functions of a juror because of an intellectual, psychiatric, cognitive, or neurological impairment, the judge may excuse or discharge the person from further attendance.

PERSONS OF RELIGIOUS VOCATION OR BELIEF

8.166 In some jurisdictions, ministers of religion, members of the clergy, or 'vowed members' of religious orders are excluded, or may claim excusal as of right, from jury service.¹¹⁴² Some jurisdictions also provide for the excusal of practising

¹¹⁴⁰ A person has impaired capacity for a matter under that Act if the person does not have capacity; capacity means the person is capable of (a) understanding the nature and effect of decisions about the matter, (b) freely and voluntarily making decisions about the matter, and (c) communicating the decisions in some way: *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 Dictionary (definitions of 'impaired capacity' and 'capacity').

¹¹⁴¹ See n 1024 above.

¹¹⁴² *Juries Act 1967* (ACT) s 11(2), sch 2 pt 2.2; *Jury Act 1977* (NSW) s 7, sch 2 cl 1, 2 to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1957* (WA) s 5(c)(i), sch 2 pt 2. See also *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* ss 1(2), 1A, sch 1 pt III; *Jury Ordinance, Cap 3* (HK) s 5(1)(h), (ha), (hb), (n).

members of religious groups, the beliefs or principles of which are 'incompatible' with jury service.¹¹⁴³

8.167 Section 8(1)(d) of the former *Jury Act 1929* (Qld) also used to exclude:

ministers of religion; officers of the Salvation Army who are lawfully authorised to celebrate marriages; monks, nuns and other members under vows of any religious community which requires its members to be under vows and postulants for membership of such a community.

8.168 These provisions invite some debate as to which religions, and which form of religious ordination, would be accepted as the basis for automatic excusal.

8.169 Religious-based exclusions are said to be warranted on a number of bases:

- Religious-based objection is recognised as a valid excuse for failure to vote at elections.¹¹⁴⁴
- If conscientious objectors are required to serve despite their objections, they will refuse to participate in jury deliberations and hung juries may result.¹¹⁴⁵
- Religious officials would be inclined to compassion, making it difficult for them 'to consider the claims of justice alone'.¹¹⁴⁶
- The absence of a priest for jury service would cause hardship to his or her congregation and community.¹¹⁴⁷
- Religious officials may have confidential information about the persons involved in a criminal trial.¹¹⁴⁸

8.170 On the other hand, it is argued that religious vocation or belief should not automatically entitle a person to be excluded from jury service because:

- There is a sense of inequity in allowing some persons to avoid a civic duty (and implicitly pass it on to others) even though they will continue to receive the benefits and privileges the duty upholds.¹¹⁴⁹

¹¹⁴³ *Juries Act 1967* (ACT) s 11(2), sch 2 pt 2.2; *Juries Act 2003* (Tas) ss 9(3)(h), 10(3)(c), 12; *Juries Act 2000* (Vic) ss 8(3)(j), 11; *Juries Act 1981* (NZ) ss 15(2)(a), 16(a).

¹¹⁴⁴ *Electoral Act 1992* (Qld) s 164(2). See also *Commonwealth Electoral Act 1918* (Cth) s 245(14); *Electoral Act 1992* (ACT) s 129(3); *Parliamentary Electorates and Elections Act 1912* (NSW) s 120C(6)(d); *Electoral Act* (NT) s 279(2); *Electoral Act 1985* (SA) s 85(8)(c); *Electoral Act 2004* (Tas) s 181(2)(c); *Electoral Act 1907* (WA) s 156(16)(a).

¹¹⁴⁵ Eg New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.30], [7.34].

¹¹⁴⁶ *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the 'Morris Report') [120].

¹¹⁴⁷ Eg Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.95].

¹¹⁴⁸ Eg Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 114.

- The risk that a conscientious objector will cause a hung jury is reduced in cases where juries are permitted to give non-unanimous verdicts.¹¹⁵⁰
- The special experience of religious officials may be ‘very useful inside the jury room’.¹¹⁵¹
- All jurors are expected to set aside their personal predilections to deliver a verdict according to law.

8.171 There is presently no specific religious-based exclusion in Queensland. The Commission understands, however, that in practice most conscientious objectors are excused because of the risk that the jury process will be frustrated as a consequence of the person’s beliefs.¹¹⁵² Those excusals are made with reference to section 21(1)(c) of the Act — which refers to substantial inconvenience to the public or a section of the public — but could also be dealt with by reference to section 21(1)(a) which refers to substantial hardship to the person.

8.172 Research conducted in some of the other Australian jurisdictions indicates that the number of people who seek excusal on the basis of conscientious objection is low, amounting to only 1% of people who had sought excusal.¹¹⁵³

8.173 In England and Wales, the automatic exclusion of the clergy has been removed.¹¹⁵⁴ The guidelines for granting excusals and deferrals in that jurisdiction provide that:¹¹⁵⁵

Applications for excusal from members of enclosed religious orders, from practising members of religious societies and orders, and from members of generic or secular organisations, whose ideology, or beliefs are incompatible with jury service, should be granted. If evidence for either situation is not provided, it should be requested before the application is further considered. Where jury service conflicts with an applicant’s religious festival they should be deferred.

8.174 The NSW Law Reform Commission similarly expressed the view that ‘the special case of those whose religious faith is inconsistent with jury service, or of those who may have some pastoral association with people involved in a particular

1149 Eg New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.33].

1150 See *Jury Act 1995* (Qld) s 59A.

1151 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.96].

1152 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1153 See [9.4] below.

1154 See *Juries Act 1974* (Eng) s 9(2). A similar approach was recommended in Hong Kong: Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.130]–[5.131], [5.83]–[5.89], Rec 7 and 8(3)(d)–(f), (j), (4).

1155 Her Majesty’s Courts Service (United Kingdom), ‘Guidance for summoning officers when considering deferral and excusal applications’ [8]. This approach generally accords with the view of Lord Justice Auld and the Runciman Royal Commission: Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [33]; The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO (1993) 132 [57].

trial' can be adequately dealt with by an application for discretionary excusal.¹¹⁵⁶ In its view, the guidelines for excusal should include reference to the 'holding of objectively demonstrated religious or conscientious beliefs that would be incompatible with jury service'.¹¹⁵⁷ However, clergy and vowed members of religious orders retain a right to claim exemption under recent amendments made to the *Jury Act 1977* (NSW).¹¹⁵⁸

8.175 The Law Reform Commission of Western Australia also concluded that where there are sufficient reasons for a minister of religion to be excluded from jury service, this can be 'accommodated within the general concept of excuse for good cause',¹¹⁵⁹ and amendments have recently been introduced into the Western Australia parliament to remove the current entitlement of 'persons in holy orders or who preach or teach in any religious congregation' to claim excusal as of right.¹¹⁶⁰

Discussion Paper

8.176 In its Discussion Paper, the Commission expressed the provisional view that there should be no automatic excusal on the basis of religious vocation or belief. It noted that discretionary excusal and deferral would adequately provide for those circumstances in appropriate cases. It proposed that:¹¹⁶¹

- 8-15 Religious vocation or belief should not render a person ineligible for jury service or otherwise entitle a person to automatic exemption from jury service. Concerns about impartiality, prior commitments or hardship arising out of a person's religious vocation are appropriately dealt with on a case-by-case basis, according to merit, by the existing provisions for discretionary excusal and discharge that are available to all prospective jurors, and, if it is adopted, by a system of deferral of jury service.

Consultation

8.177 The Queensland Law Society expressed the view that 'the current system of the Judge dealing with appropriate requests for excusal on a case by case basis is working and has not presented any problem that needs change'.¹¹⁶²

¹¹⁵⁶ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.22], and see [7.34]. See also, for example, Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.199], Rec 49. Cf New South Wales Law Reform Commission, *Conscientious Objection to Jury Service*, Report 42 (1984) [5.21] in which it was recommended that conscientious objection to jury service should be recognised as a ground of excusal as of right.

¹¹⁵⁷ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) 7, Rec 33.

¹¹⁵⁸ *Jury Act 1977* (NSW) s 7, sch 2 cl 1, 2 to be inserted by *Jury Amendment Act 2010* (NSW).

¹¹⁵⁹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 114, and see 116, Rec 59.

¹¹⁶⁰ See *Juries Act 1957* (WA) s 5(c)(i), sch 2 pt 2 cl 3 which is proposed to be repealed by Juries Legislation Amendment Bill 2010 (WA).

¹¹⁶¹ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [8.197]–[8.200], Proposal 8-15.

¹¹⁶² Submission 52.

8.178 The Department of Justice and Attorney-General also agreed that there should be no automatic exemption or excusal on the basis of religious vocation or belief.¹¹⁶³

8.179 However, one respondent, who made a preliminary submission to this review, considered that it has been ‘a serious error of judgement’ to remove the automatic exemption for members of the clergy.¹¹⁶⁴ This respondent, a Catholic priest in regional south-east Queensland, argued that priests should be automatically exempted from jury service.¹¹⁶⁵

8.180 In that respondent’s view, one reason for this is the priest’s role in the sacrament of penance (or confession). This respondent submitted that the confidentiality of the confessional extends not only to what the penitent tells the priest but to the fact that the person participated in the sacrament. Because it would breach ‘the seal of the confessional’, a priest on a jury panel may ‘find himself with privileged knowledge about a party in a case but [be] unable to disclose even this fact to a judge’.

8.181 This respondent also pointed out that clergy may feel compelled towards leniency because of their religious beliefs even if this conflicted with what would appear to be a correct verdict on the evidence and the law.

8.182 Additionally, it was suggested that a priest’s absence for jury service may jeopardise the many important pastoral duties that clergy perform in the community, especially since the number of ordained priests in Australia is in decline. It is through those duties, this respondent argued, that priests fulfil their civic obligation of community service and not through jury service.

8.183 Another two respondents, who described themselves as being ‘in fellowship with the Brethren, a world-wide association of Christians each of whom seeks to walk with a pure conscience and heart according to strict observance of Christian beliefs and way of life, as set out in the Holy Scriptures’, also submitted that conscientious objection to jury service should be specifically provided for in the *Jury Act 1995* (Qld) as it is in the legislation in some other jurisdictions.¹¹⁶⁶

8.184 These respondents explained, on the basis of their scriptural beliefs, that although they recognise the authority of government, ‘if government requires a Christian to do something contrary to Scripture, his conscience is immediately activated, and he must “obey God rather than men” (Acts 5 verse 29 last clause)’.

1163 Submission 56.

1164 Section 8(1)(d) of the former *Jury Act 1929* (Qld) used to exclude: ministers of religion; officers of the Salvation Army lawfully authorised to celebrate marriages; and monks, nuns and other members of vowed religious orders from jury service. Those exclusions were removed when the *Jury Act 1995* (Qld) was enacted.

1165 Submission 18.

1166 Submission 47.

They also explained that ‘the concept of a jury (even though we acknowledge that it is a part of our country’s legal system) is not scriptural’.¹¹⁶⁷

8.185 These respondents further explained, with reference to scriptural authority, that their conscience would prevent them from associating with people (or serving with jurors) who do not, like them, participate in the sacrament of Holy Communion. They alluded to the risk of a hung jury if they were required to serve.¹¹⁶⁸

The Commission’s view

8.186 In the Commission’s view, the present position in Queensland should be retained. Religious vocation or belief is insufficient to justify a category of automatic exclusion from jury service. Objection to jury service on the basis of religious or other personal beliefs is best accommodated on a case-by-case basis. There is no need to create special exclusions that apply only to people of religious vocation or belief.

8.187 For example, concerns about impartiality — because one of the participants in the trial is known to the person in his or her capacity as a minister of religion — can be dealt with in the same way as with anyone else. The Commission considers that it would ordinarily be sufficient for the person to inform the judge of the fact of his or her acquaintance without having to convey the circumstances of the acquaintance, such as having taken the defendant’s confession. It would thus not entail any breach of confidentiality. The judge’s discretion to discharge a juror under section 46 of the Act is discussed in Chapter 10 of this Report.

8.188 If the timing of jury service conflicts with an important religious event or commitment, this can be dealt with, where appropriate, by an application for discretionary excusal, or by deferral of jury service to a later period.¹¹⁶⁹

8.189 Finally, conscientious objections to jury service can be dealt with, where they are warranted, by applications for discretionary excusal under sections 19, 20 and 21 of the Act. In the Commission’s view, however, excusal should be granted only if the person shows evidence of a genuinely held belief or conviction that is incompatible with jury service. This is a matter that is probably best accommodated in a set of guidelines, however, rather than in an amendment to the legislation. The criteria for discretionary excusal, and the development of guidelines for excusal applications, are discussed in Chapter 9 below.

Recommendation

8.190 The Commission makes the following recommendation:

1167 Ibid.

1168 Ibid.

1169 In Chapter 9 of this Report, the Commission has recommended the introduction of a system of deferral of jury service to deal with valid, but temporary, reasons why a person is unable to perform jury service: see [9.105]–[9.106] and Recommendation 9-6 below.

8-16 Religious vocation or belief should not render a person ineligible for jury service or otherwise entitle a person to automatic exclusion from jury service. Concerns about impartiality, prior commitments or hardship arising out of a person's religious vocation are appropriately dealt with on a case-by-case basis, according to merit, by the existing provisions for discretionary excusal and discharge that are available to all persons who are summoned for jury service, and, if it is adopted, by a system of deferral of jury service.

Chapter 9

Excusal and Deferral

INTRODUCTION	252
THE BASIS FOR EXCUSAL	252
EXCUSAL AS OF RIGHT	254
Discussion Paper	256
Consultation	257
The Commission's view	258
Recommendation	259
EXCUSAL AS OF RIGHT FOR PREVIOUS JURY SERVICE	259
NSWLRC's recommendations	260
LRCWA's recommendations	261
Discussion Paper	261
Consultation	262
The Commission's view	262
Recommendations	263
EXCUSAL FOR CAUSE	263
NSWLRC's recommendations	267
LRCWA's recommendations	268
Discussion Paper	270
Consultation	270
The Commission's view	272
Recommendations	274
DEFERRAL OF JURY SERVICE	274
NSWLRC's recommendations	275
LRCWA's recommendations	275
Advantages of a system of deferral	276
Resource implications	277
Discussion Paper	278
Consultation	278
The Commission's view	279
Recommendation	280
EXCUSAL AND DEFERRAL GUIDELINES	281
Discussion Paper	283
Consultation	283
The Commission's view	283
Recommendations	284

INTRODUCTION

9.1 The Commission's Terms of Reference require it to consider whether the current provisions and systems relating to excusals for jury service are appropriate, having regard to possible alternative options to excusal such as deferment.¹¹⁷⁰

THE BASIS FOR EXCUSAL

9.2 In many jurisdictions, there are two types of excusal: excusal as of right, which entitles a person to excusal, if he or she claims it, on the basis that the person fits within a given class of exempted people; and discretionary excusal, which is granted on application only if there is sufficient cause in the individual circumstances. A number of jurisdictions also make provision for a person's service to be deferred to a later time.

9.3 The most common reasons for which people seek excusal appear to be employment or financial hardship, and personal or family commitments.

9.4 For instance, the results of a recent study of juror satisfaction conducted for the Australian Institute of Criminology in New South Wales, South Australia and Victoria showed that, while two out of three jury-eligible citizens said they would like to serve on a jury, 19% said they would seek to avoid jury service for 'personal reasons' and 14% said they would do so for 'financial reasons'.¹¹⁷¹ The researchers also found, from discussions with jury administrators, that 'employment-related concerns' and 'financial hardship' were a 'common excuse' for avoiding jury service.¹¹⁷² Of those who had been summoned but had not actually served:¹¹⁷³

- 1% had ignored the summons;
- 13% had not served because they were ineligible or disqualified;
- 40% had claimed excusal or were deferred;
- the main reasons cited for excusal or deferral were work commitments (31%) and care of dependants (23%);
- the other reasons cited were health (12%), loss of income (6%), study (5%), holiday plans (4%) and conscientious objection (1%), while 26% cited unspecified 'other' reasons.

1170 The Terms of Reference are set out in Appendix A to this Report.

1171 Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 127–57.

1172 Ibid 25.

1173 Ibid 132. Similarly, work, holiday, medical and child care commitments were the most commonly cited reasons for seeking deferral in a study of prospective jurors in the United Kingdom: R Matthews, L Hancock and D Briggs, *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04 (2004) 27.

9.5 In Queensland, planned trips and other similar prior personal commitments are a common basis for applications for excusal,¹¹⁷⁴ but the most common ground for excusal is employment. It has been noted that people may not want to be excused but nevertheless feel that their employment may be jeopardised if they serve.¹¹⁷⁵ The Commission understands that, in 2009–10, while 225 913 people were initially sent a *Notice to Prospective Juror*, 111 753 people were ultimately excused from service, for the particular jury service period or part of the period or permanently, either under section 21 of the Act (because, for example, of substantial hardship or inconvenience), or under section 22 of the Act (because they had performed jury service at some time in the preceding 12 months):

	Number of jury service notices sent	Number of people excused
2006–07	211 975	105 958
2007–08	245 940	116 118
2008–09	241 480	113 963
2009–10	225 913	111 753

Table 9.1: Number of people excused from jury service under sections 21 and 22 of the *Jury Act 1995* (Qld)¹¹⁷⁶

9.6 The Law Reform Commission of Western Australia reported that most excusals in Western Australia are made on the basis of work matters (18%), followed by health issues (5%), ‘circumstances of sufficient weight, importance or urgency’ (4.4%),¹¹⁷⁷ pre-booked holidays (2.9%), and recent jury service (0.38%).¹¹⁷⁸

9.7 The Australian Institute of Criminology study also compared the attitudes of jury-eligible citizens on the grounds for excusal with those of non-empanelled and empanelled jurors:¹¹⁷⁹

There was a general consensus amongst one-half of the jurors and community members that exemption from jury duty should be granted to people who live more than 50 km from the courthouse, and people with responsibility for children under the age of 12 years. Jurors were slightly more likely to believe that people with holiday plans (60%) and financial hardships (41%) should be

1174 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1175 Information provided by the Department of Justice and Attorney-General, 25 February 2011. It is an offence under s 69 of the Act for a person to terminate or prejudice another person’s employment because the other person is, was or will be absent from employment on jury service. Breaches and penalties under the Act are discussed in Chapter 14 of this Report.

1176 Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

1177 See the grounds in *Juries Act 1957* (WA) ss 27, 32, sch 3. Those grounds are proposed to be repealed and replaced by *Juries Legislation Amendment Bill 2010* (WA).

1178 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 114.

1179 Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 152.

exempt from jury duty, compared with community members (48% and 40% respectively). Conversely, both jurors and community members were less supportive of exemptions for people with important jobs (28%), study commitments (39%), or for people with responsibility for children aged 12–18 years (21%).

9.8 Special excusal provisions for people with ‘important jobs’¹¹⁸⁰ or who are ‘more affluent and powerful’¹¹⁸¹ appear to be a source of community concern.

9.9 In considering what the proper bases for excusal should be — and whether there should be any categories of excusal as of right — the Commission has had regard to the following principles identified in Chapter 5 of this Report:

- Juries should be broadly representative of the wider community, and wide participation in, and the fair sharing of, jury service should be encouraged and enabled. Excusals from jury service should therefore be limited to those that are essential.
- Being an important civic duty, jury service should be shared as equitably as possible among all members of the community. People should not be able to avoid jury service without special justification.
- Jurors should be competent to perform their duties.¹¹⁸² Excusal from jury service may be appropriate in some circumstances, such as illness, if a person is unable to discharge the duties of a juror.
- The inconveniences of jury service, and the desire to avoid performing jury service, should be minimised. Mechanisms, such as excusal and deferral, should be available to address circumstances of substantial hardship or inconvenience.

EXCUSAL AS OF RIGHT

9.10 People are said to be entitled to ‘excusal as of right’ if they are eligible for jury service but may opt out of service if they choose. In some jurisdictions, excusal as of right is available to persons such as doctors, teachers, emergency service workers, academics, clergy and ministers of religion, pregnant women and carers.¹¹⁸³

1180 Ibid.

1181 R Matthews, L Hancock and D Briggs, *Jurors’ perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04 (2004) 27.

1182 The principle of competence is recognised as part of the right to a fair trial in art 14(1) of the *International Covenant on Civil and Political Rights*: see [5.3] above.

1183 See *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 7, sch 2 to be inserted by *Jury Amendment Act 2010* (NSW); *Juries Act 1957* (WA) s 5(c)(ii), sch 2 pt II; *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(2), sch 1 pt III.

9.11 The general trend, however, is toward the removal of such categories.¹¹⁸⁴ In England and Wales, virtually all entitlements to excusal as of right have been removed.¹¹⁸⁵ Instead, people may be excused only if they can show there is a 'good reason'.¹¹⁸⁶ In proposing that position, Lord Justice Auld drew on these comments made by the Morris Committee:¹¹⁸⁷

In a community as highly organised as ours it is extremely difficult to draw a line between those whose work is so crucial that it would be against the public interest to compel them to serve as jurors, and those whose work does not fall into this category. Persuasive arguments can be advanced for granting entitlement to excusal as of right to a large number of occupations. It must be remembered, however, that in most occupations arrangements are made to deal with the unavoidable and temporary absence of individuals. Furthermore, the fact that the members of an occupation are not in general entitled to be excused as of right need not prevent an individual member of that occupation from making out a convincing argument on a particular occasion why the summoning officer should exercise his discretionary power to grant excusal for good reason.

9.12 The Law Reform Commission of Ireland has similarly proposed that the several categories of excusal as of right be removed and replaced with a general right of excusal for good cause.¹¹⁸⁸

9.13 Most recently in Australia, the Law Reform Commission of Western Australia has also recommended the abolition of excusals as of right.¹¹⁸⁹ In its view, excusal as of right 'potentially undermines the important goal of ensuring that juries are broadly representative of the community', is inconsistent with the encouragement of 'wide participation in jury service', and 'means that the burden of jury service is not being shared equitably'.¹¹⁹⁰ It noted that in 2009 in Perth, approximately 18% of persons summoned for jury service had been excused as of right prior to their date for service.¹¹⁹¹ Amendments have recently been introduced into parliament to remove the existing categories of excusal as of right.¹¹⁹²

9.14 Similarly, the NSW Law Reform Commission recommended the removal of a number of categories of automatic excusal.¹¹⁹³ In its view, the entitlement to

1184 See Chapter 3 above.

1185 See *Criminal Justice Act 2003* (Eng) s 321, sch 33 cl 15.

1186 *Juries Act 1974* (Eng) s 9. See also s 9A (Discretionary deferral).

1187 *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the 'Morris Report') [147]. See also Lord Justice Auld, *Review of Criminal Courts in England and Wales*, Report (2001) [37].

1188 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.107]–[3.116].

1189 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 116–17, Rec 59.

1190 *Ibid* 116.

1191 *Ibid* 113.

1192 See Juries Legislation Amendment Bill 2010 (WA) cl 10, 36 which proposes to repeal *Juries Act 1957* (WA) s 5(c)(i), sch 3.

1193 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.22], [6.26], [6.32], [6.49], [6.55], [6.57]–[6.60], [6.64], Rec 26, 27.

claim excusal as of right is regarded by many as a readily accepted 'invitation to be excused', is a 'cause for resentment and diminution in confidence' among other jurors, 'denies the system of the service of many qualified and experienced people', and 'threatens both the representative nature of juries and the fairness of the trial'.¹¹⁹⁴ Recent amendments to the *Jury Act 1977* (NSW) will remove several categories of excusal as of right, although some will be retained.¹¹⁹⁵

9.15 In contrast, the Scottish Government considered that the categories of excusal as of right in Scotland should be retained.¹¹⁹⁶ It noted, for example, that although the removal of excusal as of right would enlarge the jury pool, this benefit would be lost if case-by-case excusals were granted at 'roughly the same rate and across largely the same occupations as at present'.¹¹⁹⁷

9.16 With one exception, there is presently no provision in Queensland allowing any person to claim excusal as of right from jury service; all claims for excusal are to be assessed on a case-by-case basis and are granted in the Sheriff's or the judge's discretion. The one exception is the provision allowing people who have performed jury service at some time in the previous 12 months to be excused for the jury service period.¹¹⁹⁸

Discussion Paper

9.17 In its Discussion Paper, the Commission expressed the provisional view that there is no justification in Queensland for conferring an entitlement to claim excusal as of right (as distinguished from certain categories of ineligibility) solely on the basis of a person's occupation, office or profession, and made the following proposal:¹¹⁹⁹

7-2 No person should be entitled to claim exemption or excusal as of right from jury service solely on the basis of his or her occupation, office or profession unless that occupation, office or profession otherwise renders the person ineligible to serve.

1194 Ibid [6.3]–[6.4].

1195 *Jury Act 1977* (NSW) s 7, sch 2 to be inserted by *Jury Amendment Act 2010* (NSW). The amending Act is to repeal *Jury Act 1977* (NSW) s 7, sch 3, removing the entitlement to excusal as of right for: mining managers and under-managers of mines; persons who are at least 70 years old; pregnant women; persons with the care, custody and control of children under 18 years; persons who reside with and have full-time care of a person who is sick, infirm or disabled; and persons who reside more than 56 km from the place at which they are required to serve. The amendments will retain the entitlement to excusal as of right for: clergy; vowed members of religious orders; practising dentists, pharmacists and medical practitioners; and emergency services workers. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2010, 23675 (Barry Collier, Parliamentary Secretary).

1196 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [6]. See also *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(2), sch 1 pt III which applies to parliamentarians, the Auditor-General, full-time serving members of the defence forces, practising health professionals, persons with religious beliefs that are incompatible with jury service, ministers of religion, and persons who have performed jury service in the previous five years.

1197 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials*, Consultation Paper (2008) [4.13].

1198 *Jury Act 1995* (Qld) s 22. This is discussed later in this chapter.

1199 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.24]–[7.25], Proposal 7-2.

9.18 It also proposed that, in general, there should be no other categories of excusal as of right.¹²⁰⁰

9-1 Other than in relation to previous jury service and people 70 years or older, no person should be entitled to claim exemption or excusal from jury service as of right solely on the basis of belonging to a particular class or because of particular personal circumstances.

Consultation

9.19 The Queensland Law Society agreed that 'no person should be entitled to claim exemption or excusal solely on the basis of occupation unless the person engages in work concerning the criminal justice system'. It also agreed with the Commission's proposal that:¹²⁰¹

no person other than those entitled to claim a specific exemption on the basis of occupation or age should have a right to be excused purely because they belong to a particular class or have particular personal circumstances.

9.20 The Department of Justice and Attorney-General similarly agreed that no person should be entitled to claim excusal as of right solely on the basis of occupation or profession, or of belonging to a particular class or because of particular personal circumstances.¹²⁰²

9.21 Vision Australia also agreed with Proposal 9-1 in the Discussion Paper:¹²⁰³

people who are blind or who have low vision should not be precluded from jury duty as a right on the grounds of disability and [if] given appropriate support, which in most cases will be minimal or absent, will ably carry out the functions and responsibilities of a juror.

9.22 However, Queensland Advocacy Incorporated submitted that, just as people who are 70 years or older may choose whether or not to serve, people with a disability should 'have the right to abstain from performing jury service if they choose':¹²⁰⁴

Persons with disability should be given the right of excusal whereby they can choose to be excused from jury service because they believe jury service would cause extreme hardship or because jury service may adversely affect their health or for other personal reasons.

1200 Ibid [9.8]–[9.11], Proposal 9-1.

1201 Submission 52.

1202 Submission 56.

1203 Submission 58.

1204 Submission 60.

9.23 One respondent suggested that professionals are excused from jury service at roughly double the rate of prospective jurors in other occupational categories.¹²⁰⁵

The Commission's view

9.24 As explained earlier, the *Jury Act 1995* (Qld) enables people who have served at some time in the previous 12 months to be excused for the jury service period.¹²⁰⁶ In addition, the Commission has recommended three further categories of automatic excusal for persons who are otherwise eligible:

- persons who are, or have been in the preceding three years, a government legal officer or an Australian legal practitioner employed or engaged in the provision of legal services in criminal cases;¹²⁰⁷
- people who are 70 years or older;¹²⁰⁸ and
- for any civil trial, persons who are, or have been in the preceding three years, a government legal officer or an Australian legal practitioner employed or engaged in the provision of legal services in civil cases.¹²⁰⁹

9.25 Having regard to the trend in other jurisdictions away from excusals as of right, and except in relation to the above categories, the Commission's view is that the position in Queensland should remain as it is. To introduce a number of categories of excusals as of right would tend to undermine the representativeness of juries and the fair sharing of jury service among all members of the community. It would be unfair to allow some groups of people to decide for themselves whether or not to perform jury service. It may also lead to public cynicism about the perceived ability of those in 'special' occupations or classes to avoid a duty that other people are required to satisfy. It is reasonable to expect that, if people were able to claim excusal as of right, many of them would do so.

9.26 Other than in relation to the categories of persons set out at [9.24] above, a person who is otherwise eligible to serve should not be entitled to claim excusal as of right from jury service solely on the basis of belonging to a particular occupation, profession, office, or class, or because of particular personal circumstances. Claims for excusal should be dealt with on a case-by-case basis and assessed by reference to the circumstances of hardship and inconvenience set out in section 21 of the Act.¹²¹⁰

1205 Submission 44.

1206 *Jury Act 1995* (Qld) s 22. This is discussed later in this chapter.

1207 See Recommendation 7-23 in Chapter 7 of this Report.

1208 See Recommendations 8-1 to 8-3 in Chapter 8 of this Report. At present, persons 70 years or older are ineligible for jury service but may elect, by written notice to the Sheriff, to be eligible: *Jury Act 1995* (Qld) s 4(3)(j), (4).

1209 See Recommendation 13-1 in Chapter 13 of this Report.

1210 The matters in s 21 of the *Jury Act 1995* (Qld) are discussed in the next part of this chapter.

Recommendation

9.27 The Commission makes the following recommendation:

9-1 Subject to Recommendations 7-13, 7-23, 8-2, 9-2 and 13-1,¹²¹¹ a person who is otherwise eligible to serve should not be entitled to claim excusal as of right from jury service.

EXCUSAL AS OF RIGHT FOR PREVIOUS JURY SERVICE

9.28 In Queensland, recent jury service gives rise to a right to be excused from jury service in some circumstances. Section 22 of the Act provides that prospective jurors are entitled to be excused for the jury service period¹²¹² if they attended for jury service (whether or not they sat on a jury) during a jury service period which ended less than a year earlier:

22 When prospective juror entitled to be excused from jury service

- (1) This section applies to a prospective juror if the prospective juror—
- (a) has been summoned to perform jury service for a particular jury service period, or is on a list of prospective jurors who may be summoned to perform jury service for a particular jury service period; and
 - (b) has earlier been summoned for jury service and has attended as required by the summons for a jury service period (or, if excused from jury service for part of a jury service period, the balance of the jury service period) ending less than 1 year before the jury service period mentioned in paragraph (a).
- (2) The prospective juror is entitled to be excused from jury service for the jury service period.

9.29 An application for excusal on this basis can be made after receiving the *Notice to Prospective Juror*.¹²¹³

9.30 Similar provisions are made in the other Australian jurisdictions and in New Zealand. A person may be exempted or excused:¹²¹⁴

¹²¹¹ See [7.181], [7.335], [8.39] above, and [9.44], [13.35] below.

¹²¹² The jury service period is the period, specified in the written notice sent to prospective jurors, for which the person may be summoned: see *Jury Act 1995* (Qld) s 18(1).

¹²¹³ See generally *Jury Act 1995* (Qld) s 18; Queensland Courts, 'Notification' <<http://www.courts.qld.gov.au/160.htm>> at 9 February 2011.

¹²¹⁴ See also *Juries Act 1974* (Eng) s 8(1), (2); *Juries Act 1976* (Ireland) s 9(1)(b); *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* ss 2, 1A, sch 1 pt III. Provision is also made in some jurisdictions for excusal of jurors who have served on particularly long or arduous trials: see Chapter 10 of this Report.

- Until the next jury list is prepared if the person has been summoned from the current jury list (in the ACT);¹²¹⁵
- If the person attended and was prepared to, but did not, serve as a juror within the preceding 12 months, or if the person attended and did serve within the preceding three years (in New South Wales);¹²¹⁶
- If the person was summoned within the preceding three years (in the Northern Territory) or the person served as a juror within the preceding three years (in South Australia);¹²¹⁷
- For any period up to three years that the Sheriff considers appropriate if the person has performed jury service (in Tasmania), or that the Juries Commissioner considers appropriate if the person has attended for service or served on a jury (in Victoria);¹²¹⁸
- On the ground of ‘recent jury service’ (in Western Australia);¹²¹⁹
- If the person has served or attended for service in the preceding two years (in New Zealand).¹²²⁰

9.31 It has been suggested that provision for excusal on the ground of previous service is important to ‘ensure that the burden of jury duty is spread more evenly among the community’.¹²²¹

NSWLRC’s recommendations

9.32 The NSW Law Reform Commission recommended the continuation of the right to be excused for previous jury service.¹²²² It noted that this would help ensure an equitable sharing of jury duty particularly in rural areas where ‘there is a risk of people being summoned more frequently than in metropolitan areas’ because of the smaller size of the pool of potential jurors. It also recommended that the entitlement to excusal should be extended to ‘anyone employed by a small business (fewer than 25 employees) which has had another employee actually serve as a juror in NSW within the preceding 12 months’.¹²²³

¹²¹⁵ *Juries Act 1967* (ACT) ss 18A(1), 19. The jury lists in the ACT are to be prepared at two year intervals: s 19.

¹²¹⁶ *Jury Act 1977* (NSW) s 7, sch 2 cl 7 to be inserted by *Jury Amendment Act 2010* (NSW).

¹²¹⁷ *Juries Act* (NT) s 18AB; *Juries Act 1927* (SA) s 16(2)(a).

¹²¹⁸ *Juries Act 2003* (Tas) s 14(1); *Juries Act 2000* (Vic) s 13(1).

¹²¹⁹ *Juries Act 1957* (WA) ss 27(1), 32, sch 3. The *Juries Act 1957* (WA) does not define ‘recent jury service’.

¹²²⁰ *Juries Act 1981* (NZ) ss 15(2)(b), 16(a).

¹²²¹ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1 [3.181].

¹²²² The NSWLRC was referring to *Jury Act 1977* (NSW) s 7, sch 3 cl 13 which is to be repealed by *Jury Amendment Act 2010* (NSW). The amending Act will insert a new provision in identical terms: see n 1216 above.

¹²²³ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.69]–[6.70], and see Rec 28.

9.33 Recent amendments to the *Jury Act 1977* (NSW) will retain the right to be excused for previous jury service but will not include the NSWLRC's proposed small business exemption.¹²²⁴ The Queensland Law Reform Commission notes that substantial hardship or inconvenience to a person's employer could ground an application for discretionary excusal.

LRCWA's recommendations

9.34 In recommending a new set of grounds for excusal for good cause which would include, among other things, 'undue hardship or extreme inconvenience to the person', the Law Reform Commission of Western Australia recommended the removal of 'recent jury service' as a specific basis for excusal.¹²²⁵ It considered that this should instead be covered in a set of excusal guidelines which should provide that, in general, a person should be excused if the person 'has served on a jury in the previous 12 to 18 months'.¹²²⁶ It noted, however, that this may not be possible in some regional areas because of the small numbers of potential jurors.¹²²⁷

9.35 The Juries Legislation Amendment Bill 2010 (WA) proposes a new provision allowing a person to be excused if the person attended to serve as a juror, or served as a juror, in the previous five years, and the judge or summoning officer is satisfied that 'a sufficient number of other persons who have been summoned is present for the purposes of choosing persons to be jurors'.¹²²⁸

Discussion Paper

9.36 In its Discussion Paper, the Commission proposed that an entitlement to excusal for previous jury service should be retained and sought submissions on the period for which excusal should be granted.¹²²⁹

- 9-7 Section 22 of the *Jury Act 1995* (Qld), which provides an exemption for previous jury service, is appropriate and should be retained.
- 9-8 Is the period for which exemption is granted (currently 12 months) appropriate, or should it be changed in some way?
- 9-9 Should there be different periods of exemption for different circumstances? For instance, should there be a shorter period of exemption for people who have attended but have not served on a jury?

¹²²⁴ See *Jury Act 1977* (NSW) s 7, sch 2 cl 7 to be inserted by *Jury Amendment Act 2010* (NSW).

¹²²⁵ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 118, Rec 60 referring to *Juries Act 1957* (WA) ss 27(1), 32, sch 3.

¹²²⁶ Ibid 121, and see 122, Rec 61.

¹²²⁷ Ibid. See also Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 115.

¹²²⁸ *Juries Act 1957* (WA) s 34J as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

¹²²⁹ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [9.126]–[9.130], Proposal 9-7, Questions 9-8, 9-9.

Consultation

9.37 In a preliminary submission, Vision Australia supported the existing provision for excusal on the basis of previous jury service in the preceding 12 months.¹²³⁰

9.38 One respondent, from outside Brisbane, expressed concern about members of the same family and household frequently being called for jury service, and questioned the random nature of the jury selection process. In this respondent's experience, in one year, two members of the family had been called for the same jury service period, and one was called twice in the same year. This respondent also commented that, while others in the same neighbourhood appeared never to have been called, she had been called three times in the last six years.¹²³¹

9.39 The Queensland Law Society agreed that the entitlement to excusal for previous jury service in section 22 of the Act should be retained. In its view, the current period of 12 months is appropriate and should not be changed. It did not consider that there is any reason to have shorter periods of excusal for different persons; 'This may only lead to confusion and a consistent period of 12 months is preferable'.¹²³²

9.40 The Department of Justice and Attorney-General also expressed support for 'a single exemption period'.¹²³³

The Commission's view

9.41 In the Commission's view, the entitlement to excusal for previous jury service is appropriate and should be retained. It is both an appropriate concession to people who have recently attended for jury service and a useful means of ensuring that the burdens and benefits of jury service are shared as equitably as possible among eligible citizens. Although it has the potential to limit the pool of prospective jurors in smaller areas, the Commission considers that its recommendations for deferral of jury service may balance against this by allowing, for instance, seasonal workers who would be unavailable at particular times of the year to serve during other periods.

9.42 The Commission considers that excusal for 12 months, as is presently provided, is sufficient and agrees with the submission from the Queensland Law Society that the introduction of differential periods of exemption depending on whether the person was actually empanelled on a trial would create unnecessary confusion. Recent jury service that is not captured by this excusal provision — for example, in the preceding two years, or in the preceding 12 months but by other members of the same family — may be sufficient, depending on the individual

1230 Submission 19.

1231 Submission 30.

1232 Submission 52.

1233 Submission 56.

circumstances, to warrant excusal because of substantial hardship or inconvenience under section 21.

9.43 As a consequence of the Commission's recommendations for the introduction of a system of deferral, the Commission considers that section 22 should be amended to clarify that the entitlement to excusal does not apply to a person who attended at some time in the preceding 12 months but had his or her service deferred to the current jury service period.

Recommendations

9.44 The Commission makes the following recommendations:

9-2 Subject to Recommendation 9-3, section 22 of the *Jury Act 1995 (Qld)*, which provides an entitlement to excusal for previous jury service, is appropriate and should be retained.

9-3 Section 22 of the *Jury Act 1995 (Qld)* should be amended to clarify that the entitlement to excusal provided by that section does not apply to a person who was summoned for a jury service period ending less than one year before the current jury service period but had his or her service deferred to the current jury service period.

EXCUSAL FOR CAUSE

9.45 In Queensland, the Sheriff may excuse a person from jury service, on application, either for the whole or part of a particular jury service period or permanently.¹²³⁴ Prospective jurors can apply for excusal when they receive the *Notice to Prospective Juror* or at a later stage.¹²³⁵ A person must not state something in an application for excusal that the person knows is false.¹²³⁶

9.46 Before empanelment begins, the judge may also hear and determine applications for excusal, and renewed applications for excusals refused by the Sheriff.¹²³⁷ The judge may also excuse a person on the judge's own initiative.¹²³⁸

¹²³⁴ See *Jury Act 1995 (Qld)* ss 19–23. The 'jury service period' is the period, specified in the written notice sent to prospective jurors, for which the person may be summoned: see *Jury Act 1995 (Qld)* s 18(1).

¹²³⁵ *Jury Act 1995 (Qld)* ss 18(4), 23.

¹²³⁶ *Jury Act 1995 (Qld)* s 18(6). The maximum penalty for breach of this provision is 10 penalty units or 2 months' imprisonment.

¹²³⁷ *Jury Act 1995 (Qld)* s 20(2)–(4); Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.1] <<http://www.courts.qld.gov.au/2265.htm>> at 9 February 2011. Excusal may be for the whole or part of a jury service period or permanently: *Jury Act 1995 (Qld)* s 20(1).

¹²³⁸ *Jury Act 1995 (Qld)* s 20(2)(a).

9.47 People who are excused are relieved from the obligation to attend for some or the whole of the jury service period stipulated in the Notice or summons, but remain on the jury list and may receive a Notice in the future¹²³⁹ unless they are permanently excused.¹²⁴⁰

9.48 The power to excuse a person from jury service is found in sections 19 and 20 of the *Jury Act 1995* (Qld), which are set out in full at [3.6] in Chapter 3 above. Without limiting the power to excuse a person, section 21 of the *Jury Act 1995* (Qld) specifies a number of matters to which the Sheriff or the judge must have regard in deciding whether the person should be excused:

21 Criteria to be applied in excusing from jury service

- (1) In deciding whether to excuse a person from jury service, the sheriff or judge must have regard to the following—
 - (a) whether jury service would result in substantial hardship to the person because of the person's employment or personal circumstances;
 - (b) whether jury service would result in substantial financial hardship to the person;
 - (c) whether the jury service would result in substantial inconvenience to the public or a section of the public;
 - (d) whether others are dependent on the person to provide care in circumstances where suitable alternative care is not readily available;
 - (e) the person's state of health;
 - (f) anything else stated in a practice direction.
- (2) A person may be permanently excused from jury service only if the person is eligible to be permanently excused from jury service in the circumstances stated in the practice directions.

9.49 Practice Direction No 4 of 1997 provides that permanent excusal may be granted by the Sheriff only on 'the production of a medical certificate issued by a duly qualified medical practitioner which indicates permanent excusal is appropriate in the circumstances'. It also provides that the Sheriff may consider and, if appropriate, grant applications for excusal even if they are not on the prescribed form or, where time constraints apply, if they are made orally.¹²⁴¹

9.50 The *Notice to Prospective Juror* advises that people may be excused if their 'work or study commitments make it impossible', there are 'significant medical,

¹²³⁹ Queensland Courts, 'Excusal' <<http://www.courts.qld.gov.au/161.htm>> at 9 February 2011.

¹²⁴⁰ See *Jury Act 1995* (Qld) ss 19(1)(b), 20(1)(b).

¹²⁴¹ Supreme Court of Queensland, Practice Direction No 4 of 1997, 'Jury Act 1995 section 13' (Senior Judge Administrator, Martin Moynihan, 7 February 1997). See also *Jury Act 1995* (Qld) ss 13(d), 19(2).

personal or financial obstacles', or if they 'have served as a juror in the past 12 months'.¹²⁴² Prospective jurors are also advised that:¹²⁴³

- Applications for excusal due to work commitments must be supported by a letter from the person's employer;
- Applications on medical grounds, or because of disability,¹²⁴⁴ require a medical certificate;
- Applications based on study commitments require a copy of the person's student identification card or timetable; and
- Applications based on a person's holiday plans require the provision of a travel itinerary, ticket or other supporting documentation.

9.51 Prospective jurors are reminded that, unless empanelled on a trial, they 'will probably be required to attend no more than two mornings a week', but are also advised to make alternative arrangements for child care and other responsibilities.¹²⁴⁵

9.52 In some other jurisdictions, the legislation simply provides for excusal for 'sufficient cause', without further definition or description¹²⁴⁶ except in excusal guidelines.¹²⁴⁷ Others include more specific grounds. In addition, some jurisdictions provide categories of excusal as of right for matters that would otherwise be covered, to some extent at least, by the grounds for discretionary excusal.¹²⁴⁸

¹²⁴² See Queensland Courts, 'Notification' <<http://www.courts.qld.gov.au/160.htm>> at 9 February 2011. See also Queensland Courts, 'Selection' and 'Excusal' <<http://www.courts.qld.gov.au/103.htm>> at 9 February 2011. Excusal of persons who have served in the preceding 12 months is provided for under s 22 of the *Jury Act 1995* (Qld) and is discussed earlier in this chapter.

¹²⁴³ See Queensland Courts, 'Excusal' and 'Summons' <<http://www.courts.qld.gov.au/103.htm>> at 9 February 2011.

¹²⁴⁴ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹²⁴⁵ Queensland Courts, 'Excusal' <<http://www.courts.qld.gov.au/161.htm>> at 9 February 2011.

¹²⁴⁶ *Juries Act* (NT) s 15. See also *Juries Act 1974* (Eng) s 9(2); *Juries Act 1976* (Ireland) s 9(1)(c); *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(5); *Jury Ordinance, Cap 3* (HK) s 28(2). More specific grounds for excusal have now been recommended in Hong Kong: Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Report (2010) [5.83]–[5.89], Rec 7. See also *Jury Act 1977* (NSW) ss 18A(1), 38(1) to be repealed by *Jury Amendment Act 2010* (NSW).

¹²⁴⁷ Jurors in the Northern Territory are advised that 'Approvals for release from jury duty are however, granted sparingly by the Court and only in the case of ill health and matters of special urgency or importance': Supreme Court of Northern Territory, For Jurors, 'Persons excused from service' <<http://www.supremecourt.nt.gov.au/jurors/index.htm#q6>> at 9 February 2011. In England and Wales, see Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' <<http://www.official-documents.gov.uk/document/other/9780108508400/9780108508400.pdf>> at 25 February 2011.

¹²⁴⁸ Eg *Jury Act 1977* (NSW) s 7, sch 2 to be inserted by *Jury Amendment Act 2010* (NSW) (eg clergy, vowed members of religious orders, and persons employed or engaged in the provision of fire, ambulance, rescue or other emergency services); *Juries Act* (NT) s 11(1), sch 7 (eg incapacity because of 'disease or infirmity'); *Juries Act 1957* (WA) s 5(c)(i), sch 3 pt II (eg carers of children or sick persons, and pregnant women).

9.53 The grounds for excusal in the legislation (or guidelines) of the other jurisdictions variously include:¹²⁴⁹

- Undue or substantial hardship or inconvenience to the person (including financial hardship), to someone else or to the public;¹²⁵⁰
- Illness;
- Work commitments, for example, where the person cannot be replaced in the workplace because of staff shortages or other business exigencies, or if the person is one of two or more partners of a partnership or employees of the same establishment who have been summoned on the same day;
- Care of children or sick or infirm persons;
- Holiday or travel arrangements;
- Study or teaching commitments;
- Incapacity or physical disability;¹²⁵¹
- Pregnancy;
- Advanced aged;¹²⁵²
- Insufficient understanding of English;¹²⁵³
- Religious belief or conscientious objection;¹²⁵⁴
- Excessive time, inconvenience or distance in travelling to the court;

¹²⁴⁹ See, variously, *Juries Act 1967* (ACT) ss 14(a), (b), 15; *Juries Act 1927* (SA) s 16(2); *Juries Act 2003* (Tas) ss 9(3), 10(3), 12; *Juries Act 2000* (Vic) ss 8(3), 9; *Juries Act 1957* (WA) ss 27, 32, sch 3; *Juries Act 1981* (NZ) ss 14B(3), 15(1A). See also Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' <<http://www.official-documents.gov.uk/document/other/9780108508400/9780108508400.pdf>> at 25 February 2011 which indicates that, in general, excusal should be reserved for those cases where deferral to a time within the following twelve months would be unreasonable, but that excusal may be granted if, for example, the person performs shift work or night work, if service would conflict with public duties, or on the basis of religious beliefs. See the more detailed discussion of the grounds for excusal in Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [9.25]–[9.41].

¹²⁵⁰ The formulations vary. The legislation in Tasmania and Victoria refers to 'substantial inconvenience to the public': *Juries Act 2003* (Tas) s 9(3)(f); *Juries Act 2000* (Vic) s 8(3)(g). In New South Wales, the legislation refers to 'undue hardship or serious inconvenience to the person, the person's family or the public': *Jury Act 1977* (NSW) s 14A(a) to be inserted by *Jury Amendment Act 2010* (NSW). The legislation in Western Australia is proposed to be amended to include a similar formulation: see proposed new *Juries Act 1957* (WA) s 34H(2) to be inserted by *Juries Legislation Amendment Bill 2010* (WA) cl 34. In New Zealand, *Juries Act 1981* (NZ) s 15(1A) refers to 'undue hardship or serious inconvenience to that person, any other person, or the general public'.

¹²⁵¹ See Chapter 8 of this Report.

¹²⁵² *Ibid.*

¹²⁵³ *Ibid.*

¹²⁵⁴ *Ibid.*

- Recent jury service,¹²⁵⁵ and
- Other circumstances or matters of sufficient or special importance or urgency, or any reasonable cause.

9.54 In some jurisdictions, a request for excusal may need to be verified by affidavit or statutory declaration¹²⁵⁶ or such evidence in support as the Sheriff considers appropriate.¹²⁵⁷

NSWLRC's recommendations

9.55 The NSW Law Reform Commission recommended that the Sheriff or the court should continue to be able to excuse a person from jury service, either for the whole or part of a jury service period, or permanently, for good cause,¹²⁵⁸ but that 'good cause' should be defined.¹²⁵⁹

9.56 Amendments have subsequently been made to the *Jury Act 1977* (NSW) to give effect to those recommendations. Under the amended provision, a person will have good cause to be exempted or excused if:¹²⁶⁰

- jury service would cause undue hardship or serious inconvenience to the person, the person's family or the public, or
- some disability associated with that person would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror, or
- 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, or
- there is some other reason that would affect the person's ability to perform the functions of a juror.

9.57 The NSWLRC also recommended,¹²⁶¹ and amendments have been made to introduce, a provision allowing a person to appeal a Sheriff's refusal to excuse the person. The appeal will need to be made, within 21 days, to the Local Court or, if the person is summoned to attend on a day occurring before those 21 days, to the judge having conduct of the trial concerned.¹²⁶²

¹²⁵⁵ This issue is discussed earlier in this chapter.

¹²⁵⁶ *Juries Act 1927* (SA) s 16(3); *Juries Act 2003* (Tas) ss 9(4), 10(4); *Juries Act 2000* (Vic) ss 8(4), 9(5).

¹²⁵⁷ *Juries Act 1957* (WA) s 27(1); *Juries Act 1981* (NZ) s 15(3).

¹²⁵⁸ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.12], [7.40], Rec 29, 34 referring to *Jury Act 1977* (NSW) ss 18A, 38(1)–(6) to be repealed by *Jury Amendment Act 2010* (NSW).

¹²⁵⁹ *Ibid* [7.14], and see Rec 31.

¹²⁶⁰ *Jury Act 1977* (NSW) s 14A to be inserted by *Jury Amendment Act 2010* (NSW).

¹²⁶¹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.44]–[7.45], Rec 35.

¹²⁶² *Jury Act 1977* (NSW) s 15 to be inserted by *Jury Amendment Act 2010* (NSW).

9.58 As noted at [9.14] above, a number of categories of excusal as of right, for example, for pregnant women and carers, are to be removed in New South Wales.¹²⁶³ Those matters will instead be covered by excusal for 'good cause', defined in the legislation and dealt with in excusal guidelines.¹²⁶⁴

LRCWA's recommendations

9.59 The Law Reform Commission of Western Australia considered that the two concepts of hardship and inconvenience 'encompass all of the potential reasons a person may seek to be excused'.¹²⁶⁵ In its view, because of the need for the burden of jury service to be shared fairly and for the 'widest possible range of people' to be included in the jury pool, 'it is necessary that the degree of hardship or inconvenience ... is sufficiently high to ensure that people are not excused too readily'.¹²⁶⁶ It also considered that the grounds for excusal should be made simple and accessible.¹²⁶⁷ It recommended the following grounds:¹²⁶⁸

- 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.

9.60 New provisions dealing with excusal are proposed by the Juries Legislation Amendment Bill 2010 (WA). A new section 34H(2) of the *Juries Act 1957* (WA) will provide that a person has a good reason to be excused if attendance 'would cause undue hardship or serious inconvenience to the person, the person's family or the general public' because of any of the following:¹²⁶⁹

- (a) the nature of the person's business or occupation;
- (b) a special or pressing commitment that the person has;

¹²⁶³ See *Jury Act 1977* (NSW) s 7, sch 3 to be repealed by *Jury Amendment Act 2010* (NSW).

¹²⁶⁴ See *Jury Act 1977* (NSW) ss 14, 14A to be inserted by *Jury Amendment Act 2010* (NSW). See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2010, 23675 (Barry Collier, Parliamentary Secretary).

¹²⁶⁵ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 117.

¹²⁶⁶ *Ibid.*

¹²⁶⁷ *Ibid* 118.

¹²⁶⁸ *Ibid* 118, Rec 60.

¹²⁶⁹ *Juries Act 1957* (WA) s 34H(2) as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

- (c) mental impairment affecting the person;
- (d) a physical disability that the person has;
- (e) the person's state of physical health;
- (f) other circumstances personal to the person.

9.61 In those circumstances, a judge or the summoning officer may grant the person a deferral of jury duty and excuse the person from his or her summons, or, depending on the circumstances, excuse the person from the summons.¹²⁷⁰

9.62 The Bill also proposes new provisions to allow a judge or summoning officer to excuse a person if satisfied that the person:

- 'would not be indifferent as between the parties in [the] trial if he or she were to serve as a juror at the trial';¹²⁷¹
- has attended for jury service or served as a juror in the previous five years;¹²⁷²
- is an Australian legal practitioner, practises criminal law and is summoned for a criminal trial;¹²⁷³ or
- is an Australian legal practitioner, practises civil law and is summoned for a civil trial.¹²⁷⁴

9.63 As noted earlier, the LRCWA also recommended the abolition of the categories of excusal as of right for emergency service workers, health professionals, persons in holy orders, pregnant women, and carers.¹²⁷⁵ In its view, those persons should have their claims assessed on a case-by-case basis such that, for example, in a claim for excusal by a pregnant woman, the stage of the pregnancy and the person's state of health should be considered.¹²⁷⁶

9.64 The LRCWA also recommended provisions to allow a person whose application for excusal has been refused by the Sheriff to apply to a magistrate for

1270 *Juries Act 1957* (WA) s 34H(3) as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

1271 *Juries Act 1957* (WA) s 34I(3) as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

1272 *Juries Act 1957* (WA) s 34J as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

1273 *Juries Act 1957* (WA) s 34K(2) as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

1274 *Juries Act 1957* (WA) s 34K(3) as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

1275 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 113–16, Rec 59. This recommendation is implemented by cl 10(2)(h), 36 of the Juries Legislation Amendment Bill 2010 (WA).

1276 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 114.

excusal.¹²⁷⁷ A proposed new provision to this effect is included in the Juries Legislation Amendment Bill 2010 (WA).¹²⁷⁸

Discussion Paper

9.65 In its Discussion Paper, the Commission expressed the provisional view that the existing provisions dealing with excusal from jury service are generally appropriate and should be retained. It sought submissions, however, on whether the Act should be amended to provide for excusal on the basis that jury service would result in substantial hardship to a third party or the public because of the person's employment or personal circumstances.¹²⁷⁹

9-2 Subject to Proposals 8-5, 8-6 and 8-10 in chapter 8 of this Paper, sections 19, 20 and 21 of the *Jury Act 1995* (Qld) are appropriate and should be retained.

...

9-4 Should section 21(1)(a) of the *Jury Act 1995* (Qld) be amended to provide for excusal on the basis that jury service would result in substantial hardship to a third party or the public because of the person's employment or personal circumstances?

Consultation

9.66 One respondent commented on the difficulties that jury service can impose on co-workers and employers:¹²⁸⁰

Some workplaces ... work best with all members present because of workplace health and safety arrangements (many construction teams now require minimum 2 people). The loss of one person from my office can mean the difference between getting work done on time, or not getting it done and costing our employer thousands of dollars to reschedule the work.

9.67 Another respondent, who is a self-employed contractor, commented on the financial difficulties that jury service can impose on contractors, the self-employed and small business operators:¹²⁸¹

I am a self-employed contract engineer. I worked as an employee from 1992–2002 — but was never summoned for jury duty during that period, when my employer would have continued to pay my wages. Since becoming a contractor in 2002, I have been summoned 3–4 times. In each instance I have asked to be excused on the basis that I would lose income for every day of jury duty. I can't

¹²⁷⁷ Ibid 125, Rec 62.

¹²⁷⁸ *Juries Act 1957* (WA) s 34F(4) as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

¹²⁷⁹ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [9.65]–[9.73], Proposal 9-2, Question 9-4.

¹²⁸⁰ Submission 28.

¹²⁸¹ Submission 42.

help but think that this basis would apply to all contract, self-employed and small business owners — which is leaving out a fair chunk of the representative population.

9.68 Another respondent supported the recommendation of the NSW Law Reform Commission that excusal for ‘good cause’ should encompass the situation 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’.¹²⁸²

9.69 That respondent also considered that, if judges and lawyers are to be made eligible for jury service, they should nevertheless be excused from service if ‘their absence from another court/legal/judicial proceeding would result in substantial hardship to a third party or the public because of the person’s employment in the legal profession/judiciary’.¹²⁸³

9.70 Another respondent submitted that excusal should be available if the trial involves matters that the person has been involved with in the past, for example, for victims of assault. That respondent also considered that people with health problems who would find it difficult to serve should be excused.¹²⁸⁴

9.71 The Queensland Law Society agreed with Proposal 9-2 of the Discussion Paper. It supported the retention of the existing powers of the judge and the Sheriff to excuse a person from jury service and the Commission’s proposal to expand those powers to deal with persons who do not appear to have sufficient skills in English or whose physical disability or special needs cannot be accommodated. It also supported an amendment to provide for excusal on the basis of substantial hardship to a third party because of the person’s employment or personal circumstances.¹²⁸⁵

9.72 Vision Australia also supported Proposal 9-2. It recommended that, when considering an application for excusal from a person who is blind or has low vision by reference to section 21(1)(e) of the Act, the following matters should be taken into account:¹²⁸⁶

a. Where the onset of blindness or sight loss is recent enough that the person has not had sufficient time to deal with the loss in an emotional or practical sense. In this event, the person may still be suffering emotionally from the loss and will not be able to focus effectively on all aspects of a trial by jury. Moreover, the person may not have developed sufficient compensatory skills such as orientation and mobility skills, information accessibility skills, or use of assistive technology.

b. In circumstances where a person may feel that they are more vulnerable because of blindness. For example, a person may feel that their blindness

1282 Submission 34. See [9.55]–[9.56] above.

1283 Ibid.

1284 Submission 12 responding to Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

1285 Submission 52.

1286 Submission 58.

makes them more readily identifiable, or that as a consequence of blindness they are less safe in the community. These concerns do have foundation in that a person who is blind [and] using a mobility device such as a dog guide or long cane does tend to be more noticeable in public and cannot as readily identify a potential assault or take the same evasive action as a sighted person.

The Commission's view

9.73 In the Commission's view, sections 19, 20 and 21 of the Act, which deal with the excusal of a person from jury service, are generally appropriate and should be retained.

9.74 As explained earlier, sections 19 and 20 confer on the Sheriff and the judge, respectively, a broad discretion to excuse a person from jury service. Although section 21(1) sets out a number of considerations that must be taken into account in the exercise of that discretion, it does not limit the range of matters that may be considered (or otherwise restrict the circumstances in which excusal may be granted).

9.75 The Commission considers that this approach is generally appropriate. It directs attention to those circumstances in which excusal is most likely to be warranted and to a threshold of 'substantial' hardship or inconvenience.¹²⁸⁷ In addition, it permits matters that are not specifically listed to be taken into account, providing the flexibility that is necessary to allow individual circumstances to be considered.

9.76 Among the matters that must presently be considered under section 21 is 'whether the jury service would result in substantial inconvenience to *the public or a section of the public*'.¹²⁸⁸ This is sufficiently wide to cover the inconvenience caused to particular classes of people, such as a surgeon's hospital patients where the surgeon is summoned for jury service. However, it would not encompass substantial inconvenience that was merely caused to an individual third party.

9.77 The Commission has considered whether section 21 should be amended to require consideration to be given to hardship or inconvenience that would be caused, not to the public or a section of the public, but to a single third party, such as the employer of a prospective juror.

9.78 Where a prospective juror is employed, jury service will invariably cause at least some hardship or inconvenience to the employer; it is difficult to imagine a scenario in which an employer would not consider that the absence of an employee for jury service would cause the employer hardship or inconvenience. However, the Commission considers that the risk of amending section 21 so as to require consideration of hardship or inconvenience to a third party is that it would be difficult to frame the provision in a way that did not encourage an excess of claims. Even if the provision were limited to 'substantial' or 'serious' hardship or

¹²⁸⁷ The mandatory considerations listed in s 21(1) of the *Jury Act 1995* (Qld) cover many of the circumstances that are identified with more particularity in some other jurisdictions: see [9.53] above.

¹²⁸⁸ *Jury Act 1995* (Qld) s 21(1)(c).

inconvenience, it would run the risk that applications for excusal by employed persons would be made almost as a matter of course and, if granted, would significantly diminish the diversity and representativeness of the jury pool. On the other hand, a narrower provision that referred, for example, to 'extreme' hardship or inconvenience, may appear too restrictive.

9.79 The Commission also considers that such a change would add to the administrative workload of the Sheriff, even if the applications for excusal were not ultimately granted.

9.80 In light of these matters, the Commission is of the view that section 21 of the *Jury Act 1995* (Qld) should not be amended to include reference to hardship or inconvenience to a third party.

9.81 However, because the Commission recognises that excusal on the basis of hardship or inconvenience to a third party may be appropriate in some circumstances, it recommends that section 21 of the Act be amended to make it clear that section 21(1), in listing various circumstances that must be taken into account in deciding whether to excuse a person from jury service, does not limit the power of the Sheriff or the judge to excuse a person under section 19 or 20 of the Act. This will clarify that, although the impact of a person's jury service on a third party is not a mandatory consideration, it may nevertheless be taken into account in the Sheriff's or judge's discretion.

9.82 Further, the Commission does not consider it necessary to amend section 21 to deal with excusal on the basis of a potential conflict of interest as is now provided for in New South Wales and has been recommended in Western Australia. In practice, prospective jurors will usually become aware of a potential conflict of interest only during the empanelment process.¹²⁸⁹ Under section 46 of the Act, the judge may discharge a juror during the final stage of empanelment if there is 'reason to doubt the person's impartiality'.¹²⁹⁰

9.83 The Commission considers, however, that provision should be made in the Act for some additional, specific bases for excusal. In Chapter 8 of this Report, the Commission has recommended that provision should be made for excusal of a person from jury service if it appears that the person:¹²⁹¹

- is unable to understand, and communicate in, English well enough to discharge the duties of a juror effectively;
- after consideration of the facilities that are required and can be made available to accommodate a person's physical disability, is unable to discharge the duties of a juror effectively; or

1289 After the jury has been empanelled, but before the panel of potential jurors has been discharged, the jury will be informed of the defendant's name, the charges against the defendant and the names of the prosecution witnesses and will then be asked by the judge whether any of them feels that they 'cannot be, and by all fair-minded persons be seen to be, completely impartial': Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.3] <<http://www.courts.qld.gov.au/2265.htm>> at 9 February 2011.

1290 The judge's power to discharge a juror is discussed in Chapter 10 of this Report.

1291 See Recommendations 8-5, 8-6, 8-10, 8-11 and 8-15 in Chapter 8 of this Report.

- is incapable of effectively performing the functions of a juror because of an intellectual, psychiatric, cognitive or neurological impairment.

9.84 In the Commission's view, those matters do not fall neatly under any of the existing matters listed in section 21 of the Act and should be specifically provided for in the Act.

9.85 Later in this chapter, the Commission has recommended the development of a set of guidelines dealing with the circumstances in which a person may be excused from jury service: see [9.115]–[9.120] below.

Recommendations

9.86 The Commission makes the following recommendations:

- 9-4 Sections 19 and 20 and, subject to Recommendation 9-5, section 21 of the *Jury Act 1995* (Qld) are appropriate and should be retained.¹²⁹²**
- 9-5 Section 21 of the *Jury Act 1995* (Qld) should be amended to clarify that section 21(1) does not limit the power of the Sheriff or the judge to excuse a person from jury service under section 19 or 20 of the Act.**

DEFERRAL OF JURY SERVICE

9.87 Deferring jury service allows people who have been summoned to serve to postpone — but not to avoid or otherwise be excused from — jury service until some time in the relatively near future (generally within 12 months) that is more convenient, or less inconvenient, to them.

9.88 In Queensland, although a person may be excused from part of a jury service period and required to attend later in the same period,¹²⁹³ deferral of jury service to a different jury service period is not currently available.

9.89 Deferral provisions are, however, made in some of the other Australian jurisdictions.¹²⁹⁴ In Tasmania and Victoria, a person's service may be deferred, in the Sheriff's discretion, to another time within the following 12 months.¹²⁹⁵ Although the legislation does not specify grounds for deferral, in practice, deferral may be granted (in Victoria) if the person has pre-booked holidays or other unavoidable

¹²⁹² See also Recommendations 8-5, 8-6, 8-10, 8-11 and 8-15 in Chapter 8 of this Report.

¹²⁹³ *Jury Act 1995* (Qld) ss 19(1)(a), 20(1)(a).

¹²⁹⁴ Deferral is also recommended in Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.125]. See the more detailed discussion of the deferral provisions in the other jurisdictions in Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [9.79]–[9.99].

¹²⁹⁵ *Juries Act 2003* (Tas) s 8; *Juries Act 2000* (Vic) s 7.

commitments or if the person's absence from work would cause severe inconvenience, or (in Tasmania) because of illness, family responsibilities or fixed prior arrangements.¹²⁹⁶

9.90 In the Northern Territory and South Australia, a person may be added to the list of persons to be summoned at 'some subsequent time specified' as a condition of being excused from the present service period.¹²⁹⁷ Deferral is thus tied to the grounds for, and granting of, excusals.

9.91 In New Zealand¹²⁹⁸ and in England and Wales,¹²⁹⁹ deferral to a time in the following 12 months is available, once only, in circumstances that would ordinarily entitle the person to be excused. In New Zealand, excusal is available only if deferral is not 'reasonably practicable', and in England and Wales, the excusal guidelines generally encourage deferral rather than excusal.

NSWLRC's recommendations

9.92 The NSW Law Reform Commission recommended that deferral, to a time within 12 months, should be available to potential jurors who are 'otherwise eligible to be excused'.¹³⁰⁰ Subsequent amendments to the *Jury Act 1977* (NSW) will make provision for deferral, in the Sheriff's discretion, to 'a later time within the period during which the person may be summoned'.¹³⁰¹ The amendments do not specify any particular grounds on which deferral may be granted.

LRCWA's recommendations

9.93 The Law Reform Commission of Western Australia recommended provision for deferral, to a specified time within 12 months, as an alternative to excusal so that persons 'who would previously have been completely excused from

1296 See Courts and Tribunals Victoria, Jury Service, Just received a Jury Questionnaire, 'Postponement or Excuse' <<http://www.courts.vic.gov.au/jury-service/just-received-jury-questionnaire/postponement-or-excuse#>> at 9 February 2011; and Supreme Court of Tasmania, Going to Court, Jurors, 'The Jury Summons' <http://www.supremecourt.tas.gov.au/going_to_court/jurors/jury_summons> at 9 February 2011.

1297 *Juries Act* (NT) s 17A; *Juries Act 1927* (SA) s 16(4). See also *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(5A).

1298 *Juries Act 1981* (NZ) ss 14B, 14C, 15. The Law Commission of New Zealand recommended that deferral should be an 'absolute right, so that jurors do not have to explain why they are seeking it', allowing jurors 'to keep their domestic and personal affairs to themselves' and avoiding the need for registrars to consider the merits of each request: Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [493]–[494].

1299 *Juries Act 1974* (Eng) s 9A; Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [3], [4] <<http://www.official-documents.gov.uk/document/other/9780108508400/9780108508400.pdf>> at 25 February 2011.

1300 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) 134, Rec 32.

1301 *Jury Act 1977* (NSW) s 14B to be inserted by *Jury Amendment Act 2010* (NSW). In New South Wales, the jury roll for each jury district is to be compiled by random selection from the electoral roll 'at intervals of not more than 12 months', and the names of persons who have been on the jury roll for 15 months or such other period specified in regulations (not exceeding two years) are to be removed: *Jury Act 1977* (NSW) ss 12, 15A to be amended by *Jury Amendment Act 2010* (NSW).

jury service because of serious short-term hardship or inconvenience will now have their jury service deferred'.¹³⁰²

9.94 It considered that deferral should be granted once only, but that the Sheriff should retain the discretion to alter the deferral date to accommodate court sittings. It also considered that, if a person's service has been deferred, the person should be 'expected to arrange their affairs' appropriately and should not generally be excused on the subsequent summons unless unforeseen circumstances have arisen; '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'.¹³⁰³ In its view, these matters should be dealt with in deferral guidelines. The guidelines should also provide that, if a person applies for excusal, consideration should first be given to deferral.¹³⁰⁴

9.95 Under the Juries Legislation Amendment Bill 2010 (WA), a new section 34H of the *Juries Act 1957* (WA) will provide for the deferral of jury service.¹³⁰⁵ If a person who is summoned has a good reason to be excused from the summons, section 34H(3) and (4) will enable a judge or the summoning officer to grant the person a deferral of jury duty and excuse the person from the summons or, depending on the circumstances, to excuse the person from the summons. A deferral and excusal under section 34H(3)(a) may not be granted if the summons was issued as a result of a previous deferral of jury duty — that is, jury duty may be deferred only once. An excusal under section 34H(3)(b) must not be granted unless.¹³⁰⁶

- (a) the summons was issued as a result of the person having been previously granted a deferral of jury duty; and
- (b) either—
 - (i) the reason for the person wanting to be excused from the summons was not reasonably foreseeable when that previous deferral was granted; or
 - (ii) there are exceptional reasons why the person should again be excused under this section from a summons.

Advantages of a system of deferral

9.96 Although hardship and inconvenience can be dealt with by excusal, this reduces the pool from which jurors can be drawn and increases the burden on

1302 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 127, and see 128, Rec 63.

1303 Ibid.

1304 Ibid 127–8.

1305 *Juries Act 1957* (WA) s 34H as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

1306 *Juries Act 1957* (WA) s 34H(4) as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

other people. A system of deferral acknowledges the fact that jury service can be a considerable inconvenience because of other unavoidable commitments, and allows prospective jurors to have some input into the timing of their service.

9.97 Deferral is said to have a number of potential benefits, including:¹³⁰⁷

- reducing the number of excusals;
- enabling a broader range of people to participate in jury service, and increasing the pool of available jurors in smaller regions, since people who would otherwise have been excused can still serve, albeit at a different date;
- allowing more equitable sharing of jury service by requiring people with temporary excuses to serve, albeit at another time;
- reducing the number of people who need to be summoned in future periods since some people will have had their service deferred to those periods;
- minimising the inconvenience of jury service; and
- encouraging a greater willingness to serve because people will know that if they cannot serve now, their service can be postponed to a less inconvenient time.

9.98 Where it operates, deferral is seen as a very useful aspect of jury administration:¹³⁰⁸

All jury administrators held the view that deferral is a very positive tool in managing jurors as it allows the individual circumstances of jurors to be accommodated. For example, teachers may not be available during examination periods. Business people may have particular projects that must be attended to. Within reason, such circumstances may be accommodated by deferral. None of the jury administrators considered that the deferral process was unduly onerous to manage, particularly in light of its perceived benefits.

Resource implications

9.99 While the Australian Institute of Criminology research cited above suggests that the management of deferral processes need not be particularly onerous,¹³⁰⁹ there are nevertheless likely to be financial costs in establishing such

¹³⁰⁷ See generally, for example, Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 126; Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.117]–[3.119]; Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [156]; Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 102.

¹³⁰⁸ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 33.

¹³⁰⁹ See [9.98] above. Others have expressed concern about the administrative difficulties that such a system may involve: see the respondents cited in New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.17].

a system.¹³¹⁰ For instance, it will necessitate changes to computerised systems and staff training. Depending on the features of the deferral system and whether, for instance, it is available only if excusal would otherwise be granted, it may also impact on the number of people available to serve in the given period and therefore on the number of initial notices that need to be sent.

Discussion Paper

9.100 In its Discussion Paper, the Commission proposed that, to reduce the number of excusals that may be granted, the Act should be amended to provide for a system of discretionary deferral of jury service:¹³¹¹

- 9-5 The *Jury Act 1995* (Qld) should be amended to provide for a system of deferral of jury service to deal with valid, but temporary, reasons why a person is unable to perform jury service, which should provide for:
- (1) the Sheriff or a judge to defer a person's jury service if the person is otherwise eligible to be excused;
 - (2) deferral to a time within 12 months of the date of the original summons; and
 - (3) deferral of a person's jury service to be made once only on the particular summons.

Consultation

9.101 One respondent, who is a self-employed contractor, suggested that a person who has been excused on the basis that service at the particular time would cause financial hardship, could apply to serve at a later, more convenient, time:¹³¹²

I would be quite willing to serve on a jury. I was unemployed for 5 months this year, and would have been able to serve during that period. Also, there are other times where I take a self-imposed break between contracts, when I would be able to serve with no loss of income.

Could there be a system, whereby someone who had asked to be excused on the grounds of loss of income, could then be eligible to later apply to serve at a time when they were able?

9.102 The Queensland Law Society agreed with Proposal 9-5 for service to be delayed to a time within the next 12 months 'if the person is unable to serve due to

¹³¹⁰ Information provided by the Department of Justice and Attorney-General, 25 February 2011. In England and Wales, the Central Jury Summoning Bureau was specifically established to 'implement and manage' the excusal and deferral system established by the 2004 reforms: RG Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 166.

¹³¹¹ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [9.106]–[9.111], Proposal 9-5.

¹³¹² Submission 42.

personal or employment circumstances that will pass in the future'.¹³¹³

9.103 Queensland Advocacy Incorporated also submitted that people with a disability should be entitled to have their jury service deferred 'if they believe elements of a particular case would pose barriers to their participation and these barriers could not be relieved with reasonable accommodations'.¹³¹⁴

9.104 The Department of Justice and Attorney-General also expressed support for the introduction of a system of deferral, but cautioned that its implementation would have resource implications and should be carefully considered, in light of the systems adopted in other jurisdictions:¹³¹⁵

[We] are supportive of any initiative to increase participation in the jury process. Deferral systems are utilised seemingly with success in other jurisdictions however without further analysis of relevant system and practice changes required to implement a deferral system it is necessary to flag that additional resources are likely to be required.

Should this proposal be adopted [we] would like to engage with other jurisdictions to discuss 'lessons learnt' so as to prevent abuse of any deferral process.

The Commission's view

9.105 In the Commission's view, a system of deferral should be introduced in Queensland to deal with valid, but temporary, reasons why a person is unable to perform jury service. This would ensure that the pool of potential jurors is not diminished unnecessarily by having to excuse someone from service, rather than allowing them to attend at a later time. For example, it should reduce the number of excusals because of a planned holiday that conflicts with the jury service period, which is presently one of the most common bases for granting excusal.¹³¹⁶

9.106 In the Commission's view, as an alternative to excusing a person from jury service, the Sheriff or the judge should be empowered to defer the person's jury service to a jury service period within the next 12 months that the person has indicated would be a more convenient period. The deferral system should have the following features:

- In deciding whether to defer a person's jury service, the Sheriff or judge must have regard to the same matters, in section 21 of the Act, as for excusals.
- Generally, deferral should be preferred to excusal — excusal should be granted only if deferral is not reasonably practicable and appropriate. However, this should be dealt with in the excusal and deferral guidelines the

1313 Submission 52.

1314 Submission 60.

1315 Submission 56.

1316 See [9.5] above.

Commission has recommended at [9.115]–[9.120] below, rather than in the legislation. It is important to ensure sufficient flexibility for the Sheriff and the judge to meet individual needs and administrative exigencies. For instance, a person's state of health may prevent the person from serving on a long-term or permanent basis.

- If the Sheriff or judge thinks fit, the Sheriff or judge may treat an application for excusal as an application for deferral, and may treat an application for deferral as an application for excusal.
- Deferral should be granted once only, but the Sheriff should retain the discretion to alter the deferral date if necessary to accommodate court sitting dates. The discretion to alter the deferral date will be particularly important in regional areas that have limited court circuits.
- The judge should be able to hear renewed applications for deferral that have been refused by the Sheriff.
- On the deferral date, a person should generally be excused only if, having regard to the matters in section 21 of the Act, the person's circumstances have changed.

9.107 The introduction of a system of deferral may have an impact on the resources required by the Sheriff and his or her delegates for jury management and timetabling, and should be met with any necessary additional resources.¹³¹⁷

Recommendation

9.108 The Commission makes the following recommendation:

- 9-6** The *Jury Act 1995 (Qld)* should be amended to provide for a system of deferral of jury service to deal with valid, but temporary, reasons why a person is unable to perform jury service, to the effect that:
- (a) as an alternative to excusing the person from jury service under section 19 or 20 of the Act, the Sheriff or a judge may defer a person's jury service to a time within the next 12 months that the person has indicated would be a more convenient period;
 - (b) in deciding whether to defer a person's jury service, the Sheriff or judge must have regard to the matters listed in section 21 of the Act;

¹³¹⁷

See [9.99] above.

- (c) if the Sheriff or judge thinks fit, the Sheriff or judge may treat an application for excusal as an application for deferral, and may treat an application for deferral as an application for excusal;**
- (d) deferral of a person's jury service may be made once only on the particular summons;**
- (e) the Sheriff may alter the deferral date if necessary to accommodate court sittings;**
- (f) if the Sheriff does not grant a deferral, the person may apply to the judge and the judge may defer the person's jury service;**
- (g) when a person whose jury service has been deferred is recalled at the deferral date, the person should not be excused from service unless, having regard to the matters in section 21 of the Act, the person's circumstances have changed.**

EXCUSAL AND DEFERRAL GUIDELINES

9.109 As noted earlier, the excusal and deferral provisions in England and Wales are supplemented by a set of guidelines. The guidelines, published by the United Kingdom Courts Service, cover such matters as insufficient understanding of English, care responsibilities, religious beliefs, difficulty in reaching the court, holidays, business or work commitments, hardship for teachers and students, conflict with public duties, illness and physical disability. They also generally encourage deferral, rather than excusal.¹³¹⁸

9.110 The NSW Law Reform Commission has also recommended the development and publication of guidelines. In its view, the guidelines should elucidate the sorts of matters considered sufficient for an excusal or deferral, but should not be 'so worded as to harden into de facto entitlements to exemption'.¹³¹⁹ The guidelines would cover such things as illness, disability and pregnancy; hardship and inconvenience to the person's business or employer; time or inconvenience in travelling to court; inconvenience to the functioning of government; care-giving obligations where alternative care is not reasonably available or appropriate; conscientious or religious objection; bias or the

¹³¹⁸ Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [2], [4] <<http://www.official-documents.gov.uk/document/other/9780108508400/9780108508400.pdf>> at 25 February 2011.

¹³¹⁹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.26].

appearance of bias; concerns about anonymity or safety because of the person's high public profile; and 'pre-existing conflicting commitments'.¹³²⁰

9.111 The Law Reform Commission of Western Australia also recommended the development of excusal and deferral guidelines, in consultation with judges, that would cover the following:¹³²¹

- The general principles that 'juries should be broadly representative and that jury service is an important civil duty to be shared by the community';
- Specific examples of applications that would ordinarily be granted, or rejected, on the basis of substantial inconvenience to the public or undue hardship or extreme inconvenience to the person, and guidance in relation to other bases of exclusion such as a perceived lack of impartiality, an inability to understand, and communicate in, English, or an inability to discharge the duties of a juror because of sickness or disability;
- That consideration should first be given to whether the hardship or inconvenience could be alleviated by deferral, rather than excusal;
- The type and nature of evidence required to support an excusal application;
- Procedures for making an excusal application and for recording reasons of a private nature;
- Procedures to enable persons whose service is deferred to 'select the most suitable date' for their deferred service;
- That a person whose service is deferred 'is expected to ensure, as far as practicable, that he or she is available on the deferral date'; and
- The circumstances in which excusal may be granted to a person whose service has already been deferred.

9.112 The LRCWA did not consider, however, that the guidelines should be publicly available. In its view, the guidelines are meant to 'assist those responsible for determining excuse applications' not to provide potential jurors with a checklist of matters for which excusal is usually granted. People who have 'genuine reasons' to be released from service 'will know what those reasons are' and will simply need to have them assessed by the Sheriff or the judge.¹³²²

¹³²⁰ Ibid [7.25]–[7.27], Rec 33. That recommendation is set out in full in Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [9.53]. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2010, 23675 (Barry Collier, Parliamentary Secretary) in which it is explained that guidelines dealing with 'genuine grounds' for excusal will be developed in consultation with key stakeholders.

¹³²¹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 122, 128, Rec 61 and 63(2).

¹³²² Ibid 120. Cf Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1 [3.190], Rec 48 in which the development of guidelines for discretionary excusal from jury service was recommended so that the criteria would be 'generally known and applied consistently'.

Discussion Paper

9.113 In its Discussion Paper, the Commission proposed that the legislative provisions dealing with excusal and deferral should be supplemented by a set of guidelines:¹³²³

9-3 Guidelines should be prepared and published for determining whether a person summoned for jury service should be excused from attendance or further attendance.

...

9-6 Guidelines should be prepared for determining whether deferral of a person's jury service should be granted.

Consultation

9.114 The Queensland Law Society agreed that formal guidelines should be prepared to assist in determining whether a person should be excused from attendance, and that guidelines for deferral should be prepared 'to ensure consistency in any decision making'.¹³²⁴ Vision Australia also supported the preparation and publication of guidelines for 'determining whether a person summoned for jury service should be excused from attendance or further attendance and taking into account commentary from peak advocacy organisations'.¹³²⁵

The Commission's view

9.115 The *Notice to Prospective Juror* and the Courts' website give some indication of the sorts of matters that would, and would not, ordinarily justify excusal. Nevertheless, the Commission considers that a set of formal guidelines dealing with the circumstances in which a person may be excused from jury service, or a person's jury service may be deferred, should be prepared and published. A single set of guidelines would be beneficial to prospective jurors, and their employers, as well as to the Sheriff and the Court.

9.116 Without being exhaustive, the Commission considers that the guidelines should include examples, with reference to the matters in section 21 of the Act, of the sorts of claims that might justify excusal and the circumstances in which deferral, rather than excusal, would be appropriate. It would be useful to provide

1323 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [9.71]–[9.72], [9.111], Proposals 9-3, 9-6.

1324 Submission 52.

1325 Submission 58.

examples of the types of evidence that might be required to support an application for excusal or deferral.¹³²⁶

9.117 Guidance should also be provided about the assessment of prospective jurors' ability to understand, and communicate in, English well enough to enable them to serve. Consideration should be given to the inclusion of pertinent information in community languages other than English.¹³²⁷

9.118 The guidelines should also include information for prospective jurors with physical disabilities about the facilities that may be available, and the procedures that should be followed, to enable them to serve. There may also be benefit in providing guidance for the Sheriff, and the Court, in assessing whether a person's physical disability can be accommodated.¹³²⁸

9.119 The Commission does not anticipate, however, that the guidelines would be overly prescriptive; it is necessary to maintain the discretion and flexibility to consider and deal with individual circumstances.

9.120 The Commission considers that the Chief Justice of the Supreme Court and the Chief Judge of the District Court would be best placed to oversee the development of the guidelines. The input of the Sheriff, who will be responsible for the day-to-day management of the deferral system, will also be critical in developing the guidelines. The guidelines should also be informed by best practice in the other Australian jurisdictions that have deferral systems.

Recommendations

9.121 The Commission makes the following recommendations:

9-7 A single set of guidelines, applying in both the Supreme Court and the District Court, should be developed and published to provide assistance in considering applications for:

- (a) excusal from jury service; and**
- (b) the deferral of jury service.**

9-8 The deferral guidelines should be informed by best practice in the other Australian jurisdictions that have deferral systems.

¹³²⁶ For example, in Chapter 8 of this Report, the Commission expressed the view that excusal on the basis of conscientious objection should be granted only if the person shows evidence of a genuinely held belief or conviction that is incompatible with jury service: see [8.189] above.

¹³²⁷ See [8.76] above.

¹³²⁸ See [8.127] above.

Chapter 10

Jury Selection and Empanelment Processes

INTRODUCTION	286
JURY LISTS AND SUMMONSES	287
Compilation of jury rolls	288
Notice to prospective jurors	289
Summons	290
NSWLRC's recommendations	291
Discussion Paper	292
Consultation	292
The Commission's view	292
Recommendation	293
JUROR ORIENTATION	293
Review of orientation material	294
Discussion Paper	296
Consultation	296
The Commission's view	297
Recommendation	297
EMPANELLING A JURY	297
Empanelment of jurors	297
Reserve jurors	299
Supplementing the jury panel	300
CHALLENGING JURORS	300
Information about jurors	301
LRCWA's recommendations	304
Challenges to the jury panel as a whole	306
Challenges for cause	307
Special challenges for cause	308
Peremptory challenges	308
Arguments favouring peremptory challenges	312
Arguments against peremptory challenges	314
NSWLRC's recommendations	315
LRCWA's recommendations	316
Discussion Paper	318
Consultation	318
The Commission's view	324
Recommendations	327
EXCUSING AND DISCHARGING JURORS	327
Discharge at the final stage of selection	328
Discharge during the trial	329
NSWLRC's recommendations	332
LRCWA's recommendations	334
Discussion Paper	334
Consultation	334
The Commission's view	335
Recommendations	336
MINIMISING OR RESTRICTING THE LENGTH OF SERVICE	336

Serving on long trials.....	337
Excusal after serving on lengthy trials	338
One day, one trial attendance	339
Discussion Paper	340
Consultation	341
The Commission's view	343
Recommendations	343
IRREGULARITIES IN SUMMONING OR EMPANELMENT	344
Discussion Paper	346
Consultation	346
The Commission's view	346
Recommendation	347

INTRODUCTION

10.1 The Terms of Reference direct the Commission to review the operation and effectiveness of the provisions for the selection and empanelment of juries, having regard, in particular, to developments in other jurisdictions.¹³²⁹

10.2 The *Jury Act 1995* (Qld)¹³³⁰ and the *Jury Regulation 2007* (Qld) set out the overall way in which juries are selected from the community in Queensland, although in some respects the details are left to the Sheriff of Queensland.¹³³¹ The work involved in compiling jury panels and selecting juries for Queensland trials is considerable; in summary, it involves:

- keeping jury rolls (which list all Queenslanders eligible, and therefore liable, for jury service), lists of prospective jurors and revised lists of prospective jurors;
- issuing preliminary notices in preparation for summoning people for jury service;
- issuing summonses for jury service;
- considering applications for excusal;
- assigning jury panels (usually comprised of about 30 people for each criminal trial; and

¹³²⁹ See the Terms of Reference set out in Appendix A to this Report.

¹³³⁰ All references in this Report to 'the Act' are references to the *Jury Act 1995* (Qld). All references to sections of legislation are references to the *Jury Act 1995* (Qld) unless otherwise specified.

¹³³¹ The primary responsibility to maintain jury lists and summon members of the community for jury service rests with the Sheriff (*Jury Act 1995* (Qld) ss 9–12, 15–19, 24, 26–27, 29–30, 36, 37, 68) but these obligations may be delegated to other officers, particularly in regional areas: *Jury Act 1995* (Qld) s 8. These officers are specified in the *Jury Regulation 2007* (Qld) ss 6, 7, 72. This Report refers only to the Sheriff in relation to these powers and duties, the power to delegate being understood.

- the selection of juries of 12 people (and up to three reserve jurors, when required) from these panels, which may involve challenges to individual prospective jurors.

10.3 Similar processes apply in the other Australian jurisdictions, although there are some differences in detail and approach.

JURY LISTS AND SUMMONSES

10.4 The number of people who are actually required each year to sit on a jury for a trial is small relative to the number of people in the jury pool. The pool of people from which jurors are eventually empanelled is necessarily much larger. This maximises the representativeness of juries, taking into account the fact that some of the people randomly identified through the electoral roll may be uncontactable, ineligible or entitled to be excused or will be challenged by the parties during the empanelment process. The following figures provided by the Department of Justice and Attorney-General show the number of notices and summonses sent, and the number of people empanelled as jurors, for the years 2006–07 to 2008–09:

	Number of jury service notices sent	Number of summonses issued	Number of jurors empanelled
2006–07	211 975	26 391	7500
2007–08	245 940	30 671	8052
2008–09	241 480	26 954	6972
2009–10	225 913	26 570	8492

Table 10.1: Number of people identified for jury service in Queensland¹³³²

10.5 Given that the number of electors enrolled to vote in Queensland at 30 June 2010 was 2 684 858 and that the population of Queensland aged 20 years and over at 30 June 2010 was 2 915 693,¹³³³ the following can be drawn from the figures for 2009–10 (ignoring the slight disparity in dates):

- The pool from which jurors can be drawn (that is, those enrolled to vote) represents 92% of the total population aged over 20 years (and therefore a slightly lower percentage of the total adult population).
- Fewer than one in ten people (8%) on the electoral roll are sent a jury service notice.
- Of those who receive a notice, only a few over one in ten (12%) are sent a summons, or just 1% of those enrolled to vote.

¹³³² Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

¹³³³ See [4.6]–[4.8] above.

- Of those who are summoned, slightly less than one in three (32%) actually sit on a jury. This is less than 4% of those who are sent jury service notices and a tiny fraction (0.31%) of the total jury pool.

10.6 However, these figures give no indication of the numbers of notices and summonses that are actually received, nor of the numbers of people who are found to be ineligible or are excused for any reason. They are State-wide figures and therefore do not reveal any regional variation.

Compilation of jury rolls

10.7 The Sheriff prepares and maintains a jury roll for each of the 32 jury districts in Queensland.¹³³⁴ The jury rolls are based on information held by the Electoral Commission of Queensland. They contain the names, addresses and occupations of all electors within each jury district who are not disqualified from serving on juries.¹³³⁵ The Sheriff is authorised by the Act to make proper enquiries to maintain the jury rolls, including arrangements with the Electoral Commission of Queensland and the police.¹³³⁶ Information from the electoral roll is received electronically every month; there is no real-time access to the electoral roll by the Sheriff.¹³³⁷

10.8 The jury rolls or lists in the other jurisdictions are also prepared from the relevant electoral roll.¹³³⁸

10.9 As discussed in Chapter 11 of this Report, Queensland's jury districts are generally areas of about 20 km in radius, based on a particular courthouse, though this is varied in larger cities.

10.10 A first ballot is done by a computer-generated random selection of sufficient prospective jurors to cover each up-coming court sitting or jury service period.¹³³⁹ The Sheriff is authorised to determine how often these lists of prospective jurors need to be prepared, and how large they need to be.¹³⁴⁰ For criminal court sittings, jury lists are compiled on a weekly basis.¹³⁴¹

1334 See *Jury Act 1995* (Qld) s 9(1). Jury districts are specified in the *Jury Regulation 2007* (Qld) s 5, sch 1. Queensland's jury districts are described in Chapter 11 of this Report.

1335 *Jury Act 1995* (Qld) s 10(1), (2).

1336 *Jury Act 1995* (Qld) ss 10(3), 11, 12.

1337 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1338 See *Juries Act 1967* (ACT) s 19; *Jury Act 1977* (NSW) s 12; *Juries Act 1927* (SA) s 23; *Juries Act 2003* (Tas) ss 19, 20; *Juries Act 2000* (Vic) s 19; *Juries Act 1957* (WA) s 14. See also *Juries Act* (NT) s 21.

1339 *Jury Act 1995* (Qld) ss 15(1), 16. See also Queensland Courts, 'Selection' <<http://www.courts.qld.gov.au/159.htm>> at 1 February 2011.

1340 *Jury Act 1995* (Qld) s 15(2).

1341 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

10.11 The length of a jury service period is not specified in the Act but is determined by the lengths of the sittings for which juries are required.¹³⁴² In Brisbane, a jury service period is currently two weeks, and has been since about 2006; outside Brisbane, it is generally four weeks unless the sittings themselves are shorter.¹³⁴³ Of course, the length of time actually served by an empanelled jury depends on the length of the trial, which could exceed the usual jury service period or, if the trial starts late in that period, go beyond the anticipated end of that period.¹³⁴⁴

Notice to prospective jurors

10.12 A person who is selected by the Sheriff in a first ballot for jury service will receive a *Notice to Prospective Juror* with a *Questionnaire for Prospective Juror*.¹³⁴⁵ The Notice sets out certain basic information such as where and when the person may be required to be available for jury service, and for how long. Information about the recipients is based on information held by the Electoral Commission of Queensland, and provision is made on the Questionnaire for recipients to inform the Sheriff if their details have changed.¹³⁴⁶ This Notice is not a summons to attend, but is a preliminary notice that the recipient may receive a summons unless excused or otherwise removed from the jury roll. It is usually sent out about eight weeks before the start of the jury service period to which it relates, with two to three weeks to return the Questionnaire, and a further period to allow the Sheriff to conduct necessary checks and assess excusal applications.¹³⁴⁷ As noted at [10.4] above, 225 913 Notices were sent out in the financial year 2009–10.

10.13 Prospective jurors can seek to be excused at this point, using the application form included with the Questionnaire.¹³⁴⁸

10.14 The Questionnaire is intended to elicit information to determine the prospective juror's eligibility. It lists the categories of ineligible persons and asks prospective jurors to indicate whether any of them apply. People who indicate that they are ineligible on the basis of physical or mental disability, or who seek excusal because of work commitments or on medical grounds, are required to provide supporting documentation. The Questionnaire must be returned to the Sheriff, even if the recipient nominates a basis for ineligibility or intends to seek to be excused.¹³⁴⁹ Unless a person has a reasonable excuse, failure to return the

1342 Ibid.

1343 Ibid. But see [10.200]–[10.201] below in relation to long trials.

1344 Queensland Courts, 'Summons' <<http://www.courts.qld.gov.au/163.htm>> at 1 February 2011.

1345 *Jury Act 1995* (Qld) s 18.

1346 The Queensland Courts website advises prospective jurors to contact the Queensland Electoral Commission to have their information updated if necessary: Queensland Courts, 'Notification' <<http://www.courts.qld.gov.au/160.htm>> at 1 February 2011.

1347 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1348 *Jury Act 1995* (Qld) s 18(2); Queensland Courts, 'Excusal' <<http://www.courts.qld.gov.au/161.htm>> at 1 February 2011; Queensland Courts, 'Notification' <<http://www.courts.qld.gov.au/160.htm>> at 1 February 2011.

1349 Queensland Courts, 'Notification' <<http://www.courts.qld.gov.au/160.htm>> at 1 February 2011.

Questionnaire is an offence under the Act punishable by a maximum penalty of 10 penalty units (\$1000) or two months' imprisonment.¹³⁵⁰ In any event, a person failing to respond may be put in a second ballot.¹³⁵¹

10.15 The Sheriff must then revise the lists of prospective jurors on the basis of the returned Questionnaires, removing any people who are ineligible or have been excused or cannot be located, and correcting any other relevant information.¹³⁵²

10.16 A second random ballot based on the revised lists of prospective jurors determines who, of those who have not been excluded, will be sent a summons.¹³⁵³

10.17 Before summonses are issued, criminal history checks are done by the Sheriff in relation to all people who are available for a jury service period, based on information provided by the Queensland Police Service.¹³⁵⁴

10.18 The issue of a notice and questionnaire prior to the issue of a summons is also required in New South Wales and Victoria. In addition, the legislation in South Australia and Tasmania provides that the Sheriff may, but is not required to, send the people on the jury list a questionnaire or make whatever inquiries are necessary to determine their qualification and eligibility.¹³⁵⁵

Summons

10.19 A summons to a juror will set out where and when the person is required to attend for jury service, and over what period of jury service that person is otherwise to be available to serve. Jurors may not be required to attend on the first day, or on all days, of the jury service period. However, a trial, once started, may last longer than the jury service period notified in the summons¹³⁵⁶ or may extend beyond the end of that period.

10.20 The Sheriff has authority to determine how frequently summonses need to be issued.¹³⁵⁷

1350 *Jury Act 1995* (Qld) s 18(3); the same penalties apply for supplying false information on the Questionnaire or in an application to be excused: s 18(6). Breaches and penalties under the Act are discussed in Chapter 14 of this Report.

1351 Queensland Courts, 'Notification' <<http://www.courts.qld.gov.au/160.htm>> at 1 February 2011; Queensland Courts, 'Excusal' <<http://www.courts.qld.gov.au/161.htm>> at 1 February 2011.

1352 *Jury Act 1995* (Qld) s 24.

1353 *Jury Act 1995* (Qld) ss 25(1), 26(1), (2).

1354 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1355 See *Jury Act 1977* (NSW) s 13; *Juries Act 1927* (SA) s 25; *Juries Act 2003* (Tas) s 20(4)–(4B); *Juries Act 2000* (Vic) s 20. See also New South Wales Office of the Sheriff, Jury Service: FAQs, 'What is a notice of inclusion?' <http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/SHO_jury_faqs> at 1 February 2011; Courts and Tribunals Victoria, Being Summoned, 'Initial Selection of Potential Jurors' <<http://www.courts.vic.gov.au/node/202>> at 1 February 2011.

1356 Queensland Courts, 'Summons' <<http://www.courts.qld.gov.au/163.htm>> at 1 February 2011.

1357 *Jury Act 1995* (Qld) s 26(1).

10.21 Failure to attend in answer to a summons without reasonable excuse is an offence punishable by a maximum penalty of 10 penalty units (\$1000) or two months' imprisonment.¹³⁵⁸

10.22 Summonses are typically issued at least two weeks before the court sittings to which they relate.¹³⁵⁹ As noted at [10.4] above, in the financial year 2009–10, 26 570 summonses were issued.

10.23 As explained above, summonses in Queensland and in some other jurisdictions are preceded by the issue of a notice and questionnaire. This does not apply, however, in the ACT, the Northern Territory or Western Australia. In those jurisdictions, the requisite number of persons is summoned directly from the annual jury list for the relevant jury district. Provision is made for persons who have been summoned to notify the Sheriff prior to attending (by statutory declaration) that they are disqualified or ineligible to serve or to apply for excusal.¹³⁶⁰

NSWLRC's recommendations

10.24 In its report on jury selection, the NSW Law Reform Commission recommended that the procedure for identifying and summoning jurors should be streamlined. It recommended that the two-stage process of first issuing notifications and later issuing summonses should be combined and that summonses should instead be issued directly from the electoral roll. Rather than dealing with claims of ineligibility and applications for excusal at two stages (after notification and before the issue of a summons, and after the issue of a summons), such matters would be dealt with only after the summonses have been issued.¹³⁶¹ This would necessitate, however, provision for the withdrawal of summonses for people who are found to be ineligible or who are excused.¹³⁶²

10.25 The NSWLRC also recommended that the period of notice for attendance at court pursuant to a summons should be no less than four weeks, unless a judge orders otherwise.¹³⁶³

1358 *Jury Act 1995* (Qld) s 28. Breaches and penalties under the Act are discussed in Chapter 14 of this Report.

1359 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1360 See *Juries Act 1967* (ACT) ss 24, 26; *Juries Act* (NT) ss 27, 29; *Juries Act 1957* (WA) ss 23, 32C. In the ACT, the jury list must be prepared at least once every two years; in the Northern Territory and Western Australia, it is to be prepared annually. See also Supreme Court of the ACT, Jury Duty, 'Service of jury summons' and 'Applications to be excused' <http://www.courts.act.gov.au/supreme/content/about_jury_duty.asp?textonly=no#2>; Supreme Court of the Northern Territory, For Jurors, 'How do I notify the sheriff?' <<http://www.supremecourt.nt.gov.au/jurors/index.htm#q7>>; Supreme Court of Tasmania, Jurors 'The Jury Summons' <http://www.supremecourt.tas.gov.au/going_to_court/jurors/jury_summons>; Department of the Attorney General (Western Australia), Court and Tribunal Services, Jury Duty, 'Excuse from Jury Duty' <http://www.courts.dotaq.wa.gov.au/E/excuse_from_jury_duty.aspx?uid=9995-2446-9129-6857> at 1 February 2011.

1361 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [8.39]–[8.50], Rec 39.

1362 Ibid [9.4]–[9.5], Rec 40. Provision for the withdrawal of a summons if the person is found to be disqualified or exempt or is excused from service is made in the ACT: see *Juries Act 1967* (ACT) s 26A.

1363 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [9.6]–[9.9], Rec 41.

10.26 These recommendations are not reflected in the *Jury Amendment Act 2010* (NSW).

Discussion Paper

10.27 In its Discussion Paper, the Commission sought submissions on whether the current two-stage notice and summons procedure for selection of prospective jurors is working well and should be retained, or whether it should be replaced by a one-step summons process as applies in some other jurisdictions and has been recommended by the NSW Law Reform Commission:¹³⁶⁴

- 10-1 Is the current system for selecting prospective jurors by issuing notices to prospective jurors before issuing summonses to attend for jury service appropriate, or should it be changed in some way?

Consultation

10.28 The Queensland Law Society expressed the view that the current system of issuing notices to prospective jurors prior to the issue of a summons is preferable 'as it will bring any problems that selected prospective jurors have to the notice of the Sheriff before any summons is issued'.¹³⁶⁵

10.29 The Department of Justice and Attorney-General noted, however, that the existing 'selection and vetting processes for prospective jurors are labour intensive and at times complex'. It also noted that some of the Proposals in the Discussion Paper have the potential to add to this complexity, rather than alleviate it. The Department noted, for instance, that the proposals to alter the criminal history disqualifications, of which it was generally supportive, would require more complex criminal history checks to be undertaken.¹³⁶⁶

The Commission's view

10.30 In the Commission's view, the current two-stage notice and summons procedure provided for under the *Jury Act 1995* (Qld) for the selection of prospective jurors is appropriate and should be retained. The two-stage process has a number of benefits. It enables people who are disqualified, ineligible or entitled to be excused to be identified at an early stage in the process. This means that their names can be removed from the pool of potential jurors without the need to answer a summons. This has the benefit that the summons, which is a form of legal process, does not need to be withdrawn. The two-stage process also has the attendant benefit that, generally, it enables summonses to be issued to people who, in the Sheriff's opinion, are qualified for jury service. It may also assist in identifying changes of address. Additionally, it has the advantage of giving advance notice of the possibility of being called for jury service to those who receive notification.

¹³⁶⁴ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [10.26]–[10.28], Question 10-1.

¹³⁶⁵ Submission 52.

¹³⁶⁶ Submission 56.

Recommendation

10.31 The Commission makes the following recommendation:

10-1 The current two-stage notice and summons procedure provided for under the *Jury Act 1995 (Qld)* for the selection of prospective jurors is appropriate and should be retained.

JUROR ORIENTATION

10.32 In Queensland, before being empanelled, all prospective jurors who have been summoned to attend for jury service attend an orientation session at which they are provided with some information about their role and their obligations, entitlements and other administrative matters.¹³⁶⁷ These sessions are conducted by bailiffs and officers on behalf of the Sheriff. The jurors are given advice on how to conduct themselves in court and during a trial. This includes the requirements not to discuss the trial with people outside the jury room and not to make private enquiries about the evidence or private visits of locations associated with the case. They are informed that evidence may be given in a variety of ways; for example, photographs may be viewed on large screens in the court room, and video evidence may be taken from witnesses in another location. They are also told that the court may be closed if, for example, evidence is to be given by a child.

10.33 After this introduction, prospective jurors are shown a video that outlines the empanelling and trial process.¹³⁶⁸ The jurors' information video includes:

- an introduction by the Chief Justice explaining the importance of jury service and thanking the jurors for their contribution;
- an outline of the jury selection process;
- an overview of the court room identifying each of the people in the court room by reference to their location and court attire, explaining the last opportunity to seek an excusal from jury service from the judge, and showing how the defendant is arraigned and a plea is taken;
- an outline of the empanelling process explaining what information about the jurors is made available to counsel, what happens when a juror is called, the

¹³⁶⁷ Similar orientation sessions are conducted in all other Australian jurisdictions: see E Najdovski-Terziovski et al, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70. Jurors are also provided with information about the Juror Support Program, a counselling service that jurors may access after they have performed jury service: Queensland Courts, *Juror's Handbook* (2008) <<http://www.courts.qld.gov.au/Factsheets/SD-Publication-JurorsHandbook.pdf>> at 9 February 2011.

¹³⁶⁸ See, for example, Australian Institute of Judicial Administration Inc, *Working with Juries Seminar: Summary of Proceedings* (15 June 2007) App, 21. Potential jurors are also given a booklet: Queensland Courts, *Juror's Handbook* (2008) <<http://www.courts.qld.gov.au/Factsheets/SD-Publication-JurorsHandbook.pdf>> at 9 February 2011.

taking of the oath or an affirmation, the defendant's and prosecutor's right to challenge a juror, and the need for jurors to feel that they can be, and be seen to be, completely impartial;

- an explanation of the jury's role and of the trial processes once the jury has been empanelled;¹³⁶⁹ and
- an outline of jurors' responsibilities concerning jury deliberations.¹³⁷⁰

10.34 The video is some 12 years old and contains some information that is now out of date.¹³⁷¹

10.35 Prospective jurors each also receive a booklet, the *Juror's Handbook*, which covers similar topics.¹³⁷²

Review of orientation material

10.36 The jury notice and information procedures in Queensland were the subject of a survey conducted in 1999, by Deborah Wilson Consulting Services Pty Ltd, which found a 'high level of satisfaction ... with notices and information provided to jurors':¹³⁷³

Jurors gave performance ratings (on a scale where 1 is poor and 5 is excellent) for the following information:

- Notice to Prospective Jurors.
- Summons to a Juror.
- The Juror's Handbook.
- A video shown to jurors.
- The talk by the Bailiff.

¹³⁶⁹ This part of the video explains that the bailiff is not permitted to discuss the case with the jury, that the jurors are usually free to go home at the end of each day of the trial, and that the jury will be asked to nominate a speaker. It also explains that the judge will hear argument on matters of law in the jury's absence, that jurors must not discuss the trial with any one and must never inspect any places referred to in the trial, and that jurors should keep an open mind throughout the trial. It explains that at the end of the evidence, counsel will make their closing addresses and the judge will give the summing up.

¹³⁷⁰ This includes explanations that jurors should consider the evidence calmly and carefully, and should listen to one another and not be afraid to discuss the issues; that what happens in the jury room remains confidential and that it is an offence to publish jury deliberations, or disclose jury deliberations to anyone if it is likely to be published; and that jurors should read the *Juror's Handbook*.

¹³⁷¹ For example, the video refers to the now repealed statutory requirement for unanimous verdicts in all criminal jury trials. It also does not mention that information about when to attend court is also available on the Queensland Courts' website at <www.courts.qld.gov.au> after 5.30 pm on the evening of each working day.

¹³⁷² Queensland Courts, *Juror's Handbook* (2008). See also <<http://www.courts.qld.gov.au/103.htm>> and <<http://www.courts.qld.gov.au/Factsheets/SD-Publication-JurorsHandbook.pdf>> at 1 February 2011.

¹³⁷³ Deborah Wilson Consulting Services Pty Ltd, *Survey of Queensland Jurors December 1999*, Main Report (2000) 1–2. The survey canvassed the views of 491 people who had served as jurors in Beenleigh, Brisbane, Bundaberg, Cairns, Gladstone, Ipswich, Kingaroy, Longreach, Mackay, Maryborough, Maroochydore, Mt Isa, Rockhampton, and Townsville: [2.2].

On a scale where 1 is poor and 5 is excellent, 3 is an average rating. Average ratings of 4 and above indicate good or excellent facilities.

Consistently high ratings (4.3 to 4.5) were reported for all information provided to jurors. Results indicate that jurors found information provided to them easy to understand and informative. Only slight variations in satisfaction levels occurred in different areas of the state.

10.37 The preliminary notice and orientation material in New South Wales, Victoria and South Australia were also considered in the review of juror satisfaction conducted by the Australian Institute of Criminology in 2007.¹³⁷⁴ It was suggested in that review that juror satisfaction is greater when there is more information and explanation about the system and the jury deliberation process.¹³⁷⁵

10.38 The orientation materials and processes in seven Australian jurisdictions were also reviewed in an article published in 2008.¹³⁷⁶ That study looked at the material provided to jurors upon arrival at court rather than in advance of attendance,¹³⁷⁷ and the published results covered the materials provided and procedures followed in courts across Australia.¹³⁷⁸

10.39 All jurisdictions used videos, and five of the seven (including Queensland) also provided handbooks.¹³⁷⁹ The written material was generally found to be acceptably readable and within the capabilities of jurors and consumers generally.¹³⁸⁰ Two jurisdictions used personal presentations by a jury administrator, and one provided a judge to answer jurors' questions before empanelment.¹³⁸¹

10.40 The authors noted the important role that orientation procedures can have in reversing any negative impressions that jurors might have, and in reinforcing the importance of their role and allaying concerns:¹³⁸²

1374 Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 50–69.

1375 Ibid 9.

1376 E Najdovski-Terziovski et al, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70. Tasmania was not included as it was reported that it did not, at that time, provide orientation material to its jurors: *ibid*, 70. An orientation pamphlet on jury duty has since been produced for people selected for jury service in that State: Supreme Court of Tasmania, *Jury Duty: Your Part in the Administration of Justice in Tasmania* (2008) <http://www.supremecourt.tas.gov.au/going_to_court/jurors/pamphlets> at 1 February 2011. Information about jury service is also provided on the Court's website: Supreme Court of Tasmania, *Going to Court, 'Jurors'* <http://www.supremecourt.tas.gov.au/going_to_court/jurors> at 1 February 2011.

1377 E Najdovski-Terziovski et al, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70, 71.

1378 The authors indicate that a jurisdiction-by-jurisdiction breakdown is available from them: *Ibid* 70.

1379 E Najdovski-Terziovski et al, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70, 71.

1380 *Ibid* 76.

1381 *Ibid* 72.

1382 *Ibid* 75.

Many people view jury duty as an inconvenience; therefore, reinforcing the importance of their role and the value of jury duty at the outset may help dispel such concerns. (notes omitted)

10.41 In addition, the fact that a juror's role and duties are referred to in the orientation process and later repeated by a judge is likely to lead to greater familiarity with, and adherence to, these requirements.¹³⁸³

10.42 The authors stress that the orientation procedures should not be seen as a stand-alone exercise but regarded as part of a 'continuum of communication aimed at assisting jurors to perform their task':¹³⁸⁴

It is therefore important that there be a sense of continuity as jurors move from orientation to the trial itself, and that all those involved in the trial process recognize the importance of an effective orientation in assisting them to carry out their onerous and difficult responsibility.

Discussion Paper

10.43 In its Discussion Paper, the Commission sought submissions on whether the juror orientation materials and processes could be improved in any way:¹³⁸⁵

10-2 In what ways can the orientation materials and processes that are used by the courts for prospective jurors be improved?

Consultation

10.44 The Queensland Law Society did not make any suggestions about how to improve the juror orientation materials or procedures but commented that, in their view, 'the DVD presentation is useful'.¹³⁸⁶

10.45 The Department of Justice and Attorney-General suggested that there should be a greater use of computer and internet technology to communicate with potential jurors.¹³⁸⁷

[We] are supportive of ensuring that juror induction materials remain current and relevant. In an increasingly technological age, opportunities to harness new ways to communicate with potential jurors should be pursued. By way of suggestions:— on-line interactive court diagrams where jurors could learn at their own pace prior to attending for service; short videos of real or fictional court processes being available on-line, etc.

1383 Ibid 77.

1384 Ibid.

1385 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [10.42]–[10.44], Question 10-2.

1386 Submission 52.

1387 Submission 56.

The Commission's view

10.46 Orientation materials and processes are important tools in helping prospective jurors to understand what to expect in terms of procedures and protocol, and to comprehend their new role and responsibilities. They also present an opportunity to educate prospective jurors about the positive value of jury service both to the justice system and to themselves.

10.47 The Commission considers that the combined use of written information, beginning with the first notice sent to prospective jurors, and personal and video presentations on the first day of attendance at the courts is appropriate. It is important that the juror orientation material and processes are internally consistent in order to facilitate the transition of prospective jurors into jury service. They also need to be kept up to date and presented in innovative and flexible formats. In particular, the video presentation given to prospective jurors should be reviewed to ensure that it reflects the current law and practice.¹³⁸⁸ As much of the jurors' orientation material as possible, including the jurors' information video, should also be made available on the Courts' website.

Recommendation

10.48 The Commission makes the following recommendation:

10-2 The orientation material and processes provided to jurors in Queensland Courts are generally appropriate. It is important that the juror orientation material and processes are internally consistent in order to facilitate the transition of prospective jurors into jury service. They also need to be kept up to date and presented in innovative and flexible formats. In particular, the video presentation given to prospective jurors should be reviewed to ensure that it reflects the current law and practice. As much of the jurors' orientation material as possible, including the jurors' information video, should also be made available on the Courts' website.

EMPANELLING A JURY

Empanelment of jurors

10.49 Following the juror orientation process, groups or 'panels' of 30 or more prospective jurors¹³⁸⁹ are taken to each court where trials are scheduled to begin

¹³⁸⁸ See n 1371 above.

¹³⁸⁹ These groups are, somewhat confusingly, also called 'panels': see, for example, Queensland Courts, 'Summons' <<http://www.courts.qld.gov.au/163.htm>> at 1 February 2011. Some confusion in the use of the term 'panel' may arise because a jury that has been sworn in is said to have been 'empanelled'.

for the final selection process, from which a jury of 12 (and possibly up to three reserve jurors) will be empanelled.¹³⁹⁰

10.50 The judge may at this stage hear and decide applications from any members of the jury panel for excusal, including any renewed applications for excusals that were refused by the Sheriff. These applications are generally heard without formality; the prospective juror approaches the bench to discuss the matter.¹³⁹¹

10.51 Cards showing the name, town or suburb, and occupation of each prospective juror are mixed in a rotating box to ensure a random selection.¹³⁹² The judge's associate then draws the cards one by one, calling out the prospective juror's number and name (but not town, suburb or occupation). However, if the judge considers that, for security or other reasons, the persons' names should not be read out in open court, the judge may direct that the persons be identified by number only.¹³⁹³ The person called then walks to the bailiff to take the juror's oath or affirmation.¹³⁹⁴

10.52 At any time before the bailiff starts to administer the oath or affirmation, a juror may be challenged by either party, in which case he or she returns to the back of the court room.¹³⁹⁵ If not, the juror is sworn in. The procedure is repeated until a complete jury (including any reserve jurors) has been sworn in.¹³⁹⁶

10.53 After the requisite number of jurors has been sworn in and the judge has ensured that no juror is unable to serve, the remaining members of the jury panel may be taken to other courts where juries are required on that day, or may be required to attend at court on other days during the jury service period if other juries are required by the court.

10.54 As noted at [10.4] above, almost 8500 people (8492) were empanelled as jurors for trials in Queensland in the financial year 2009–10.

10.55 The empanelment procedure is generally very similar in the other jurisdictions, except in relation to the way in which prospective jurors are identified

1390 *Jury Act 1995* (Qld) ss 33, 34, 36(1).

1391 *Jury Act 1995* (Qld) s 20(2)–(4); Supreme and District Courts Benchbook, 'Trial Procedure' [5B.1] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

1392 *Jury Act 1995* (Qld) s 37.

1393 *Jury Act 1995* (Qld) s 41.

1394 *Jury Act 1995* (Qld) s 44. See also Queensland Courts, 'Serving on a jury' <<http://www.courts.qld.gov.au/162.htm>> at 1 February 2011.

1395 Queensland Courts, 'Serving on a jury' <<http://www.courts.qld.gov.au/162.htm>> at 1 February 2011.

1396 See generally Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.2]–[5B.3] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

when called.¹³⁹⁷ In some jurisdictions, prospective jurors are called by number only, and not by name.¹³⁹⁸

Reserve jurors

10.56 Juries for criminal trials are to consist of 12 people.¹³⁹⁹

10.57 The Act gives the judge discretion, however, to direct that up to three additional people from the jury panel be selected and sworn as 'reserve jurors'. Reserve jurors are selected and liable to be challenged and discharged in the same way as other jurors, take the same oath or affirmation as other jurors, and are subject to the same arrangements as other jurors during the trial,¹⁴⁰⁰ but do not retire with the jury to deliberate on a verdict unless they have replaced a juror who has died or been discharged.

10.58 Reserve jurors might be selected if the trial is expected to be a relatively long or complex one,¹⁴⁰¹ or during flu season.

10.59 A reserve juror will take a place on the jury only if a juror dies or is discharged after the trial has begun (but before the jury has retired to consider its verdict). If there are two or more reserve jurors available, the juror to take a place on the jury is to be decided by lot or 'in another way decided by the judge'.¹⁴⁰²

10.60 When the jury retires to consider its verdict, any reserve jurors who have not taken a place on the jury are discharged from further attendance.¹⁴⁰³

10.61 Provision for the empanelment of reserve, or additional, jurors is also made in the other Australian jurisdictions,¹⁴⁰⁴ although the number of extra jurors varies: up to two in Tasmania; up to three in New South Wales, the Northern Territory, South Australia, and Victoria; up to four in the ACT; and up to six in Western Australia.

¹³⁹⁷ See *Juries Act 1967* (ACT) ss 28, 31, 33, 35; *Jury Act 1977* (NSW) s 48; *Juries Act* (NT) s 37; *Juries Act 1927* (SA) ss 42, 46; Supreme Court of South Australia, *Criminal Practice Directions 2007*, Practice Direction No 7 (Selection of Jurors) [7.3]; *Juries Act 2003* (Tas) s 29(7)–(8); *Juries Act 2000* (Vic) ss 4, 31, 32, 36; *Juries Act 1957* (WA) ss 36(1), 36A.

¹³⁹⁸ See Table 10.2 below.

¹³⁹⁹ *Jury Act 1995* (Qld) s 33. But see ss 56, 57 which allow for the discharge of an individual juror and the continuation of the trial with less than 12 jurors (but not less than 10 jurors).

¹⁴⁰⁰ *Jury Act 1995* (Qld) s 34(1), (2). See generally Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.6] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

¹⁴⁰¹ Information provided by the Department of Justice and Attorney-General, 25 February 2011. See generally Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.6] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

¹⁴⁰² *Jury Act 1995* (Qld) s 34(3), (4).

¹⁴⁰³ *Jury Act 1995* (Qld) s 34(5). See generally Queensland Courts, *Supreme and District Courts Benchbook*, 'General Summing Up Directions' [24.8] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

¹⁴⁰⁴ *Juries Act 1967* (ACT) s 31A; *Jury Act 1977* (NSW) ss 19(2), 55G; *Juries Act* (NT) s 37A; *Juries Act 1927* (SA) s 6A; *Juries Act 2003* (Tas) ss 25(2), 26; *Juries Act 2000* (Vic) ss 23, 48; *Juries Act 1957* (WA) s 18. See also New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.43]–[10.54], Rec 45, 46.

10.62 There are also some differences in approach. Like Queensland, the Northern Territory and Tasmania make provision, in similar terms, for reserve jurors who, if they have not replaced a juror during the trial, are discharged before the jury retires. The other jurisdictions empanel additional, rather than reserve, jurors. In the ACT, South Australia and Victoria, if there are more than 12 jurors at the time immediately before the jury retires, a ballot is taken to remove the excess jurors from the jury. Similar provisions apply in New South Wales and Western Australia but instead of balloting the removal of the excess jurors, a ballot is taken to select the 12 jurors who will retire to deliberate on the verdict.

Supplementing the jury panel

10.63 If there appears to be too few people for the selection of a jury, the Act provides for the Sheriff, at the judge's direction, to select and summon additional people to supplement the jury panel.¹⁴⁰⁵

10.64 Similar provisions are made in the other Australian jurisdictions when there are, or appear to be, too few people summoned to make up a jury.¹⁴⁰⁶

CHALLENGING JURORS

10.65 As noted in Chapter 5, the broad objective of the jury selection process is to select a jury which is, and is perceived to be, independent, impartial and competent, and which is broadly representative of the community. These attributes ensure that the defendant, the State and the community perceive the trial to be fair, thereby promoting public confidence in the justice system. However, the pre-court stage of the jury selection process does not necessarily ensure a jury with these attributes. This is because a particular jury panel is comprised of people who have been randomly selected from a list of qualified jurors.

10.66 The random selection of jurors is a necessary first step in ensuring that jurors are independent and impartial. However, a randomly selected jury may include jurors who are, or who may be perceived to be, biased against one party in the particular case or not competent to discharge their duties. Furthermore, a randomly selected jury may not be broadly representative of the community. It is for this reason that the right to challenge jurors is fundamental to the jury selection process.

10.67 The *Jury Act 1995* (Qld) provides for the manner in which the prosecution and each defendant may challenge the empanelment of prospective jurors. There are different forms of challenge:

- challenges to the array (that is, to the jury panel as a whole);
- challenges for cause; and

¹⁴⁰⁵ *Jury Act 1995* (Qld) s 38.

¹⁴⁰⁶ *Juries Act 1967* (ACT) s 31(2)–(4); *Jury Act 1977* (NSW) ss 27, 51; *Juries Act* (NT) s 37(2)–(2B); *Juries Act 1927* (SA) s 69; *Juries Act 2003* (Tas) s 37; *Juries Act 2000* (Vic) s 41. See also *Jury Rules 1990* (NZ) r 20.

- peremptory challenges, for which no cause need be shown.¹⁴⁰⁷

10.68 Generally, challenges must be made when the person's name is called. In Queensland, they must be made before the court officer begins to administer the oath or affirmation to the juror whose name has just been called¹⁴⁰⁸ although there is provision for a challenge for cause to be made during the final stage of the jury selection process.¹⁴⁰⁹

10.69 Before the selection process begins, the defendant is to be informed of the right to challenge.¹⁴¹⁰ Challenges made by a party's lawyer or other representative are assumed, in the absence of evidence to the contrary, to have been made on the party's authority.¹⁴¹¹

Information about jurors

10.70 Upon request, the Sheriff must provide a party to a trial with a list of the people who have been summoned for (and not excused from) jury service (with their names, localities, and current or last paid occupations) which identifies the people who have been instructed to attend on the day of the trial in question. The request may be made no earlier than 4 pm on the last business day before the trial is due to start.¹⁴¹² This tight timeline limits the ability of the parties to conduct research on the jurors based on the demographic information contained in the lists. In practice, both the prosecution and the defence will collect the jury list on the day of the trial on their way to their individual court.¹⁴¹³

10.71 This is the only information about potential jurors that is made available to the parties by the court and, apart from the appearance and demeanour of the jurors themselves in the court room and (especially in small communities) any personal knowledge that the parties may have of the potential jurors, is all the information that the parties have to rely on in determining what challenges to make. These lists must be returned to the Sheriff and destroyed as soon as practicable after the jury for that trial has been selected.¹⁴¹⁴ Failure to return the lists is an offence under the Act punishable by a maximum penalty of 10 penalty units

¹⁴⁰⁷ Such challenges by the prosecution are often done by the prosecutor asking the prospective juror to 'stand by': see [10.95]–[10.106] below.

¹⁴⁰⁸ *Jury Act 1995* (Qld) s 44.

¹⁴⁰⁹ *Jury Act 1995* (Qld) ss 44(3), 47. See [10.92]–[10.94] below.

¹⁴¹⁰ *Jury Act 1995* (Qld) s 39; *Criminal Practice Rules 1999* (Qld) r 47. See also Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.2] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

¹⁴¹¹ *Jury Act 1995* (Qld) s 49.

¹⁴¹² *Jury Act 1995* (Qld) s 29.

¹⁴¹³ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁴¹⁴ *Jury Act 1995* (Qld) s 29(5)–(7).

(\$1000) or two months' imprisonment.¹⁴¹⁵ It is also an offence to copy, distribute or disclose the list or its contents without authorisation from the Sheriff.¹⁴¹⁶

10.72 No-one may put any question to a person who has been summoned — or to a third person about a person who has been summoned — to find out how the potential juror is likely to react to issues arising in a trial or for other purposes relating to the selection of the person as a juror, unless authorised by the Act or a judge. The maximum penalty for doing so is two years' imprisonment.¹⁴¹⁷

10.73 However, if one party obtains information about a prospective juror that may show that the person is unsuitable to serve as a juror in the trial, that party must disclose that information to the other party as soon as possible.¹⁴¹⁸

10.74 The information about jurors that is disclosed to the parties does not record their full addresses, just their 'locality addresses', which is defined in section 37(3) of the Act to be 'the city, town, suburb or other locality' in which they reside. The Commission understands that prospective jurors' occupations may also be described in general terms; a prospective juror might be described, for instance, as a 'public servant' without noting whether the person is, for example, employed by Queensland Health or as a policy officer for the Department of Justice, two very different positions.¹⁴¹⁹

10.75 The information given to the parties about the persons summoned for jury service differs in the other jurisdictions. Provision is made for the parties' legal representatives to inspect or obtain a copy of the jury panel or list of persons who have been summoned to attend in the ACT, South Australia, Tasmania and Western Australia, although the type of information, and the time provided for inspection, differs.

10.76 In New South Wales, the Northern Territory and Victoria, in contrast, the parties are not entitled to inspect or receive a copy of the list of prospective jurors. The first time prospective jurors will be identified to the parties in those jurisdictions will be during the empanelment process itself when the jurors are called. However, in some cases, jurors may be called by identification number only, and not by name.

1415 *Jury Act 1995* (Qld) s 29(5).

1416 *Jury Act 1995* (Qld) s 30. Breaches and penalties under the Act are discussed in Chapter 14 of this Report.

1417 *Jury Act 1995* (Qld) s 31.

1418 *Jury Act 1995* (Qld) s 35(1). The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) does not apply for this purpose: s 35(2). The Commission understands that it is not the practice for the prosecution to undertake criminal history searches in relation to prospective jurors: Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1419 This was noted by a member of the Criminal Law Section of the Queensland Law Society in a preliminary consultation with the Commission: Submission 26A.

10.77 The type of information available to the parties is summarised in the following table:

	Prior to empanelment	During empanelment
QLD	A copy of the jury list, containing the <u>name, occupation and address</u> of persons summoned, may be obtained by the parties' or their lawyers no earlier than 4 pm on the business day immediately before the day fixed for trial.	Prospective jurors are called by <u>number and name</u> , unless the judge directs, for security or other reasons, that they be called by number only.
ACT	A copy of the jury panel, containing the <u>name and occupation</u> of persons summoned, may be obtained by the parties' legal practitioners on the day fixed for the trial. ¹⁴²⁰	Prospective jurors are called by <u>name and occupation</u> .
NSW	There is no right to inspect the jury panel, containing the name and occupation of persons summoned.	Prospective jurors are called by <u>number only</u> .
NT	There is no right to inspect the jury list containing the name, occupation and address of persons summoned.	Prospective jurors are called by <u>name and description</u> (that is, occupation and address).
SA	A copy of the jury panel and list giving the <u>number, name, occupation and suburb</u> of the prospective jurors is made available to counsel in court 'sufficiently long enough before the jury is empanelled to enable counsel to take instructions to challenge'. ¹⁴²¹	Prospective jurors are called by <u>number only</u> .
Tas	A list of the <u>names</u> of the persons to whom a summons was issued is given to the Director of Public Prosecutions, the Commissioner of Police, the defendant or his or her representative, and the parties to the trial.	Prospective jurors are called by <u>name</u> , ¹⁴²² unless the court directs, for security or any other reason, that they be called by number only.
Vic	There is no right to inspect the jury pool or panel showing the name, occupation and date of birth of persons summoned.	Prospective jurors are called by <u>name and occupation</u> , ¹⁴²³ unless the court directs that they be identified by number only, in which case they are called by number and occupation.

¹⁴²⁰ *Juries Act 1967* (ACT) s 29(1) also provides that, except by leave of the court, a person shall not, before the day fixed for trial, be permitted to inspect the panel of jurors for the trial or to inspect or obtain a copy of the panel.

¹⁴²¹ Supreme Court of South Australia, *Criminal Practice Directions 2007*, Practice Direction No 7 (Selection of Jurors) [7.2] also provides that while unrepresented defendants will be given a copy of the jury list containing the prospective jurors' name, occupation and suburb, the judge may 'direct the Sheriff to have information included or removed from the list as appropriate for the matter before the Court'.

¹⁴²² *Juries Act 2003* (Tas) s 29(6) provides, however, that if two or more persons have the same name, those persons are to be called by name and occupation, and if two or more persons have the same name and occupation, those persons are to be called by name, occupation and date of birth.

¹⁴²³ *Juries Act 2000* (Vic) s 36(1) provides, however, that if two or more persons have the same name and occupation, those persons are to be called by name, occupation and date of birth.

	Prior to empanelment	During empanelment
WA	A copy of the jury panel or pool, showing the <u>number, name and address</u> of the persons summoned, may be inspected by the parties' solicitors in the four clear days before the day appointed for the attendance of the jurors, <i>subject to an order of the court prohibiting, restricting or imposing conditions on the inspection.</i> ¹⁴²⁴	Prospective jurors are called by <u>number only</u> .

Table 10.2: Information about jurors prior to and during empanelment¹⁴²⁵

10.78 As can be seen from the table above, New South Wales takes the most restrictive approach; the parties at no time have access to prospective jurors' names, occupations or residential localities to help inform the exercise of their right to challenge.¹⁴²⁶ This has led some people to criticise the right of peremptory challenge in that State on the basis that it 'encourage[s] largely superficial judgments based on a juror's demeanour, and [is] unlikely to have a significant influence on the composition of the jury'.¹⁴²⁷ A similar, though somewhat less restrictive, position arises in Victoria, where judges may order that jurors be called by number and occupation only.¹⁴²⁸ This differs from the position in Queensland where the parties have access prior to empanelment, albeit for a short time only, to prospective jurors' name, occupation and locality, even if the judge requires that the jurors be identified in open court by number only.

LRCWA's recommendations

10.79 In Western Australia, the prosecution is entitled to provide the jury list to the police for the purpose of checking the prospective jurors' criminal histories; that information is not available to the defendant.¹⁴²⁹ The Law Reform Commission of Western Australia recommended that the prosecution should no longer be

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Juries Act 1957 (WA) s 43A provides that, if it is necessary to protect the security of persons summoned or sworn as a juror, the judge may: prohibit, restrict or impose conditions on the inspection by the parties or provision of copies to the parties of a jury panel or pool; direct that the names and details of the persons' addresses (other than suburb) be deleted from a copy of a jury panel or pool prior to its inspection by a party; direct that the time for inspection be reduced to a period less than the usual four days; direct that, if the parties' inspection of a jury panel or pool is restricted or prohibited, the parties may have access to a copy of the panel or list in open court immediately before empanelment; or give such other directions as the court considers necessary.

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See *Juries Act 1967* (ACT) ss 27(1), (3), 29(2), 31(1); *Jury Act 1977* (NSW) ss 28, 29, 67A; *Juries Act* (NT) ss 21(2), (4), 32(1), 37(1); *Juries Act 1927* (SA) ss 42, 46; Supreme Court of South Australia, *Criminal Practice Directions 2007*, Practice Direction No 7 (Selection of Jurors) [7.1]–[7.2], [7.6]; *Juries Act 2003* (Tas) ss 27(6), 29(4)–(7); *Juries Act 2000* (Vic) ss 31(3), 36(1), 65(2); *Juries Act 1957* (WA) ss 14(2), 26(3), (6), 30, 34, 36(1), 36A, 43A.

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See, for example, the commentary in New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.25]–[10.27].

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Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 79.

1428

Juries Act 2000 (Vic) ss 31(3), 36(1).

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Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 28–9; *Criminal Procedure Rules 2005* (WA) r 57.

authorised to check the criminal backgrounds of prospective jurors.¹⁴³⁰ It explained:¹⁴³¹

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

10.80 The LRCWA also recommended that the jury list provided to the parties should contain only the suburb or town for each person and not the street name and number. It did not consider the street name and number to be necessary to the exercise of peremptory challenges and considered the restriction to be an appropriate protection of juror security.¹⁴³²

10.81 In addition, the LRCWA considered whether prospective jurors' names should continue to be provided to the parties for the jury selection process, noting that jurors' fears about being identified might compromise their ability to undertake jury service objectively. The LRCWA did note, however, that its recommendations to restrict the time for which the jury list is made available to the parties and to remove street addresses from the list ought to be sufficient protection in this regard.¹⁴³³

10.82 The LRCWA also recommended that the jury list should be available to the parties only on the morning of the trial, rather than four days before the trial as is currently required.¹⁴³⁴ In its view, this strikes the right balance between the parties' right to examine the jury list and the need to ensure that inappropriate jury vetting does not occur.¹⁴³⁵

1430 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 28–9, Rec 6.

1431 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 38.

1432 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 31–2, Rec 8.

1433 Ibid 32.

1434 Ibid 30, Rec 7; *Juries Act 1957* (WA) s 30. This recommendation is reflected in the Juries Legislation Amendment Bill 2010 (WA) s 21.

1435 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 29–30.

Challenges to the jury panel as a whole

10.83 In Queensland, a party may challenge the whole of a jury panel from which a jury is to be selected before any juror is sworn.¹⁴³⁶ These are also known as ‘challenges to the array’. The judge must rule on the challenge before proceeding with the selection of jurors.¹⁴³⁷

10.84 Challenges to the array were originally the remedy available to a party when the composition of the jury pool had been improperly manipulated or the jury pool was not impartial.¹⁴³⁸ In practice, these issues may now more often give rise to an application to transfer the trial to a different location or, more recently, for a judge-only trial.

10.85 Challenges to the array are rarely made in Queensland.¹⁴³⁹ In *R v Chapman*,¹⁴⁴⁰ the defence challenged the array of jurors on the ground that ‘a certain and large class of persons qualified to serve on the jury, namely coalminers, were debarred from serving on the jury’. The Deputy Sheriff gave evidence that:

After receipt by him of an instruction from a Minister of the Crown, during the war of 1939–1945, coalminers whose names were drawn from the box marked ‘Jurors in Use’ in accordance with the provisions of s 24 of the said Acts¹⁴⁴¹ were not included in the jury panels and such persons were not summoned for jury service. The reason for the instruction was the national importance of the production of coal. ... [the Deputy Sheriff] further testified that he had asked for instructions in the matter after the war had ended and had been instructed to continue this practice and had done so. (note added)

10.86 The challenge was upheld, and the panel quashed.

10.87 Express provision is made for a party to challenge the whole jury panel before empanelment commences in Tasmania¹⁴⁴² and the common law right of challenge to the array is preserved in New South Wales, the Northern Territory and South Australia.¹⁴⁴³ Challenge to the array is not, however, available to a defendant

1436 *Jury Act 1995* (Qld) s 40(1).

1437 *Jury Act 1995* (Qld) s 40(2).

1438 Lord P Devlin, *Trial by Jury* (1956) 26.

1439 See Queensland Law Reform Commission, *A Report of the Law Reform Commission on a Bill to Amend and Reform the Jury Act, the Justices Act and the Criminal Code Insofar as Those Acts Relate to Committal Proceedings and Trial by Jury in Criminal Courts*, Report 35 (1984) 105.

1440 [1952] QWN 16. See also, for example, *R v Ilic* [1959] Qd R 228, which involved an unsuccessful challenge to the array on the ground that people may have been improperly excluded from the jury list as a consequence of the Sheriff’s practice of relying on the identification by the police of individuals disqualified from service; and *R v Walker* [1989] 2 Qd R 79, discussed in Chapter 5 of this Report.

1441 See former *Jury Act 1929* (Qld) s 24 (Prospective jurors’ list).

1442 *Juries Act 2003* (Tas) s 32.

1443 See *Jury Act 1977* (NSW) s 41; *Juries Act* (NT) s 42; *Juries Act 1927* (SA) s 67. See, for example, *R v Grant* [1972] VR 423; *R v Diak* (1983) 69 FLR 268. In the Northern Territory, however, an omission, error or irregularity by the Sheriff in the time or mode of service of a summons or the summoning or return of a juror by a wrong name (if there is no question as to identity) is not a cause of challenge to the array: s 47(1).

in Western Australia.¹⁴⁴⁴

Challenges for cause

10.88 In Queensland, each party may make an unlimited number of challenges for cause. A challenge for cause is made on the basis that the person challenged is not qualified for jury service or is not impartial.¹⁴⁴⁵

10.89 The number of challenges for cause is not limited in any of the other Australian jurisdictions, although this is not always stated expressly but may be presumed from the lack of express restriction in the legislation.¹⁴⁴⁶

10.90 A party who challenges a juror for cause must inform the judge of the basis of the challenge and provide the judge with information and materials available to the party that are relevant to the challenge. The judge may permit questions to be put to the prospective juror, and may permit the prospective juror to be examined and cross-examined on oath.¹⁴⁴⁷ The judge must then rule on the challenge.¹⁴⁴⁸ That ruling is not subject to interlocutory appeal but may be considered in any eventual appeal against the final judgment of the court.¹⁴⁴⁹

10.91 Challenges for cause are relatively rare in Queensland; the short time that the potential jurors' names are known to the parties and the prohibition on asking questions about potential jurors mean that it would be difficult to collect material that would support such a challenge. The position could well be different, however, in a small community such as a rural town where participants in a trial may well know, or know of, the people summoned for jury service.

¹⁴⁴⁴ See *Juries Act 1957* (WA) s 40; *Criminal Procedure Act 2004* (WA) s 104(1).

¹⁴⁴⁵ *Jury Act 1995* (Qld) s 43(2). Lack of impartiality is not an express cause for challenge in South Australia: *Juries Act 1927* (SA) s 66. See also *Criminal Procedure Act 2004* (WA) s 104(5).

¹⁴⁴⁶ *Juries Act 1967* (ACT) s 34; *Jury Act 1977* (NSW) ss 43, 44; *Juries Act* (NT) ss 42, 44; *Juries Act 1927* (SA) ss 66, 67; *Juries Act 2003* (Tas) s 33; *Juries Act 2000* (Vic) s 37; *Criminal Procedure Act 2004* (WA) s 104(5); *Juries Act 1981* (NZ) ss 23, 25. See also *Juries Act 1967* (Ireland) s 21, which the Law Reform Commission of Ireland has recently proposed should be retained: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [6.54]–[6.56].

¹⁴⁴⁷ *Jury Act 1995* (Qld) s 43(3), (4). The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) does not apply to the disclosure of information in response to questions asked pursuant to those provisions: s 43(5).

¹⁴⁴⁸ *Jury Act 1995* (Qld) s 43(6). Similarly, in the other Australian jurisdictions, challenges for cause are to be tried by the presiding judge: *Juries Act 1967* (ACT) s 36A; *Jury Act 1977* (NSW) s 46; *Juries Act 1927* (SA) s 68; *Juries Act 2003* (Tas) s 27(6); *Juries Act 2000* (Vic) s 40; *Criminal Procedure Act 2004* (WA) s 104(6).

¹⁴⁴⁹ *Jury Act 1995* (Qld) s 43(7). See, for example, *R v A Judge of the District Courts & Shelley* [1991] 1 Qd R 170, in which the Full Court of the Supreme Court of Queensland considered the decision of a judge of the District Court to allow the male defendant to challenge for cause all prospective women jurors on the basis that it was against his beliefs to be tried by women, which was, in his view, an 'abomination of God'. The offence charged was demanding with menaces, and did not appear to raise any sexual or gender-based issues. On appeal, the trial was held to be null and void. The simple fact of being a woman was held not to be a ground for a challenge for cause, which otherwise must be proved. The only grounds for such a challenge at the time were those under s 610 of the Criminal Code (Qld): that the juror was either not qualified to act as a juror, or was 'not indifferent as between the Crown and the accused person'. The Court held that, from the time that the defendant was first allowed to challenge a female member of the jury panel on the basis of her sex alone, the trial was not authorised by law and the jury was not lawfully constituted, and the proceedings after the plea were a nullity. This case was determined prior to the enactment of the *Jury Act 1995* (Qld). The same two grounds are now reflected in s 43 of the Act, though the second of them is now that the juror is not 'impartial'.

Special challenges for cause

10.92 If there are special circumstances surrounding a particular trial, the parties may make an application under section 47 of the Act to the judge who is to hear it to ask questions of jurors (and reserve jurors) once they have been sworn in. This application is to be made at least three days before the trial is scheduled to begin. The example given in the Act of the circumstances that might give rise to such an application is prejudicial pre-trial publicity.¹⁴⁵⁰

10.93 If the application is granted, the judge may authorise questioning of jurors after they have been sworn in but before the remainder of the jury panel has been discharged. That questioning would be directed to finding out whether the jurors questioned are impartial. After questioning a juror, a party may make a challenge for cause. The judge must then rule on the challenge. If the challenge is upheld, another juror must be selected from the remainder of the jury panel.

10.94 There is no provision equivalent to section 47 in the other Australian jurisdictions. However, provision is made in New South Wales for the judge to examine a juror on oath in relation to his or her possible exposure to prejudicial material.¹⁴⁵¹

Peremptory challenges

10.95 In Queensland, both parties in a criminal trial may make up to eight peremptory challenges (that is, challenges for which no cause need be shown).¹⁴⁵² Up to two additional peremptory challenges are available if reserve jurors are also to be selected.¹⁴⁵³ If there are multiple defendants, each defendant may make eight peremptory challenges, and the prosecution may make as many as the defendants combined.¹⁴⁵⁴

10.96 The current system of limiting each party to a maximum of eight peremptory challenges is a significant change from the previous system. When it was introduced, the *Jury Act 1929* (Qld) provided for the parties to make an unlimited number of challenges on the first call through of the entire panel.¹⁴⁵⁵ On the second call through of the panel, the defendant was entitled to 23 peremptory challenges for a person arraigned for treason, 18 challenges for a person arraigned for wilful murder or murder, and 12 challenges for any person arraigned for 'any

¹⁴⁵⁰ In *R v Stuart* [1974] Qd R 297 it was held that 'a foundation of fact in support of the ground of challenge must be made out by witnesses' before a right to question a juror arises.

¹⁴⁵¹ *Jury Act 1977* (NSW) s 55D.

¹⁴⁵² *Jury Act 1995* (Qld) s 42(3).

¹⁴⁵³ *Jury Act 1995* (Qld) s 42(4). The NSW Law Reform Commission has recommended that, if provision is made for the empanelment of additional jurors in long trials, there should be no provision for further peremptory challenges: New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.57]–[10.58], Rec 48.

¹⁴⁵⁴ *Jury Act 1995* (Qld) s 42(5). See also *Juries Act 1981* (NZ) s 24(2).

¹⁴⁵⁵ *Jury Act 1929* (Qld) s 32.

other crime or for misdemeanour';¹⁴⁵⁶ and section 32 had provided an unlimited right for the prosecution to apply for any juror to be 'stood by'.¹⁴⁵⁷

10.97 With the exception of cases of treason, the numbers of peremptory challenges available on the second call through of the panel were reduced when the Act was amended in 1958 so that it provided 14 peremptory challenges in the case of wilful murder or murder, and eight in the case of any other crime or for a misdemeanour. It also limited the prosecution's right to stand by to the number of peremptory challenges allowed to the defendant.¹⁴⁵⁸

10.98 Those distinctions were then removed when the *Jury Act 1995* (Qld) was introduced and simply provided for eight peremptory challenges for each party in a criminal trial.¹⁴⁵⁹

10.99 In a number of Australian jurisdictions there has been a general trend of reducing the number of peremptory challenges over time.¹⁴⁶⁰ The number of, and procedures relating to, challenges available to the parties varies amongst the Australian States and Territories:

- Eight peremptory challenges are available in Queensland and the ACT, although more are available if reserve jurors or an expanded jury are used.¹⁴⁶¹
- Six peremptory challenges are available in the Northern Territory,¹⁴⁶² Tasmania (with one extra available for reserve jurors)¹⁴⁶³ and Victoria.¹⁴⁶⁴
- Five peremptory challenges are available in Western Australia.¹⁴⁶⁵

¹⁴⁵⁶ *Jury Act 1929* (Qld) s 35(2), (3). Prior to the 1929 Act, s 34 of the *Jury Act of 1867* (Qld) had similarly provided the following number of peremptory challenges: 23 for treason, 18 for capital felonies, and 12 for 'any other felony or piracy or for misdemeanour'.

¹⁴⁵⁷ For an historical discussion of the prosecution's right to require juror's to stand by: see Queensland Law Reform Commission, *A Report of the Law Reform Commission on a Bill to Amend and Reform the Jury Act, the Justices Act and the Criminal Code Insofar as Those Acts Relate to Committal Proceedings and Trial by Jury in Criminal Courts*, Report 35 (1984) 105.

¹⁴⁵⁸ *Jury Acts Amendment Act 1958* (Qld) ss 5, 6.

¹⁴⁵⁹ *Jury Act 1995* (Qld) s 42(3) as passed.

¹⁴⁶⁰ More recently, in Western Australia, there have been calls for the abolition of peremptory challenges, although ultimately, the right to exercise a peremptory challenge has been preserved: see the discussion in Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 20.

¹⁴⁶¹ *Jury Act 1995* (Qld) ss 42, 43; *Juries Act 1967* (ACT) ss 31A, 34.

¹⁴⁶² *Juries Act* (NT) s 44.

¹⁴⁶³ *Juries Act 2003* (Tas) s 35.

¹⁴⁶⁴ *Juries Act 2000* (Vic) s 39(1)(a). The maximum number of peremptory challenges allowable is reduced to five challenges if there are two defendants in the trial or four challenges if there are three or more defendants in the trial: s 39(1)(b), (c).

¹⁴⁶⁵ *Criminal Procedure Act 2004* (WA) s 104. If passed, the Juries Legislation Amendment Bill 2010 (WA) will reduce the number of peremptory challenges available from five to three.

- Four peremptory challenges are available in New Zealand.¹⁴⁶⁶
- Only three peremptory challenges are available in South Australia,¹⁴⁶⁷ and New South Wales (unless the prosecution and all defendants agree that an unlimited number of peremptory challenges shall be available), with one additional challenge available in NSW if the jury to be empanelled is larger than 12.¹⁴⁶⁸

10.100 The number of peremptory challenges available to a party is not reduced by any challenges for cause made by that party.¹⁴⁶⁹

10.101 Generally speaking, there is very little information available to a party on which to base any peremptory challenge.¹⁴⁷⁰ Whereas a challenge for cause can be used to eliminate a potential juror in relation to whom there is some evidential basis to allege bias, a peremptory challenge can be used to eliminate any potential juror without the need to articulate a reason. While peremptory challenges can be made for many reasons, potential reasons for the exercise of a peremptory challenge include that a juror:¹⁴⁷¹

- is perceived to be biased against the party's case;
- appears very uninterested;
- appears to be hostile or very unwilling to be empanelled on the jury;
- appears to be incapable of discharging his or her duties competently;
- may appear to be resentful if a party has unsuccessfully challenged the juror for cause or if the juror has unsuccessfully applied to be excused from jury service; or
- has an occupation that might suggest potential for bias in the circumstances of a particular trial.

10.102 In Queensland, Crown Prosecutors are subject to guidelines that require them to avoid selection of juries that are unrepresentative. Their duty is 'to act fairly

¹⁴⁶⁶ *Juries Act 1981* (NZ) s 24(1) reduced from six by the *Juries Amendment Act 2008* (NZ), which commenced on 25 December 2008. The Law Commission of New Zealand had previously recommended that no change should be made to the maximum number of six peremptory challenges: Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 91.

¹⁴⁶⁷ *Juries Act 1927* (SA) ss 61, 63.

¹⁴⁶⁸ *Jury Act 1977* (NSW) s 42.

¹⁴⁶⁹ *Jury Act 1995* (Qld) s 43(8). See also *Juries Act 1967* (ACT) s 34; *Jury Act 1977* (NSW) s 42; *Juries Act* (NT) s 44; *Juries Act 1927* (SA) s 61; *Juries Act 2003* (Tas) ss 34, 35; *Juries Act 2000* (Vic) ss 38, 39; *Criminal Procedure Act 2004* (WA) s 104(3), (4); *Juries Act 1981* (NZ) ss 24, 25(1).

¹⁴⁷⁰ See [10.70]–[10.78] above.

¹⁴⁷¹ Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 18; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 19.

and impartially, to assist the court to arrive at the truth'.¹⁴⁷² Guideline 30 of the *Director's Guidelines* issued by the Director of Public Prosecutions states:¹⁴⁷³

30. Jury Selection

Selection of a jury is within the general discretion of the prosecutor. However, no attempt should be made to select a jury that is unrepresentative as to race, age, sex, economic or social background.

10.103 While the *Director's Guidelines* advise against challenges on the grounds of race, age, sex, economic or social background, neither the Bar Association of Queensland, the Queensland Law Society nor Legal Aid Queensland has adopted any similar guidelines or ethical codes.

10.104 The system of peremptory challenges in New South Wales, Victoria and South Australia was considered as part of the review of juror satisfaction conducted by the Australian Institute of Criminology in 2007.¹⁴⁷⁴ Participating stakeholders from New South Wales thought the number of peremptory challenges should be reduced, while those in Victoria and South Australia generally favoured the retention of peremptory challenges. It was recognised, for instance, that the right of peremptory challenge provides an important, albeit limited, opportunity for the defendant to participate in the selection of the jury and that it thus contributes to a fair trial¹⁴⁷⁵ (or at least the perception of a fair trial). Most stakeholders considered that, while challenges have the capacity to impact on jury representativeness, they do not have a significant influence on the composition of the jury and there is generally insufficient information available to the parties to exercise challenges effectively.¹⁴⁷⁶ The researchers also noted the potential frustration and embarrassment that jurors may feel when they are challenged. The researchers concluded:¹⁴⁷⁷

Being challenged during the empanelment procedure is intimidating for jurors and frustrating if they have reorganised their schedules and made substantial efforts to attend jury duty.

...

¹⁴⁷² Office of the Director of Public Prosecutions, *Director's Guidelines*, as at 1 October 2010 under s 11(1)(a)(i) of the *Director of Public Prosecutions Act 1984* (Qld); see Office of the Director of Public Prosecutions, *Annual Report 2009–2010* (2010) 34.

¹⁴⁷³ Ibid 74. See also Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 20. The present guideline on jury selection appears to have been included in the 2003 release of the *Director's Guidelines*. Its tenor echoes the guidelines issued in 1988 following allegations of a perceived prosecutorial practice in Queensland to 'stand by' prospective jurors of Aboriginal descent as a matter of course: see *Binge v Bennett* (1989) 42 A Crim R 93, 101, 102.

¹⁴⁷⁴ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 34–6, 60.

¹⁴⁷⁵ Ibid 83, 86, 96.

¹⁴⁷⁶ Ibid 79, 86.

¹⁴⁷⁷ Ibid 186, and see 104. More recently, a call has been made for the process of peremptory challenge to be abandoned altogether: J Horan and J Goodman-Delahunty, 'Challenging the peremptory challenge system in Australia' (2010) 34 *Criminal Law Journal* 167.

In addition, the humiliation or embarrassment of jurors who are challenged can be minimised by reading out in court a joint list compiled by both parties of the numbers of the individual jurors challenged, rather than requiring individual jurors to parade before the parties while individual challenges to that juror are announced in open court.

10.105 Peremptory challenges were also considered by the Law Reform Commission of Ireland in its recent Consultation Paper on jury service. In Ireland, both the defendant and prosecution are entitled to seven peremptory challenges.¹⁴⁷⁸ The Law Reform Commission of Ireland provisionally concluded that the right of peremptory challenge should be retained, noting that:¹⁴⁷⁹

- it allows the defendant to remove prospective jurors who are perceived ‘rightly or wrongly, to be potentially prejudiced against the defence’ and thus gives the defendant ‘a measure of control over the jury composition’ without which the trial, and any subsequent conviction, may be thought unfair; and
- it provides an efficient means for the prosecutor to eliminate prospective jurors who are perceived to be biased or prejudiced — if it were abolished, greater use of challenges for cause would be made and the length and complexity of proceedings would be extended.

10.106 It did suggest, however, that the number of peremptory challenges permitted could be reduced from seven to five:¹⁴⁸⁰

This approach allows counsel to exclude jurors they perceive to be biased, while simultaneously making it more difficult for the manipulation of the racial or gender composition of a jury.

Arguments favouring peremptory challenges

10.107 *Impartiality*: One of the key arguments in support of peremptory challenges is that they can be used to facilitate the selection of a jury that is, or is perceived to be, impartial. In the absence of any formal procedure for assessing actual or potential bias, the peremptory challenge process is the only means of removing jurors about whose impartiality the defendant or the prosecutor is in doubt, where such doubt falls short of justifying challenge for cause.¹⁴⁸¹

10.108 The assessment of bias by defence counsel and the prosecution is generally a subjective exercise. All people have certain prejudices and biases, many of which are not recognised or acknowledged by them or others around them, not least because they may simply reflect the biases and attitudes of many other people in their community. Given the limited information available to the defence and the prosecution about prospective jurors, it is impossible to assess all

¹⁴⁷⁸ *Juries Act 1967* (Ireland) s 20(2).

¹⁴⁷⁹ Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [6.50], [6.52].

¹⁴⁸⁰ *Ibid* [6.51], [6.53].

¹⁴⁸¹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 23.

of the biases a prospective juror may harbour. However, peremptory challenges provide a means to exclude prospective jurors who appear to be hostile or very unwilling, or who, because of their particular occupations, are perceived to be unlikely to be able to approach the task of jury service in the circumstances of the particular trial in an unbiased manner.

10.109 *Representativeness*: Another argument that is used to support the use of peremptory challenges relates to the principle of representativeness. The random selection of jurors is designed to produce juries that are not only socially, culturally and ethnically diverse, but also truly representative of the community they serve. One common criticism of peremptory challenges is that they undermine the representative nature of the jury.¹⁴⁸² However, in any particular case, the random selection of jurors in the ballot process may result in a jury that is unrepresentative in terms of race, age, sex, economic or social background. In such a case, peremptory challenges may be used to guard against the appearance of an unfairly unrepresentative jury.¹⁴⁸³ For example, peremptory challenges might be used to ensure a roughly equal number of male and female jurors, or to ensure an appropriate age-spread among the jurors, something of particular significance for younger defendants.¹⁴⁸⁴

10.110 The use of peremptory challenges highlights what the Victorian Court of Appeal has described as a tension between the competing objectives of random representativeness on one hand, and impartiality and 'indifference' on the other:¹⁴⁸⁵

There has always been some tension between the objective of obtaining a jury which is randomly selected and representative of the community, on the one hand, and the desire to ensure that such a jury is impartial and indifferent to the cause on the other. As [Counsel] for the Director of Public Prosecutions (Cth) on these appeals, pointed out, the tension is demonstrated in the *Juries Act* itself. The process of selecting a particular jury for a particular inquest is a 'two stage' process. The first stage comprises the preparation of 'jury lists', the 'pre-selection' of jurors and the preparation of 'panels' by the sheriff (Pts II, III and IV of the *Juries Act 1967*). This is a random process designed to achieve broad representation of the community. [However, as the minister pointed out in introducing the 1994 amendments there is still reason to suppose that the method by which the panels are prepared does not secure the degree of community representation which is desired.] The second stage is the selection

¹⁴⁸² Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 19; New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, Report 48 (1986) [4.61]; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 21; Queensland Law Reform Commission, *A Report of the Law Reform Commission on a Bill to Amend and Reform the Jury Act, the Justices Act and the Criminal Code Insofar as Those Acts Relate to Committal Proceedings and Trial by Jury in Criminal Courts*, Report 35 (1984) 107.

¹⁴⁸³ J Horan and J Goodman-Delahanty, 'Challenging the peremptory challenge system in Australia' (2010) 34 *Criminal Law Journal* 167, 174.

¹⁴⁸⁴ Comment to this effect was made by some members of the Criminal Law Section of the Queensland Law Society in a preliminary consultation with the Commission: Submissions 26, 26A. On the other hand, it has been said that the parties might seek to have *older* people on the jury 'who through dint of years have more experience, are likely to be far more familiar with the cruel vicissitudes of life, and therefore more forgiving of the frailties of the human condition': C Nyst, 'Let age be their judge', *Weekend Gold Coast Bulletin*, 29 May 2010, 36. Peremptory challenges might also be used to challenge persons who, although they have not sought excusal, appear unwell or whose behaviour appears bizarre.

¹⁴⁸⁵ *R v Su* [1997] 1 VR 1, 18 (Winneke, Hayne JJA, Southwell AJA). See [10.102] above in relation to the role of the Office of the Director of Public Prosecutions in the striking of juries.

of a particular jury from the panel (Pt V of the Act). This stage is calculated to diminish the 'representative capacity' of the panel by 'challenge'. Experience has shown that the accused will use his right of challenge or, where there is more than one accused, their right of challenges in an endeavour to shape the jury to accord with preconceptions as to 'what sort of a jury' would be best suited to the interests of the accused. For example, whether the jury should be male or female oriented, whether it should comprise old or young people, people who don't wear returned service badges and so on. On the other side of the ledger the Crown exercised its right to 'stand aside' persons whom it regarded as unsuited to service on the particular jury. That right has now been replaced by the right to 'challenge' without cause. Because of the role which the Crown adopts in criminal trials, this right is exercised in the interests of securing a jury which is indifferent to the cause to be tried. ...

10.111 *Alternative mechanisms are not a sufficient answer:* Alternative mechanisms such as a challenge for cause are not as effective as a peremptory challenge in excluding an unsuitable person as a juror. Challenges for cause are rarely made and difficult to sustain because there is very little information made available about prospective jurors. In the event that a challenge for cause is unsuccessful, the juror may harbour resentment against the challenging party.

10.112 *The involvement of the defendant:* It has been suggested that peremptory challenges permit the defendant a degree of formal participation in the trial and thus represent an aspect of procedural fairness.¹⁴⁸⁶ By giving the defendant the opportunity to object to people who might be perceived to be prejudiced or unlikely to be impartial, it allows the defendant to be comfortable with, and confident in, the way in which the jury that is to determine his or her guilt is constituted.¹⁴⁸⁷ This, however, assumes that the defendant will, in fact, have an input into the decision to make a challenge. In practice, most often the decision about whether to make a challenge is made by the defence counsel rather than the defendant. The Commission considers this argument to be the least persuasive of the arguments made in favour of peremptory challenges.

Arguments against peremptory challenges

10.113 *The arbitrary and subjective nature of the challenge:* Because peremptory challenges are made on the basis of limited information about a juror,¹⁴⁸⁸ it has been suggested that they allow the parties to implement challenges based on their subjective biases. However, it has also been suggested that it is generally 'risky to rely on assumptions about why peremptory challenges are made'.¹⁴⁸⁹

When making peremptory challenges the parties do not rely solely on the age, gender and appearance of prospective jurors; other relevant information may

¹⁴⁸⁶ Eg P Byrne, 'Jury reform and the future' in M Findlay and P Duff (eds), *The Jury Under Attack* (1988) 190, 194.

¹⁴⁸⁷ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.17], [10.37] citing *Katsuno v The Queen* (1999) 199 CLR 40, [51] (Gaudron, Gummow and Callinan JJ), [83] (Kirby J).

¹⁴⁸⁸ See [10.70]—[10.78] above.

¹⁴⁸⁹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 33. See also Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 21.

include the juror's name, address and occupation as well as physical observations of his or her behaviour and mannerisms in court. For example, defence counsel might challenge a juror of conservative appearance, but this juror may in fact have been challenged because the accused recognises the juror's name and thinks that he might be related to someone who dislikes the accused. Likewise, the prosecutor may challenge a young shabbily dressed juror but the reason may be because the prosecutor observed this juror yawning and appearing [uninterested] when the judge was addressing the jury panel.

10.114 *The impact on jurors:* Potential jurors who are challenged may be offended or embarrassed and may be left with an unfavourable impression of jury service and a feeling that their time has been wasted.¹⁴⁹⁰ While such feelings are understandable, the challenge for cause process is potentially far more demeaning for jurors as it is necessary for counsel to raise their reasons for challenging a juror in open court. Furthermore, the primary consideration in the jury selection process is the provision of a trial that is, and is seen to be, fair.

10.115 *The rights of jurors to serve on a jury:* Recent debates on jury reform have suggested that the peremptory challenge process infringes upon the juror's 'democratic right' to serve on a jury.¹⁴⁹¹ However, the right to serve on a jury is part of a broader right — the right to participate in the jury selection process as a whole. That broader right recognises the importance of availability for service, as opposed to actual service on a jury, as being an outcome in itself.

10.116 *Resources:* The availability of peremptory challenges necessitates a larger jury pool than would be the case if peremptory challenges were unavailable and, particularly in cases involving several defendants, adds to the cost of the jury system.¹⁴⁹² Similar costs arguments apply in relation to having higher, rather than lower, numbers of peremptory challenges available. There is also the personal cost and inconvenience to those jurors who are challenged. However, ultimately, because a fundamental concern of the criminal justice system is to ensure a fair trial, the costs of making provision for the system of peremptory challenges are a necessary incident of the jury selection system.

NSWLRC's recommendations

10.117 In New South Wales, each defendant has three peremptory challenges, and the prosecution has three peremptory challenges for each defendant.¹⁴⁹³ In light of the general support that appeared to exist for the retention of the right of peremptory challenge, the NSW Law Reform Commission did not make any recommendation about its retention, but recommended that its use be kept under

1490 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.21]–[10.24].

1491 J Horan and J Goodman-Delahunty, 'Challenging the peremptory challenge system in Australia' (2010) 34 *Criminal Law Journal* 184.

1492 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.29].

1493 *Jury Act 1977* (NSW) s 42.

review 'with a view to its eventual abolition if it is assessed as not serving any legitimate purpose'.¹⁴⁹⁴

10.118 As an alternative to complete abolition, the NSWLRC noted that the number of challenges could be further reduced.¹⁴⁹⁵ It concluded that the ability of the prosecution and defence to agree to enlarge the number of challenges should be removed.¹⁴⁹⁶

In light of the general support which currently appears to exist for the retention of this right of challenge, we confine ourselves to the suggestion that the ability of trial counsel to agree to an extension of the statutory number of challenges should be subject to leave being given by the judge, pursuant to application made before the date fixed for trial. This would have the advantage of avoiding the need for the Sheriff to assemble an unnecessarily large panel against the contingency of counsel agreeing to enlarge the number of challenges. Otherwise, we consider that the continued availability of the right of peremptory challenge be kept under review to ensure that it does in fact advance the fairness of trial by jury, and does not in fact involve a distortion of the process.

LRCWA's recommendations

10.119 In Western Australia, as in Queensland, challenges for cause and peremptory challenges are available to both the prosecution and defendant. The Law Reform Commission of Western Australia considered the merits of each type of challenge at some length in its Discussion Paper.¹⁴⁹⁷ It concluded, in its Final Report, that the right to peremptory challenge should be retained and that, in trials involving multiple defendants, the prosecution should have the same number of peremptory challenges as the total number available to the co-defendants.¹⁴⁹⁸

10.120 The LRCWA pointed out that the right of peremptory challenge can play an important role in ensuring a fair trial:¹⁴⁹⁹

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

For both sides to have any confidence in the system, the arbiter must appear to be impartial, disinterested in the outcome.¹⁵⁰⁰

¹⁴⁹⁴ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.20], Rec 44.

¹⁴⁹⁵ *Ibid* [10.41]. The Law Reform Commission of Ireland made a similar proposal: see [10.106] above.

¹⁴⁹⁶ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.42], and see Rec 43, referring to *Jury Act 1977* (NSW) s 42(2), (3).

¹⁴⁹⁷ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 26–34.

¹⁴⁹⁸ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 18–24, Rec 3, 4. If passed, s 4 of the *Juries Legislation Amendment Bill 2010* (WA) will reduce the number of peremptory challenges available to both the prosecution and the defendant from five to three.

¹⁴⁹⁹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 33. See also Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 23.

In advocating for peremptory challenges, it is often said that the accused should have a 'good opinion' of (or confidence in) his or her jury.¹⁵⁰¹ It has been argued that peremptory challenges enable an accused to challenge a juror whom they 'simply dislike' and this promotes acceptance of the verdict by the accused.¹⁵⁰² Likewise, if peremptory challenges were abolished, the fairness of the trial may be questioned if either party believes that a juror is biased or lacks the capacity to serve as a juror. ...

The right to peremptory challenge is also significant in two other specific circumstances — if a challenge for cause is unsuccessfully made¹⁵⁰³ or if a juror unsuccessfully seeks to be excused. A juror who has been unsuccessfully challenged for cause may 'harbour resentment or bias'¹⁵⁰⁴ against the challenging party. Similarly, a juror whose excuse is rejected by the trial judge may be angry at being 'forced' to serve on a jury. It has been observed that a 'disgruntled juror' is 'a potential threat to sound deliberation'.¹⁵⁰⁵ The Commission believes that it is important, in order to ensure that there is a fair trial, for both the accused and the prosecution to be able to challenge jurors in these circumstances. (notes in original)

10.121 The LRCWA noted that peremptory challenges are made far more frequently than challenges for cause principally because challenges for cause require a demonstrable factual basis and the parties have very little information about the potential jurors upon which to base any such challenge.¹⁵⁰⁶ The LRCWA also noted that the process for challenges for cause is also more time-consuming, costly and potentially embarrassing for the prospective juror because it requires the juror to be questioned and a legal ruling to be made by the judge.¹⁵⁰⁷ If peremptory challenges were abolished, the LRCWA considered that the right to challenge for cause would have to be expanded; it considered the retention of peremptory challenges preferable in those circumstances.¹⁵⁰⁸

10.122 The LRCWA also recommended that the Sheriff's Office record the number of peremptory challenges made in each trial, and that the Western

1500 Israel M, 'Ethnic Bias in Jury Selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 37 (emphasis added).

1501 NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986) [4.59]; *Katsuno v R* [1999] HCA 50 [83].

1502 Gobert J, 'The Peremptory Challenge — An Obituary' [1989] *Criminal Law Review* 528, 529. See also NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [229].

1503 See *Katsuno* [1999] HCA 50 [83]; NSWLRC *Jury Selection*, Report No 117 (2007) 180.

1504 McCrimmon L, 'Challenging a Potential Juror for Cause: Resuscitation or requiem?' (2000) 23 *University of New South Wales Law Journal* 127, 132.

1505 Lord Justice Phillips, 'Challenge for Cause' (1996) 29 *Victoria University Wellington Law Review* 479, 480.

1506 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 18–19.

1507 *Ibid* 22–3.

1508 *Ibid*. The Law Reform Commission of Ireland expressed a similar view: see [10.105] above.

Australian government consider undertaking research to examine the characteristics of those challenged and the reasons why challenges are made.¹⁵⁰⁹

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.

Discussion Paper

10.123 In its Discussion Paper, the Commission raised a number of issues for consideration in relation to the empanelment of juries and the use of challenges in the empanelment process. The Commission expressed the provisional view that, in general, the current procedures are appropriate, but noted that it may be appropriate to alter the number of peremptory challenges to which the defendant and prosecution are entitled. The Commission sought submissions on the following questions:¹⁵¹⁰

- 10-3 Are the provisions for challenges to the whole jury panel, challenges for cause, and special challenges for cause in sections 40, 43 and 47 of the *Jury Act 1995* (Qld) appropriate or should they be changed in some way?
- 10-4 Is the provision for peremptory challenges in section 42 of the *Jury Act 1995* (Qld) appropriate, or should it be changed in some way?
- 10-5 Is the number of peremptory challenges allowed to each party appropriate, or should it be changed in some way?
- 10-6 Should the procedure for jury selection set out in section 41 of the *Jury Act 1995* (Qld) be amended to provide that prospective jurors are to be called by number only?

Consultation

10.124 The Queensland Law Society expressed the view that the provisions for challenges to the whole jury panel, challenges for cause, and special challenges for cause in sections 40, 43 and 47 of the Act are generally appropriate.

Peremptory challenges

10.125 A number of submissions specifically supported the retention of peremptory challenges.¹⁵¹¹

¹⁵⁰⁹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 24, Rec 3.

¹⁵¹⁰ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [10.128]–[10.137], Questions 10-3 to 10-6.

¹⁵¹¹ Submissions 61, 62, 63, 64.

10.126 The Bar Association of Queensland explained that the significant reduction in the number of peremptory challenges that was effected by the *Jury Act 1995* brought about a complete change in the dynamic of jury selection in Queensland.¹⁵¹²

The *Jury Act 1995* limited the number of peremptory challenges to 8. This changed the entire dynamic of jury selection. Instead of counsel now using a large number of peremptory challenges in the hope of obtaining selection of jurors who counsel positively wanted on the jury, the limited number of peremptory challenges meant that those challenges had to be kept for jurors who counsel thought would not be appropriate to serve on the jury.

The process therefore became much more random. Twelve out of the first 28 jurors called (in a single accused trial) would form the jury.

The modernisation of the system meant then that counsel had to turn their minds to identify those jurors who, for one reason or another, may not be suitable to sit on the jury on that particular case. While the old system (pre the *Jury Act 1995*) produced all sorts of dubious 'science' and theories as to how a jury should be selected, the 1995 Act very much ensured that peremptory challenges would be used and used only for the purpose for which such challenges should be used, namely, to avoid the empanelment of jurors who ought not sit on the trial; or in other words, to ensure a fair trial.

10.127 The Bar Association of Queensland considered that there are some jurors who, because of their life experiences or other circumstances, may not be able to approach the task of jury service in the particular case without bias:

It simply is the fact that there will be jurors who may honestly consider themselves impartial but who may not, because of their life experiences, or other circumstances be able to bring a truly unbiased mind to bear on the issues in the case.

For example, it would be a completely reasonable and legitimate use of a peremptory challenge to challenge a bank manager in a trial on a charge of armed robbery. The bank manager may himself have been the subject of a robbery and probably likely to know other employees of the bank who have experienced such things. He may have been traumatised himself by the experience (if it was a personal experience) or may know some person who was traumatised.

In a case involving a sexual assault upon a child, it would be completely legitimate to challenge a juror who was a child care worker.

In the charge of an assault against a security guard, it would be perfectly understandable to challenge a potential juror who is, himself, a security guard.

In a case where juveniles are charged with assaulting an elderly person, it might obviously be thought desirable that elderly jurors might (subconsciously) empathise unfairly with the victim. Elderly jurors might be the subject of peremptory challenge in those cases.

There are also geographic considerations. It may be undesirable to have persons sitting on a trial involving a brutal crime committed in their neighbourhood. Who knows what has been said locally about the incident.

The examples are virtually limitless.

10.128 However, the Bar Association of Queensland emphasised that, in the experience of its members, ‘challenges are not based on prejudice’:

Our members do not challenge or stand by jurors because of any general policy based on age, race, occupation or geographical area of residence.

10.129 The Bar Association of Queensland expressed the view that the retention of peremptory challenges was fundamental to ensure a fair trial:

as we hope we have shown from our examples, issues arise on a case by case basis which are legitimately addressed by the right of peremptory challenge. The right of peremptory challenge is, we submit, one of many measures that are taken in order to promote and protect the central institution of the criminal justice system, namely a fair trial.

10.130 The Director of Public Prosecutions (DPP) also supported the retention of the system of peremptory challenges.¹⁵¹³ The DPP considered that peremptory challenges allow both sides to maintain a degree of balance in the final composition of the jury:

The real value of peremptory challenges is that they allow both sides to maintain a degree of balance in the final composition of the jury. One side might prefer a jury comprised primarily of women, or young people, or indeed the converse. Where that can be seen to be happening, peremptory challenges serve to restore balance.

Note that this imbalance can start even if one side is not actively engineering it. Statistical stochastic effects that can readily arise in dealing with the relatively small numbers involved in juries can result in the early selections all being women, or all being post-middle age, and so on.

10.131 The DPP also noted that peremptory challenges are sometimes used to remove a juror whose appearance or occupation suggests that he or she may be unsuitable for jury service in that particular trial:

It also sometimes happens that there are people whose appearance means that they are quite unsuitable for service in a way that cannot be readily articulated but is nevertheless real. On the trial of a bike gang member for drug offences, the appearance of someone in typical biker attire (jeans, leather vest, beard and haircut, Harley Davidson insignia, etc) would not be suitable, notwithstanding that it is always possible to conjure arguments about whether this person might or might not share the anti-authoritarian stance of the accused.

Similarly, it is undesirable to have a person whose interests might be thought to be too closely aligned (by employment, etc) with or against the interests of the accused. Examples are limited only by imagination — a union organiser on the

1513

Submission 64.

trial of [a] union official charged with corruption, a building inspector on a trial where the accused [is alleged to have] assaulted a building inspector, etc. These things are not at all uncommon. The prospective juror may not know any of the witnesses or the accused, and yet his potential for a hidden agenda will be apparent.

10.132 On the other hand, several submissions expressed concern about aspects of the peremptory challenge process.¹⁵¹⁴

10.133 The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd ('ATSILS') noted the duty of Crown Prosecutors to act fairly and impartially in accordance with the Director of Public Prosecution's Guidelines, and referred to the need to introduce positive measures to address race-based peremptory challenges:¹⁵¹⁵

Without appropriate checks and balances in place, it cannot simply be assumed that because there is a guideline it is being adhered to by Prosecutors.

We are unaware of any statistics in regard to the selection numbers of Aboriginal and Torres Strait Islander peoples into jury pools and the resultant number of Aboriginal and Torres Strait Islander peoples on jury panels. However, cases exist where resultant numbers of Aboriginal and Torres Strait Islander peoples on jury panels have been raised as an issue, either by defendants or judges.

10.134 ATSILS expressed support for the adoption of measures to hold Crown Prosecutors who are found to have engaged in racially biased jury selection accountable.¹⁵¹⁶ These measures included disqualification from participation in the retrial of any person wrongly convicted as a result of discriminatory jury selection, and the imposition of penalties for recurrent discriminatory behaviour. This respondent also considered that criminal defence lawyers should receive greater support, training, and assistance in ensuring that people from racial minority groups are not excluded from serving on juries on the basis of race.

10.135 The Department of Justice and Attorney-General supported the removal or reduction of peremptory challenges:¹⁵¹⁷

[We] are supportive of the removal or reduction (in number) of peremptory challenges available to the prosecution and defence. If the aim of this review is to increase the 'representativeness' of juries in Queensland then the right to arbitrarily challenge an individual's place on a jury based on physical characteristics or occupation is surely at odds with that aim.

Additionally from a resourcing perspective, any reduction in the number of peremptory challenges will result in fewer jurors needing to be summonsed for service, meaning less cost.

1514 Submissions 1, 23, 33, 43, 56.

1515 Submission 43.

1516 Ibid, referring to Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, Report (2010).

1517 Submission 56.

10.136 One respondent commented on the experience of going through the selection procedure for a long trial:¹⁵¹⁸

We were told the trial may last 4 to 5 weeks and therefore anybody unable to make themselves available for this time should exclude themselves.¹⁵¹⁹

Several did but there were still 60 odd who were willing to go on. As this was not enough, a further 6 were encouraged to participate.

The process of empanelling where Prosecutors and Defence Barristers challenge or stand by jurors is ridiculous. This is not a fair selection or fair representation of society, but a concocted assortment of people who, for one reason or another, the Barristers feel will be more beneficial for their client.

Surely only 20 or 24 jurors should be chosen for a particular trial, and the first 12 whose name comes up, should be on the jury.

To require 332 people to make themselves available for 2 weeks, with in my case only once going to court, seems a ridiculous waste of funds and resources. (note added)

10.137 In that respondent's view, the system of selection involved a 'waste of funds and resources'. The Commission notes that the large number of people included in the panel for that trial suggests that the trial may have involved multiple defendants¹⁵²⁰ and, consequently, a larger overall number of possible peremptory challenges.¹⁵²¹ If the trial was expected to be a particularly long one, additional panel members may also have been required to enable the selection of reserve jurors.¹⁵²²

10.138 Two former jurors also queried the system of peremptory challenge. One respondent asked:¹⁵²³

Why can defence challenge so many potential jurors? They should not be allowed to reject any more than 2 people during the selection process Better still Why don't we have a truly random jury selection with NO PICKING AND CHOOSING at all? What you're dealt is what you get. (emphasis in original)

10.139 Another respondent, a former juror, suggested that:¹⁵²⁴

Jurors are selected by appearance, demeanour, age etc, depending on the case as the defendant / prosecution lawyers see them. A recipe for wrong decisions.

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Submission 33.

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This is reflective of the procedure, described in later in this chapter, for the selection of panels of prospective jurors in cases where the length of the trial is expected to exceed the standard two-week jury service period.

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Generally, the panel of prospective jurors for a given trial is limited to 30 or so people: see [10.49] above.

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See [10.95] above.

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See [10.95] above.

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Submission 23.

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Submission 1 responding to the Commission's review of jury directions.

The number of peremptory challenges

10.140 The Bar Association of Queensland also noted that, in the experience of its members, generally, on the empanelment of a jury in the trial of a single defendant, the maximum number of defence challenges and the maximum number of Crown standbys is not reached.¹⁵²⁵ It explained, however, that:

It is though quite common for there to be six or seven peremptory challenges by defence and Crown. However, the fact that the maximum is rarely reached is really a consequence of the modern system. The modern system (as we have explained) operates so that the peremptory challenges are used to exclude jurors who, for some reason, are thought might not suit the particular case. It is therefore bold to use all challenges and not 'keep one up one's sleeve' in case a juror is called towards the end of the empanelment who ought to be challenged.

Therefore, in real terms, even though it is most common that 6 or 7 peremptory challenges are used, the whole 8 are really being taken into account in the process.

10.141 It also noted that, in practice, where there are multiple defendants, the Crown 'very rarely use any where near their total number of challenges'.

10.142 The Bar Association of Queensland considered that there is no justification for reducing the current maximum number of eight peremptory challenges:

The present system of 8 peremptory challenges seems to work well. Jury selection is quite quick and efficient. The lengthy and cumbersome procedures under the old system have been shown, by the implementation of the new system, to have been unnecessary. If, in a single accused trial all challenges are used then 12 jurors have been picked from 28 called. It is reasonable to assume, we think, that such proportion is likely to enable legitimate use of the right of peremptory challenge and the selection of an appropriate jury.

10.143 It also considered that the Crown's right to have eight challenges for each defendant in a joint trial should be retained:

Although these peremptory challenges for the Crown, in multiple accused trials are rarely used, if the number of Crown peremptory challenges was reduced, an imbalance would emerge.

10.144 The DPP expressed the view that, while it is common for close to the maximum number of challenges to be exhausted, it is less common for literally all to be exhausted for the reason that counsel prefer to keep one or more of their available challenges in reserve in case a highly inappropriate juror is called up for selection.¹⁵²⁶ The DPP considered that because the representative balance of a jury can be distorted even without deliberate attempts to do so, it is probably necessary for the number of peremptory challenges to be in the range of about half the number of jurors eventually empanelled or higher. The DPP therefore

1525 Submission 63.

1526 Submission 64.

supported the retention of the current maximum number of eight peremptory challenges.

10.145 The Queensland Law Society considered that the number of peremptory challenges allowed to each party should be increased to 12; 'It makes sense that for 12 jurors there should be 12 potential challenges'.¹⁵²⁷

Information about jurors

10.146 The Queensland Law Society expressed the view that the information provided to the parties on the list of prospective jurors is too restrictive.¹⁵²⁸

The Society is of the view that the tightening of all these provisions when the *Jury Act 1995* was introduced should be relaxed. The information obtained on the list of jurors is of little assistance particularly in regional areas where every juror is said to live in the same locality.

10.147 In its view, 'the defence should have an enlarged challenge to view prospective jurors particularly in high profile matters'.

Calling of jurors by number and name

10.148 Neither the Department of Justice and Attorney-General nor the Queensland Law Society considered that prospective jurors should be called by number only.¹⁵²⁹ In the Queensland Law Society's view:¹⁵³⁰

Such process will be difficult for jurors who are forgetful (about their number) and may cause delays when the number is called rather than the name which always produces an immediate response.

10.149 The Department of Justice and Attorney-General submitted that:¹⁵³¹

the calling of names is arguably an important feature of the transparency of court processes and the justice process in general.

There have been very few instances of reprisal against jurors in Queensland as a result of the empanelment process, accordingly the rationale for change is unclear.

The Commission's view

10.150 In the Commission's view, the current system of challenges is generally appropriate.

¹⁵²⁷ Submission 52.

¹⁵²⁸ Ibid.

¹⁵²⁹ Submissions 52, 56.

¹⁵³⁰ Submission 52.

¹⁵³¹ Submission 56.

Challenges to the jury panel as a whole

10.151 Challenges to the jury panel as a whole are rarely exercised but are nonetheless an important safeguard against juries whose composition has been unfairly skewed. The Commission is not aware of any problems in the operation of section 40 of the Act and considers it should be retained.

Challenges for cause

10.152 Challenges for cause are also of vital importance. They are one of the means by which the system provides for a 'competent, independent and impartial' jury and thus for a fair trial.¹⁵³² It follows from the purpose of challenges for cause that the number of such challenges that may be made by each party should be unlimited. It is also appropriate that grounds should be given for such challenges and that those grounds, if they appear proper, should be tested and the prospective juror questioned. The Commission is not aware of any particular difficulties with section 43 of the Act and thus considers it should be retained.

Special challenges for cause

10.153 The Commission also considers that the provision, in section 47 of the Act, for special challenges for cause is appropriate and should be retained. There may be circumstances peculiar to the trial in which the ground for challenge potentially affects the whole jury panel and cannot be determined in relation to individual jurors without questioning. A likely scenario is one in which the trial is preceded by significant and prejudicial publicity.

Peremptory challenges

10.154 The Commission considers that the *Jury Act 1995* (Qld) should continue to provide for the parties' rights to exercise peremptory challenges. Peremptory challenges are one of the fundamental safeguards in the Act against the selection of a jury that is, or is perceived to be, biased or unfairly unrepresentative. The exercise of a peremptory challenge is generally a subjective exercise. However, that does not necessarily mean that a challenge is made without foundation. In particular, the right to exercise peremptory challenges is important because it allows the defence to challenge persons who are perceived to be potentially biased against the defence. It also allows the prosecution to challenge people who may have a bias or be unrepresentative. It also allows either party to remove jurors who are obviously unsuited to sitting on the jury.

The number of peremptory challenges generally

10.155 In the Commission's view, the *Jury Act 1995* (Qld) should not be amended to reduce the current maximum number of peremptory challenges available to the parties. Although the number of peremptory challenges available in other Australian jurisdictions is generally lower than in Queensland, that fact by itself is not a sufficient reason to recommend a similar reduction in Queensland. As noted above,

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See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14 (entered into force 23 March 1976; entered into force in Australia 13 November 1980).

the Commission considers that peremptory challenges constitute an important safeguard in the jury selection process. While lowering the number of challenges available would have the result that correspondingly fewer people would be required for a jury panel, minimising both the costs associated with jury selection and the numbers of people required for jury service, it would also diminish the ability of the parties to counter the effect of a biased or an unrepresentative jury and may undermine confidence in the fairness of the trial. Ultimately, the latter consideration must prevail. Eight challenges is sufficient to fulfil the functions of the peremptory challenge process, while not being enough to upset the random nature of the juror balloting process.

The number of peremptory challenges if there are two or more defendants in a criminal trial

10.156 Currently, in a criminal trial involving two or more defendants, each of the defendants is entitled to the same number of peremptory challenges that is allowed to a defendant who is being tried alone; and the prosecution is entitled to a number of peremptory challenges that is equal to the total number available to all of the defendants. In the Commission's view, this is the correct approach and should be maintained. It would be unfair to make a distinction between the number of peremptory challenges allowed to a defendant on the basis of whether the defendant is being tried jointly or separately (for example, by reducing the number of peremptory challenges available to a defendant who is being tried jointly). The interests of justice require that all defendants in criminal trials are treated equally. It would also be undesirable to reduce the number of peremptory challenges available to the prosecution relative to the defence, as that may make it difficult for the prosecution to achieve a representative jury.

Information about jurors

10.157 Making the jury list available no earlier than 4 pm on the business day immediately preceding the day on which the jury is to be selected, as has been provided since the introduction of the Act, strikes the right balance between enabling the parties to give the jury list some consideration while limiting the possibility of unnecessary and unwarranted incursions into jurors' privacy. The Commission also notes that the details of the juror's address are limited to the city, town, suburb or other locality in which the juror resides, and do not include the juror's street address.

10.158 The Commission notes that the provisions restricting access to the lists of people summoned for jury service are an integral part of the suite of reforms against jury-vetting made when the *Jury Act 1995* (Qld) was first introduced. Those provisions, which include the prohibition on pre-trial questioning of prospective jurors, were enacted after detailed consideration in several inquiries and reviews.¹⁵³³ It is unnecessary and undesirable to disturb those provisions.

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See *Jury Act 1995* (Qld) ss 29, 30, 31, 35. See also [3.23], [10.70]–[10.74] above.

The calling of jurors by number and name

10.159 The Commission is of the view that the procedure for jury selection set out in section 41 of the *Jury Act 1995* (Qld) should not be amended to provide that prospective jurors are to be called by number only. The current approach of calling both a prospective juror's number and name helps to avoid any confusion for jurors who may be mistaken or uncertain about their number being called during the empanelment process. It is also a more respectful approach, consistent with recognising and maintaining the dignity of each individual juror. If, in a particular case, it is necessary to address issues of juror privacy or security, the judge may direct that the jurors be identified by number only.

Recommendations

10.160 The Commission makes the following recommendations:

- 10-3** The provisions for challenges to the whole jury panel, challenges for cause, and special challenges for cause in sections 40, 43 and 47 of the *Jury Act 1995* (Qld) are appropriate and should be retained.
- 10-4** Section 42 of the *Jury Act 1995* (Qld) should continue to provide for the parties' rights to exercise peremptory challenges.
- 10-5** Section 42 of the *Jury Act 1995* (Qld) should not be amended to reduce the current maximum number of peremptory challenges available to the parties.
- 10-6** If there are two or more defendants in a criminal trial, each defendant should continue to be entitled to the number of challenges that is allowed to the defence if there is one defendant in a criminal trial; and the prosecution should continue to be entitled to a number of peremptory challenges that is equal to the total number available to the defendants.
- 10-7** The provisions in sections 29 and 30 of the *Jury Act 1995* (Qld) dealing with the content of, and the parties' access to and use of, the list of persons summoned for jury service are appropriate and should be retained.
- 10-8** The procedure for jury selection set out in section 41 of the *Jury Act 1995* (Qld) should not be amended to provide that prospective jurors are to be called by number only.

EXCUSING AND DISCHARGING JURORS

10.161 At any time prior to the empanelment of the jury, the judge has power to excuse a prospective juror or member of a jury panel from service, either for the

whole or part of a particular jury service period or permanently.¹⁵³⁴ The grounds for excusal are discussed in Chapter 9 of this Report.

10.162 The Act also gives the judge express power to discharge a juror, or jury, at the final stage of the jury selection process — that is, after the requisite number of jurors have been selected and sworn but before the remainder of the jury panel has been discharged.

Discharge at the final stage of selection

10.163 Section 46 of the *Jury Act 1995* (Qld) deals with the judge's discretion to discharge an individual juror when the judge reaches the final stage of the selection process. At that stage, the judge may discharge a juror 'if there is reason to doubt the impartiality' of that juror, whether or not a challenge for cause has been made. If that happens, another person must be selected from the jury panel to replace the discharged juror. Judges will often ask the jurors at this point whether they know of any reason why they cannot or should not sit on the jury for that trial. The Queensland Supreme and District Courts Benchbook sets out the following general procedure in these circumstances:¹⁵³⁵

12. The judge may discharge a person who has been selected as a juror if there is reason to doubt the impartiality of the person.¹⁵³⁶ To see whether that is necessary, the judge might say before the rest of the panel is released:

Those who have been sworn as jurors, as well as those members of the panel who have not, should listen to what I am about to say. The defendant's name is (set out name). He is charged with (here describe the offence, mentioning the name of any victim). The prosecutor will now read out the names of the witnesses for the prosecution. To see if you recognize any of the names, please listen carefully.

13. After the prosecutor has concluded identifying the prospective prosecution witnesses, the judge may say:

It is essential that every member of the jury be, and by all fair-minded people be seen to be, completely impartial as between the prosecution and the defendant. Sometimes a juror knows a witness or about him or her, or knows the defendant or something about him or her, or knows a relative or an associate of some such person, and on that account the juror may feel that he or she cannot be, and be seen to be, completely impartial. And there may be reasons personal to any one of you which may cause you to wonder whether you can be completely impartial in this case. If for any reason whatsoever, any one of you feels

¹⁵³⁴ *Jury Act 1995* (Qld) ss 20, 22, 23.

¹⁵³⁵ Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.3] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

¹⁵³⁶ Section 46(1) *Jury Act*.

that you cannot be, and by all fair-minded people be seen to be, completely impartial, please raise your hand now.

14. A juror who indicates such a problem is to be invited to approach the bench so that the nature of the difficulty can be ascertained and the judge decide, having regard to anything counsel may say, whether the juror should be discharged and another juror sworn in substitution. Any substitute juror should be asked whether he has understood what has been said concerning the inquiry as to the appearance of impartiality. (notes and formatting in original)

10.164 The legislation in Tasmania and Victoria also provides that the jury must be informed of the charge, the names of the defendant and principal witnesses and the estimated length of the trial, before calling on the jurors to seek excusal. The court may excuse a juror for the trial if satisfied the person is 'unable to consider the case impartially' or 'is unable to perform jury service for any other reason'.¹⁵³⁷

10.165 Moreover, in Queensland, a judge may at the same point discharge the whole of a jury if the judge considers that 'the challenges made to persons selected to serve on the jury or as reserve jurors have resulted in a jury of a composition that may cause the trial to be, or appear to be, unfair'.¹⁵³⁸ In that event, a new jury must be selected from the remainder of the jury panel. A similarly worded power applies in New South Wales.¹⁵³⁹ This is rarely exercised but occurred in a New South Wales District Court trial in 1981 when a judge discharged a wholly non-Indigenous jury in a trial of an Indigenous man; the three Indigenous members of the jury panel had been peremptorily challenged by the prosecutor.¹⁵⁴⁰

Discharge during the trial

10.166 The judge also has power to discharge individual jurors, or the whole jury, if particular problems arise or come to light after the jury is empanelled and during the trial.

10.167 Without discharging the whole jury, the judge may discharge an individual juror, who has been sworn, if:¹⁵⁴¹

- (a) it appears to the judge (from the juror's own statements or from evidence before the judge) that the juror is not impartial or ought not, for other reasons, be allowed or required to act as a juror at the trial; or
- (b) the juror becomes incapable, in the judge's opinion, of continuing to act as a juror; or

¹⁵³⁷ *Juries Act 2003* (Tas) s 39(1)–(4); *Juries Act 2000* (Vic) s 32.

¹⁵³⁸ *Jury Act 1995* (Qld) s 48.

¹⁵³⁹ *Jury Act 1977* (NSW) s 47A.

¹⁵⁴⁰ *R v Smith* (Unreported, District Court of New South Wales, Martin J, 19 October 1981). See case note by Neil Rees at [1982] *Aboriginal Law Bulletin* [8].

¹⁵⁴¹ *Jury Act 1995* (Qld) s 56(1).

- (c) the juror becomes unavailable, for reasons the judge considers adequate, to continue as a juror;

10.168 The judge's discretion to discharge is thus very wide.

10.169 A judge may discharge a juror on the basis of suspected impartiality under this provision only if it appears, from the juror's own statements or from evidence before the judge, that the juror is not impartial. This would seem to be a higher threshold than the one that applies under section 46 for the discharge of a juror at the final stage of selection if 'there is reason to doubt the impartiality' of the juror.

10.170 If a juror is discharged (or dies) *before* the trial begins, the judge may direct that another juror be selected and sworn.

10.171 If a juror is discharged (or dies) *after* the trial has begun (but before the jury has retired to consider its verdict), and a reserve juror is available, the reserve juror will take the juror's place.¹⁵⁴² If, however, there is no reserve juror available, the judge may direct that the trial continue with the remaining jurors (provided they number not less than 10).¹⁵⁴³ In the latter case, the verdict of the remaining jurors has the same effect 'as if all the jurors had continued present'.¹⁵⁴⁴

10.172 The Queensland Supreme and District Courts Benchbook includes the following bench notes for judges in relation to the discharge of individual jurors during the trial:¹⁵⁴⁵

Discharging a juror

25. Section 33 enshrines the common law principle that conviction for an offence should be the decision of a jury of 12. However, that principle is qualified by s 56 *Jury Act* pursuant to which a judge may discharge a juror without discharging the whole jury if in the judge's opinion the juror becomes incapable of continuing to act as a juror. The judge has a discretion under s 57 *Jury Act* to direct (where there is no reserve juror) that the trial continue with the remaining 11 jurors where a juror was discharged under s 56. Nevertheless, the exercise of that power has to be balanced against the fundamental right of an accused person to a trial by a jury of 12 persons: *R v Hutchings* [2006] QCA 219; *R v Shaw* [2007] QCA 231.
26. It is plainly desirable that a judge exercising the powers to discharge a juror and the power to proceed with a jury of less than 12 members does so in unmistakable terms: *Wu v The Queen* (1999) 199 CLR 99 (at 103). Ordinarily that will be made by the judge making two separate orders. The exercise of the discretion to proceed with less than 12 jurors is to be approached consistently with the principles enunciated in *Wu* with the reasons for the exercise of the discretion clearly identified.

¹⁵⁴² *Jury Act 1995* (Qld) s 34(3).

¹⁵⁴³ *Jury Act 1995* (Qld) s 57(1), (2). Under s 33 of the Act, a jury for a criminal trial ordinarily consists of twelve jurors.

¹⁵⁴⁴ *Jury Act 1995* (Qld) s 57(3).

¹⁵⁴⁵ Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.10] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011. See also *R v Metius* [2009] QCA 003.

Guiding considerations are the fair and lawful trial of the defendant with relevant considerations including the primary right to be tried by a jury of 12, the burden on the defendant of delay in the trial, the consequences of delay to others, including witnesses, the expense to the community and the nature of the charge. See also *R v Hutchings* [2006] QCA 219; *R v Shaw* [2007] QCA 231 and *R v Walters* [2007] QCA 140.

10.173 Similar provision is made in some of the other jurisdictions, although the expression of the grounds differs:

- In the ACT, the judge must be satisfied that ‘because of illness or other sufficient cause’ the juror should not continue to serve.¹⁵⁴⁶
- In Tasmania and Victoria, a juror may be discharged if it appears that the juror is not impartial, the juror becomes incapable of continuing to act as a juror, the juror becomes ill, or it appears for any other reason that the juror should not continue to act as a juror.¹⁵⁴⁷
- In Western Australia, the judge must be satisfied that the juror should not be required or allowed to continue in the jury and that if the juror is discharged, it will leave at least 10 jurors remaining.¹⁵⁴⁸

10.174 Provision is also made in New South Wales, as described at [10.180] below.

10.175 In New Zealand, a juror may be discharged if the court considers that the juror is incapable of performing his or her duty, the juror is disqualified, the juror’s spouse or partner or a member of the juror’s family (including their spouse’s or partner’s family), is ill or has died, the juror is personally concerned in the facts of the case, or the juror is closely connected with a party, witness or prospective witness.¹⁵⁴⁹ If jury numbers fall to 10, the trial is usually abandoned (although the court may proceed if it considers that, because of exceptional circumstances relating to the trial, and having regard to the interests of justice, the trial should proceed).¹⁵⁵⁰ A Bill has recently been introduced into the New Zealand Parliament that would allow the court to proceed with fewer than 10 jurors, if all the parties consent and the court, having regard to the interests of justice, considers that it should do so.¹⁵⁵¹

¹⁵⁴⁶ *Juries Act 1967* (ACT) s 8(1). Similar provision is made in *Juries Act 1927* (SA) s 56(1) except that it provides for the juror to be ‘excused’ rather than ‘discharged’.

¹⁵⁴⁷ *Juries Act 2003* (Tas) s 40; *Juries Act 2000* (Vic) s 43.

¹⁵⁴⁸ *Criminal Procedure Act 2004* (WA) s 115.

¹⁵⁴⁹ *Juries Act 1981* (NZ) s 22.

¹⁵⁵⁰ *Juries Act 1981* (NZ) s 22A(2). See also Explanatory Note, *Criminal Procedure (Reform and Modernisation) Bill 2010* (NZ) 10.

¹⁵⁵¹ *Criminal Procedure (Reform and Modernisation) Bill 2010* (NZ) cll 426, 427.

10.176 In Queensland, the whole jury may also be discharged without giving a verdict in particular circumstances, namely:

- if the jury cannot agree on a verdict;¹⁵⁵²
- if the judge considers there are ‘other proper reasons’ for discharging the jury without giving a verdict;¹⁵⁵³
- if proceedings are to be discontinued because the trial is adjourned;¹⁵⁵⁴ or
- if the judge dies, or becomes ‘incapable of proceeding with the trial’.¹⁵⁵⁵

10.177 If the jury is discharged, the judge may either adjourn the trial or proceed immediately with the selection of a new jury.¹⁵⁵⁶

10.178 Provision is also made in some of the other jurisdictions for the jury to be discharged without giving a verdict, for example, if the number of jurors is reduced below 10, or if it is in the interests of justice to do so.¹⁵⁵⁷

NSWLRC’s recommendations

10.179 Prior to amendments made in 2008, the legislation in New South Wales did not provide the judge with express power to discharge individual jurors. In its report on jury selection in 2007, the NSW Law Reform Commission recommended express provision for the discharge of jurors for cause or because of irregularities in empanelment.¹⁵⁵⁸

10.180 Following the NSWLRC’s recommendations, changes to the legislation were made by the *Jury Amendment Act 2008* (NSW).¹⁵⁵⁹ Sections 53A and 53B of the *Jury Act 1977* (NSW) now provide for mandatory and discretionary discharge of jurors.¹⁵⁶⁰

1552 *Jury Act 1995* (Qld) s 60(1).

1553 *Jury Act 1995* (Qld) s 60(1).

1554 *Jury Act 1995* (Qld) s 60(2).

1555 *Jury Act 1995* (Qld) s 61. In this circumstance, an ‘appropriate officer of the court’ must discharge the jury.

1556 *Jury Act 1995* (Qld) s 62(1).

1557 See *Juries Act 1967* (ACT) s 8(3); *Jury Act 1977* (NSW) ss 22, 53C(1); *Juries Act 1927* (SA) s 56(2); *Juries Act 2003* (Tas) s 41; *Criminal Procedure Act 2004* (WA) s 116; *Juries Act 1981* (NZ) s 22.

1558 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 11, Rec 52–56.

1559 See the second reading speech of the *Jury Amendment Bill 2008* (NSW): New South Wales, *Parliamentary Debates*, Legislative Council, 15 May 2008, 7681 (John Hatzistergos, Attorney General and Minister for Justice).

1560 The wording of ss 53A(1) and 53B(a) has been amended slightly by the *Jury Amendment Act 2010* (NSW) cl [9]–[10].

53A Mandatory discharge of individual juror

- (1) The court or coroner must discharge a juror if, in the course of any trial or coronial inquest:
 - (a) it is found that the juror was mistakenly or irregularly empanelled, whether because the juror was excluded from jury service or was otherwise not returned and selected in accordance with this Act, or
 - (b) the juror has become excluded from jury service, or
 - (c) the juror has engaged in misconduct in relation to the trial or coronial inquest.
- (2) In this section:

misconduct, in relation to a trial or coronial inquest, means:

- (a) conduct that constitutes an offence against this Act, or

Note. For example, under section 68C it is an offence for a juror to make certain inquiries except in the proper exercise of his or her functions as a juror.

- (b) any other conduct that, in the opinion of the court or coroner, gives rise to the risk of a substantial miscarriage of justice in the trial or inquest.

53B Discretionary discharge of individual juror

The court or coroner may, in the course of any trial or coronial inquest, discharge a juror if:

- (a) the juror (though able to discharge the duties of a juror) has, in the judge's or coroner's opinion, become so ill or infirm as to be likely to become unable to serve as a juror before the jury delivers their verdict or has become so ill as to be a health risk to other jurors or persons present at the trial or coronial inquest, or

Note. Under clause 12 of Schedule 2, a juror who because of sickness or infirmity is unable to discharge the duties of a juror is ineligible to serve as a juror.

- (b) it appears to the court or coroner (from the juror's own statements or from evidence before the court or coroner) that the juror may not be able to give impartial consideration to the case because of the juror's familiarity with the witnesses, parties or legal representatives in the trial or coronial inquest, any reasonable apprehension of bias or conflict of interest on the part of the juror or any similar reason, or
- (c) a juror refuses to take part in the jury's deliberations, or
- (d) it appears to the court or coroner that, for any other reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act as a juror.

Note. Section 22 provides for the continuation of a trial or inquest on the death or discharge of a juror.

LRCWA's recommendations

10.181 The Law Reform Commission of Western Australia sought submissions on whether the trial judge should have the power to discharge the whole jury if its composition is, or appears to be, unfair, as is the case in Queensland and New South Wales, but concluded that such a provision is unnecessary in Western Australia.¹⁵⁶¹

10.182 It considered the proposition that such a provision might assist if peremptory challenges have been used to exclude Aboriginal jurors, but noted that 'the available evidence does not suggest that Aboriginal people are significantly underrepresented as jurors in this state'.¹⁵⁶²

Discussion Paper

10.183 In its Discussion Paper, the Commission expressed the provisional view that the provisions of the Act setting out the circumstances in which the judge may discharge a juror or a jury are generally adequate and appropriate and should be retained. It made the following proposals on which it sought submissions:¹⁵⁶³

- 10-7 Subject to Proposals 8-6 and 8-10 in chapter 8 of this Paper, the provisions for the discharge of jurors in sections 46 and 56 of the *Jury Act 1995* (Qld) are appropriate and should be retained.
- 10-8 The provisions for the discharge of the jury in sections 60 and 61 of the *Jury Act 1995* (Qld) are appropriate and should be retained.

Consultation

10.184 The Queensland Law Society agreed that the provisions in the Act for the discharge of a juror or jury are appropriate and should be retained, subject to the Commission's proposals regarding the judge's ability to discharge a person because of an insufficient ability to understand, and communicate in, English or because the person's disability cannot be accommodated.¹⁵⁶⁴

10.185 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd commented on the practical limitations of the Court's power to deal with a jury whose composition appears to be unfair.¹⁵⁶⁵ It referred to the New South Wales District

¹⁵⁶¹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 27–8. It was considered that the provision for an equal number of peremptory challenges to the prosecution as the total available to all co-defendants would 'significantly reduce the potential for distortion of the composition of the jury'. Further, it was noted that a broad power to discharge the jury already exists under the *Criminal Procedure Act 2004* (WA).

¹⁵⁶² Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 27.

¹⁵⁶³ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [10.158]–[10.165], Proposals 10-7, 10-8.

¹⁵⁶⁴ Submission 52.

¹⁵⁶⁵ Submission 43.

Court case of *R v Smith*,¹⁵⁶⁶ in which Martin DCJ discharged an all white jury after the Crown had challenged all of the prospective Aboriginal jurors. The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd suggested that:

It is only in a situation such as [in the case of *R v Smith*], that is, in a town where there is a large population of Aboriginal peoples, where there is a likelihood of the array consisting of at least some Aboriginal and Torres Strait Islander peoples, that a jury could be discharged.

10.186 It did not, however, suggest that the provisions be changed. It preferred a range of other measures to increase the pool of potential Aboriginal and Torres Strait Islander jurors and to address race-based peremptory challenges.¹⁵⁶⁷

The Commission's view

10.187 The Commission considers that the judge's powers to discharge individual jurors are generally appropriate and should be retained.

10.188 In the Commission's view, it is important for the judge to be able to discharge a person who should not be required or allowed to act as a juror at the earliest time possible. If discharge occurs at the final stage of selection, further jurors can be selected to make up the numbers on the jury. This will obviously not always be possible since the reason for discharge may arise only after the trial is underway; for instance, if a juror suddenly becomes very ill or engages in prohibited behaviour. In other cases, however, the reason for discharge can be anticipated at the final stage of selection; for example, where the person has a disability that cannot be adequately accommodated.

10.189 Section 46 of the Act, which is specific to the final stage of the selection process, is limited to discharge when there is 'reason to doubt' the person's impartiality and allows the judge to discharge a juror whether or not a challenge for cause has been made. Section 56 of the Act also appears to be capable of applying at the final stage of selection (provided the juror has been sworn), although it seems to be largely directed to situations that arise during the trial itself. It applies if:

- it appears to the judge, from the juror's own statements or from evidence before the judge, that the juror is not impartial or ought not *for other reasons*, be allowed or required to act as a juror at the trial;
- the juror becomes incapable, in the judge's opinion, of continuing to act as a juror; or
- the juror becomes unavailable, for reasons the judge considers adequate, to continue as a juror.

¹⁵⁶⁶ *R v Smith* (Unreported, District Court of New South Wales, Martin J, 19 October 1981). See case note by Neil Rees at [1982] *Aboriginal Law Bulletin* [8].

¹⁵⁶⁷ Regional issues and indigenous representation are discussed in Chapter 11 of this Report.

10.190 In Chapter 8 of this Report, the Commission has recommended that the Act should be amended to provide that the judge may discharge a juror, without discharging the whole jury, if it appears to the judge that the juror:¹⁵⁶⁸

- is unable to understand, and communicate in, English well enough to discharge the duties of a juror effectively;
- after consideration of the facilities that are required and can be made available to accommodate the person's disability, is unable to discharge the duties of a juror effectively.

10.191 These proposed provisions are intended to apply at any time after the juror has been sworn, including at the final stage of the jury selection process. This necessitates that they apply to the situations covered by both sections 46 and 56 of the Act. It is also recommended in Chapter 8 that judges, and the Sheriff, be given express power to excuse a *prospective* juror in those circumstances.¹⁵⁶⁹

10.192 The Commission has also recommended in Chapter 8 that the judge should have a similar power to discharge a juror if it appears that the juror is ineligible for jury service because of an intellectual, psychiatric, cognitive or neurological impairment.¹⁵⁷⁰

10.193 In the Commission's view, the provisions for the judge to discharge the whole jury are also generally appropriate and should be retained.

Recommendations

10.194 The Commission makes the following recommendations:

10-9 Subject to Recommendations 8-6, 8-11 and 8-15, the provisions for the discharge of jurors in sections 46 and 56 of the *Jury Act 1995 (Qld)* are appropriate and should be retained.

10-10 The provisions for the discharge of the jury in sections 60 and 61 of the *Jury Act 1995 (Qld)* are appropriate and should be retained.

MINIMISING OR RESTRICTING THE LENGTH OF SERVICE

10.195 The Commission anticipates that there may be methods by which some aspects of the uncertainties and vagaries of jury service could be reduced by more sophisticated jury management and timetabling techniques. However, if that is so,

¹⁵⁶⁸ See Recommendations 8-6, 8-11 in Chapter 8 of this Report.

¹⁵⁶⁹ See Recommendations 8-5, 8-6, 8-10, 8-11 in Chapter 8 of this Report.

¹⁵⁷⁰ See Recommendation 8-15 of this Report.

one difficulty that might remain incapable of easy resolution is that of long trials, and the length of trials generally.

10.196 The unpredictable nature and length of trials is one factor that makes jury service difficult to manage, both for jurors and for the Sheriff.

10.197 In Brisbane, potential jurors are called to serve for a two-week jury service period and must attend each day as required until excused or discharged, usually for no more than two or three days.¹⁵⁷¹ While there are systems for notifying prospective jurors of the days they will be required to attend or be available, with updates available on the courts' website and by telephone each afternoon,¹⁵⁷² there is nevertheless likely to be some degree of uncertainty about the length of service. Some jurors may not be selected to a jury even after being available for some days; others may be selected for a trial that runs beyond the two-week period.

10.198 Whilst some uncertainty is unavoidable, there may be practical ways to address concerns about waiting times and the somewhat uncertain length of jury service and to acknowledge the contributions made by jurors who serve on longer trials. Such goals are important in promoting positive attitudes towards jury service. A persistent complaint made by some former jurors is the amount of time spent waiting without being empanelled on a jury.¹⁵⁷³

Serving on long trials

10.199 Jury legislation makes no express provision for long trials.¹⁵⁷⁴ In Queensland, a number of practices apply to deal with long trials.¹⁵⁷⁵

10.200 As noted above, in Brisbane, jurors are summoned to attend for a standard two-week service period. None of the initial paperwork sent to prospective jurors indicates the possibility that they may be required for a period longer than two weeks. Juries for all trials set down to begin in the two-week service period are drawn from the panel summoned for that period. If a trial is expected to exceed that

¹⁵⁷¹ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁵⁷² See generally Queensland Courts, 'Serving on jury' <<http://www.courts.qld.gov.au/162.htm>> at 1 February 2011 in which jurors are informed that: they will be informed the evening before whether they will be required the following day; that they will be told of the number and estimated duration of the trials that are to commence each day that they attend; that District Court trials last for an average of three to four days while Supreme Court trials last an average five to seven days, although some trials may take longer; and that, if they are selected for a trial, they will be told at the start of the trial how long it is expected to last. There is also a notice on the courts' website for jurors to check the daily law list or to telephone the court to check whether their attendance is required: Queensland Courts, 'Information for jurors' <<http://www.courts.qld.gov.au/103.htm>> at 1 February 2011.

¹⁵⁷³ See, for example, Deborah Wilson Consulting Services Pty Ltd, *Survey of Queensland Jurors December 1999*, Main Report (2000) 32, 45; Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 167. See also Submission 22. The Commission notes that practitioners are urged to notify the court 'of any perceived need for a voir dire ... well prior to the assembling of the jury panel in the ordinary course to avoid unnecessary, or unnecessarily early, summoning of jurors': Supreme Court of Queensland, Practice Direction No 12 of 1999, 'Criminal Jurisdiction (Brisbane)' (Chief Justice, Paul de Jersey, 11 May 1999) [C.3].

¹⁵⁷⁴ The daily remuneration payable to jurors generally rises, however, with the length of the trial. Remuneration is discussed in Chapter 12 of this Report.

¹⁵⁷⁵ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

period, prospective jurors are asked to volunteer.¹⁵⁷⁶ Those who agree to serve for the long trial comprise the panel from which the jurors are selected for that trial. Whilst this system has produced sufficient jurors for longer trials, including some three-month trials, it may skew the demographic cross-section of such juries.¹⁵⁷⁷ People with work, family or other commitments, for instance, are perhaps less likely to volunteer for longer trials.

10.201 Outside Brisbane, a different procedure applies. In many regions, the length of the jury service period stated in the *Notice to Prospective Juror* and summons will be increased to match the expected duration of any upcoming trial of unusual length. Thus, if a trial is anticipated to run for seven weeks, the length of service included on the Notice and summons will be seven weeks. This has the benefit of putting potential jurors on notice about the possibility of serving for a longer than usual period. It may, however, give rise to more applications for excusal.

Excusal after serving on lengthy trials

10.202 Several other jurisdictions specifically allow jurors to be excused from further attendance after serving on a trial that has been particularly long or arduous. At the end of a trial, the court may excuse a juror from further jury service:

- if the length of the trial justifies doing so (in the ACT);¹⁵⁷⁸
- if attendance for the trial was for a lengthy period (in New South Wales, Tasmania and Victoria);¹⁵⁷⁹
- if the trial was of an exceptionally exacting nature (in Ireland);¹⁵⁸⁰ or
- for any other good reason (in Tasmania and Victoria).¹⁵⁸¹

10.203 In South Australia, the legislation simply provides that the court before which a jury has served may release a juror from further jury service in compliance with the juror's summons.¹⁵⁸²

10.204 No such provisions are made in Queensland, although section 20 of the Act empowers a judge to excuse a person from jury service for the whole or part of

¹⁵⁷⁶ The Commission understands that, in Brisbane, this is done via the touch-screen computer terminals at which prospective jurors scan their summonses to register their attendance: Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁵⁷⁷ Information about jury demographics in Queensland is provided in Chapter 4 of this Report.

¹⁵⁷⁸ *Juries Act 1967* (ACT) s 18A(2).

¹⁵⁷⁹ *Jury Act 1977* (NSW) s 39(1); *Juries Act 2003* (Tas) s 14(2); *Juries Act 2000* (Vic) s 13(2), (3). In New South Wales, such jurors are entitled to claim excusal as of right: s 7, sch 2 cl 8.

¹⁵⁸⁰ *Juries Act 1976* (Ireland) s 9(8).

¹⁵⁸¹ *Juries Act 2003* (Tas) s 14(2); *Juries Act 2000* (Vic) s 13(2), (3).

¹⁵⁸² *Juries (General) Regulations 1998* (SA) reg 6.

a particular jury service period or permanently. This section is commonly used to excuse jurors from future jury service if they have sat on a harrowing trial.

10.205 The NSW Law Reform Commission has recently recommended the retention in that State of the entitlement to claim excusal as of right for previous lengthy jury service:¹⁵⁸³

We regard this as providing for a significant symbolic gesture, recognising the fact that those who have served as jurors in inquests or trials which the presiding judge or coroner assessed were sufficiently lengthy, demanding or harrowing to justify a s 39 direction, have provided a valuable community service.

One day, one trial attendance

10.206 Apart from recognising the contribution of jurors on long trials, there might also be scope for minimising the length of jury service generally or, at least, providing a greater measure of certainty for potential jurors about the time for which they may be required. At present, persons who are summoned for jury service in Brisbane will usually be required to attend for two to three days (or more if there are multiple trials scheduled for the sittings), until discharged, even if they are not empanelled on a jury.¹⁵⁸⁴ Uncertainty about the length of time for which they will be required may be an understandable cause of frustration for prospective jurors.

10.207 Instead, in some United States jurisdictions, provision is made for a person to be excused from further attendance after either serving on a trial or attending on the first day without being empanelled.¹⁵⁸⁵ In other words, by the end of the first day of attendance, prospective jurors are either empanelled to serve on a trial or are discharged from service. This approach is commonly referred to as a 'one trial or one day' system.¹⁵⁸⁶

10.208 This has been said to operate to some extent in Victoria. The intention appears to be that if a person has not been empanelled after attending on the first or second day (or, in Country Courts, the third or fourth day), he or she is excused from further attendance.¹⁵⁸⁷ The Victorian Law Reform Committee commended this approach in its 1996 report on jury service:¹⁵⁸⁸

Evidence given to the committee suggests that the introduction of a one trial or one day pool system would increase the administrative workload of the sheriff's office. Nonetheless, its potential to lessen the burden of jury service, which should lead to greater community involvement, makes it an attractive option for

¹⁵⁸³ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.66].

¹⁵⁸⁴ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁵⁸⁵ See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [5.5].

¹⁵⁸⁶ Ibid.

¹⁵⁸⁷ See, for example, Victoria Law Foundation and Juries Commissioner's Office Victoria, *Juror's Handbook* (2005) 4 <<http://www.courts.vic.gov.au/sites/courts.vic.gov.au/files/Jurors%20Handbook.pdf>> at 1 February 2011.

¹⁵⁸⁸ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) vol 1, [5.10].

reform. The introduction of such a system would also make it harder to justify many of the current categories of exemption and the range of excuses from jury service. In the committee's opinion the use of this system would increase the number and categories of people available for jury service and thereby increase the representativeness of the jury system. (note omitted)

10.209 The number of days' attendance that is necessary is likely to vary depending on the size of the court centre and jury panel. But, as a matter of general principle, it might be appropriate to provide that a person who is not empanelled on a jury need attend only for the minimum number of days necessary.

10.210 The Commission understands that such a system does not presently operate in Queensland. The Department of Justice and Attorney-General expressed some support for the adoption of something like the Victorian system in large centres with big populations, but cautioned that it would not be practical in smaller towns.¹⁵⁸⁹ Even in Brisbane, such a system is likely to be resource intensive and may be difficult to administer.

10.211 The NSW Law Reform Commission considered, but did not recommend, the introduction of the Victorian system. It noted that the general practice for District Court trials in Sydney is to allocate people to a trial or release them from attendance on their first or second day of attendance. Such a system would not be workable for Supreme Court trials, however, because the caseload involves fewer but much longer trials. In those circumstances, people may be kept on standby for up to one week.¹⁵⁹⁰ The NSWLRC acknowledged that attendance on more than one day without being selected to a jury involves inconvenience and cost, but also recognised that an inflexibly applied one day, one trial system could also involve inconveniences and additional administrative costs.¹⁵⁹¹ It concluded:¹⁵⁹²

We do not underestimate the difficulty which the Sheriff and the courts face in ensuring that sufficient jurors are present to allow trials to commence on the date for which they are listed, while avoiding the inconvenience to those who are summoned but not required, or who, alternatively, are required to remain on call for a period until they are either empanelled or released. Effective case management, and trial judges' awareness of the need to accommodate the convenience of potential jurors are important in resolving this problem.

Discussion Paper

10.212 In its Discussion Paper, the Commission considered whether there is a need for any specific changes to the Act to deal with the length of jury service and sought submissions on the following questions:¹⁵⁹³

1589 Information provided by the Department of Justice and Attorney-General, 25 February 2011.

1590 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [9.12]–[9.16].

1591 *Ibid* [9.17]–[9.18].

1592 *Ibid* [9.19].

1593 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [11.24]–[11.26], Questions 11-1, 11-2.

- 11-1 Is it necessary to make express provision to allow a trial judge to excuse a juror from further attendance on the basis of having served on a particularly long or harrowing trial?
- 11-2 Should there be provision for something similar to a one day, one trial system in Queensland?

Consultation

10.213 Some respondents commented on the inconveniences of jury service, and some expressed frustration at the amount of time that jury service requires.¹⁵⁹⁴ In the words of one respondent, people who are summoned for jury service are required to ‘live in limbo at the whim of the courts’.¹⁵⁹⁵

10.214 One respondent, who was a former juror, suggested that the main reason prospective jurors try to avoid jury service is inconvenience:¹⁵⁹⁶

Most people don't like doing jury duty.

And most will do whatever they can to avoid it.

...

Reasons for their current avoidance include fear of the unknown, the worry, the responsibility, or horror at what they may encounter and some because the pay is incredibly low (for them).

But the biggest and most common complaint is inconvenience. It's the expectation to put one's life on hold for weeks, knowing you cannot make any plans for each 'tomorrow' until after that daily 5pm phone call. In an age of the internet and instant communications, when the Sheriff's Office is, well, fully aware of roughly when a range will be called again, this information is not passed on and the 'jurors' anxiously await their 5pm call each day to find out.

10.215 This respondent noted, however, that while people may have misgivings about performing jury service, they often end their service with a much more positive attitude:¹⁵⁹⁷

Jury service was a real eye-opener. Like me, most of my 12 were first timers — and each of these bar one said they had held concerns and misconceptions beforehand; wished they had more information earlier (before attending) but at the end offered that they did rather enjoy the responsibility and experience much more than they expected; in fact they'd definitely recommend it to others and would gladly come back if called. So, if prospective jurors could see that up front, they might even want to participate — and that is the key.

¹⁵⁹⁴ Submissions 22, 24, 28, 32, 33, 44.

¹⁵⁹⁵ Submission 28.

¹⁵⁹⁶ Submission 44.

¹⁵⁹⁷ Ibid.

To aid his/her responsibility for providing representative jury panels, the Sheriff of Queensland should be given modern tools to communicate with Qld citizens / prospective jurors. And of course, in these 'busy' times, reducing the period of service will generate better rates of participation, but I firmly believe that improved communication and education is the real winner.

10.216 This respondent suggested, therefore, that improved communication with prospective jurors would be the best way to encourage participation:¹⁵⁹⁸

The single-most beneficial facility that would arrest the increasing unwillingness to participate is: improved communication. Not just when you might be called in but in a wide range of services such as response to questionnaire, EFT [electronic funds transfer] data for payments, [statistics] on how often a person had been called (a common complaint given the growing numbers now needed), videos on jury participation and court facilities, etc, etc). ... why is the jury process paper-based? The internet should be in play here.

... Change the approach to make it easier for citizens to serve as jurors, improve communication and provide more information. ...

10.217 Another respondent expressed the view that the summoning of large numbers of people, many of whom will not actually serve on a trial, is wasteful:¹⁵⁹⁹

To require 332 people to make themselves available for 2 weeks, with in my case only once going to court, seems a ridiculous waste of funds and resources.

10.218 The Department of Justice and Attorney-General did not support the introduction of something like a one day, one trial system:¹⁶⁰⁰

It is anticipated that it would be difficult to administer and potentially costly with a greater number of jurors [who] would be required to be summonsed for a sittings as a result. The situation often emerges in Brisbane that on the first day of a sittings that only 10–20% of the trials listed to commence actually do proceed to jury empanelment. Should it have been necessary to summons 200 jurors for that day then under this proposal approx 170 potential jurors would be paid for their attendance and never seen again during the sittings.

10.219 Neither did the Queensland Law Society consider that a one day, one trial system would be appropriate in Queensland. In its view:¹⁶⁰¹

It would necessitate a much larger panel. The practice at the moment making all efforts to have juries empanelled as quickly as possible each morning works well enough.

1598 Ibid.

1599 Submission 33.

1600 Submission 56.

1601 Submission 52.

10.220 The Queensland Law Society submitted, however, that ‘the judge should have power to excuse individual jurors from further attendance if they have participated in a particularly long or harrowing trial’.¹⁶⁰²

The Commission’s view

Serving on longer juries

10.221 The Commission is of the view that the *Notice to Prospective Jurors* sent to prospective jurors who are summoned for jury service in Brisbane should indicate if there is a possibility that they may be required to serve as a juror for longer than the standard two week period. In addition, the *Questionnaire for Prospective Juror* that accompanies the Notice should elicit information about whether the person is prepared to serve on a jury for that extended period. Such information would assist in the compilation of suitable jury lists for the Brisbane sittings, especially in relation to longer trials.

Excusal after serving on lengthy trials

10.222 In the Commission’s view, it is unnecessary to amend the *Jury Act 1995* (Qld) to make express provision to allow a trial judge to excuse a juror from further attendance on the basis of having served on a particularly long or harrowing trial. As mentioned earlier, the judge already has an unfettered discretion under section 20 of the Act to excuse a person from jury service for the whole or part of a particular jury service period or permanently. As is presently the case, that section may be utilised to excuse a juror from future jury service after serving on a lengthy or harrowing trial.

One day, one trial attendance

10.223 The Commission is of the view that a one day, one trial system, or something similar to it, should not be adopted in Queensland. Whilst such an approach may benefit prospective jurors, it is unlikely to be a workable arrangement in all cases and for all courts. There is a need to balance the administrative and procedural demands of the courts, and the convenience of prospective jurors. It is preferable to seek out other ways of addressing many of the concerns about waiting times and the uncertainties about the length of service, for example, by continued improvements to community and juror education and court facilities.

Recommendations

10.224 The Commission makes the following recommendations:

¹⁶⁰²

Ibid.

10-11 The *Notice to Prospective Jurors* sent to prospective jurors who are summoned for jury service in Brisbane should indicate if there is a possibility that they may be required to serve as a juror for longer than the standard two week period. The *Questionnaire for Prospective Juror* that accompanies the *Notice* should elicit information about whether the person is prepared to serve on a jury for that extended period.

10-12 It is unnecessary to amend the *Jury Act 1995 (Qld)* to make express provision to allow a trial judge to excuse a juror from further attendance on the basis of having served on a particularly long or harrowing trial.

10-13 A one day, one trial system should not be implemented in Queensland.

IRREGULARITIES IN SUMMONING OR EMPANELMENT

10.225 Section 6 of the *Jury Act 1995 (Qld)* provides that ‘the fact that a person who is not qualified for jury service serves on a jury is not a ground for questioning the verdict’.¹⁶⁰³

10.226 There have been some rare instances in Queensland where it appears that people who were disqualified from serving on a jury have done so. The Criminal Justice Commission of Queensland (‘CJC’) reported in 1991 that it appeared that some people ‘who may not be legally eligible for jury service [were] nevertheless being admitted to jury panels’.¹⁶⁰⁴ The ineligible people in question had convictions that should have disqualified them from serving on juries. They remained, however, on the jury lists supplied to the prosecution and may have served on juries.¹⁶⁰⁵ As the CJC noted, this would not have vitiated the verdicts in those cases.¹⁶⁰⁶

10.227 It is understandable that cases of disqualified people actually serving on juries would be rare, and even more rarely come to light. The Commission has been informed that there have been some instances where travel allowance claims lodged by jurors have shown that the jurors travelled from outside the relevant jury district to serve. In appropriate cases, they are excused from further attendance, and the relevant information is updated on the lists of prospective jurors.¹⁶⁰⁷

¹⁶⁰³ Qualification for jury service is discussed in Chapters 3 and 6 of this Report.

¹⁶⁰⁴ Criminal Justice Commission, *Report of an Investigative Hearing Into Alleged Jury Interference* (1991) 1.

¹⁶⁰⁵ Ibid 25–6. The CJC did not make any substantive recommendations on this issue.

¹⁶⁰⁶ Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 12.

¹⁶⁰⁷ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

10.228 Provisions dealing with verdicts involving unqualified jurors also apply in other jurisdictions.¹⁶⁰⁸

10.229 Some of those jurisdictions also provide that the verdict is not impeached because of an irregularity in the selection, summoning or empanelment of a juror.

10.230 In the ACT and Northern Territory, the legislation provides that ‘an omission, informality or error in name or occupation (if there is no question of identity)’ in relation to ‘the jury list, a jury precept or a panel of jurors’ does not invalidate or affect the jury’s verdict.¹⁶⁰⁹

10.231 Similarly, the legislation in Tasmania provides that any irregularity relating to the preparation of a jury list, the issuing of a summons, the constitution of a panel or the selection of a jury is not a ground for impeaching a verdict.¹⁶¹⁰ Similar provision is made in New Zealand.¹⁶¹¹

10.232 The provision in New South Wales is the most comprehensive.¹⁶¹²

73 Verdict not invalidated in certain cases

(1) The verdict of a jury shall not be affected or invalidated by reason only:

(a) that any juror was, after being required by summons to attend for jury service, mistakenly or irregularly empanelled, whether because the juror was excluded from jury service or was otherwise not returned and selected in accordance with this Act, or

Note. For example, this paragraph prevents the verdict of a jury from being invalid if, as in *R v Brown & Tran* [2004] NSWCCA 324, a juror who received a jury summons reported for service a day early and was mistakenly empanelled.

(a1) that any juror became excluded from jury service in the course of the trial or coronial inquest, or

¹⁶⁰⁸ *Jury Exemption Act 1965* (Cth) s 5; *Juries Act 1967* (ACT) s 18; *Jury Act 1977* (NSW) s 73(1); *Juries Act* (NT) s 13; *Juries Act 1927* (SA) s 15; *Juries Act 2003* (Tas) s 7; *Juries Act 2000* (Vic) s 6; *Juries Act 1957* (WA) s 8; *Juries Act 1981* (NZ) s 33.

¹⁶⁰⁹ *Juries Act 1967* (ACT) s 30; *Juries Act* (NT) s 35.

¹⁶¹⁰ *Juries Act 2003* (Tas) s 7(2).

¹⁶¹¹ *Juries Act 1981* (NZ) s 33. See, for example, *R v Cornelius* [1994] 2 NZLR 74, which dealt with an irregularity in the composition of the jury list arising from an error in the selection of potential jurors exclusively from one particular electorate, rather than from four electorates, as required under s 3 of the *Juries Act 1981* (NZ). As a result of the mistake the jury list from which the panel and jury were drawn may have had more urban electors and more non-Maori electors than would have been the case if a proper list had been used. The Court held that, by virtue of s 33 of the *Juries Act 1981* (NZ), the verdict was not in any way affected merely because of the mistake.

¹⁶¹² Subsections (1)(a), (a1) and (2) were added to s 73 of the *Jury Act 1977* (NSW) by the *Jury Amendment Act 2008* (NSW) s 3, sch 1 to give effect to the recommendation of the NSW Law Reform Commission that the saving provision should be extended to include the case of a person who was empanelled by error where the irregularity was not discovered and cured by discharge of the juror during the trial, but should not apply in the case of juror impersonation: New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [11.46], Rec 55. The wording of s 73(1)(a), (a1) was amended slightly by the *Jury Amendment Act 2010* (NSW) cl [18]–[19].

- (b) of any omission, error or irregularity with respect to any supplementary jury roll, jury roll, card or summons prepared or issued for the purposes of this Act, or
 - (c) that any juror was misnamed or misdescribed (where there is no question as to the juror's identity).
- (2) Subsection (1) does not apply:
- (a) in respect of a juror if the juror impersonated, or is suspected of impersonating, another person, or
 - (b) if there is evidence of any other attempt to deliberately manipulate the composition of the jury.

10.233 No similar provision is made in Queensland.

Discussion Paper

10.234 In its Discussion Paper, the Commission proposed an amendment to the Act to provide for the saving of verdicts if there has been an irregularity in the jury selection process:¹⁶¹³

- 10-9 The *Jury Act 1995* (Qld) should be amended to provide for the saving of verdicts when there has been an irregularity in the selection, summoning or empanelment of the jury.

Consultation

10.235 The Queensland Law Society disagreed with the Commission's proposal for a savings provision in the case of an irregularity in the jury selection process:¹⁶¹⁴

We hold the view that these rules should be strictly adhered to and the default position should remain that if a jury has been constituted unlawfully then any verdict that follows should also be unlawful by default.

The Commission's view

10.236 In the Commission's view, it is neither necessary nor desirable to amend the *Jury Act 1995* (Qld) to provide specifically for the saving of verdicts when there has been an omission, error or irregularity in the selection, summoning or empanelment of the jury.

10.237 The Commission is unaware of any particular mischief arising from the absence of such a savings provision. The issue of whether an omission, error or irregularity in the selection, summoning or empanelment of a jury ought to vitiate

¹⁶¹³ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [10.172], Proposal 10-9.

¹⁶¹⁴ Submission 52.

the jury's verdict in any particular case is one that is able to be dealt with by way of the appeal process.¹⁶¹⁵

10.238 In addition, the formulation of a legislative provision that attempts to deal comprehensively with the effect on the verdict of a jury when there has been an omission, error or irregularity in the selection, summoning or empanelment of the jury would be problematic in a number of respects. In particular, it would be difficult to draft a legislative provision that distinguishes clearly between an omission, error or irregularity that is minor or inconsequential and one that goes to the heart of whether the outcome of the jury selection process was, or was perceived to be, fair; or that does not inadvertently trump other sections of the Act that set out the substantive legal requirements for jury selection. These issues are best left to be determined on a case-by-case basis on appeal.

Recommendation

10.239 The Commission makes the following recommendation:

10-14 The *Jury Act 1995 (Qld)* should not be amended to provide specifically for the saving of verdicts when there has been an omission, error or irregularity in the selection, summoning or empanelment of the jury.

¹⁶¹⁵

Section 668E of the Criminal Code (Qld) deals generally with the determination of appeals by the Court of Appeal in criminal cases. One of the grounds on which a conviction may be appealed is that there was a miscarriage of justice: Criminal Code (Qld) s 668E(1). The Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred: Criminal Code (Qld) s 668E(2).

Chapter 11

Regional Issues and Indigenous Representation

INTRODUCTION	349
JURY DISTRICT BOUNDARIES.....	350
Queensland	350
Other Australian jurisdictions	352
NSWLRC's recommendations	355
LRCWA's recommendations	356
INDIGENOUS PARTICIPATION	357
NSWLRC's recommendations	363
LRCWA's recommendations	364
Discussion Paper	365
Consultation	365
The Commission's view	369
Recommendations	373
JUDICIAL POWER TO DIRECT THE COMPOSITION OF THE JURY.....	375
Discussion Paper	378
Consultation	378
The Commission's view	380
Recommendation	381

INTRODUCTION

11.1 In the preceding chapters of this Report, the Commission has made a number of recommendations to ensure that the pool from which prospective jurors are drawn is as large as circumstances and principle permit. Those recommendations are intended to enhance the representative nature of juries, and ensure that the burdens and benefits of jury service are shared as widely and fairly as possible.

11.2 This chapter considers two issues that affect the fairness and representativeness of juries and the equity of jury selection and participation:

- the impact of jury district boundaries; and
- the representation of Indigenous people on juries.

11.3 The Commission notes in this regard that the Terms of Reference require it to consider, among other things:¹⁶¹⁶

¹⁶¹⁶ See the Terms of Reference set out in Appendix A to this Report.

The extent to which juries in Queensland are representative of the community and to which they may have become unrepresentative because of the number of people who are ineligible for service or exercise their right to be excused from service, including whether there is appropriate representation of minority groups (such as Aboriginal people and Torres Strait Islanders), the factors which may contribute to under-representation and suggestions for increasing representation of these groups.

11.4 The imperatives of improved jury representativeness and the equitable sharing of the burdens and benefits of jury service require a consideration of the practical concerns that arise in regional jury areas and in relation to the representation of Indigenous Queenslanders.¹⁶¹⁷

JURY DISTRICT BOUNDARIES

Queensland

11.5 In Queensland, a person is qualified, and liable, to serve as a juror only in relation to trials held in the jury district in which the person resides.¹⁶¹⁸ The jury districts for Queensland, and their boundaries, are defined under the *Jury Regulation 2007* (Qld).¹⁶¹⁹

11.6 The main jury districts are:¹⁶²⁰

District Name	District Area and Boundaries
Brisbane	The City of Brisbane, Pine Rivers Shire, Redcliffe City, and Redland Shire, ¹⁶²¹ to the extent those areas fall within the Brisbane District Court district.
Beenleigh	Logan City, ¹⁶²² and the area within a 20 km radius of the Beenleigh District Court, to the extent that area falls within the Beenleigh District Court district.
Cairns	The area within a 25 km radius of the Cairns courthouse.
Hervey Bay	The area within a 15 km radius of the Hervey Bay courthouse.
Ipswich	The area of Bundamba, Ipswich and Ipswich West electoral districts under the <i>Electoral Act 1992</i> (Qld).

¹⁶¹⁷ See, for example, C Baxter, 'Barrister calling for Murri jurors', *Queensland Times* (Ipswich), 1 May 2010 <<http://www.qt.com.au/story/2010/05/01/ipswich-barrister-calling-for-murri-jurors/>> at 4 May 2010.

¹⁶¹⁸ *Jury Act 1995* (Qld) ss 4(1), 5. See also, in the other jurisdictions: *Juries Act* (NT) s 12; *Juries Act 1927* (SA) s 14; *Juries Act 1957* (WA) s 4; *Juries Act 1981* (NZ) s 6.

¹⁶¹⁹ See *Jury Act 1995* (Qld) s 7; *Jury Regulation 2007* (Qld) s 5, sch 1.

¹⁶²⁰ See *Jury Act 1995* (Qld) s 7; *Jury Regulation 2007* (Qld) s 5(1), sch 1. The District Court district for a place consists of the Magistrates Courts district specified for the place under *District Court Regulation 2005* (Qld) s 2, sch 1. The Magistrates Courts districts and their areas are declared under *Justices Regulation 2004* (Qld) s 16, sch 1.

¹⁶²¹ As they are shown on area maps LGB1 edition 6 sheets 1 to 4, LGB104 edition 5, LGB108 edition 1, and LGB109 edition 4, respectively: *Jury Regulation 2007* (Qld) s 5(1), sch 1 cl 2.

¹⁶²² As it is shown on area map LGB78 edition 9: *Jury Regulation 2007* (Qld) s 5(1), sch 1 cl 1(a).

District Name	District Area and Boundaries
Kingaroy	The area within a 20 km radius of the Kingaroy courthouse, and Cherbourg Shire. ¹⁶²³
Maryborough	The area within a 15 km radius of the Maryborough courthouse, to the extent that area falls within the Maryborough District Court district.
Southport	The Southport District Court district, which is the area within Gold Coast City ¹⁶²⁴ and south of the Beenleigh-Gold Coast dividing line.
Townsville	The area within a 25 km radius of the Townsville courthouse.

Table 11.1: Queensland jury districts¹⁶²⁵

11.7 For all of the other places in Queensland at which the District Court may be constituted, the relevant jury districts are the areas within a 20 km radius of the relevant courthouse.¹⁶²⁶ Those places are: Bowen, Bundaberg, Charleville, Charters Towers, Clermont, Cloncurry, Cunnamulla, Dalby, Emerald, Gladstone, Goondiwindi, Gympie, Hughenden, Innisfail, Longreach, Mackay, Maroochydore, Mount Isa, Rockhampton, Roma, Stanthorpe, Toowoomba, and Warwick.¹⁶²⁷ Until 1 July 2006, when the *Jury Regulation 1997* (Qld) was amended,¹⁶²⁸ these jury districts were comprised of the area within a 13 km radius of the District Court.¹⁶²⁹

11.8 The exclusion of people who fall outside the jury district areas may reduce the representativeness of juries. In jury districts with smaller populations, it may also mean that people are called to serve more often than in areas that have a larger population. The Department of Justice and Attorney-General has noted that, in smaller jury districts, there may be only 500 enrolled voters available to serve and, taking into account response rates, it would not be unusual for almost all of those people to receive an initial notice.¹⁶³⁰

11.9 In smaller communities, there is also a greater chance that people will be excused or unable to serve because of a familial or other relationship with a defendant or a witness.

¹⁶²³ As it is shown on area map LGB151 edition 1: *Jury Regulation 2007* (Qld) s 5(1), sch 1 cl 6(b).

¹⁶²⁴ As it is shown on area map LGB58 edition 7: *District Court Regulation 2005* (Qld) s 2(1), sch 1; *Justices Regulation 2004* (Qld) s 16(1)(a), (b), sch 1 cl 18(2)(a).

¹⁶²⁵ For the purposes of defining Jury Districts, 'a reference to a city or shire by name is a reference to the city or shire of that name declared as a local government area under the *Local Government Act 1993* as in force immediately before the changeover day': see *Jury Regulation 2007* (Qld) s 5(2)(b). As explained at [11.34] below, the *Local Government Act 1993* (Qld) has been repealed.

¹⁶²⁶ *Jury Regulation 2007* (Qld) s 5(3), (4); *District Court of Queensland Act 1967* (Qld) s 6(3); *District Court Regulation 2005* (Qld) s 2(1), sch 1 column 1.

¹⁶²⁷ See *District Court of Queensland Act 1967* (Qld) s 6(3); *District Court Regulation 2005* (Qld) s 2(1), sch 1 column 1.

¹⁶²⁸ The *Jury Amendment Regulation (No 1) 2006* (Qld) s 4 amended s 4(3) of the *Jury Regulation 1997* (Qld) to substitute 20 km for 13 km. The *Jury Amendment Regulation (No 1) 2006* (Qld) commenced on 1 July 2006.

¹⁶²⁹ See *Jury Regulation 1997* (Qld) (repealed) s 4(3), Reprint 1E.

¹⁶³⁰ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

11.10 The appropriateness of the current jury districts necessarily requires a consideration of available transport or options for the provision of transport. The Commission understands, for instance, that, although Cherbourg Shire was included in the jury district for Kingaroy in 2005,¹⁶³¹ ‘transport is not readily available for the 53 km trip to Kingaroy through Murgon’ so that the change ‘doesn’t result in any better representation’ of Cherbourg residents.¹⁶³²

11.11 The fact that lists of prospective jurors are based on jury districts, which (especially outside Brisbane) are based on the location of District Courts and particular courthouses,¹⁶³³ produces some geographical anomalies. For example, as the Supreme Court does not sit on the Gold Coast or the Sunshine Coast, and Supreme Court cases involving defendants from those areas are heard in Brisbane, residents from those areas are never summoned to sit on Supreme Court juries, and defendants from those areas who are tried in the Supreme Court never have residents from those areas on their juries. Given the large populations in those areas, this is a significant anomaly. The Commission understands that a similar situation arises in relation to defendants from the Cape and Gulf regions of Queensland, whose trials are heard in Cairns and Mount Isa, respectively.¹⁶³⁴

Other Australian jurisdictions

11.12 The following table sets out how jury districts are defined in the other states and territories, along with the total land area for each jurisdiction.¹⁶³⁵ The majority of the other jurisdictions constitute jury districts according to electoral divisions, which are much larger than the current jury districts in Queensland. As noted above, Queensland jury districts are generally restricted to within a 15, 20 or 25 km radius of the relevant courthouse.¹⁶³⁶ Western Australia is the only other jurisdiction that defines its jury districts according to a specific kilometre radius from the courthouse (variously 50 or 80 km from the courthouse in the circuit town).¹⁶³⁷

¹⁶³¹ *District Court Regulation 2005* (Qld) s 4 (as made SL No 75 of 2005), which inserted s 3A into sch 1 of the *Jury Regulation 1997* (Qld) (now repealed).

¹⁶³² Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁶³³ See *Jury Act 1995* (Qld) s 7; *Jury Regulation 2007* (Qld) s 5, sch 1.

¹⁶³⁴ This was noted in a preliminary consultation with the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd: Submissions 21, 21A.

¹⁶³⁵ For comparison, Queensland has an area of 1 734 174.9 km²: see Australian Bureau of Statistics, *National Regional Profile* (2009) for the land area of Queensland.

¹⁶³⁶ See [11.6]–[11.7] above.

¹⁶³⁷ *Juries Act 1957* (WA) s 10; *Western Australian Government Gazette*, No 71, 24 April 2009, 1383–4.

Jurisdiction	Definition of Jury District Area	Area of State/Territory ¹⁶³⁸
ACT	There are no separate jury district areas in the ACT. ¹⁶³⁹	2 351.4 km ²
NSW	A jury district comprises 'such electoral districts or parts of electoral districts' as the Sheriff may determine 'from time to time'. ¹⁶⁴⁰	801 315.4 km ²
NT	NT has two jury districts. The jury district for Alice Springs comprises the municipality of Alice Springs. The jury district for Darwin comprises the area of land in the electoral divisions of Blain, Brennan, Casuarina, Drysdale, Fannie Bay, Fong Lim, Goyder, Johnston, Karama, Nelson, Nightcliff, Port Darwin, Sanderson and Wanguri. ¹⁶⁴¹	1 352 176.1 km ²
SA	The whole of SA is divided into three jury districts: Adelaide, Northern (Port Augusta) and South-Eastern (Mount Gambier). The jury districts consist of the electoral district subdivisions declared by the Governor by proclamation. ¹⁶⁴²	985 338.3 km ²
Tas	There is a jury district for Hobart, Launceston and Burnie (comprising the areas shown as bounded by heavy black lines on Plan No. 3156–8 in the Central Plan register). ¹⁶⁴³	67 914.2 km ²
Vic	There is a jury district for Melbourne and each circuit town (Ballarat, Bendigo, Geelong, Hamilton, Horsham, Mildura, Sale, Shepparton, Wangaratta, Warrnambool, Bairnsdale, Kerang and Morwell), comprising the electoral district or districts for the Legislative Assembly around each town. ¹⁶⁴⁴	227 415.6 km ²

¹⁶³⁸ See the Australian Bureau of Statistics, *National Regional Profile* (2009) for the land area of each state and territory.

¹⁶³⁹ Prospective jurors are drawn from the electoral roll for the whole of the Territory. See *Juries Act 1967* (ACT) ss 9, 19(2).

¹⁶⁴⁰ *Jury Act 1977* (NSW) s 9(2). Each existing jury district has been administratively determined by the Sheriff. The districts are not formally gazetted in NSW as they are required to be in other Australian jurisdictions: New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [8.3].

¹⁶⁴¹ *Juries Act* (NT) ss 19, 20; *Juries Amendment Regulations 2010* (NT) regs 4, 5. See also Northern Territory Government, 'Alice Springs Municipality' <<http://www.nt.gov.au/placenames/localities/alicesprings/index.shtml>> at 24 February 2011.

¹⁶⁴² *Juries Act 1927* (SA) s 8; *South Australian Government Gazette*, 20 August 1992, 882; Courts Administration Authority South Australia, 'Are you liable to be called for jury duty?' <http://www.courts.sa.gov.au/sheriff/jury_duty/index.html> at 24 February 2011.

¹⁶⁴³ *Juries Act 2003* (Tas) s 18. Governor (Tas), 'Juries Act 2003 — Order', *Tasmanian Government Gazette*, 21 December 2005, 2206.

¹⁶⁴⁴ *Juries Act 2000* (Vic) s 18; *Victoria Government Gazette*, No G12, 20 March 2003, 506; *Victoria Government Gazette*, No S232, 5 September 2006.

WA	<p>A jury district comprises one or more electoral districts of the Legislative Assembly. There are 17 jury districts in Western Australia (Perth, Fremantle, Rockingham, Busselton, Bunbury, Albany, Esperance, Kalgoorlie, Geraldton, Carnarvon, Karratha, South Hedland, Broome, Derby, Kununurra, and a further two covering the Commonwealth territories of Cocos Islands and Christmas Island).</p> <p>The jury districts for Circuit Courts are generally restricted to those parts of the Assembly district within a 50 km or 80 km radius from the courthouse in the circuit town, and exclude any adjacent islands.¹⁶⁴⁵</p>	2 531 563.7 km ²
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Table 11.2: Jury districts for other Australian jurisdictions

11.13 In small jurisdictions, such as the ACT, it may be possible for all parts of the jurisdiction to fall within a jury district.¹⁶⁴⁶ However, in most jurisdictions, including Queensland, jury district boundaries encompass localities within only a limited radius of each town or city in which the court sits or courthouse, leaving some parts of the state or territory outside those boundaries. As a consequence, some people will not fall within a jury district and will not be included in the pool of potential jurors.

11.14 In some Australian jurisdictions, people may also claim or seek excusal if they live beyond a certain distance from the court or if travel to the court would take an excessive time or cause excessive inconvenience.¹⁶⁴⁷

11.15 No specific provision to this effect is made in Queensland, although substantial hardship because of the person's personal circumstances is one of the matters to be taken into account under section 21 of the Act in considering whether a person should be excused.¹⁶⁴⁸

11.16 In its report on juror satisfaction in Australia, the Australian Institute of Criminology noted that the use of an arbitrary, fixed distance for such entitlements to excusal may involve some inequity:¹⁶⁴⁹

¹⁶⁴⁵ *Juries Act 1957* (WA) s 10; *Western Australian Government Gazette*, No 71, 24 April 2009, 1383, 1384. See also Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 15.

¹⁶⁴⁶ In the ACT, prospective jurors are drawn from the electoral roll for the whole of the Territory; there are no separate jury districts that encompass limited areas only of the Territory: see *Juries Act 1967* (ACT) ss 9, 19(2).

¹⁶⁴⁷ *Jury Act 1977* (NSW) s 7, sch 3 (the person resides more than 56 km from the place at which the person is required to serve), although the right to claim excusal on that basis will be removed by the *Jury Amendment Act 2010* (NSW); *Juries Act 2003* (Tas) ss 9(3)(c), 12 (excessive time or excessive inconvenience to the person to travel to the place at which the person is required to attend for jury service); *Juries Act 2000* (Vic) s 8(3)(c), (d) (the distance to travel to the place at which the person is required to serve is over 50 km if the place is Melbourne, or over 60 km for a place other than Melbourne; or travel to the place would take excessive time or cause excessive inconvenience to the person).

¹⁶⁴⁸ The Commission understands that the factors that are taken into account in determining whether someone should be excused on this basis include the person's proximity to public transport, the person's mobility and the person's age: Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁶⁴⁹ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 24.

In New South Wales, a fixed distance exceeding 56 km is applied. Such fixed exemptions can cause difficulties, as some areas which are outside the 56 km limit may be well-serviced with public transportation, while others within the limit may be poorly serviced. Fixed limits also make less sense in regional areas where people may routinely travel long distances. (notes omitted)

NSWLRC's recommendations

11.17 In New South Wales, the jury districts and their boundaries are determined administratively. Like Queensland, they do not encompass all areas of the State and there is to be no overlap between jury districts. Consequently, a person who is listed in one jury district is not to be listed, at the same time, in another jury district. The jury district boundaries have not, however, been defined by reference to that 56 km radius and have not been revised in several years.¹⁶⁵⁰

11.18 The NSW Law Reform Commission noted a number of concerns with the current system:¹⁶⁵¹

- In some areas, people are rarely, if ever, called to serve because jury trials are rarely, if ever, held in their jury districts.
- In other, more remote areas, people do not serve because they live more than 56 km away from the court. This reduces the available pool of jurors for some courts and 'imposes excessive obligations' on people who live close to the court.
- In some regions, people live close enough to two different courts to enable them to travel to either, but because they fall within one jury district only, they are not called to serve in the other jury district even though it may be a busier court.

11.19 To address these concerns, the NSWLRC supported the adoption of a 'smart electoral roll' and recommended that the Sheriff be able to access and use it. A smart electoral roll is maintained in 'real time'. It also has the capacity to be enhanced by attaching a 'geopositioning code' to individual residential properties, which would enable particular attributes such as the relevant state electoral district and local government area to be noted on it.¹⁶⁵² Further:¹⁶⁵³

A jury service area for each court, equivalent to the former 'jury districts', could be identified by drawing its boundaries and then linking it to the relevant geopositioning code for each property within those boundaries. The Electoral Commission would be able to provide the Sheriff with the relevant details of all electors within the jury service areas so determined.

1650 See generally New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [8.3]–[8.5].

1651 Ibid [8.18]–[8.21].

1652 Ibid [8.24]–[8.28], Rec 36.

1653 Ibid [8.28].

11.20 The *Jury Amendment Act 2010* (NSW) makes provision to broaden the Sheriff's capacity to cross-check data relating to a potential juror's residential address with records held by other Government agencies.¹⁶⁵⁴

11.21 The NSWLRC found that the 56 km radius 'is an inappropriate, arbitrary criterion for exemption as of right, or for the determination of an application to be excused, and should not be retained'.¹⁶⁵⁵ This entitlement to excusal will be removed by the *Jury Amendment Act 2010* (NSW).

LRCWA's recommendations

11.22 The Law Reform Commission of Western Australia noted that the jury districts for Broome, Derby, Carnarvon and Kununurra are limited to an 80 km radius from the courthouse, with the result that people beyond that radius will not be included in the pool of potential jurors unless they fall within another jury district.¹⁶⁵⁶

11.23 In those districts 'the required annual quota is higher than the number of eligible persons on the electoral roll in that jury district'.¹⁶⁵⁷ As a consequence, people can be required to serve on a jury more than once a year.¹⁶⁵⁸ Jury fatigue is one unwelcome consequence of this.¹⁶⁵⁹

11.24 The LRCWA invited submissions on whether those jury districts — or indeed jury districts in Western Australia generally — should be expanded:¹⁶⁶⁰

The Commission acknowledges that jury service may be extremely difficult for people who reside long distances from the courthouse.¹⁶⁶¹ However, expanding jury district boundaries would enable people who are currently excluded to participate in jury service and assist in reducing the burden on those people who reside closer to regional courts. It should not be assumed that everyone who resides further than 80 km from the court is unable to serve (eg, some people will have private transport and some people may be able to stay with friends or relatives during the trial). Further, the somewhat arbitrary cut off of 80 km may operate unfairly to those who reside within the 80 km boundary. For instance, a person who resides 79 km from the courthouse may have no access to transport but a person who resides 81 km may own a car and be able to serve. (note in original)

¹⁶⁵⁴ Specifically, it inserts a new s 75A into the *Jury Act 1977* (NSW) authorising the Sheriff to request information from the Roads and Traffic Authority for the purposes of checking the details of a person the Sheriff proposes to summon for jury duty.

¹⁶⁵⁵ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.64].

¹⁶⁵⁶ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 37.

¹⁶⁵⁷ *Ibid* 34.

¹⁶⁵⁸ *Ibid*.

¹⁶⁵⁹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 41.

¹⁶⁶⁰ *Ibid* 44.

¹⁶⁶¹ It is noted that jurors are eligible to be reimbursed for road travel (\$0.375 per km): *Juries Act 1957* (WA) s 58B(2); *Juries Regulations 2008* (WA) reg 5.

11.25 The LRCWA noted, for example, that the whole of the State of South Australia falls within one of three jury districts; people who live within 150 km of the court are generally expected to serve, but people who live more than 150 km from the court may opt out of jury service.¹⁶⁶²

11.26 The LRCWA recommended that the Western Australian 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:¹⁶⁶³

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.

INDIGENOUS PARTICIPATION

11.27 Although the Commission has limited information about the number of Indigenous people who are called for jury service or who are empanelled on juries,¹⁶⁶⁴ it is apparent that many Indigenous communities in Queensland fall outside the jury districts.

11.28 What research there is in relation to Indigenous representation on juries in Australia suggests that a very small percentage of jurors are Indigenous. As the NSW Law Reform Commission noted, this is all the more alarming because of the over-representation of Indigenous Australians as criminal defendants and in the prison population.¹⁶⁶⁵ At 30 June 2010, Indigenous prisoners represented 29.5% of the total prisoner population in Queensland and Indigenous Queenslanders were 15 times more likely than non-Indigenous Queenslanders to be in prison.¹⁶⁶⁶

11.29 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd provided the following anecdotal feedback from its regional offices:¹⁶⁶⁷

Next to no Indigenous Australian representation on juries involving Indigenous defendants. Our Townsville office indicated that since November 2008 — they have only had Indigenous Australian representation on juries 3 times (twice

¹⁶⁶² Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 44.

¹⁶⁶³ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 38, Rec 13.

¹⁶⁶⁴ See Chapter 4 above for information about Queensland's jury demographics.

¹⁶⁶⁵ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.35], and see the research cited there. See also M Israel, 'Juries, race and the construction of community' in AJ Goldsmith and M Israel (eds), *Criminal Justice in Diverse Communities* (2000) 96–112, 109.

¹⁶⁶⁶ Australian Bureau of Statistics, *Prisoners in Australia* (2010), Cat No 4517.0, 31.

¹⁶⁶⁷ Submission 43.

involving the same juror). Mount Isa — despite a relatively high local Indigenous Australian population — still very rare to have an Indigenous juror (at least for our clients). In Brisbane the few that are on the panel are invariably stood down by the Crown.

11.30 It is very difficult, however, to obtain a clear picture of the apparent under-representation of Indigenous people on Queensland juries in the absence of statistical research.

11.31 In 2006, Indigenous people made up 3.5% of the Queensland population.¹⁶⁶⁸ Some parts of Queensland, however, have higher Indigenous populations than others. Most 'local government areas'¹⁶⁶⁹ in Queensland have Indigenous populations of less than 10%, many less than 5%. There are several local government areas, however, with Indigenous populations of 90% or more. These are mostly small communities in remote areas of far northern and western Queensland.¹⁶⁷⁰

11.32 It is also clear that the areas with the highest Indigenous populations almost universally fall outside Queensland's jury district boundaries. District Court judges do, however, visit the remote Aboriginal and Islander communities on circuit for sentencing and civil matters. Judges sit in the 'Gulf (Mornington Island, Doomadgee and Normanton), the Cape (Weipa/Napranum, Kowanyama, Aurukun, Pormpuraaw and Lockhart River), Thursday Island, Bamaga, Yarrabah, Cooktown, Palm Island, and Woorabinda' and 'in Murgon to deal with Cherbourg matters'.¹⁶⁷¹

11.33 An estimate of the proportion of Indigenous people residing within each of Queensland's jury districts can be made by matching each jury district to the corresponding local government area. The current jury districts relate to local government areas established under the *Local Government Act 1993* (Qld). This is because, for the purpose of defining jury districts, 'a reference to a city or shire by name is a reference to the city or shire of that name declared as a local government area under the *Local Government Act 1993* as in force immediately before the changeover day'.¹⁶⁷²

1668 Australian Bureau of Statistics, *National Regional Profile: Queensland*, 'Population/People' (2008).

1669 Local government areas are 'spatial units which represent the geographical areas of incorporated local government councils' each of which has an official status, for example, as a City, Town or Shire: see Australian Bureau of Statistics, *National Regional Profile: Queensland* (2008) Glossary.

1670 See the Australian Bureau of Statistics, *National Regional Profile* (2008) for each of Queensland's local government areas
<<http://www.ausstats.abs.gov.au/ausstats/nrpmmaps.nsf/NEW+GmapPages/national+regional+profile?opendoc+ument>> at 1 June 2010. Those statistics are drawn from the 2006 Census of Population and Housing. The local government areas identified as having Indigenous populations of 90% or more are: Aurukun, Boigu, Cherbourg, Dauan, Doomadgee, Erub, Hammond, Hope Vale, Iama, Injinoo, Kowanyama, Kubin, Lockhart River, Mabuag, Mapoon, Mer, Mornington, Mapranum, New Mapoon, Palm Island, Pormpuraaw, Poruma, Saibai, St Pauls, Umagico, Warraber, Woorabinda, Wujal Wujal, Yarrabah, and Yorke.

1671 Queensland Courts, *District Court of Queensland Annual Report 2009–2010* (2010) 7. The Gulf Circuit (Doomadgee, Normanton and Mornington Island) is within the Mt Isa District, the Cape Circuit (Weipa, Aurukun, Pormpuraaw and Kowanyama) is within the Cairns District, the Thursday Island and Bamaga Circuit is within the Cairns District and the Cooktown Circuit (Hope Vale, Lockhart River and Cooktown) is within the Cairns District.

1672 *Jury Regulation 2007* (Qld) s 5(2)(b).

11.34 The following table therefore refers to the local government areas as they were under the (now repealed) *Local Government Act 1993* (Qld).¹⁶⁷³ These local government areas do not precisely correlate to Queensland's jury districts; in some instances, the relevant jury district boundaries may lie well inside those of the local government area. The following table shows, for each relevant local government area, the total population, the percentage of the population that is Indigenous, and the area's geographic classification.

Jury District	Local Government Area ('LGA')	Total LGA population	%age of LGA population that is Indigenous	LGA geographic classification ¹⁶⁷⁴
Beenleigh — Logan City and the area within a 20 km radius of the Beenleigh District Court	Logan (City)	178 320	2.7	Major city. Major urban.
Bowen — 20 km radius of District Court courthouse	Bowen (Shire)	13 142	7.2	Predominantly ¹⁶⁷⁵ outer regional. Predominantly other urban.
Brisbane — City of Brisbane, Pine Rivers Shire, Redcliffe City, Redland Shire	Brisbane (City)	992 176	1.4	Major city. Major urban.
	Pine Rivers (Shire)	144 862	1.4	Predominantly major city. Predominantly major urban.
	Redcliffe (City)	52 518	2.1	Major city. Major urban.

1673

When the local government area boundaries were changed in 2008, a number of areas were amalgamated: *Local Government Reform Implementation Act 2007* (Qld). For example, Pine Rivers Shire was amalgamated with the City of Redcliffe and Caboolture Shire to form the Moreton Bay Region; Hervey Bay was amalgamated with Maryborough, Woocoo Shire and part of Tiaro Shire to form the Fraser Coast Region; Emerald was amalgamated with Bauhinia Shire, Duaranga Shire and Peak Downs Shire to form the Central Highlands Region; Kingaroy was amalgamated with Murgon Shire, Nanango Shire and Wondai Shire to form the South Burnett Region; Maroochy Shire was amalgamated with Caloundra City and Noosa Shire to form the Sunshine Coast region; Roma Town was amalgamated with Bendemere Shire, Booringa Shire, Bungil Shire and Warroo Shire to form the Maranoa Region; and Stanthorpe Shire was amalgamated with Warwick Shire to form the Southern Downs Region.

1674

There are two types of geographical classifications indicated in this table. The first is classification into one of five remoteness areas which indicate the extent to which the area's geographic distances to the nearest town impose restrictions on the accessibility to the widest range of goods, services and opportunities for social interaction: 'major city' (minimal restriction); 'inner regional' (some restriction); 'outer regional' (moderate restriction); 'remote' (high restriction); and 'very remote' (the highest restriction): see Australian Bureau of Statistics, *National Regional Profile: Queensland* (2008), Explanatory Notes [65]–[69].

The second is the classification of an area as urban or rural. There are five categories: 'major urban' (population of 100 000 or more); 'other urban' (population from 1000 to 99 999); 'bounded locality' (population from 200 to 999); 'rural balance' (indicated in the table as 'rural', the remainder of the state or territory); and 'migratory' (areas composed of off-shore, shipping and migratory Collection Districts): see Australian Bureau of Statistics, *National Regional Profile: Queensland* (2008), Explanatory Notes [70]–[73].

1675

Where the word 'predominantly' is used, it indicates that between 75% and 94% of the population for the local government area falls within the particular classification; where the word 'predominantly' is *not* used, it indicates that 95% or more of the population for that area falls with the particular classification; the word 'combined' is used when two or more classifications together apply to the majority of the population.

Jury District	Local Government Area ('LGA')	Total LGA population	%age of LGA population that is Indigenous	LGA geographic classification ¹⁶⁷⁴
	Redland (Shire)	131 332	1.6	Major city. Predominantly major urban.
Bundaberg — 20 km radius of District Court courthouse	Bundaberg (City)	48 525	3.7	Inner regional. Other urban.
Cairns — 25 km radius of the Cairns courthouse	Cairns (City)	136 558	8.5	Outer regional. Predominantly major urban.
Charleville — 20 km radius of District Court courthouse	Murweh (Shire)	4870	11.1	Predominantly remote. Combined other urban and rural.
Charters Towers — 20 km radius of District Court courthouse	Charters Towers (City)	8469	10.9	Outer regional. Other urban.
Clermont — 20 km radius of District Court courthouse	Belyando (Shire)	11 185	1.7	Combined outer regional and remote. Combined other urban and rural.
Cloncurry — 20 km radius of District Court courthouse	Cloncurry (Shire)	3362	24.5	Predominantly remote. Other urban.
Cunnamulla — 20 km radius of District Court courthouse	Paroo (Shire)	2055	29.6	Very remote. Combined other urban and rural.
Dalby — 20 km radius of District Court courthouse	Dalby (Town)	10 384	6.5	Inner regional. Other urban.
Emerald — 20 km radius of District Court courthouse	Emerald (Shire)	15 364	3.2	Predominantly outer regional. Predominantly other urban.
Gladstone — 20 km radius of District Court courthouse	Gladstone (City)	31 028	3.9	Inner regional. Other urban.
Goondiwindi — 20 km radius of District Court courthouse	Goondiwindi (Town)	5019	5.7	Outer regional. Other urban.
Gympie — 20 km radius of District Court courthouse	Cooloola (Shire)	38 193	2.2	Predominantly inner regional. Combined other urban and rural.
Hervey Bay — 15 km radius of the Hervey Bay courthouse	Hervey Bay (City)	55 113	2.7	Inner regional. Predominantly other urban.

Jury District	Local Government Area ('LGA')	Total LGA population	%age of LGA population that is Indigenous	LGA geographic classification ¹⁶⁷⁴
Hughenden — 20 km radius of District Court courthouse	Flinders (Shire)	1907	8.5	Very remote. Combined other urban and rural.
Innisfail — 20 km radius of District Court courthouse	Johnstone (Shire)	19 517	8.2	Predominantly outer regional. Combined other urban and rural.
Ipswich — area of Bundamba, Ipswich and Ipswich West electoral districts	Ipswich (City)	143 649	3.6	Predominantly major city. Predominantly major urban.
Kingaroy — 20 km radius of Kingaroy courthouse and Cherbourg Shire	Kingaroy (Shire)	12 952	2.0	Predominantly inner regional. Combined other urban and rural.
	Cherbourg (Shire) ¹⁶⁷⁶	1241	97.6	Inner regional. Other urban.
Longreach — 20 km radius of District Court courthouse	Longreach (Shire)	3758	4.7	Very remote. Predominantly other urban.
Mackay — 20 km radius of District Court courthouse	Mackay (City)	90 303	4.2	Predominantly inner regional. Predominantly other urban.
Maroochydore — 20 km radius of District Court courthouse	Maroochy (Shire)	152 664	1.3	Combined major city and inner regional. Combined major and other urban.
Maryborough — 15 km radius of Maryborough courthouse	Maryborough (City)	27 211	3.5	Inner regional. Predominantly other urban.
Mount Isa — 20 km radius of District Court courthouse	Mount Isa (City)	21 082	18.9	Remote. Other urban.
Rockhampton — 20 km radius of District Court courthouse	Rockhampton (City)	62 610	6.3	Inner regional. Other urban.
Roma — 20 km radius of District Court courthouse	Roma (Town)	6955	9.4	Outer regional. Predominantly other urban.

1676

The first sittings for which Cherbourg electors were made available to the jury system was the Kingaroy sittings commencing 29 August 2005: see *District Court of Queensland Annual Report 2004–2005* (2005) 30.

Jury District	Local Government Area ('LGA')	Total LGA population	%age of LGA population that is Indigenous	LGA geographic classification ¹⁶⁷⁴
Southport — the area within Gold Coast City and south of the Beenleigh-Gold Coast dividing line	Gold Coast (City)	507 439	1.3	Major city. Major urban.
Stanthorpe — 20 km radius of District Court courthouse	Stanthorpe (Shire)	10 745	2.0	Outer regional. Combined other urban and rural.
Toowoomba — 20 km radius of District Court courthouse	Toowoomba (City)	96 226	3.4	Inner regional. Other urban.
Townsville — 25 km radius of Townsville courthouse	Townsville (City)	102 020	5.6	Outer regional. Predominantly major urban.
Warwick — 20 km radius of District Court courthouse	Warwick (Shire)	22 878	3.0	Predominantly inner regional. Combined other urban and rural.

Table 11.3: Indigenous population of jury districts by reference to local government areas¹⁶⁷⁷

11.35 As can be seen from this table, most of the jury districts are located in areas in which the percentage of Indigenous residents is small. There are some notable exceptions. The most obvious is the Kingaroy jury district which includes the Cherbourg Aboriginal Shire.¹⁶⁷⁸

11.36 Other jury districts located in areas that appear to have a higher than average percentage of Indigenous residents (although not nearly as high as Cherbourg Shire) include Cunnamulla, Cloncurry and Mount Isa, and, to a lesser extent, Charleville, Charters Towers, Roma, Cairns, Hughenden, and Bowen. The Commission is not aware of the extent to which Indigenous people are actually represented on juries in those districts. The Commission understands that jury trials are held in those locations as caseloads require.¹⁶⁷⁹

11.37 A number of different factors appear to contribute to the apparent under-representation of Indigenous people on juries. The major reason would seem to

¹⁶⁷⁷

The local government area data in this table is derived from the Australian Bureau of Statistics, *National Regional Profile* (2008) for each of Queensland's local government areas <<http://www.ausstats.abs.gov.au/ausstats/nrmaps.nsf/NEW+GmapPages/national+regional+profile>> at 1 June 2010. Those statistics are drawn from the 2006 Census of Population and Housing. In relation to the jury districts shown in column one, see [11.6]–[11.7] above. See also Queensland Showing Districts of the Supreme, District and Magistrates Courts <<http://www.courts.qld.gov.au/Maps/QLdCourtMaps2006.pdf>> at 20 February 2011; South East Queensland Court Maps <<http://www.courts.qld.gov.au/Maps/SEQldCourtMap2006.pdf>> at 20 February 2011.

¹⁶⁷⁸

As noted earlier, however, the lack of available transport to the courthouse in Kingaroy means that the inclusion of the Cherbourg Shire has not resulted in increased Indigenous representation in the Kingaroy jury district: see [11.10] above.

¹⁶⁷⁹

See District Court of Queensland, *Annual Report 2009–2010* (2010) 26.

follow, obviously enough, from the above data: Indigenous people often fall outside the jury district boundaries and thus do not appear on any jury lists. Other contributing factors have also been identified. For instance, it has been suggested that Indigenous people may be:¹⁶⁸⁰

- less likely to enrol to vote;¹⁶⁸¹
- transient and thus less likely to receive a jury summons, particularly if they are served by post, although the Law Reform Commission of Western Australia noted that ‘there does not appear to be any practical alternative to serving jury summonses by post’;¹⁶⁸²
- more likely to be disqualified on the basis of criminal convictions due to the disproportionate representation of Aboriginal people in the criminal justice system;¹⁶⁸³
- disqualified from serving because of a poor command of standard English;¹⁶⁸⁴ and
- more likely, in regional areas, to know the accused or a witness, and seek excusal or be ineligible on this basis, or otherwise be reluctant or unable to serve because of cultural issues.

NSWLRC’s recommendations

11.38 In its Report on jury selection, the NSW Law Reform Commission had regard to concerns about Indigenous under-representation on juries in consideration of a number of issues. It noted, for instance, that Indigenous people may be disproportionately excluded from jury service on the basis of the criminal history disqualification. In its view, the existing disqualification provision — which applies to a person who has served a sentence of imprisonment at any time in the preceding 10 years — is too wide and it therefore recommended that it be reformulated.¹⁶⁸⁵ The *Jury Amendment Act 2010* (NSW) removes the uniform 10

¹⁶⁸⁰ See Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 47; New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.36] and the authorities cited there; M Israel, ‘Ethnic bias in jury selection in Australia and New Zealand’ (1998) 26 *International Journal of the Sociology of Law* 35–54; and M Israel and S Hutchings, *Aboriginal People and Juries: Does the Composition of the Jury Matter? A Report for the Division of State Aboriginal Affairs, South Australia* (1998).

¹⁶⁸¹ See [6.14] above. The Australian Electoral Commission’s North and Central Australia Remote Area Strategy (NACARAS) is encouraging enrolment in divisions that ‘cover a large area, contain a number of small isolated communities, have high proportions of culturally and linguistically diverse Indigenous people and receive very limited or no mail delivery’: *AEC Annual Report 2009–10* (2010) 39.

¹⁶⁸² Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 47.

¹⁶⁸³ See [6.57] above.

¹⁶⁸⁴ See [8.54] above.

¹⁶⁸⁵ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.19], [3.23], Rec 4.

year exclusion after any term of imprisonment and replaces it with a graduated scheme for the exclusion of people on the basis of their criminal history.¹⁶⁸⁶

11.39 The NSWLRC also noted anecdotal evidence that Indigenous people are subject to peremptory challenge in cases involving Indigenous defendants. It recommended a requirement for leave of the court to enlarge, by agreement between the parties, the number of peremptory challenges that may be made and that the right of peremptory challenge be kept under review.¹⁶⁸⁷

11.40 The NSWLRC also noted the possibility of under-enrolment of Indigenous people on the electoral roll and their consequent exclusion from the pool of potential jurors. It considered, but rejected, the idea of supplementing the electoral roll as the basis for selecting jurors with other databases in an attempt to capture people who are eligible but neglect to enrol. It considered that this would involve practical difficulties. It also considered that access to more up-to-date electoral information, through a smart roll, would help address this concern.¹⁶⁸⁸

LRCWA's recommendations

11.41 The Law Reform Commission of Western Australia noted that 'although it is often claimed that Aboriginal people are under-represented as jurors there is no accurate and up-to-date statewide data to confirm this view'.¹⁶⁸⁹

11.42 The LRCWA did refer to one exit survey in which only 1% of jurors self-identified as being Indigenous. Since Aboriginal and Torres Strait Islander people comprise 1.5% of the metropolitan population, this result suggests that Indigenous people are slightly under-represented as jurors in the metropolitan area. The LRCWA also noted, however, that, while there were no statistics available for regional areas, the proportion of Indigenous people in those areas is much higher and anecdotal information suggests that they are relatively well represented on juries.¹⁶⁹⁰

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 ...

¹⁶⁸⁶ These provisions are discussed in Chapter 6 of this Report.

¹⁶⁸⁷ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.30]–[10.32], [10.42], Rec 43, 44. Those recommendations are discussed in Chapter 10 of this Report.

¹⁶⁸⁸ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [2.19], [2.27], Rec 1. The NSWLRC's recommendation in relation to the smart electoral roll is discussed at [11.19] above.

¹⁶⁸⁹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 34.

¹⁶⁹⁰ *Ibid* 34, note 3. The Juries Legislation Amendment Bill 2010 (WA) makes a number of amendments to the *Juries Act 1957* (WA) to broaden community representation on juries.

11.43 The LRCWA concluded that its proposals in relation to increasing participation in regional areas generally¹⁶⁹¹ should assist in improving participation rates by Aboriginal people.¹⁶⁹²

Discussion Paper

11.44 In its Discussion Paper, the Commission raised a number of issues for consideration in relation to jury district boundaries and Indigenous participation on juries. The Commission did not reach a provisional view on those issues, but sought submissions on the following questions:¹⁶⁹³

- 11-3 In what ways can the under-representation of Indigenous people on juries in Queensland be addressed?
- 11-4 Should Indigenous representation on juries in Queensland be the subject of specific and ongoing research?
- 11-5 Should any jury districts for jury trials be expanded or otherwise modified?
- 11-6 Should transport and accommodation be provided for people in outlying areas who are summoned to jury service and who cannot otherwise reach the court?

Consultation

General comments

11.45 The Indigenous Lawyers Association of Queensland referred generally to the importance of Indigenous participation in the jury system:¹⁶⁹⁴

It is important that indigenous people are included in the criminal justice process. Participating as members of a jury is a significant role that indigenous people can play in that process. Acting as a juror increases indigenous peoples' exposure to the Court process and permits indigenous people to view that process not from the perspective of the accused, the complainant or as a witness, but as a decision maker who may have a real impact on the outcome of the proceedings.

Exclusion from the criminal justice process is still a common feeling held in the indigenous community and with that feeling comes a sense of injustice and distrust. Perhaps, best illustrated by the example given in the discussion paper, of the idea of the trial by 'one's peers'. In our view, while that may be a notion held in the wider community, it is not a notion that is commonly held by indigenous people. ...

¹⁶⁹¹ See [11.26] above.

¹⁶⁹² Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 34.

¹⁶⁹³ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [11.61]–[11.68], Questions 11-3 to 11-6.

¹⁶⁹⁴ Submission 65.

Indigenous peoples' sense of exclusion from the criminal justice process is exemplified by the limited number of indigenous people who act in significant roles in the criminal justice system, whether it be as a Judge, a Magistrate, Counsel or a Solicitor, the number of indigenous people in these roles is limited. This is due to the requirement for high levels of education and training that has not always been accessible to indigenous people. Acting as a juror does require a person to possess a number of certain skills, however, this role does not require the years of study and training that is required in the other roles, making the role of a juror more accessible to all in the community including indigenous people.

11.46 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd ('ATSILS') referred generally to the barriers that face Aboriginal and Torres Strait Islander people in undertaking jury service.¹⁶⁹⁵

Given the higher proportion of Aboriginal and Torres Strait Islander peoples compared to the general population, from a low socioeconomic background, it is more likely that there will be greater issues in fronting for jury service due to transportation issues, financial constraints, care for children and others, proficiency in English, criminal records, as well as family, cultural and community commitments.

11.47 ATSILS considered that current jury selection processes have not resulted in a representative number on juries of members of minority groups within the community, such as Aboriginal and Torres Strait Islander people. It emphasised the importance of increasing Indigenous representation on juries in order to gain the confidence of Aboriginal and Torres Strait Islander people in the legal system.¹⁶⁹⁶

We view such representation as a fundamental issue to enable the community and defendants to gain confidence in the criminal justice system.

11.48 ATSILS expressed general support for a range of practical strategies to increase the representation of Aboriginal and Torres Strait Islander people on juries in Queensland. These include: changing or relaxing the disqualification criteria in regard to proficiency in English, and narrowing the exclusions in section 4(3)(m) and (n) of the *Jury Act 1995* (Qld) so as not to exclude people who have committed 'the more minor indictable offences'.

11.49 However, ATSILS also considered that there is a need to address what it viewed as the 'systemic inequalities' of the current process of jury selection in excluding Indigenous jurors.¹⁶⁹⁷

We also wish to advise that the solutions we are advocating are limited to those that will make an immediate impact. We view increasing levels of education and literacy, decreasing incarceration rates and encouraging people to register to vote as just some of the important longer term options to increase Aboriginal and Torres Strait Islander peoples presence on juries. However, we also reiterate what we said above in regard to the systemic inequalities of the present jury selection process in excluding Aboriginal and Torres Strait Islander

1695 Submission 43.

1696 Ibid.

1697 Ibid.

peoples. We do not view rectification of the exclusion of Aboriginal and Torres Strait Islander people occurring without meaningful changes.

11.50 ATSILS expressed support for the adoption of some of the recommendations made by the American non-profit law organization, the Equal Justice Initiative, in its report on *Illegal Racial Discrimination in Jury Selection*, including that:¹⁶⁹⁸

Support and assistance should be provided by justice systems to ensure that those who are often excluded from jury service because of their lack of means (such as low-income earners, single parents or carers) have an opportunity to serve.

11.51 A legal academic commented on the importance of all citizens having an opportunity to serve as jurors, and suggested that this would require a range of approaches:¹⁶⁹⁹

Greater importance needs to be placed on the value of all citizens having the opportunity to participate as jurors and a clear and focused effort needs to be put into achieving the goal of greater participation. This will require a multi-pronged approach including:

- Collaboration with the relevant agencies and organisations that work with Indigenous people and communities to increase enrolment;
- Legislative changes to address issues such as those related to criminal histories (this issue has been considered in other contexts such as the issue of Blue Cards and eligibility for JP (Quals) and JP (Mag)) ...

11.52 The Department of Communities also expressed support for a range of strategies to increase Indigenous representation on juries, including increased electoral enrolment, and changes in the requirements of juror qualification to enable people with minor criminal histories to serve on juries.¹⁷⁰⁰

Jury districts

11.53 The Department of Justice and Attorney-General expressed the general view that Queensland's jury districts should be 'reconsidered in light of modern transport methods':¹⁷⁰¹

It is not uncommon for individuals to commute for an hour or more each day to reach a place of employment, however if you reside outside of a particular radius from the courthouse you are unlikely to ever be called upon to complete jury service.

1698 Ibid referring to Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, Report (2010).

1699 Submission 66.

1700 Submission 35A. Aboriginal and Torres Strait Islander Services is part of the Department of Communities.

1701 Submission 56.

11.54 A legal academic considered that the expansion of jury districts might make juries more representative, without creating problems in obtaining an impartial jury:¹⁷⁰²

Changes to jury districts would allow, for example, for the selection of people living in the Torres Strait to sit on a jury in Cairns. The likelihood of the juror knowing the defendant is significantly reduced, particularly if the defendant is a non-Indigenous person.

11.55 The Department of Communities expressed support for a range of strategies to increase Indigenous representation on juries, including expansion of the current jury districts.¹⁷⁰³

11.56 However, the Queensland Law Society did not appear to support the expansion of existing jury districts. It considered that residence in a jury district is 'the only suitable method of selecting potential jurors', and did not consider that Indigenous persons should be summoned from outlying areas:¹⁷⁰⁴

The issue of under-representation of Indigenous persons on Queensland juries is difficult. The only suitable method of selecting potential jurors is from the Electoral Roll, combined with the person living in the requisite radius from the court house. To impose a system where indigenous persons are summonsed from more further reaching localities would only create hardship, particularly in regional areas.

Transport and accommodation

11.57 A legal academic commented that practical barriers to participation, such as the cost of travel, need to be addressed.¹⁷⁰⁵

Transport and accommodation should be provided to those people living in rural or remote parts of Queensland to allow them an equal opportunity to participate as citizens in the legal system.

11.58 Although the Queensland Law Society did not support the extension of the current jury districts, it did support the provision of transport and accommodation to enable people in outlying areas to attend court for jury service:¹⁷⁰⁶

Transport and accommodation support for persons outside the reach of the court is the only sensible way of requiring persons in those outlying areas to attend.

11.59 However, the Department of Justice and Attorney-General did not consider that transport or accommodation should be provided for prospective jurors in outlying areas who cannot otherwise reach the court.¹⁷⁰⁷

1702 Submission 66.

1703 Submission 35A. Aboriginal and Torres Strait Islander Services is part of the Department of Communities.

1704 Submission 52.

1705 Submission 66.

1706 Submission 52.

Education

11.60 A legal academic commented that the range of factors required to increase Indigenous participation on juries included community education on the role of juries, jurors, and the importance of participating in this part of the legal system.¹⁷⁰⁸

Research

11.61 The Indigenous Lawyers Association of Queensland considered that, because much of the available information about the participation of Indigenous people in the jury system is anecdotal, research should be carried out in relation to that issue.¹⁷⁰⁹

11.62 The Department of Communities, the Queensland Law Society, the Department of Justice and Attorney-General and a legal academic also agreed that further research should be undertaken on the issue of Indigenous representation on juries.¹⁷¹⁰

The Commission's view

Introduction

11.63 It is widely accepted that representativeness is an essential feature of the institution of trial by jury.¹⁷¹¹ It is not simply that it is important for Indigenous defendants to have the opportunity to be tried by juries that include Indigenous jurors. Representativeness requires that there is proper representation of Indigenous people on juries irrespective of whether the defendant is Indigenous.

11.64 Further, as the Indigenous Lawyers Association of Queensland observed, the increased representation of Indigenous people on juries is also important in terms of reducing the sense of exclusion from the criminal justice system that is experienced by many Indigenous people.¹⁷¹²

11.65 Earlier in this Report, the Commission has made a number of recommendations that are aimed at increasing the representativeness of juries. In particular:

- In Chapter 6, the Commission has made a number of recommendations that will ameliorate the disqualifying effect of a person's criminal history. In particular, the Commission has recommended that:

1707 Submission 56.

1708 Submission 66.

1709 Submission 65.

1710 Submissions 35A, 52, 56, 66.

1711 See, for example, *Cheatle v The Queen* (1993) 177 CLR 541, 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), which is referred to at [5.7] above.

1712 See [11.45] above.

- section 4(3)(m) of the *Jury Act 1995* (Qld) be amended so that a conviction in relation to an indictable offence does not exclude a person from jury service if the conviction is heard and determined summarily; and
 - the operation of section 4(3)(m) and (n) is to be subject to the operation of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), so that these provisions will not exclude a person if the rehabilitation period in relation to a relevant conviction has expired and the conviction has not been revived.
- In Chapter 8, the Commission has recommended that the exclusion in section 4(3)(k) be amended to provide that a person who is unable to understand, and communicate in, English well enough to enable the person to discharge the duties of a juror effectively is ineligible for jury service. At present, that section excludes a person who ‘is not able to read or write the English language’.

11.66 While these recommendations are not directed specifically at Indigenous people, it is anticipated that they should nonetheless contribute to an increased representation of Indigenous people on juries.

11.67 In this chapter, the Commission has examined a number of measures that are specifically directed to increasing Indigenous participation on juries. In considering these measures, the Commission has been acutely aware that the under-representation of Indigenous people has a multiplicity of causes, and that no single recommendation will, of itself, redress this situation. Not surprisingly, the recommendations made in this chapter do not generally involve legislative changes; rather, the Commission’s recommendations reflect the practical nature of many of the current barriers to Indigenous representation on juries, and represent a practical response to those barriers.

11.68 Most of the Commission’s recommendations in this chapter will have resource implications for either the Sheriff or the Department of Justice and Attorney-General. It is important that appropriate funding be provided to ensure that the practical steps recommended in this chapter can be implemented. In the absence of that funding, it cannot realistically be expected that the current situation will improve.

Review of jury districts

11.69 At present, one of the major obstacles to Indigenous representation on Queensland juries is the fact that most Indigenous people reside outside a jury district, and are therefore not eligible to serve on a jury. Given the importance of ensuring the representativeness of Queensland juries and, in particular, a greater inclusion of Indigenous people, the Commission recommends that the Department of Justice and Attorney-General should, as a priority, review the current jury districts.

11.70 The Commission understands that, when the jury districts were last reviewed in 2005, it was a recommendation of that review that the districts be reviewed every five years.¹⁷¹³ In the meantime, the *Local Government Act 1993* (Qld) has been repealed and new local government areas have been formed under the *Local Government Reform Implementation Act 2007* (Qld). As a result, the jury districts provided for by the *Jury Regulation 2007* (Qld) are based on local government areas that no longer exist. This change provides a further reason to review the jury districts to ensure that they still provide a rational basis for the selection of jurors.

11.71 The Commission notes that Queensland is one of the few Australian jurisdictions that fixes the boundaries of most of its jury districts by reference to a specific distance from the relevant courthouse.¹⁷¹⁴ The recommended review should specifically consider whether:

- the system for jury districts should instead be modelled on the new local government areas established by the *Local Government Reform Implementation Act 2007* (Qld), or at least sections of those areas; and
- whether there are additional Indigenous communities that are sufficiently proximate to a courthouse so that they could be included within a revised jury district.

11.72 In considering the latter issue, regard should be had to the Commission's recommendations below in relation to the provision of transport and accommodation to assist people from Indigenous communities to attend court for jury service.

Transport

11.73 The lack of available transport for potential jurors from the Cherbourg Aboriginal Shire to the Kingaroy District Court has been identified as a reason for the lack of participation of Indigenous people from that Shire on juries for trials held in Kingaroy.¹⁷¹⁵ Unless arrangements can be made to provide transport options, the inclusion of Indigenous communities within jury districts will not, of itself, result in increased representation.

11.74 At present, the *Jury Regulation 2007* (Qld) makes provision for the reimbursement of taxi fares if public transport is not reasonably available. Because the *Notice to Prospective Juror* does not mention the reimbursement of taxi fares, it is possible that many people may not be aware of this entitlement. In Chapter 12, the Commission has recommended that the Notice be amended to provide this information.¹⁷¹⁶ However, even with that knowledge, the requirement to incur this expenditure upfront may still constitute a barrier to participation.

1713 Department of Justice and Attorney-General, *Review of Jury Districts* (2005) 17.

1714 See [11.12] above.

1715 See [11.10] above.

1716 See Recommendation 12-4 of this Report.

11.75 The Commission is therefore of the view that, if public or private transport is not reasonably available or cannot reasonably be used, the Sheriff should, if necessary, make arrangements, in advance, to assist people from Indigenous communities to attend court when summoned for jury service. The Sheriff should also meet the costs of those arrangements.

11.76 These measures involve an instance of taking positive steps to increase Indigenous participation on juries.¹⁷¹⁷

Accommodation

11.77 If it is not reasonably practicable for a person from an Indigenous community to travel each day to attend court for jury service, accommodation should be arranged, and funded, to enable the person to attend.

11.78 In such a case, the distance to the courthouse might mean that the person would also have a strong case for excusal on the ground of substantial inconvenience. If, however, the person is willing to serve and does not wish to be excused, the Sheriff should make arrangements to accommodate the person.

Education

11.79 In September 2009, the Chief Justice of the Supreme Court, the Honourable Paul de Jersey AC, and the then Attorney-General, the Honourable Cameron Dick MP, launched a campaign to encourage more Queenslanders to take part in jury duty.¹⁷¹⁸

11.80 The Commission considers that additional educational programs should be developed for Indigenous communities, to promote the importance of jury service and the benefits of participating in the jury system, and to address any concerns that Indigenous people are likely to have about serving on a jury.

11.81 The educational programs should be specifically tailored for these communities, and should be delivered in a way that is culturally appropriate. They should use a variety of methods, materials and media, such as radio programs, videos and promotional visits to the Indigenous communities. They should also include presentations by Indigenous lawyers and Indigenous community leaders. Community Justice and other Indigenous groups should also be approached to assist in the design and implementation of these programs.

Research

11.82 There is a general lack of research and data that establishes the exact extent of any disparity in representation for Indigenous people on jury panels in Queensland.

¹⁷¹⁷ See *Anti-Discrimination Act 1991* (Qld) ss 104, 105.

¹⁷¹⁸ Attorney-General and Minister for Industrial Relations, 'Attorney-General encourages Queenslanders to participate in jury duty' (Ministerial Media Statement, 24 September, 2009) <<http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=66523>> at 17 February 2011.

11.83 The Commission is of the view that research should be conducted to determine the actual extent of representation of Indigenous people on juries in Queensland and the factors that may increase or reduce their rate of participation in jury service. Comprehensive qualitative and quantitative research is necessary to identify and understand fully the cultural, educational, geographic and other barriers to jury participation for Indigenous people, and to evaluate possible options for the continued improvement of Indigenous participation on juries.¹⁷¹⁹

11.84 To facilitate the collection of data for research into the extent of Indigenous participation, the *Questionnaire for Prospective Juror* that is included with the *Notice to Prospective Juror* should be changed to include an additional question that asks jurors whether they identify as being an Aboriginal or Torres Strait Islander person. However, this information should not be included on the jury roll that is kept for the relevant jury district because of the risk that the information could be used in a discriminatory way.

Establishment of working group

11.85 The Commission considers that the effectiveness of changes made as a result of the recommendations in this report, to the extent that those changes relate to the participation of Indigenous people on juries, should be monitored to ensure that the reforms are having their intended effect.

Recommendations

11.86 The Commission makes the following recommendations:

Review of jury districts

11-1 The Department of Justice and Attorney-General should, as a priority, review the current jury districts with a view to increasing the representativeness of juries. In particular, specific consideration should be given to the inclusion of additional Indigenous communities.

¹⁷¹⁹

One such barrier may be the adequacy of mail deliveries in some communities and whether this affects the timely service and return of Notices and Summonses. See, for example, Australian Bureau of Statistics, Australian Social Trends, 2003, Services and Assistance, *Services in Remote Aboriginal and Torres Strait Islander Communities*, 7; Australian Financial Counselling and Credit Reform Association, *ATM Fees in Indigenous Communities*, November 2010, 11 <<http://www.apo.org.au/sites/default/files/ATM%20Fees%20in%20Indigenous%20Communities.pdf>> at 24 February 2011; Australian Government Office of the Coordinator-General for Remote Indigenous Services, *The Governance and Capacity Gap*, Rec 2.1.<<http://www.cgris.gov.au/site/qcg.asp>> at 24 February 2011.

Transport

- 11-2 If public or private transport is not reasonably available or cannot reasonably be used, the Sheriff should, if necessary, make arrangements, in advance, to assist people from Indigenous communities to attend court when summoned for jury service, and should meet the costs of those arrangements.

Accommodation

- 11-3 If it is not reasonably practicable for a person from an Indigenous community to travel each day to attend court for jury service, accommodation should be arranged, and funded, to enable the person to attend.

Education

- 11-4 Culturally appropriate educational programs that promote the importance and benefits of jury service should be developed and made available within Indigenous communities.

Research

- 11-5 Research should be conducted to determine the extent of representation of Indigenous people on juries in Queensland and the factors that may increase or reduce their rate of participation in jury service.
- 11-6 The *Questionnaire for Prospective Juror* that is included with the *Notice to Prospective Juror* should be changed to include an additional question that asks jurors whether they identify as being an Aboriginal or Torres Strait Islander person. However, this information should not be included on the jury roll that is kept for the relevant jury district.

Establishment of a working group

- 11-7 The Department of Justice and Attorney General should establish a Working Group to ensure that any reforms made under the proposed review of the jury districts, and any other changes made as a result of the recommendations in this Report to the extent that they relate to the participation of Indigenous people on juries, are effective and achieve their aims.

JUDICIAL POWER TO DIRECT THE COMPOSITION OF THE JURY

11.87 As mentioned in Chapter 5 of this Report, juries *de medietate linguæ*, whose compositions were deliberately mixed and which allowed the parties' own language and customs to be considered, were once used in cases involving merchants from other countries, but have been unavailable in Queensland for many years.¹⁷²⁰

11.88 Nevertheless, there have been some cases, although rare, in which Indigenous defendants have argued, unsuccessfully, that the right to a fair trial required that there be at least some Indigenous people on their juries.¹⁷²¹ At least one attempt has also been made by a defendant to secure an all-male jury on the basis that it was against his beliefs to be tried by women.¹⁷²² Although the trial judge in that case allowed the defendant's challenge for cause against all of the women on the jury panel, the Full Court of the Supreme Court of Queensland subsequently held that the women were qualified to be jurors, that the jury had not been chosen according to law, and that the subsequent proceedings were therefore a nullity.

11.89 Suggestions have also been made from time to time for the use of specially formed juries that contain people from the same racial or ethnic background as the defendant. For instance, in his review of juries in New South Wales for the Australian Institute of Judicial Administration in the 1990s, then Associate Professor Mark Findlay commented that:¹⁷²³

the 57 juries studied as part of this exercise were particularly representative in terms of age, gender and education. However, because of the characteristics of the accused, or the nature of the circumstances, certain trials might arguably require a jury with particular age, gender or ethnic/racial representatives if the concept of the 'communion of peers' is to have any reality.

11.90 In its 1993 Report on criminal justice, the Runciman Royal Commission in the United Kingdom recommended a specific procedure in trials 'believed to have a racial dimension' which would allow the selection of a jury containing up to three people from 'ethnic minority communities':¹⁷²⁴

1720 See n 299 above.

1721 Eg *R v Walker* [1989] 2 Qd R 79; *Binge v Bennett* (1989) 42 A Crim R 93. See also Australian Institute of Judicial Administration (S Fryer-Smith), *Aboriginal Benchbook for Western Australian Courts* (2nd ed, 2008) [7.2.3]. There is clearly a risk that a minority group that 'is in conflict with much of the rest of society, is over-represented among offenders and sees the criminal justice system as an instrument of oppression used against it by the majority' will not consider the jury to be representative if the group is not represented on it: M Israel, 'Juries, race and the construction of community' in AJ Goldsmith and M Israel (eds), *Criminal Justice in Diverse Communities* (2000) 96–112, 99.

1722 *R v A Judge of the District Courts & Shelley* [1991] 1 Qd R 170.

1723 Australian Institute of Judicial Administration (M Findlay et al), *Jury Management in New South Wales* (1994) 177. See also J Horan and D Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 182–3, in which Findlay's comment is quoted.

1724 The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO (1993) ch 8 [62]–[63].

We are reluctant to interfere with the principle of random selection of juries. We are, however, anxious that everything possible should be done to ensure that people from the ethnic minority communities are represented on juries in relation to their numbers in the local community. The pool from which juries are randomly selected would be more representative if all eligible members of ethnic communities were included on the electoral roll. Even if this were to be achieved, however, there would statistically still be instances where there would not be a multi-racial jury in a case where one seemed appropriate. The Court of Appeal in *Ford*¹⁷²⁵ held that race should not be taken into account in selecting juries. Although we agree with the court's position in regard to most cases, we believe that there are some exceptional cases where race should be taken into account.

We have therefore found very relevant a proposal made to us by the Commission for Racial Equality (CRE) for a specific procedure to be available where the case is believed to have a racial dimension which results in a defendant from an ethnic minority community believing that he or she is unlikely to receive a fair trial from an all-white jury. The CRE would also like to see the prosecution on behalf of the victim be able to argue that a racial dimension to the case points to the need for a multi-racial jury. In such cases the CRE propose that it should be possible for either the prosecution or the defence to apply to the judge before the trial for the selection of a jury containing up to three people from ethnic minority communities. If the judge grants the application, it would be for the jury bailiff to continue to draw names randomly selected from the available pool until three such people were drawn. We believe that, in the exceptional case where compelling reasons can be advanced, this option, in addition to the existing power to order that the case be transferred to another court centre, should be available and we so recommend. However, we do not envisage that the new procedure should apply (as proposed by the CRE) simply because the defendant thinks that he or she cannot get a fair trial from an all-white jury. The defendant would have to persuade the judge that such a belief was reasonable because of the unusual and special features of the case. Thus, a black defendant charged with burglary would be unlikely to succeed in such an application. But black people accused of violence against a member of an extremist organisation who said they had been making racial taunts against them and their friends might well succeed. (note in original)

11.91 These recommendations were not implemented, and Findlay, quoted above, went on to argue that 'such direct intervention by the judiciary to "stack" juries does not seem warranted either in principle or in fact' without further evidence that juries are racially or ethnically imbalanced or that particular classes of defendants are disadvantaged by the 'general community "mix" of juries'.¹⁷²⁶ However, Lord Justice Auld proposed something similar in his review:¹⁷²⁷

I believe that the practical problems, in devising a procedure, in appropriate cases, to ensure a wider racial mix and to balance any competing interests of defendant and complainant, are not insurmountable. The Central Summoning Bureau could ask potential jurors to state their ethnic origins, a question asked in the census. If they don't want to say, they need not do so. The parties could

¹⁷²⁵ 3 A.E.R. 445 [1989] QB 868.

¹⁷²⁶ Australian Institute of Judicial Administration (M Findlay et al), *Jury Management in New South Wales* (1994) 177.

¹⁷²⁷ Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [60]–[61].

be required to indicate early in their preparation for the pre-trial assessment whether race is likely to be a relevant issue and, if so, whether steps should be taken to attempt to secure some ethnic minority representation on the jury. This could be done by the empanelment of a larger number of jurors than normal from which the jury for the case is to be selected, some of whom would be identified by their juror cards as from ethnic minorities. It may be necessary to allow a longer period of notice in such cases than the standard summons period of eight weeks ahead. The first nine selected would be called to serve and, if they did not include a minimum of — say three — ethnic minority jurors, the remainder would be stood down until the minimum was reached. My recommendations for widening the pool of potential jurors so as to include better ethnic minority representation country-wide, if adopted, should go some way to assist in securing sufficient ethnic minority members of court panels to make such a scheme feasible.

As to the suggested difficulty where the defendant and the complainant are of different ethnic origin, the judge's ruling would be for a racially diverse jury in the form that I have suggested, not that it should contain representatives of the particular ethnic background on either side. Any question as to who would qualify as an ethnic minority for this purpose should be an implementation issue to be resolved in consultation with the Commission for Racial Equality and other relevant groups. (note omitted)

11.92 More recently, however, the Law Commission of New Zealand specifically considered, and rejected, the possibility of empowering trial judges to direct that people of the same ethnic identity as the defendant or alleged victim serve on the jury.¹⁷²⁸

11.93 The NSW Law Reform Commission also rejected the notion of introducing special panels to hear charges against Indigenous defendants.¹⁷²⁹ Neither did the Law Reform Commission of Western Australia consider that deliberate methods should be employed to place Aboriginal people on jury lists or on juries:¹⁷³⁰

these types of deliberate selection methods would unjustifiably interfere with the principle of random selection and, further, there is insufficient evidence to suggest that such radical measures are necessary in Western Australia.

11.94 As was discussed in Chapter 10 of this Report, trial judges in Queensland already have express power to deal with a jury whose composition appears to be unfair. The judge may discharge the jury, and require a new jury to be selected from the panel, if the judge considers that the challenges made to the prospective jurors have 'resulted in a jury of a composition that may cause the trial to be, or appear to be, unfair'.¹⁷³¹ A similarly worded power applies in New South Wales.¹⁷³²

¹⁷²⁸ Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [160]. See also Law Commission of New Zealand, *Juries in Criminal Trials: Part One*, Preliminary Paper 32 (1998) [293]–[295].

¹⁷²⁹ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.51]–[1.53].

¹⁷³⁰ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 46–7.

¹⁷³¹ *Jury Act 1995* (Qld) s 48.

¹⁷³² *Jury Act 1977* (NSW) s 47A.

Discussion Paper

11.95 In its Discussion Paper, the Commission expressed the provisional view that it would be inappropriate to make provision allowing the trial judge to direct the ethnic, racial or gender composition of the jury. The Commission sought submissions on the following proposal:¹⁷³³

- 11-7 There should not be any provision to allow a trial judge to direct that the jury must contain persons from the same ethnic or racial background or gender as the defendant.

Consultation

11.96 The Department of Communities, the Queensland Law Society, and the Department of Justice and Attorney-General each agreed that there should not be any provision to allow a trial judge to direct that the jury must contain persons from the same ethnic or racial background or gender as the defendant.¹⁷³⁴

11.97 The Department of Communities submitted:¹⁷³⁵

The discussion paper indicates that the QLRC does not consider there should be a provision to allow a trial judge to direct that the jury must contain people from the same ethnic or racial background as the defendant. The department agrees with this view on the basis that family and community connections to the defendant, complainant and witnesses may compromise objectivity making jury selection very difficult.

11.98 As noted above, that respondent preferred the adoption of alternative strategies to increase Indigenous representation on juries.¹⁷³⁶

11.99 The Indigenous Lawyers Association of Queensland cautioned against the adoption of an approach that would allow judges to direct the composition of the jury:¹⁷³⁷

We would caution against the approach suggested in the discussion paper that one way to increase the number of indigenous people acting as jurors would be to use judicial power to direct the composition of the jury. While that would see an increase in the number of indigenous people participating on juries, any benefit may be outweighed by the impact on the rights of an accused.

11.100 The Queensland Law Society submitted that jury selection should continue to be random:¹⁷³⁸

1733 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [11.77]–[11.79], Proposal 11-7.

1734 Submissions 35A, 52, 56.

1735 Submission 35A. Aboriginal and Torres Strait Islander Services is part of the Department of Communities.

1736 See [11.52] above.

1737 Submission 65.

1738 Submission 52.

There is no need at all for a trial Judge to descend into the ethnic make up of a jury and to do so may cause unnecessary delays to trials. Objections to the ethnic, racial or gender of a jury may be wide. The make up of a jury must remain random as it is now.

11.101 However, ATSILS commented that the process of selecting juries by random selection fails to be representative, and address the needs, of minority community groups, such as Aboriginal and Torres Strait Islander people:¹⁷³⁹

Processes which try to reflect the community in the broadest sense tend to capture the dominant class and fail to cater for the most vulnerable and those most exposed to injustices because of their position in the community. This entrenches the lack of power of a class of people who continue to be represented and have decisions made on their behalf by the dominant class lacking in understanding of the issues faced and experiences endured.

One person's community might be different to that of another person's, even though they might be living in the same vicinity — depending upon how the word community is defined. This is problematic in terms of ensuring that juries are selected from and are representative of a defendant's community in the case of defendants from minority groups in particular.

11.102 As noted earlier, ATSILS supported a range of practical measures to increase the pool of potential Indigenous jurors and gain a better racial balance on jury source lists.¹⁷⁴⁰ However, it also commented that simply tweaking the existing system 'will not bring about the change required to ensure that juries are representative of Indigenous peoples'. It referred to the view expressed by the Australian Law Reform Commission that 'better selection procedures need to be adopted to ensure that juries are representative of Indigenous peoples'.¹⁷⁴¹

11.103 ATSILS expressed some support for the introduction of a provision to allow a trial judge to direct that a jury must contain jurors, or a certain number of jurors, from the same racial minority group as the defendant, regardless of whether race is an issue. In suggesting this, it emphasised the value and importance of a racially diverse jury. ATSILS cited American research that showed that racially diverse juries increased the general public's confidence in the legal system and also positively influenced the nature and quality of jury deliberations.¹⁷⁴² ATSILS further commented:

Brennan's view is that we should go further in ensuring representation of racial minority group members on juries, suggesting the following measures:

- The exercise of judicial discretion;

1739 Submission 43.

1740 See [11.48] above.

1741 Submission 43 referring to Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [592].

1742 Submission 43 citing S Sommers, 'Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research' (2008) 2(1) *Social Issues and Policy Review* 65.

- a firm rule requiring a number of people from racial minority groups on jury panels where race is an issue; and
- the presence of people from racial minority groups on any jury panel regardless of the issue in the case.¹⁷⁴³

Lord Justice Auld, as was mentioned above, also recommended that there be a certain number (three) of people from racial minority groups on a jury in cases where the Court considers that race is likely to be a relevant issue.¹⁷⁴⁴ We are inclined to agree with the view of Sommers, based on his findings of the value and importance of a racially diverse jury for every matter, despite the relevance of race as an issue. (notes in original)

11.104 ATSILS expressed support for the adoption of some of the recommendations made by the American non-profit law organization, the Equal Justice Initiative, in its report on *Illegal Racial Discrimination in Jury Selection*, including that:¹⁷⁴⁵

Policies and procedures should be strengthened to ensure full representation in jury pools of people from minority groups, including peoples from racial minority groups. This could occur by supplementing source lists for jury pools or through using computer models that weight groups appropriately.

11.105 ATSILS also commented on the limitations of the Courts' power to deal with a jury whose composition appears to be unfair. It referred to the case of *R v Smith*, which was heard in the District Court of New South Wales.¹⁷⁴⁶ In that case, Martin DCJ discharged an all-white jury after the Crown had challenged each of the prospective Aboriginal jurors who was selected, and suggested that:

It is only in a situation such as the above, that is, in a town where there is a large population of Aboriginal peoples, where there is a likelihood of the array consisting of at least some Aboriginal and Torres Strait Islander peoples, that a jury could be discharged.

The Commission's view

11.106 In the Commission's view, it would be inappropriate, as a matter of principle, to provide for the trial judge to direct that a jury must contain jurors, or a certain number of jurors, from the same ethnic or racial background, or gender, as the defendant. Such a change would be at odds with the principle of random selection, which is the key mechanism for ensuring a broadly representative jury.¹⁷⁴⁷ That process is facilitated by selection from the electoral roll given that all

¹⁷⁴³ F Brennan, 'Ethnic Minority Representation on Juries — A Missed Opportunity' (2007) *Internet Journal of Criminology* 1.

¹⁷⁴⁴ Ibid 13.

¹⁷⁴⁵ Submission 43 referring to Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, Report (2010).

¹⁷⁴⁶ Unreported, District Court of New South Wales, Martin DCJ, 19 October 1981.

¹⁷⁴⁷ See, for example, *R v Buzzacott* (2004) 154 ACTR 37, [27]–[28] (Connolly J).

adult citizens, regardless of ethnic or racial background, gender or other distinction, are required to enrol.

11.107 Because direct interference by judges in the composition of juries is inconsistent with the principle of random selection, it could create a perception of injustice, with a resultant loss of public confidence in the jury system.

11.108 In addition, the Commission considers that the suggestion by the Runciman Royal Commission that there should be a judicial power to direct the composition of the jury in trials having a 'racial dimension'¹⁷⁴⁸ is too imprecise a test to be capable of being implemented.

11.109 The main concern in the jury system should be with ensuring that juries are not unfairly skewed by *excluding* people on discriminatory grounds. This is firstly a matter of ensuring that the pool of prospective jurors is as wide as practicable. In relation to selection procedures at the time of trial, the parties may then exercise rights of challenge and the trial judge may discharge a jury whose composition appears unfair.¹⁷⁴⁹ In addition, there are provisions for a change of venue or a judge-only trial that will assist in some cases where there are concerns about jury prejudice that might not otherwise be overcome.¹⁷⁵⁰

Recommendation

11.110 The Commission makes the following recommendation:

11-8 There should not be any provision to allow a trial judge to direct that the jury must contain persons from the same ethnic or racial background or gender as the defendant.

1748 See [11.90] above.

1749 *Jury Act 1995* (Qld) s 48.

1750 Criminal Code (Qld) ss 559, 614, 615; *District Court of Queensland Act 1967* (Qld) s 63.

Chapter 12

Remuneration of Jurors

INTRODUCTION	383
WORKPLACE RELATIONS LEGISLATION AND AWARDS.....	384
<i>Fair Work Act 2009</i> (Cth)	384
<i>Industrial Relations Act 1999</i> (Qld)	385
Directive 13/2010: Court Attendance and Jury Service	386
JURORS' ALLOWANCES IN QUEENSLAND	386
Statutory allowances	386
Comparison with minimum and average salaries	388
Actual expenditure on jurors	388
THE POSITION IN OTHER AUSTRALIAN JURISDICTIONS	389
Australian Capital Territory.....	389
New South Wales.....	389
Northern Territory	391
South Australia	392
Tasmania.....	392
Victoria	394
Western Australia	394
DISCUSSION PAPER.....	397
CONSULTATION	397
THE COMMISSION'S VIEW	398
Daily allowance for jury service.....	398
Travelling allowance.....	400
Family care expenses	401
RECOMMENDATIONS	401

INTRODUCTION

12.1 The low level of juror remuneration is frequently cited as one of the major obstacles to willing participation on juries.¹⁷⁵¹

12.2 Jurors receive allowances for their attendance in court, the rates for which are set by the *Jury Regulation 2007* (Qld).

12.3 As explained below, the remuneration (by their employers) of employees who attend for jury service is also governed by various provisions of the *Fair Work Act 2009* (Cth), the *Industrial Relations Act 1999* (Qld) and some industrial awards.

¹⁷⁵¹ See, for example, Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 87–93.

WORKPLACE RELATIONS LEGISLATION AND AWARDS

Fair Work Act 2009 (Cth)

12.4 The *Fair Work Act 2009* (Cth) sets minimum standards (referred to in the Act as ‘National Employment Standards’) that apply to the employment of ‘national system employees’.¹⁷⁵² These standards include provisions dealing with the entitlements of national system employees who are absent from their employment because of jury service. Section 111 of the Act provides that:

- the employer must pay the employee at the employee’s base rate of pay¹⁷⁵³ for the employee’s ordinary hours of work in the period, but only for a period of ten days;
- the employer may require the employee to give the employer evidence that the employee has taken all necessary steps to obtain any amount of jury service pay (being attendance allowance) to which the employee is entitled; and
- if the employee provides the evidence of steps taken to obtain his or her jury service pay, the amount payable by the employer to the employee is reduced by the amount of the jury service pay that has been paid, or is payable, to the employee.

12.5 Generally, section 111 applies to all employees and employers in Queensland¹⁷⁵⁴ with the exception of public sector employees and employers, officers and employees of the Queensland Parliamentary Service, law enforcement officers, and local government sector employees and employers.¹⁷⁵⁵ However, it does not apply to an employee who is a casual employee.¹⁷⁵⁶

12.6 The *Fair Work Act 2009* (Cth) also provides for ‘modern awards’, which may include terms that are ancillary or supplementary to the National Employment Standards, but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.¹⁷⁵⁷ These awards may be made in relation to national system employees.¹⁷⁵⁸

1752 *Fair Work Act 2009* (Cth) ss 60, 61(1). These standards cannot be displaced: s 61(1).

1753 See *Fair Work Act 2009* (Cth) s 16 (Meaning of *base rate of pay*).

1754 *Fair Work Act 2009* (Cth) ss 13 (Meaning of *national system employee*), 14 (Meaning of *national system employer*), 30M (Extended meaning of *national system employee*), 30M (Extended meaning of *national system employer*). Note, ss 30M and 30N apply to a referring State, such as Queensland, that referred relevant workplace matters to the Commonwealth after 1 July 2009 but on or before 1 January 2010: s 30L.

1755 *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) s 6(d), (f)–(h). These employees and employers were excluded from the matters referred to the Parliament of the Commonwealth.

1756 *Fair Work Act 2009* (Cth) s 111(1)(b).

1757 *Fair Work Act 2009* (Cth) s 55(4), pts 2–3.

1758 *Fair Work Act 2009* (Cth) s 133.

12.7 A small number of modern awards provide for an entitlement to payment while on jury service that is additional to that provided for by the National Employment Standards. For example, the Manufacturing and Associated Industries and Occupations Award 2010 requires that a full-time employee who attends for jury service during his or her ordinary hours of work is to be reimbursed by his or her employer for an amount equal to the difference between the amount paid to the employee for the jury service and the amount the employee would have received in respect of the ordinary hours of work if the employee had not been on jury service. It also requires a part-time employee to be similarly reimbursed if the employee attends for jury service on a day on which the employee would normally be required to work.¹⁷⁵⁹ Unlike section 111 of the *Fair Work Act 2009* (Cth), these provisions do not limit the number of days in respect of which the employee is required to be remunerated.

Industrial Relations Act 1999 (Qld)

12.8 The entitlement of employees who are not national system employees under the *Fair Work Act 2009* (Cth) — principally local government employees and officers — is governed by the *Industrial Relations Act 1999* (Qld). Section 14A of that Act provides that:

- an employee who is required to attend for jury service is entitled to take jury service leave; and
- for the period of jury service leave, the employer must pay the employee the difference between the amount stated in the jury service document as the daily allowance for attendance and the ordinary rate the employee would have been paid if the employee had not taken jury service leave.

12.9 The period for which the employee is entitled to be remunerated is not limited.

12.10 Although section 14A is expressed to apply to an employee under an industrial instrument made after 1 September 2005,¹⁷⁶⁰ a Declaration of General Ruling of the Queensland Industrial Relations Commission made in 2005 varied almost all Queensland awards to contain an identical entitlement.¹⁷⁶¹

12.11 Neither section 14A of the *Industrial Relations Act 1999* (Qld) nor the 2005 ruling of the Queensland Industrial Relations Commission applies to casual employees.

1759 Fair Work Australia, Manufacturing and Associated Industries and Occupations Award 2010 cl 43.2 <http://www.fwa.gov.au/documents/modern_awards/pdf/MA000010.pdf> at 19 February 2011.

1760 *Industrial Relations Act 1999* (Qld) s 14A(1)(a).

1761 See *Declaration of General Ruling — Jury Service* [2005] QIRComm 154; QGIG 514 (14 September 2005) available at <<http://www.austlii.edu.au/au/cases/qld/QIRComm/2005/154.html>> at 18 February 2011.

Directive 13/2010: Court Attendance and Jury Service

12.12 The *Public Service Act 2008* (Qld) provides that the Minister for Industrial Relations may make directives about the remuneration and conditions of employment of non-executive employees.¹⁷⁶²

12.13 Directive 13 of 2010 (Court Attendance and Jury Service) provides that an employee who is required to undertake jury service is to be granted full salary for that purpose. It also provides that fees received by the employee for serving as a juror during the approved leave must be forwarded to the chief executive for payment into departmental funds.¹⁷⁶³

12.14 The Directive further provides that casual employees are entitled to receive payment for the hours they would have worked but for the requirement for jury service.¹⁷⁶⁴

12.15 These entitlements are not limited to a maximum number of days.

JURORS' ALLOWANCES IN QUEENSLAND

Statutory allowances

12.16 Any person who attends when summoned for jury service is entitled to the following remuneration specified by the *Jury Regulation 2007*:¹⁷⁶⁵

Daily allowance for attendance when not empanelled on a jury	\$35.50
Daily rate when empanelled as a juror or reserve juror	\$107.00
Additional daily remuneration after the 20th weekday of service as a juror or reserve juror ¹⁷⁶⁶	\$35.50
Daily allowance for a juror after the 20th weekday of service as a juror or reserve juror where the court is adjourned for the whole day or if not required to attend court	\$107.00
Lunch allowance (if the jury is allowed to separate)	\$12.00
Dinner allowance (if the jury is allowed to separate)	\$21.00

Table 12.1: Remuneration for jurors in Queensland

¹⁷⁶² *Public Service Act 2008* (Qld) s 54.

¹⁷⁶³ However, an employee is entitled to retain any allowances received or expenses reimbursed for travel, accommodation or meals while attending court as a juror.

¹⁷⁶⁴ However, casual employees 'are not entitled to be compensated for travel, accommodation or meals while attending court as a juror'.

¹⁷⁶⁵ *Jury Act 1995* (Qld) s 63; *Jury Regulation 2007* (Qld) ss 8–9, sch 2.

¹⁷⁶⁶ This means that a juror receives a total of \$142.50 per day after the 20th weekday of a trial.

12.17 A person who is summoned for jury service is also entitled to be reimbursed for transport costs associated with travel to and from court. Section 10 of the *Jury Regulation 2007* (Qld) provides:

10 Travelling allowance—Act, s 63

- (1) A person summoned for jury service is entitled to be reimbursed the amount of public transport fares or, if a bus, train or ferry is not reasonably available or can not reasonably be used, taxi fares, the person properly spends in attending or returning from court.
- (2) However, a person who can not reasonably travel by public transport or taxi and travels by private motor vehicle is entitled to an allowance at the rate of—
 - (a) for travel by motorbike—15 cents for each km; or
 - (b) for travel by another motor vehicle—37½ cents for each km.

12.18 While the *Notice to Prospective Juror* includes information about the reimbursement of public transport fares, it does not mention that, depending on the circumstances, a person may be entitled to be reimbursed for taxi fares or to receive an allowance for travel by private motor vehicle.

12.19 The *Jury Act 1995* (Qld) also authorises certain special payments to be made where a person suffers injury, damage or loss arising out of jury service. However, a claim for special compensation for financial loss arising out of the juror's inability to carry on a business or engage in remunerative activity while performing jury service can be made only if the claimant served as a juror or reserve juror in a trial that continued for at least 30 days (that is, six weeks).¹⁷⁶⁷

12.20 The taxable status of jurors' allowances depends on their other income and financial circumstances, and on whether a juror whose employer continued to pay the juror his or her normal salary reimbursed the employer with these allowances.¹⁷⁶⁸ Generally speaking, juror allowances will need to be declared on jurors' tax returns (unless reimbursed to their employers) and declared to Centrelink if the juror is receiving any benefits.¹⁷⁶⁹

12.21 It is an offence under the *Jury Act 1995* (Qld) for an employer to terminate the employment of a person, or prejudice a person in his or her employment, because of the person's absence on jury service.¹⁷⁷⁰

¹⁷⁶⁷ *Jury Act 1995* (Qld) s 64(1)–(2).

¹⁷⁶⁸ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁷⁶⁹ Queensland Courts, 'Remuneration' <<http://www.courts.qld.gov.au/157.htm>> at 21 January 2011.

¹⁷⁷⁰ *Jury Act 1995* (Qld) s 69. The maximum penalty under s 69 is one year's imprisonment.

Comparison with minimum and average salaries

12.22 The National Minimum Wage for the current financial year (2010–11) is \$569.90 per week, which is equivalent to \$113.98 per day or \$29 716.21 per annum.¹⁷⁷¹ This represents 58.3% of the seasonally adjusted average weekly earnings recorded for August 2010 of \$977.40,¹⁷⁷² which is equivalent to \$195.48 per day or \$50 964.43 per annum.

12.23 By comparison, the standard daily allowance for empanelled jurors in Queensland of \$107 is equivalent to \$535 per week and \$27 896 per year. This is about 93.9% of the National Minimum Wage and 54.7% of average weekly earnings.

12.24 The higher allowance of \$142.50 payable to jurors in long trials after the 20th weekday of the trial represents \$712.50 per week and \$37 152 per year. This is 125% of the National Minimum Wage and 72.9% of average weekly earnings.

Actual expenditure on jurors

12.25 The Department of Justice and Attorney-General has provided information relating to the amounts expended on juror attendance and other allowances for the financial years 2007–08 to 2008–09, as well as the expenditure for accommodating jurors for those years:¹⁷⁷³

	2007–08	2008–09	2009–10
Juror fees for attending (when not empanelled)	1 084 711.82	859 159.55	922 121.95
Juror fees (when empanelled)	2 578 275.38	2 449 146.27	3 158 784.70
Conveyance costs	168 867.54	151 407.15	164 534.67
Mileage costs	40 704.02	33 282.51	36 502.87
Juror accommodation	122 159.42	33 250.36	28 838.17
Juror meals (actuals and allowance)	440 140.35	343 892.81	389 602.00
Total	4 434 858.53	3 870 138.65	4 700 384.36

Table 12.2: Expenditure on jurors

¹⁷⁷¹ Fair Work Ombudsman, 'National Minimum Wage' <<http://www.fairwork.gov.au/pay/national-minimum-wage/pages/default.aspx>> at 21 January 2011.

¹⁷⁷² See Australian Bureau of Statistics, *Average Weekly Earnings Australia, August 2010* (2010) Cat No 6302.0, 5.

¹⁷⁷³ Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

THE POSITION IN OTHER AUSTRALIAN JURISDICTIONS

12.26 Jurors' remuneration in each Australian jurisdiction is governed by regulations that specify daily rates, and travel and meal allowances. Each regime is different and it is difficult to make direct comparisons with the position in Queensland. In some cases, entitlement to these allowances depends on whether the juror is paid his or her normal salary during jury service or otherwise suffers financial loss.¹⁷⁷⁴

12.27 Each of the jurisdictions provides daily attendance allowances. Some have flat rates that increase in accordance with the number of days' attendance, while others have rates that vary depending on the number of hours the person has attended in the day. Most of the jurisdictions provide travel and meal allowances, and some make provision for jurors to be reimbursed for actual loss of income or earnings.

12.28 In general terms, the allowances paid to jurors in Queensland are comparable with the highest rates paid interstate. The provision allowing claims for special compensation under section 64 of the *Jury Act 1995 (Qld)*¹⁷⁷⁵ has counterparts in some, though not all, of the other Australian jurisdictions.

Australian Capital Territory

12.29 In the ACT, jurors' remuneration is governed by the *Juries (Payment) Determination 2010*,¹⁷⁷⁶ which provides for the following rates of payment:

Attendance at court for up to 4 hours	\$46.20
Attendance at court for more than 4 hours—	
Day 1–4	\$92.90
Day 5–10	\$107.90
Each day after day 10	\$125.80
Travel allowance for each day of attendance at court	\$15.70

Table 12.3: Remuneration for jurors in the Australian Capital Territory

New South Wales

12.30 The NSW Law Reform Commission noted that the adequacy of juror remuneration has 'a direct and significant relationship to the willingness of people to serve as jurors'.¹⁷⁷⁷ It recommended that the daily allowances be increased, and

¹⁷⁷⁴ Unless otherwise specified, the allowances set out in this chapter are those in force as at 1 February 2011.

¹⁷⁷⁵ See [12.19] above.

¹⁷⁷⁶ *Juries (Payment) Determination 2010*, Disallowable Instrument DI2010-270, made under s 51 of the *Juries Act 1967* (ACT).

¹⁷⁷⁷ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [12.2].

that there should also be provision for a capped amount to be paid to reimburse jurors for actual loss of income or earnings:¹⁷⁷⁸

we recognise that an increase in the daily allowance will not completely address the position of all people who are called upon to serve. To a certain extent, it is inevitable that jury service will have an uneven impact on different classes of people, some of whom may suffer financially more than others, while some groups, such as students, pensioners, and the unemployed, may do better by serving on a jury than they otherwise would.

The Commission therefore proposes a financial loss model whereby jurors would be entitled to a moderately increased basic daily allowance which could then be supplemented by a capped amount to provide a measure of compensation for the additional loss of earnings or income incurred as a result of jury service. The capped amount, which could be available to compensate jurors for financial loss suffered over and above the basic level should, in our view, be set at a more realistic level closer to average weekly earnings.

12.31 It also recommended that payment for loss of earnings should depend on the production of a certificate of loss of earning or income.¹⁷⁷⁹

12.32 The *Jury Regulation 2010* (NSW) subsequently increased daily jury allowances and simplified the payment model as follows:¹⁷⁸⁰

Attendance at court for less than 4 hours but not selected for jury service	Nil
Attendance at court for 4 hours or more but not selected for jury service	\$100
Daily allowance for attendance at court—	
1st to 10th day of attendance (whether employed or not)	\$100
11th and subsequent days of attendance, if juror is not employed	\$100
11th and subsequent days of attendance, if juror is employed	\$225
Travel allowance for each day of attendance at court—	
For a journey of not more than 14 km	\$4.30
For a journey of 14 km–100 km	30.7¢ per km each way
For a journey of 100 km or more	\$30.70 each way
Refreshment allowance for lunch (if jury is released)	\$6.60

Table 12.4: Remuneration for jurors in New South Wales

¹⁷⁷⁸ Ibid [12.24]–[12.26], and see Rec 57.

¹⁷⁷⁹ Ibid [12.30], Rec 58.

¹⁷⁸⁰ *Jury Regulation 2010* (NSW) sch 1 pt 1.

12.33 During the Second Reading Speech for the Jury Amendment Bill 2010 (NSW) it was said that ‘these changes represent a significant step in ensuring that employed jurors are not left out of pocket as a result of jury service, and will assist in encouraging participation in jury duty’.¹⁷⁸¹ The Bill did not propose a move to the full ‘income compensation model’ as recommended by the NSW Law Reform Commission.¹⁷⁸²

This would have a cost to the jury system that is not sustainable, and in light of the National Employment Standards¹⁷⁸³ is unnecessary.

The proposal in the bill recognises that service can be more difficult for some due to the loss of income, and redresses that as far as possible while maintaining a reasonable cost to society. (note added)

Northern Territory

12.34 In the Northern Territory, under the *Juries Regulations* (NT), jurors are not entitled to any juror remuneration if they have continued to receive their ordinary pay without any deductions from their leave entitlements.¹⁷⁸⁴

12.35 If that is not the case, jurors are entitled to receive the following base allowances:¹⁷⁸⁵

Attendance at court for each day or part of a day as a juror—	
If the trial lasts 9 days or less	\$60
If the trial lasts 10 days or more	\$120
Attendance at court for each day or part of a day without serving as a juror	\$20

Table 12.5: Remuneration for jurors in the Northern Territory

12.36 If it is proved to the satisfaction of the Sheriff that jurors have suffered financial loss, they are entitled to receive an additional amount equivalent to that loss up to a maximum of \$30 per day (or \$20 per day if the person did not serve as a juror for a trial).¹⁷⁸⁶

12.37 Jurors’ travel expenses are to be paid at the rate of 27¢ per kilometre or the amount payable for travel by public transport if public transport is available.¹⁷⁸⁷

¹⁷⁸¹ New South Wales, *Parliamentary Debates*, Legislative Council, 22 June 2010 (Michael Veitch, Parliamentary Secretary) 24356.

¹⁷⁸² Ibid.

¹⁷⁸³ See [12.4]–[12.5] above for a discussion of the National Employment Standards that apply under the *Fair Work Act 2009* (Cth) and the provision made by s 111 of that Act in relation to the remuneration of employees who are absent from their employment because of jury service.

¹⁷⁸⁴ *Juries Regulations* (NT) reg 8(1).

¹⁷⁸⁵ *Juries Regulations* (NT) reg 8(2).

¹⁷⁸⁶ *Juries Regulations* (NT) reg 8(3).

¹⁷⁸⁷ *Juries Regulations* (NT) reg 9.

South Australia

12.38 In South Australia, under the *Juries (Remuneration for Jury Service) Regulations 2002* (SA), the rate of remuneration depends on whether the Minister, on the advice of the court, declares a trial to be a 'long trial' for the purposes of the Regulations.¹⁷⁸⁸

12.39 The amounts in the Schedule to the Regulations are those which applied during the 2007–08 financial year. The amounts that are to apply for each subsequent financial year are to be indexed to reflect inflation in the Consumer Price Index.¹⁷⁸⁹ The amounts to be paid to a juror are to reflect actual monetary loss or expenditure up to the maximum amounts provided for in the Schedule. The indexed amounts for 2010–11 are:¹⁷⁹⁰

For each day's attendance for a trial other than a 'long trial'— If no loss or expenditure in excess of \$20 was incurred Otherwise, up to a maximum of	\$20 \$137
For each day's attendance for a 'long trial'— Before empanelment: If no loss or expenditure in excess of \$20 was incurred Otherwise, up to a maximum of After empanelment: If no loss or expenditure in excess of \$20 was incurred Otherwise, up to a maximum of	\$20 \$137 \$20 \$247
Travel allowance for each day of attendance at court	66¢ per km for a minimum of 12 km

Table 12.6: Remuneration for jurors in South Australia

Tasmania

12.40 In Tasmania, the amount of the allowances paid to jurors under the *Juries Regulations 2005* (Tas) depends on whether they are employed or not, and whether they are State public servants.

¹⁷⁸⁸ See *Juries (Remuneration for Jury Service) Regulations 2002* (SA) reg 5. The Minister may, on the advice of the court, by notice in the Gazette, declare a criminal trial to be a long trial for the purpose of those regulations: reg 5(2). The Commission is aware of only one trial having been declared a long trial in this way: see *South Australian Government Gazette*, No 13, 4 March 2010, 941, which declared 'the criminal trial of *R v Matthew Reginald Heyward and Jeremy Adam Minter* (SCCRM-09-80)' to be a long trial. The Commission understands that the trial lasted some seven weeks: A Dowdell, 'Tears flow in court after son, farmhand found guilty of murder', *The Advertiser* (Adelaide) 1 April 2010, 4.

¹⁷⁸⁹ *Juries (Remuneration for Jury Service) Regulations 2002* (SA) regs 4, 5.

¹⁷⁹⁰ Information provided by Mark Stoker, Sheriff, South Australia, 21 February 2011.

12.41 Unemployed people are entitled to the following allowances:¹⁷⁹¹

Attendance at court for all or part of a day if not subsequently empanelled	\$25
Attendance at court if subsequently empanelled—	
First half day	\$25
For each of the first three days	\$40 ¹⁷⁹²
For each subsequent day	\$50 ¹⁷⁹³
Mileage allowance per km travelled whilst on jury service—	
Over 2L engine capacity	47.87¢ per km
Under 2L engine capacity	41.17¢ per km
Lunch allowance for each full day at court, other than when the jury has retired	\$10.95

Table 12.7: Remuneration for jurors in Tasmania

12.42 Employed and self-employed jurors must first demonstrate to the Registrar that they have suffered some loss of income, salary or wages, or other monetary loss caused by their attendance at court.¹⁷⁹⁴ If they have suffered any such loss, they are entitled to receive the actual amount of that loss up to the maximum specified by regulation 5(7).¹⁷⁹⁵

12.43 Regulation 5(7) sets out a formula for the indexation of the maximum daily juror remuneration. For the financial year ending on 30 June 2009, the amount was \$176.¹⁷⁹⁶ For each later financial year, the amount is indexed to reflect inflation in average weekly earnings.¹⁷⁹⁷ The present amount is \$184.83.¹⁷⁹⁸

12.44 Meal and travel allowances are the same as those payable to State Service officers and employees under the General Condition of Service Award for State public servants.¹⁷⁹⁹

12.45 State Service officers and employees who are entitled under their award or under the *State Service Regulations 2001* (Tas) to full pay while attending court

¹⁷⁹¹ *Juries Regulations 2005* (Tas) regs 4, 6; Supreme Court of Tasmania, Jurors, 'Expenses' <http://www.supremecourt.tas.gov.au/going_to_court/jurors/expenses> at 21 January 2011.

¹⁷⁹² Or a proportionate part of \$25, whichever is the greater: *Juries Regulations 2005* (Tas) reg 4.

¹⁷⁹³ Or a proportionate part of \$25, whichever is the greater: *Juries Regulations 2005* (Tas) reg 4.

¹⁷⁹⁴ *Juries Regulations 2005* (Tas) reg 5(2), (5).

¹⁷⁹⁵ *Juries Regulations 2005* (Tas) reg 5(1), (4).

¹⁷⁹⁶ *Juries Regulations 2005* (Tas) reg 5(7)(a).

¹⁷⁹⁷ *Juries Regulations 2005* (Tas) reg 5(7)(b).

¹⁷⁹⁸ Supreme Court of Tasmania, Jurors, 'Expenses' <http://www.supremecourt.tas.gov.au/going_to_court/jurors/expenses> at 21 January 2011.

¹⁷⁹⁹ *Juries Regulations 2005* (Tas) reg 6.

for jury service are not entitled to any juror remuneration (other than meal and travel allowances).¹⁸⁰⁰

Victoria

12.46 In Victoria, the position is governed by the *Juries (Fees, Remuneration and Allowances) Regulations 2001* (Vic), especially regulation 6, which provides for the following rates of remuneration:

For each day of attendance at court (whether the juror has actually served or not)—	
For the first 6 days	\$36
After 6 days, but up to 12 months	\$72
After 12 months	\$144

Table 12.8: Remuneration for jurors in Victoria

12.47 Jurors are entitled to double these amounts for the last day of any trial if they are required to serve longer than eight hours.¹⁸⁰¹

12.48 Jurors outside the jury district for Melbourne are entitled to a travel allowance for one journey per day at the rate of 38¢ per km in excess of 8 km.¹⁸⁰²

Western Australia

12.49 In Western Australia, juror's remuneration is governed by the *Juries Act 1957* (WA) and the *Juries Regulations 2008* (WA).

12.50 Currently, section 58B(3) of the Act provides that an employer must pay an employee who performs jury service the amount that the person would reasonably expect to be paid during the period of jury service.¹⁸⁰³ An employer who makes a payment in accordance with section 58B(3) is entitled to be paid by the State the amount prescribed by the Regulations for the person's service.¹⁸⁰⁴ A person who is not paid under section 58B(3), or who is not covered by that section — such as a self-employed or unemployed person — is entitled to be paid the amounts prescribed by the Regulations.¹⁸⁰⁵ The Regulations may exclude classes of people or employers from this regime, disentitling them from receiving any

¹⁸⁰⁰ *Juries Regulations 2005* (Tas) reg 7.

¹⁸⁰¹ *Juries (Fees, Remuneration and Allowances) Regulations 2001* (Vic) reg 6(2).

¹⁸⁰² *Juries (Fees, Remuneration and Allowances) Regulations 2001* (Vic) reg 6(3)–(4).

¹⁸⁰³ The employer is liable to a fine of \$2000 for failing to do so: *Juries Act 1957* (WA) s 58B(3).

¹⁸⁰⁴ *Juries Act 1957* (WA) s 58B(4).

¹⁸⁰⁵ *Juries Act 1957* (WA) s 58B(5)–(6).

allowances under the Regulations.¹⁸⁰⁶ The Regulations currently provide for the following fees, allowances and expenses:¹⁸⁰⁷

Attendance at court—	
First half day	\$10
For each of the first three days	\$15
For each subsequent day	\$20
Travel allowance, when public conveyance is not available for travel each way by a person doing jury service between the person's usual residence and the court. ¹⁸⁰⁸	37.5¢ per km

Table 12.9: Remuneration for jurors in Western Australia

12.51 Under regulation 4(2) of the Regulations, if the summoning officer is satisfied that a person doing jury service has, by reason of that service, lost income greater than the amounts set out in regulation 4(1),¹⁸⁰⁹ the summoning officer may pay that person an amount equal to that loss. This amount is not capped, although a maximum of \$500 per day used to apply under the previous *Juries (Allowances to Jurors) Regulations (WA)*, which was repealed by the *Juries Regulations 2008 (WA)*. Regulation 4(2) appears to make that payment discretionary as it provides that the summoning officer *may* (not 'must') reimburse that loss.

12.52 The Law Reform Commission of Western Australia has observed that Western Australia has 'the most generous system of juror reimbursement in Australia, covering actual loss of earnings for all jurors'.¹⁸¹⁰ Accordingly, the LRCWA noted that the perception that jurors are inadequately compensated is:¹⁸¹¹

perhaps the most widespread misconception about jury service in Western Australia and it may be a significant barrier to participation in jury service.

12.53 It therefore recommended that regular community awareness strategies should be resourced and undertaken to inform the community about juror remuneration.¹⁸¹²

¹⁸⁰⁶ *Juries Act 1957 (WA)* s 58B(4)–(5). *Juries Regulations 2008 (WA)* reg 6 excludes the following employers from this scheme: State Government departments, State instrumentalities, and State trading concerns.

¹⁸⁰⁷ *Juries Regulations 2008 (WA)* regs 4–5.

¹⁸⁰⁸ If public transport is available, a person doing jury service may claim the fee paid for 'travelling on a public conveyance each way between the person's usual residence and the court': *Juries Regulation 2008 (WA)* reg 5(1).

¹⁸⁰⁹ If a person is paid by his or her employer in accordance with s 58B(3) of the *Juries Act 1957 (WA)*, the person will not incur such a loss.

¹⁸¹⁰ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 131; *Juries Act 1957 (WA)* s 58B; *Juries Regulations 2008 (WA)* regs 4, 5. This comment was made before the introduction of the *Juries Legislation Amendment Bill 2010 (WA)*, which proposes amendments to s 58B of the *Juries Act 1957 (WA)*: see [12.57] below.

¹⁸¹¹ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 131.

¹⁸¹² *Ibid* 133, Rec 64.

12.54 The LRCWA also recommended that the daily allowances set out in regulation 4 of the *Juries Regulations 2008 (WA)* be increased to at least a level that adequately accounts for inflation.¹⁸¹³

12.55 The LRCWA noted that, as a matter of practice, child care expenses are reimbursed by the Sheriff's Office and recommended that this be expressly provided for in the legislation.¹⁸¹⁴ It made the following recommendation:¹⁸¹⁵

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.

12.56 These recommendations are not reflected in the Juries Legislation Amendment Bill 2010 (WA).

12.57 The Bill proposes amendments to section 58B of the *Juries Act 1957 (WA)*, deleting the current section 58B(3)–(6) and inserting a new section 58B(3)–(5).¹⁸¹⁶ The new provisions will remove the current requirement that an employer must pay an employee who performs jury service the earnings that the employee could reasonably expect to have been paid during that period.¹⁸¹⁷ Instead, the new section 58B(3) will provide that, *if* an employer makes such a payment to an employee who performs jury service, the employer is entitled to be paid by the State the amount prescribed by the Regulations.¹⁸¹⁸

¹⁸¹³ Ibid 134, Rec 65. These amounts are set out in the first row of Table 12.9 at [12.50] above.

¹⁸¹⁴ Ibid 134. The LRCWA noted that, at present, child care expenses are reimbursed by the Sheriff's Office but that, since people with the responsibility for children under 14 years old are entitled to excusal, few claims for reimbursement are made. However, the Commission recommended that all excuses as of right be repealed (including those related to child care or other carer responsibilities). Accordingly, the Commission also recommended that reimbursement for child care and other carer expenses be expressly provided for in the regulations: at 134.

The Law Reform Commission of Ireland has also recognised that provision for childcare and dependent care expenses may allow greater participation by women and those who are economically disadvantaged: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [7.36]. In that jurisdiction, there is presently no provision for juror remuneration; jurors are to be paid by their employers as if they were working and out-of-pocket expenses are carried by the juror: see *Juries Act 1976 (Ireland)* s 29.

¹⁸¹⁵ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 115, Rec 58.

¹⁸¹⁶ Juries Legislation Amendment Bill 2010 (WA) cl 43.

¹⁸¹⁷ The new provisions will also omit the corresponding penalty for non-payment by an employer. See, however, the discussion at [12.4]–[12.7] above of the requirements that apply under the *Fair Work Act 2009 (Cth)*.

¹⁸¹⁸ The new s 58B(4)–(5) of the *Juries Act 1957 (WA)* are in similar terms to the omitted s 58B(5)–(6) of that Act.

DISCUSSION PAPER

12.58 In its Discussion Paper, the Commission considered whether the existing provisions for juror remuneration are appropriate or should be changed in some way. The Commission sought submissions, in particular, on whether provision should be made for jurors to be reimbursed for actual loss of income or earnings, or for reasonable, out-of-pocket child care expenses.¹⁸¹⁹

- 11-8 Are the provisions for juror allowances appropriate? If not, how might they be improved?
- 11-9 Should there be provision for jurors to be paid an amount to reimburse them for actual loss of income or earnings?
- 11-10 Should there be provision for jurors to be paid an amount to reimburse them for reasonable, out-of-pocket child care or other care expenses incurred as a result of jury service?

CONSULTATION

12.59 A number of respondents commented that jury service imposes both financial costs and significant inconvenience on jurors and prospective jurors.¹⁸²⁰ Some respondents also remarked that the financial compensation available to jurors, in light of those burdens, is inadequate and acts as a disincentive to jury service.¹⁸²¹

12.60 One respondent made the following comment:¹⁸²²

Isn't it obvious why people don't want to serve?

Just compensate people for the inconvenience/expense incurred and you'll get as many jury people serving as you need.

12.61 Similarly, another respondent queried 'Why are juries the lowest paid workers in the courtroom even when their decision decides the outcome of a case?'¹⁸²³

12.62 Another respondent commented on the need for realistic travel allowances:¹⁸²⁴

1819 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [11.127]–[11.130], Questions 11-8 to 11-10.

1820 Submissions 24, 28, 30, 31.

1821 Submissions 22, 24, 28, 31.

1822 Submission 31.

1823 Submission 23.

1824 Submission 24.

Very few prospective Jurors have a public transport from the door of their residence to the Court House. The time involved is often very great from the time leaving home to the time of a Court Sitting opening time, and can often be 2 hours or more because of infrequent and unreliable public transport. Then the same happens again when the court closes for the day or the prospective juror is not required. ... A minimum of 50 cents per kilometer each way from the juror's residence would overcome all travelling problems and give the person complete independence. This would help attendance numbers in a lot of cases and would not be a drain on their finances! (emphasis in original)

12.63 Another respondent commented that, although she has been summoned to serve three or four times, as a self-employed contractor, she has asked to be excused each time 'on the basis that I would lose income for every day of jury duty'.¹⁸²⁵

12.64 The Queensland Law Society expressed the view that, generally, there is no need to change the current system of juror allowances. It did express some support, however, for the reimbursement of reasonable out-of-pocket expenses.¹⁸²⁶

The Society does not believe that there should be any change to Juror allowances.

The Society believes that all jurors should be paid the same regardless of their background or income.

It is reasonable that consideration be given to out-of-pocket and travel expenses incurred as a result of jury service particularly where no public transport is available or a member of the jury panel is single parent.

12.65 The Department of Justice and Attorney-General noted that juror remuneration is a source of legitimate concern for some individuals, but that increased remuneration would obviously result in increased costs.¹⁸²⁷

[We] acknowledge that this is a legitimate complaint for many individuals in the community. Unfortunately the issue of remuneration is not one on which we can make comment, albeit to say that any remuneration change results in increased costs.

THE COMMISSION'S VIEW

Daily allowance for jury service

12.66 As explained earlier in this chapter, most employees who are absent from their employment because of jury service are entitled to be remunerated by their

1825 Submission 42.

1826 Submission 52.

1827 Submission 56.

employers for a period of ten days.¹⁸²⁸ The exception is casual employees, who are not generally entitled to be remunerated while on jury service.¹⁸²⁹

12.67 Because of the existing workplace entitlements that apply in relation to remuneration while on jury service, the categories of people who are most likely to be financially disadvantaged by performing jury service are casual employees, employees serving on a trial of more than ten days' duration, and people who are self-employed.

12.68 As explained earlier in this chapter, the standard daily remuneration for empanelled jurors in Queensland is \$107, which is equivalent to 93.9% of the National Minimum Wage but only 54.7% of average weekly earnings.¹⁸³⁰

12.69 Ideally, the standard daily allowance for attending for jury service would be comparable with average weekly earnings. However, that would involve almost doubling the current expenditure on juror fees, which for the last financial year was in excess of \$3 000 000 for jurors who were empanelled, and just under \$1 000 000 for prospective jurors who attended court but were not empanelled. Although these are not large amounts relative to overall government expenditure, they represent large amounts in terms of the expenditure of the Supreme Court and the District Court. The Commission does not consider that such an increase could realistically be made, at least not without a significant increase in the Courts' funding.

12.70 The Commission considers it important that the rate of remuneration for jurors, although modest, is regularly increased so that its real value is not eroded by inflation. In the Commission's view, the simplest way of ensuring that this occurs is by basing the remuneration rate of a juror or reserve juror in items 2 and 4 of Schedule 2 of the *Jury Regulation 2007* (Qld) on the National Minimum Wage that applies for the financial year in which the jury service is performed. Because the National Minimum Wage represents an entitlement in respect of weekly remuneration, the amounts for these items in the Regulation should be one-fifth of the National Minimum Wage.

12.71 Similarly, to ensure that the allowance in item 1 for attending court for each day or part of a day when not empanelled (\$35.50) and the additional remuneration in item 3 that is payable to a juror who serves on a 'long trial' (\$35.50) retain their current value, these amounts should be set at an amount that is one-third of the daily remuneration in item 2. This will maintain the current ratio between these amounts.

12.72 Further, because many employees are not required to be remunerated by their employers after the tenth weekday of a trial, the daily remuneration payable to a juror who serves on a 'long' trial should be payable after the tenth weekday of the person's attendance, rather than after the twentieth weekday, as is presently the case. This will require the amendment of item 3 in Schedule 2 of the Regulation.

1828 See [12.4]–[12.15] above. As explained in that discussion, some employees have even more generous entitlements as the period for which they must be remunerated is not limited.

1829 See [12.5], [12.11] above.

1830 See [12.23] above.

The change from 20 weekdays to 10 weekdays should also be made in section 9 of the Regulation, which deals with the allowance payable to a juror, after the twentieth weekday, for a day when the trial is adjourned for the full day or the juror is not required to attend court.

12.73 While these changes represent only a small increase to the current rate of remuneration, a person who would suffer substantial financial hardship by reason of performing jury service will still be able to apply to be excused.

Travelling allowance

12.74 As explained earlier in this chapter, section 10 of the *Jury Regulation 2007* (Qld) provides for the payment of a travelling allowance. Depending on the circumstances, this may consist of the reimbursement of public transport fares, the reimbursement of taxi fares, or an allowance at the specified rate per kilometre for travel by private motor vehicle.¹⁸³¹

12.75 Section 10(1) limits reimbursement of taxi fares to circumstances in which public transport is not reasonably available or cannot reasonably be used. However, there is no requirement in section 10(1) limiting the reimbursement of taxi fares to circumstances in which a private motor vehicle is not reasonably available or cannot reasonably be used. Moreover, section 10(2) goes on to provide that the entitlement to an allowance for travel by private motor vehicle arises when a person cannot reasonably travel by 'public transport or taxi'. In effect, this establishes a priority for the payment of travelling allowances as follows:

- public transport fares;
- taxi fares;
- private motor vehicle allowance.

12.76 In the Commission's view, it is appropriate for section 10 to make provision for a person to be reimbursed for taxi fares incurred in attending court. However, the conditions for the reimbursement of taxi fares should be changed. For reasons of economy, the reimbursement of taxi fares should rank *after* the payment of an allowance for use of a private motor vehicle.

12.77 Section 10 of the *Jury Regulation 2007* (Qld) should therefore be amended to provide that a person who is summoned for jury service is entitled to be reimbursed for taxi fares if public transport is not reasonably available or cannot reasonably be used and a private motor vehicle is not reasonably available or cannot reasonably be used.

12.78 In considering whether a private vehicle can reasonably be used, the cost of parking will be a relevant consideration. For example, the reasonableness of using a private motor vehicle will differ according to the location of the courthouse. In a regional community, there might be no parking costs. In the central business

¹⁸³¹ *Jury Regulation 2007* (Qld) is set at [12.17] above.

district of Brisbane, however, the cost of all-day parking to attend court is likely to be considerable.

12.79 As mentioned earlier, the *Notice to Prospective Juror* mentions the entitlement to reimbursement of public transport fares, but does not mention the other available travelling allowances. The Notice should be amended so that it also explains the circumstances in which an allowance may be paid for travel by private motor vehicle and the circumstances in which taxi fares may be reimbursed.

Family care expenses

12.80 One of the grounds on which people commonly seek to be excused from jury service is that they are responsible for the care of dependants.¹⁸³² As explained earlier, the Law Reform Commission of Western Australia has recently proposed that reasonable out-of-pocket expenses for child care or family care incurred as a consequence of jury service should also be reimbursed.¹⁸³³

12.81 This Commission considers that the reimbursement of reasonable expenses for the care of a family member is essentially an issue of equality. Without provision for jurors to be reimbursed for these expenses, many people will, in practical terms, be precluded from performing jury service. The Commission is therefore of the view that the *Jury Regulation 2007* (Qld) should be amended to provide that the allowances to which a juror is entitled include the reimbursement of reasonable out-of-pocket expenses for child care or family care incurred as a result of performing jury service. Reserve jurors and people summoned to perform jury service who are not empanelled should also be entitled to this allowance.

RECOMMENDATIONS

12.82 The Commission makes the following recommendations:

Remuneration

12-1 Schedule 2 of the *Jury Regulation 2007* (Qld) should be amended to provide that:

- (a) the allowance in item 1 for attending court for each day or part of a day when a person is not empanelled is equal to one-third of the daily remuneration in item 2;**
- (b) the remuneration rate of a juror or reserve juror in item 2 is equal to one-fifth of the National Minimum Wage that applies for the financial year in which the jury service is performed;**

¹⁸³² See [4.56], [9.4] above.

¹⁸³³ See [12.55] above.

- (c) the additional remuneration in item 3 is equal to one-third of the daily remuneration in item 2 and should apply after the tenth weekday;
- (d) the daily allowance of a juror or reserve juror in item 4 is equal to one-fifth of the National Minimum Wage that applies for the financial year in which the jury service is performed.

12-2 Section 9(1)–(2) of the *Jury Regulation 2007* (Qld) should be amended so that the entitlements provided apply after ten weekdays.

Travelling allowance

12-3 Section 10 of the *Jury Regulation 2007* (Qld) should continue to make provision for a person who is summoned for jury service to be reimbursed for taxi fares. However, the entitlement to reimbursement of taxi fares should rank *after* the allowance for travel by private motor vehicle, and should apply if:

- (a) public transport is not reasonably available or cannot be reasonably be used; and
- (b) a private motor vehicle is not reasonably available or cannot reasonably be used.

12-4 The *Notice to Prospective Juror* should be amended so that, in addition to mentioning reimbursement of public transport fares, it also explains the circumstances in which an allowance may be paid for travel by private motor vehicle and the circumstances in which taxi fares may be reimbursed.

Family care expenses

12-5 The *Jury Regulation 2007* (Qld) should be amended to provide that jurors and reserve jurors, and persons who are summoned for jury service but not empanelled, are entitled to be reimbursed for the reasonable out-of-pocket expenses for child care or family care incurred as a result of attending court when summoned to perform jury service.

Chapter 13

Civil Jury Trials

INTRODUCTION	403
AVAILABILITY OF TRIAL BY JURY	403
FREQUENCY OF CIVIL JURY TRIALS.....	404
FEE FOR CIVIL JURIES	405
HOW CIVIL JURY TRIALS OPERATE: BASIC CONCEPTS	405
ISSUES FOR CONSIDERATION.....	406
NSWLRC’s recommendations	407
LRCWA’s recommendations	408
Discussion Paper	408
Consultation	409
The Commission’s view	409
Recommendation	410

INTRODUCTION

13.1 The Commission’s Terms of Reference require it to review the ‘provisions of the *Jury Act 1995* (Qld) relating to the selection (including empanelment), participation, qualification and excusal of jurors’.¹⁸³⁴ Those provisions apply equally to juries in both criminal and civil trials.

13.2 Jury trials are mainly used for the determination of serious criminal charges, and the focus of this Report has, accordingly, been on criminal juries. Civil jury trials are much rarer.

AVAILABILITY OF TRIAL BY JURY

13.3 There is no common law right to trial by jury for civil cases.¹⁸³⁵ Whether or not a jury may be used is determined by statute. Rule 472 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that, unless jury trial is excluded by statute, a plaintiff or defendant in a civil case started by claim¹⁸³⁶ is entitled to elect for a

1834 The Terms of Reference are set out in Appendix A to this Report.

1835 *Matthews v General Accident Fire & Life Insurance Co Ltd* [1970] QWN 37 (Kneipp J); *Lohe v Gargan* [2000] QSC 140, [45] (Holmes J).

1836 *Uniform Civil Procedure Rules 1999* (Qld) r 471.

jury.¹⁸³⁷ The court also has power, under rule 475, to order trial by jury if 'it appears to the court that an issue of fact could more appropriately be tried by a jury'.¹⁸³⁸

13.4 Section 21 of the *Defamation Act 2005* (Qld) also specifically preserves the right to trial by jury at the election of the plaintiff or defendant in a defamation proceeding, unless the court orders otherwise.

13.5 The right to jury trial may be overridden by the court. Rule 474 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that the court may order that the trial proceed without a jury if:¹⁸³⁹

- (a) the trial requires a prolonged examination of records; or
- (b) [the trial] involves any technical, scientific or other issue that can not be conveniently considered and resolved by a jury.

13.6 An identically worded provision applies in relation to defamation proceedings, under section 21(3) of the *Defamation Act 2005* (Qld).

13.7 Section 283(2)(g) of the *Supreme Court Act 1995* (Qld) also permits a judge to order that an action be tried without a jury (unless a jury is demanded by both parties) to ensure the 'speedy and inexpensive determination of the questions in the action really at issue between the parties'.¹⁸⁴⁰

13.8 In addition, a number of statutes specifically exclude the right to trial by jury for civil causes of action. Significantly, jury trial is excluded under section 73 of the *Civil Liability Act 2003* (Qld) for proceedings for damages for personal injury.¹⁸⁴¹ It is also excluded for proceedings for damages under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) and the *Public Interest Disclosure Act 2010* (Qld).¹⁸⁴²

FREQUENCY OF CIVIL JURY TRIALS

13.9 The availability of jury trial for civil proceedings is, therefore, limited. Civil jury trials have been abolished altogether in some jurisdictions,¹⁸⁴³ and restricted in

¹⁸³⁷ See also *District Court of Queensland Act 1967* (Qld) s 75 (When a jury may be summoned).

¹⁸³⁸ Some special reason must ordinarily be shown why trial by jury should be ordered: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [1999] QSC 384, [3]–[4] (Douglas J). Rule 473 of the *Uniform Civil Procedure Rules 1999* (Qld) also provides that the court may order a third party proceeding, which is to be decided separately, to be tried by a jury.

¹⁸³⁹ See, for example, *Smit v Chan* [2001] QSC 493 (Mullins J), in relation to a medical negligence claim.

¹⁸⁴⁰ See also *Supreme Court Act 1995* (Qld) s 51; *Uniform Civil Procedure Rules 1999* (Qld) r 468(2)(b)(ii).

¹⁸⁴¹ See also *Commonwealth Motor Vehicles (Liability) Act 1959* (Cth) s 6.

¹⁸⁴² *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 301; *Public Interest Disclosure Act 2010* (Qld) s 42(3).

¹⁸⁴³ Eg *Supreme Court Act 1933* (ACT) s 22; *Juries Act 1927* (SA) s 5.

others.¹⁸⁴⁴ As a consequence, juries are now rarely used; civil trials in Queensland are almost universally determined by a judge without a jury, and civil juries tend to be common only in defamation proceedings.¹⁸⁴⁵

13.10 The Commission understands that there are generally no more than one or two civil jury trials held in Queensland each year; in the last 10 financial years, there have been only 13 civil jury trials.¹⁸⁴⁶

FEE FOR CIVIL JURIES

13.11 If a party in a civil proceeding elects for trial by jury, that party must pay a prescribed fee of \$712, as well as the total amount of remuneration that is payable to jurors and reserve jurors for their attendance at the trial. If the court requires the jury, those fees are to be paid by the plaintiff.¹⁸⁴⁷

13.12 If the trial does not proceed and no person attends the court for jury service, the fee-paying party is entitled to the return of those fees.¹⁸⁴⁸

HOW CIVIL JURY TRIALS OPERATE: BASIC CONCEPTS

13.13 The questions for the jury to determine in a civil trial are formulated once all of the evidence has been given.¹⁸⁴⁹ In a defamation proceeding, the jury is to determine 'whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been

¹⁸⁴⁴ The ordinary mode of trial for a civil action in the High Court, the Federal Court and in New South Wales and the Northern Territory is by a judge without a jury, but the court may order trial by jury if it is in the interests of justice: *Judiciary Act 1903* (Cth) ss 77A, 77B; *Federal Court of Australia Act 1976* (Cth) ss 39, 40; *Supreme Court Act 1970* (NSW) s 85; *Juries Act* (NT) ss 6A, 7. See also *Rules of the Supreme Court 1971* (WA) O 32 r 3. In other jurisdictions, there is a prima facie entitlement to trial by jury for civil actions, but this may be overridden by the court, for example, if the trial will involve prolonged examination of scientific evidence: *Supreme Court Rules 2000* (Tas) rr 557, 558; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 47.02; *Supreme Court Act 1935* (WA) s 42. Similar provision is made in s 21 of the *Defamation Act 2005* as it applies in New South Wales, Tasmania, Victoria and Western Australia. See generally J Horan, 'Perceptions of the civil jury system' (2005) 31 *Monash University Law Review* 120, 120–1.

¹⁸⁴⁵ See generally Queensland Courts, 'The Supreme Court of Queensland' fact sheet (2010) <<http://www.courts.qld.gov.au/Factsheets/SC-FactSheet.pdf>> at 10 February 2011; and Department of Justice and Attorney General, Courts and Tribunals: Forms and Publications, 'Queensland's courts system' fact sheet (2008) <http://www.justice.qld.gov.au/_data/assets/pdf_file/0020/18740/Queensland_courts_system.pdf> at 10 February 2011; Judge S Rares, 'The jury in defamation trials' (Paper presented at the Defamation and Media Law Conference, Sydney, 25 March 2010).

¹⁸⁴⁶ Information provided by the Supreme and District Courts Branch, Department of Justice and Attorney-General, 28 May 2010; and the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 10 February 2011.

¹⁸⁴⁷ *Jury Act 1995* (Qld) s 65(1)–(2); *Jury Regulation 2007* (Qld) s 11. The initial fee is payable before the trial begins; the amount for juror remuneration is, generally, to be paid before the start of each day of the trial. Juror remuneration is discussed in Chapter 12 of this Report.

¹⁸⁴⁸ *Jury Act 1995* (Qld) s 65(3). The reimbursement amount is less any amount necessarily spent by the Sheriff in arranging for or cancelling the attendance of prospective jurors for the proposed trial.

¹⁸⁴⁹ Supreme Court of Queensland, Practice Direction No 1 of 2002, 'Civil jury trials' (Chief Justice, Paul de Jersey, 25 March 2002) [2](b). For examples of the sorts of questions put to a jury in a civil trial, see *Barmettler v Greer & Timms* [2007] QCA 170, [10]; *Smit v Chan* [2001] QSC 493, [17].

established', but is not to determine the amount of damages, if any, that should be awarded.¹⁸⁵⁰ The verdict must ordinarily be unanimous.¹⁸⁵¹

13.14 The jury in a civil trial consists of four people, although the trial may continue with three jurors.¹⁸⁵² Up to three reserve jurors may also be selected, and the parties are each entitled to two peremptory challenges.¹⁸⁵³

13.15 The summoning, selection and empanelling of a civil jury are otherwise the same as for a criminal jury. Those procedures and provisions are outlined in Chapter 10 of this Report. Provisions about the general operation of juries, such as the confidentiality of jury deliberations and the remuneration of jurors, also apply to criminal and civil juries alike.¹⁸⁵⁴

ISSUES FOR CONSIDERATION

13.16 In Chapter 5 of this Report, the Commission has outlined the underlying principles that should inform the review of the jury selection and eligibility provisions of the Act, namely:

- The right to a fair trial;
- The independence, impartiality and competence of jurors;
- The representativeness and non-specialist composition of the jury; and
- The importance of non-discrimination in juror selection.

13.17 Those principles would seem to apply equally to criminal and civil jury trials.¹⁸⁵⁵

13.18 For the most part, the discussion in the foregoing chapters, in light of those principles, would therefore also apply just as well to civil juries as to criminal juries. Civil juries may, however, involve slightly different considerations in relation to the categories of occupational exclusion that should apply.

¹⁸⁵⁰ *Defamation Act 2005* (Qld) s 22.

¹⁸⁵¹ *Jury Act 1995* (Qld) s 58. The court may, if the parties agree, take a 3-1 verdict if, after six hours of deliberation, the jury has failed to produce a unanimous verdict: s 58(2).

¹⁸⁵² *Jury Act 1995* (Qld) ss 32, 57(1)–(2).

¹⁸⁵³ *Jury Act 1995* (Qld) ss 34, 42(1). The parties are entitled to additional challenges if reserve jurors are selected: s 42(2). Reserve jurors and peremptory challenges are discussed in Chapter 10 of this Report.

¹⁸⁵⁴ There are a small number of provisions in the Act that apply to criminal trials only: *Jury Act 1995* (Qld) ss 35 (Information about prospective jurors to be exchanged between prosecution and defence in criminal trials), 39 (Defendant to be informed of right to challenge), 53 (Separation of jury), 54 (Restriction on communication), 69A (Inquiries by juror about accused prohibited).

¹⁸⁵⁵ The enunciation of the right to a fair trial in art 14 of the *International Covenant on Civil and Political Rights*, for instance, applies both to the determination of a criminal charge and to the determination of 'rights and obligations in a suit at law'.

13.19 Exclusion from jury service on the basis of occupation is dealt with in Chapter 7 of this Report. A key recommendation in that chapter is that occupational ineligibility should be confined to those categories of people whose presence on a jury would, or could be seen to, compromise:¹⁸⁵⁶

- the independence of the jury from the executive, legislative and judicial arms of government because of their special or personal duties to the state; or
- the impartiality and non-specialist composition of the jury because of their employment or engagement in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of criminal justice or penal administration.

13.20 This is aimed at ensuring a representative jury pool by limiting occupational exclusions to those that are necessary, having regard, in particular, to the need to preserve the independence, impartiality and non-specialist composition of the jury.

13.21 In applying this approach, the Commission has recommended that lawyers as a general class should be made eligible for jury service. It has recommended, however, that certain public sector lawyers who perform special legal services for the state,¹⁸⁵⁷ and lawyers who have attained specialist accreditation in criminal law or have nominated criminal law as an area of practice with the Queensland Law Society or the Bar Association of Queensland, should be excluded while so employed or engaged and for three years thereafter.¹⁸⁵⁸

13.22 The Commission has also recommended (given the difficulties of defining a category of ineligibility with sufficiently objective criteria) that a person who is, or has been in the preceding three years, a government legal officer or an Australian legal practitioner employed or engaged in the provision of legal services in criminal cases should be entitled to be excused from jury service.¹⁸⁵⁹

13.23 This is consistent with the Commission's focus on criminal trials. The Commission has considered, however, whether this approach should be modified for civil jury trials.

NSWLRC's recommendations

13.24 Because the use of juries in civil trials has 'diminished significantly', the New South Wales Law Reform Commission focused on juries in the criminal jurisdiction in its Report on jury selection,¹⁸⁶⁰ and recommended that 'the regime for

¹⁸⁵⁶ See [7.30]–[7.33], Recommendation 7-1 above.

¹⁸⁵⁷ This applies to certain officers of the Director of Public Prosecutions, Legal Aid and Crown Law.

¹⁸⁵⁸ See [7.173]–[7.185], [7.327]–[7.335], Recommendations 7-11, 7-12, 7-22(b)–(i) above.

¹⁸⁵⁹ See [7.181]–[7.183], [7.335], Recommendation 7-13(a), 7-23 above.

¹⁸⁶⁰ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.12], and see [1.19]–[1.20]. See also n 1844 above.

the exclusion of people from jury service for civil trials should be the same as that for criminal trials'.¹⁸⁶¹

the administrative difficulty involved in dealing separately with the tiny proportion of civil jury trials that are now likely to occur, and the cost ineffectiveness of any such scheme, militates against creating a separate category of exclusion for such trials. (notes omitted)

LRCWA's recommendations

13.25 In its recent Report on the selection, eligibility and exemption of jurors, the Law Reform Commission of Western Australia noted that 'juries are virtually unheard of in civil trials', and made no recommendations specific to civil juries.¹⁸⁶²

13.26 However, different eligibility and excusal rules for criminal and civil juries have been proposed by amendments recently introduced into the parliament of Western Australia. Under the Juries Legislation Amendment Bill 2010 (WA), certain public sector criminal lawyers, public officials involved with the Corruption and Crime Commission, and police officers will be excluded from jury service only in respect of criminal trials.¹⁸⁶³ In addition, a lawyer who 'practises criminal law' will be able to seek excusal from serving on a criminal trial, while a lawyer who 'practises civil law' will be able to seek excusal from service on a civil trial.¹⁸⁶⁴ In combination, these provisions are intended to ensure that, except where a lawyer is 'not indifferent' to the accused or there is a 'risk of a public perception of possible inherent bias', lawyers are able to serve.¹⁸⁶⁵

13.27 None of the other Australian jurisdictions in which civil jury trials are available apply different eligibility or excusal provisions for criminal and civil juries.

Discussion Paper

13.28 In its Discussion Paper, the Commission sought submissions on whether civil jury trials give rise to any special considerations in the context of juror eligibility and selection. In particular, it posed the following questions on which it sought submissions:¹⁸⁶⁶

¹⁸⁶¹ Ibid [4.105]–[4.106], Rec 22.

¹⁸⁶² Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 7.

¹⁸⁶³ *Juries Act 1957* (WA) s 5(3)(bb), sch 1 div 2 as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 10, 36.

¹⁸⁶⁴ *Juries Act 1957* (WA) s 34K as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 34.

¹⁸⁶⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 9709–10 (Charles Porter, Attorney General).

¹⁸⁶⁶ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [12.36], Questions 12-1, 12-2.

- 12-1 In addition to Proposal 7-14 in Chapter 7 of this Paper,¹⁸⁶⁷ should section 4(3) of the *Jury Act 1995* (Qld) be amended to provide that a lawyer or paralegal employed or engaged in the public or private sector in the provision of legal services in civil cases is ineligible for jury service for a civil trial?
- 12-2 Should any of the Commission's proposals in this Paper be modified where the trial in question is a civil trial? If so, which proposals should be modified and in what way? (note added)

Consultation

13.29 The Queensland Law Society did not make any submissions about whether any of the Commission's proposals in the Discussion Paper should be modified in the case of a civil trial, but reiterated its view that *all* lawyers should be excluded from jury service 'as we maintain that it is too difficult to determine rules to outline who is practising in civil cases'.¹⁸⁶⁸

13.30 However, the Department of Justice and Attorney-General did not consider that a lawyer or paralegal employed or engaged in the provision of legal services in civil cases should be made ineligible for jury service in a civil trial. Neither did the Department consider that any of the proposals in the Discussion Paper need to be modified where the trial in question is a civil trial.¹⁸⁶⁹

The Commission's view

13.31 Juries are rarely used in civil trials and, at present, the eligibility provisions of the Act make no distinction between criminal and civil jury trials. In the Commission's view, it is unnecessary and undesirable to introduce such a distinction, particularly given the significant impact that this would be likely to have on the administration of the jury system. The Commission considers, therefore, that the categories of ineligibility and general grounds for excusal under the Act, subject to the recommendations in this Report, should continue to apply with respect to all juries, whether criminal or civil.

13.32 The Commission notes, however, that, under its recommendations in Chapter 7, lawyers in private practice who are employed or engaged in the provision of legal services in civil matters will be eligible for jury service in both criminal *and* civil trials. Civil matters cover a diverse range of practice areas, many

¹⁸⁶⁷

Proposal 7-14 in the Commission's Discussion Paper was that s 4(3)(f) of the *Jury Act 1995* (Qld) — which presently provides that lawyers who are actually engaged in legal work are ineligible for jury service — be amended to provide that only the following persons are ineligible for jury service:

- (a) a person who is a Director or Deputy Director of Public Prosecutions or a Crown Prosecutor;
- (b) a person who is a Crown Solicitor, Deputy Crown Solicitor, Crown Counsel, or Assistant Crown Solicitor; and
- (c) a lawyer or paralegal employed or engaged in the public or private sector in the provision of legal services in criminal cases: see Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [7.147]–[7.150].

¹⁸⁶⁸

Submission 52.

¹⁸⁶⁹

Submission 56.

of which would not come before a jury. In those instances in which a lawyer-juror is perceived to have an interest in the trial, or a connection with the trial participants, which precludes the person from sitting on the jury, the provisions for excusal (or deferral), challenge and discharge would be available. Nevertheless, the principles of impartiality and non-specialist composition suggest that there may be more general concerns about civil lawyers sitting on civil juries.

13.33 As is the case with criminal lawyers in private practice, the Commission notes that it is difficult to formulate an objective basis for exclusion of civil lawyers.¹⁸⁷⁰ The Commission also notes that the introduction of a separate ground of *ineligibility* for civil trials would impose significant administrative costs on the Sheriff. On balance, therefore, the Commission considers that civil lawyers should remain eligible but should be entitled to be excused from service on a civil trial.

13.34 In the Commission's view, the *Jury Act 1995* (Qld) should be amended to provide that a person who is otherwise eligible for jury service is entitled to be excused from jury service for any civil trial, on written notice to the Sheriff, if the Sheriff is satisfied that the person is, or has been in the preceding three years, a government legal officer or an Australian legal practitioner¹⁸⁷¹ employed or engaged in the provision of legal services in civil cases.¹⁸⁷² The Act should also be amended to provide that, if a person on a civil jury could have claimed excusal on this basis but did not, the person's presence on the jury does not, by itself, invalidate the jury's verdict.

13.35 This approach mirrors the provisions recommended in Chapter 7 for the excusal of criminal lawyers.¹⁸⁷³

13.36 Because of the infrequent use of civil juries, and the relatively small number of people who would fall within this category of excusal, the Commission does not consider that this approach would significantly affect the representativeness of the jury pool.

Recommendation

13.37 The Commission makes the following recommendation:

1870 See [7.178] above.

1871 See *Legal Profession Act 2007* (Qld) ss 6(1), 12(1) (definitions of 'Australian legal practitioner' and 'government legal officer').

1872 The sort of evidence that would be required to support a claim for excusal on this basis could usefully be included in the excusal guidelines the Commission has recommended in Chapter 9 of this Report: see [9.116]–[9.120], Recommendation 9-8 above.

1873 See [7.181]–[7.183], [7.335], Recommendations 7-13(a), 7-23 above.

13-1 The *Jury Act 1995* (Qld) should be amended to provide that:

- (a) a person who is otherwise eligible for jury service is entitled to be excused from jury service for any civil trial, on written notice to the Sheriff, if the Sheriff is satisfied that the person is, or has been in the preceding three years, a government legal officer or an Australian legal practitioner employed or engaged in the provision of legal services in civil cases; and**
- (b) if a person on a jury could have claimed excusal on that basis but did not, the person's presence on the jury does not, by itself, invalidate the verdict.**

Chapter 14

Breaches and Penalties

INTRODUCTION	413
PENALTIES UNDER THE <i>JURY ACT 1995</i> (QLD)	415
Regulations	417
Contempt of court.....	418
Proceedings for offences and enforcement of fines	419
COMPARISON WITH THE JURY LEGISLATION IN OTHER JURISDICTIONS	420
Failure to attend or answer questions	421
Breaches of confidentiality	422
Influencing or threatening a juror	424
Impersonating a juror	424
Wrongful termination of employment	425
Receiving excess juror fees	426
Breaches by officials	427
COMPARISON WITH OTHER LEGISLATION IN QUEENSLAND.....	427
Penalties for failing to enrol or vote.....	427
Penalties for failing to appear when summoned as a witness	428
Penalties for offences against the administration of law and justice.....	428
ARE THE PRESENT PENALTIES APPROPRIATE?	429
ARE THE PRESENT PENALTIES EFFECTIVE?	431
A POSSIBLE INFRINGEMENT NOTICE SCHEME.....	433
Infringement notices under the <i>State Penalties Enforcement Act 1999</i> (Qld)	433
Infringement notices for failing to vote	435
NSWLRC's recommendations	437
LRCWA's recommendations	438
DISCUSSION PAPER.....	439
CONSULTATION	440
THE COMMISSION'S VIEW	442
RECOMMENDATIONS	444

INTRODUCTION

14.1 The Commission's Terms of Reference require it to review 'the appropriateness of maximum penalties' under the Act, and whether they should be increased, with particular attention to the penalties for non-return of notices by prospective jurors and non-compliance with jury service summonses. The Commission is to have regard to the level of penalties for similar offences in Queensland and other Australian jurisdictions.¹⁸⁷⁴

14.2 The Terms of Reference also direct the Commission to consider 'possible improvements to proceedings for offences', including whether the Sheriff should be

¹⁸⁷⁴ The Terms of Reference are set out in Appendix A to this Report.

authorised to commence proceedings for an offence. These matters are also addressed in this chapter.

14.3 The Commission understands that the most common breaches under the Act are the non-return of the *Questionnaire* sent with the *Notice to Prospective Juror*, and non-attendance pursuant to a summons. A significant number of notices are sent each year, relative to the number of summonses that are subsequently issued:

	Number of jury service notices sent	Number of summonses issued	Number of jurors empanelled
2006–07	211 975	26 391	7500 ¹⁸⁷⁵
2007–08	245 940	30 671	8052
2008–09	241 480	26 954	6972
2009–10	225 913	26 570	8492

Table 14.1: Number of people identified for jury service in Queensland¹⁸⁷⁶

14.4 Part of the reason for the lower number of summonses relative to the number of initial notices sent, is that some notices are returned with successful applications for excusal or claims of ineligibility. For instance, as can be seen from Table 14.2 below, that in 2009–10, almost 5% of the persons to whom jury notices were sent were ineligible for jury service.

14.5 However, it appears that a substantial number of people simply fail to return the initial notice. In 2009–10, approximately 30% of all jury service notices that were sent either went ‘unclaimed’, were returned late or were not returned at all. However, it cannot be assumed that all non-responses are deliberate avoidances; in at least some cases it is reasonable to expect that the person did not receive the notice because, for instance, of a change of address.

14.6 The figures relating to the issue and return of the jury service notice for 2009–10 are set out in the following table:

Notices sent	Responses	Ineligible respondents	No responses	Summonses issued
225 913	141 262 ¹⁸⁷⁷ (62.53%)	10 734 (4.75%)	73 917 ¹⁸⁷⁸ (32.72%)	26 570

Table 14.2: Response rates to the jury service notice in Queensland, 2009–10¹⁸⁷⁹

¹⁸⁷⁵ For the figures in this column, note that a juror may be empanelled more than once during a court sitting.

¹⁸⁷⁶ Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

¹⁸⁷⁷ This figure includes responses from both prospective jurors who were available and those who were excused.

¹⁸⁷⁸ This figure includes ‘no returns, late returns and unclaimed’.

¹⁸⁷⁹ Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

PENALTIES UNDER THE *JURY ACT 1995* (QLD)

14.7 The Act includes a number of offences relating to jury service. The maximum penalties prescribed for those offences range from a fine of 10 penalty units or two months' imprisonment, to a period of imprisonment of up to two years. Some breaches of the Act may also be dealt with as a contempt of court.

14.8 At present, one penalty unit is equivalent to \$100.¹⁸⁸⁰

14.9 The Act prescribes a penalty of 10 penalty units (\$1000) or two months' imprisonment for the following offences:¹⁸⁸¹

- Failure of a prospective juror to return the completed prospective juror questionnaire to the Sheriff within the time allowed without a reasonable excuse.
- Making a false statement in the prospective juror questionnaire or in an application to be excused from jury service.
- Failure to comply with a jury summons without reasonable excuse.
- Failure of a person who receives a copy of the list of persons summoned for jury service to return the list to the Sheriff as soon as practicable after the jury has been selected.
- Reproducing or disclosing the contents of the list of persons summoned for jury service other than to a party, or a lawyer or other person representing a party, to the trial to which the list relates.
- Failure of a person who is instructed to attend for jury service as a supplementary juror to comply with the instruction to attend or any further instruction about jury service given by the Sheriff or a judge.
- Failure of a juror to comply with any conditions imposed by the judge when allowing the jury or juror to separate after the jury has retired to consider its verdict.

14.10 The Act prescribes a penalty of 20 penalty units (\$2000) or four months' imprisonment for the following offences:¹⁸⁸²

- Failure of a person to answer a reasonable question from the Sheriff to find out whether the person is qualified for jury service.

¹⁸⁸⁰ *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁸⁸¹ *Jury Act 1995* (Qld) ss 18(3), (6), 28(1), 29(5), 30(1), 38(4), 53(8); *Penalties and Sentences Act 1992* (Qld) s 5. If the legislation creating the offence provides that the maximum penalty may be a fine or a period of imprisonment, the offender may be fined, imprisoned, or both: *Penalties and Sentences Act 1992* (Qld) s 180A.

¹⁸⁸² *Jury Act 1995* (Qld) ss 68(2), (3), (5); *Penalties and Sentences Act 1992* (Qld) s 5. If the legislation creating the offence provides that the maximum penalty may be a fine or a period of imprisonment, the offender may be fined, imprisoned, or both: *Penalties and Sentences Act 1992* (Qld) s 180A.

- Untruthfully answering a reasonable question from the Sheriff to find out whether the person is qualified for jury service.
- Failure of a person to comply with a request by the Sheriff to produce a document to find out whether the person is qualified for jury service.

14.11 The Act prescribes a penalty of one year's imprisonment for terminating a person's employment, or prejudicing a person in his or her employment, because the person is, was, or will be absent from employment for jury service.¹⁸⁸³ Although the Act does not expressly provide for a fine for this offence, the *Penalties and Sentences Act 1992* (Qld) provides that a fine may be imposed instead of, or in addition to, a period of imprisonment. In the case of the Magistrates Court, the maximum fine that may be imposed on an individual is 165 penalty units (\$16 500).¹⁸⁸⁴

14.12 The Act prescribes a penalty of two years' imprisonment for the following offences:¹⁸⁸⁵

- Unauthorised questioning of a person summoned for jury service to find out how the person is likely to react to issues arising in a trial or for other purposes related to the person's selection, or possible selection, as a juror.¹⁸⁸⁶
- Unauthorised questioning of a person to find out how another person summoned for jury service is likely to react to issues arising in a trial or for other purposes related to the other person's selection, or possible selection, as a juror.
- Contravening a condition imposed by a judge on the questioning of a person who has been summoned for jury service.
- Pretending to be a member of a jury panel, a juror or a reserve juror.
- Falsifying a record that must be made or kept under the Act.
- Obstructing or interfering with the proper formation of a jury under the Act.
- The making of any inquiries by a juror in a criminal trial about the defendant until the jury of which that juror is a member has given its verdict or been discharged by the judge.

¹⁸⁸³ *Jury Act 1995* (Qld) s 69.

¹⁸⁸⁴ *Penalties and Sentences Act 1992* (Qld) ss 153(2), 46(1)(a)(1). The maximum that may be imposed by the District Court for an individual is 4175 penalty units (\$417 500); there is no limit on the fine that may be imposed by the Supreme Court: s 46(1)(b), (2).

¹⁸⁸⁵ *Jury Act 1995* (Qld) ss 31(1), (2), (5), 66, 67(1), (2), 69A(1), 70(2), (3), (4), (14).

¹⁸⁸⁶ The prohibition against making unauthorised inquiries about persons on the jury list was recommended by the Litigation Reform Commission and incorporated into the *Jury Act 1995* (Qld) when it was enacted: see [3.23] above.

- Publishing jury information¹⁸⁸⁷ to the public.
- Seeking the disclosure of jury information from a juror or former juror.
- Disclosure by a juror or former juror of jury information if that juror has reason to believe that any of that information will, or is likely to be, published to the public.
- Disclosure by a health professional of jury information unless necessary for the health or welfare of a former juror.

14.13 As noted above, the Magistrates Court may impose a fine of 165 penalty units (\$16 500) instead of, or in addition to, a period of imprisonment, for such offences.¹⁸⁸⁸

14.14 Higher penalties may be imposed for corporate offenders. In the case of an offence for which a fine is prescribed as a penalty without expressly prescribing a different fine for a body corporate, a body corporate may be fined an amount equal to five times the maximum fine that is prescribed for the offence.¹⁸⁸⁹ In the case of an offence for which the only prescribed penalty is a period of imprisonment, the corporation may instead be fined up to a certain amount: if the period of imprisonment that is prescribed for the offence is not more than six months, the corporation may be fined up to 415 penalty units (\$41 500); if the imprisonment is more than six months but not more than one year, the corporation may be fined up to 835 penalty units (\$83 500); and if the imprisonment is more than one year but not more than two years, the corporation may be fined up to 1660 penalty units (\$166 000).¹⁸⁹⁰

Regulations

14.15 Under section 74(2) of the Act, the Governor is empowered to make regulations to create offences and prescribe penalties of no more than 10 penalty units. None has yet been made.

¹⁸⁸⁷ *Jury Act 1995* (Qld) s 70(17) defines 'jury information' to mean:

- (a) information about statements made, opinions expressed, arguments advanced, or votes cast, in the course of a jury's deliberations; or
- (b) information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding.

Confidentiality of jury deliberations also forms part of the oath or affirmation that is to be taken, or made, by a juror: *Jury Act 1995* (Qld) s 50; *Oaths Act 1867* (Qld) ss 21, 22. Legislative protection of the secrecy of jury deliberations was recommended in Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [7.28]–[7.29], Rec 31–33.

¹⁸⁸⁸ *Penalties and Sentences Act 1992* (Qld) ss 153(2), 46(1)(a).

¹⁸⁸⁹ *Penalties and Sentences Act 1992* (Qld) s 181B.

¹⁸⁹⁰ *Penalties and Sentences Act 1992* (Qld) s 181A.

Contempt of court

14.16 The following breaches of the Act may also be treated as a contempt of court:¹⁸⁹¹

- Failure of a prospective juror to attend before the court as instructed by the Sheriff or the court without reasonable excuse.¹⁸⁹²
- Failure of a person who is instructed to attend for jury service as a supplementary juror to comply with the instruction to attend or another instruction about jury service given by the Sheriff or a judge.¹⁸⁹³
- Separating from the rest of the jury when not permitted to do so.
- Communicating with a juror without the judge's leave when the jury is kept together.¹⁸⁹⁴

14.17 Contempt in the face of the court is a criminal offence, but is dealt with summarily and in civil proceedings.¹⁸⁹⁵ The court may deal with the contempt immediately and on its own motion¹⁸⁹⁶ or on application by another person;¹⁸⁹⁷ it may also order the registrar to bring proceedings to punish a person for contempt.¹⁸⁹⁸

14.18 The court's sentencing powers for contempt are very wide.¹⁸⁹⁹ The court 'may punish the individual by making an order that may be made under the *Penalties and Sentences Act 1992 (Qld)*',¹⁹⁰⁰ including an order imposing a fine or a term of imprisonment, and may do so with conditions 'for example, a suspension of punishment during good behaviour'.¹⁹⁰¹ Alternatively or in addition, the court

¹⁸⁹¹ *Jury Act 1995 (Qld)* ss 28(2), 38(5), 53(9), 54(3).

¹⁸⁹² This is an alternative to the offence created by s 28(1) of the Act: see [14.9] above.

¹⁸⁹³ This is an alternative to the offence created by s 38(4) of the Act: see [14.9] above.

¹⁸⁹⁴ See also *Oaths Act 1867 (Qld)* ss 31 (Oath of bailiff in charge of jury), 31A (Oath of police officer assisting bailiff in charge of jury).

¹⁸⁹⁵ See *Criminal Code Act 1899 (Qld)* s 8; *Uniform Civil Procedure Rules 1999 (Qld)* ch 20 pt 7. See also CJ Miller, *Contempt of Court* (3rd ed, 2000) [1.10]–[1.11], [4.41].

¹⁸⁹⁶ *Uniform Civil Procedure Rules 1999 (Qld)* ch 20 pt 7 div 2 (Contempt in face or hearing of court). See also *District Court of Queensland Act 1967 (Qld)* s 129(4).

¹⁸⁹⁷ *Uniform Civil Procedure Rules 1999 (Qld)* ch 20 pt 7 div 3 (Application for punishment for contempt).

¹⁸⁹⁸ *Uniform Civil Procedure Rules 1999 (Qld)* r 928.

¹⁸⁹⁹ See generally *Uniform Civil Procedure Rules 1999 (Qld)* ch 20 pt 7 div 4 (General). The Supreme Court's inherent power, as a superior court of record, to punish for contempt is preserved by *Supreme Court of Queensland Act 1991 (Qld)* s 9.

¹⁹⁰⁰ *Uniform Civil Procedure Rules 1999 (Qld)* r 930(2).

¹⁹⁰¹ *Uniform Civil Procedure Rules 1999 (Qld)* r 930(4).

may, at common law, reprimand the offender, require an apology or order payment of costs.¹⁹⁰²

14.19 Under the *Penalties and Sentences Act 1992* (Qld), the maximum fine that may be imposed by the District Court, when no maximum is otherwise stipulated, is 4175 penalty units (\$417 500), but there is no limit on the amount of the fine that may be imposed by the Supreme Court.¹⁹⁰³ Section 153A(b) of that Act provides for a maximum term of imprisonment of two years when a maximum is not otherwise stipulated. However, where the conduct is also dealt with by way of a statutory offence, as is the case with respect to breaches of sections 28 and 38 of the *Jury Act 1995* (Qld), the court is likely to be guided, if not bound, by the maximum penalties stipulated for those offences.¹⁹⁰⁴

Proceedings for offences and enforcement of fines

14.20 Offences under the Act are simple offences (as distinct from indictable offences) and are to be dealt with summarily under the *Justices Act 1886* (Qld).¹⁹⁰⁵

14.21 Under that Act, proceedings are commenced by written complaint on which a justice may issue a summons or, in certain circumstances, a warrant for the defendant's appearance before the Magistrates Court, which will hear and determine the complaint.¹⁹⁰⁶ If convicted, the Court may impose a fine up to the amount specified in the *Jury Act 1995* (Qld) for the offence.

14.22 If a person defaults on payment of a fine, enforcement procedures may be taken under the *State Penalties Enforcement Act 1999* (Qld).¹⁹⁰⁷ That Act allows for the enforcement of fines by way of enforcement orders (requiring payment or application for instalment or community service payment options, within a certain time) or, on further default of payment, by enforcement warrants (to seize or charge property), fine collection notices (to re-direct earnings or other moneys) and, in limited circumstances, warrants for arrest and imprisonment.¹⁹⁰⁸

¹⁹⁰² Thomson Reuters, *The Laws of Australia*, Criminal Offences, 'Contempt' [10.11.1440] (at 14 February 2011). Also see *Uniform Civil Procedure Rules 1999* (Qld) r 932 (Costs).

¹⁹⁰³ *Penalties and Sentences Act 1992* (Qld) ss 45(3), 46(1)(b), (2)(b). At common law, there is, theoretically, no fixed maximum threshold for the term of imprisonment or amount of the fine that may be imposed for contempt in the face of the court: CJ Miller, *Contempt of Court* (3rd ed, 2000) [3.92], [3.93].

¹⁹⁰⁴ See CJ Miller, *Contempt of Court* (3rd ed, 2000) [3.94], [4.42].

¹⁹⁰⁵ Criminal Code (Qld) s 3; *Acts Interpretation Act 1954* (Qld) s 44. As noted at [14.16] above, some offences under the Act may also be dealt with as contempt of court.

¹⁹⁰⁶ *Justices Act 1886* (Qld) ss 42, 53, 54, 59, 144–146, 148. Provision is also made in the *Justices Act 1886* (Qld) for the magistrate or clerk of the court to require the defendant to submit to mediation and for the Court to adjourn the hearing of the complaint and to determine the matter in the absence of the defendant in certain circumstances: s 53A, pt 6 div 2 (Default by complainant or defendant).

¹⁹⁰⁷ *Justices Act 1886* (Qld) s 161A(3)(b); *State Penalties Enforcement Act 1999* (Qld) s 34. But see also *Justices Act 1886* (Qld) s 161A(3)(a) in relation to execution warrants issued by a justice.

¹⁹⁰⁸ *State Penalties Enforcement Act 1999* (Qld) ss 38, 41, 52, 63, 75, 119.

14.23 The Commission understands that, although fines for breaches of the Act have been imposed on occasion, many such fines are remitted because of the low level of the fines relative to the procedures required for enforcement.¹⁹⁰⁹

14.24 The Commission also understands that between 2006–07 and 2009–10, there have been no prosecutions for offences under the Act relating to the failure to respond to the *Notice to Prospective Juror*, the prejudicing of a person's employment due to his or her jury service, or disclosure or publication of jury information.¹⁹¹⁰

14.25 No 'infringement notice' or similar procedure is presently available for offences under the *Jury Act 1995* (Qld). An overview of those procedures is provided later in the chapter.

COMPARISON WITH THE JURY LEGISLATION IN OTHER JURISDICTIONS

14.26 The jury legislation in the other Australian jurisdictions provides a similar range of offences to those in Queensland, although there are differences of detail and the prescribed penalties vary. Tasmania and Victoria generally provide for substantially higher penalties than the other jurisdictions. South Australia also provides for a significantly higher penalty, of seven years' imprisonment, for some offences. Otherwise, the Queensland penalties are not radically inconsistent with the other States and Territories overall.

14.27 The penalties in most jurisdictions are calculated by reference to 'penalty units'.¹⁹¹¹ One penalty unit is equivalent to:

- \$100 in Queensland;¹⁹¹²
- \$110 in the Australian Capital Territory¹⁹¹³ and New South Wales,¹⁹¹⁴

¹⁹⁰⁹ Information provided by the Department of Justice and Attorney-General, 25 February 2011.

¹⁹¹⁰ Information provided by the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, 23 February 2011.

¹⁹¹¹ Penalty units are not generally used in South Australian legislation.

¹⁹¹² *Penalties and Sentences Act 1992* (Qld) s 5. If the legislation creating the offence prescribes a period of imprisonment as the only penalty for the offence, the Magistrates Court may impose a maximum fine of 165 penalty units (for an individual) instead of, or in addition, to a period of imprisonment: ss 153(2), 46(1)(a). If the legislation creating the offence provides that the maximum penalty may be a fine or a period of imprisonment, the offender may be fined, imprisoned, or both: s 180A. Also, if the offender is a body corporate, and the legislation creating the offence does not otherwise provide, the offender may be fined an amount equal to five times the maximum fine that is prescribed for the offence: s 181B. If the offender is a body corporate and imprisonment is the only penalty that is prescribed for the offence, the offender may instead be fined up to a certain amount: s 181A.

¹⁹¹³ *Legislation Act 2001* (ACT) s 133. If the offender is a corporation, one penalty unit is equivalent to \$550.

¹⁹¹⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

- a gazetted amount in Victoria, currently \$119.45, with the actual penalty rounded to the nearest dollar;¹⁹¹⁵ and
- an indexed amount in the Northern Territory, currently \$133,¹⁹¹⁶ and in Tasmania, currently \$130.¹⁹¹⁷

Failure to attend or answer questions

14.28 Failure to attend for jury service in answer to a summons or similar notice is an offence in each of the Australian jurisdictions. In Tasmania and Victoria, the maximum penalty for failing to attend is higher if the person has been empanelled as a juror.

14.29 Failure to answer questions from the Sheriff, or providing false or misleading information to the Sheriff, in relation to a person's eligibility to serve is also an offence in many jurisdictions. In some instances, higher penalties are prescribed if a person provides false or misleading information in order to evade jury service.

14.30 The Queensland penalties generally fall within the lower to middle end of the range when compared with the other jurisdictions, including New Zealand and the United Kingdom.

	Failure to respond to Sheriff's notice	Failure to answer Sheriff's questions (or providing false information)	Failure to attend in answer to summons
Qld	\$1000 or 2 months' imprisonment or both	\$1000 or 2 months' imprisonment or both \$2000 or 4 months' imprisonment or both if knowingly state something false or misleading in response to the Sheriff's notice or in an application for excusal	\$1000 or 2 months' imprisonment or both
ACT	n/a	n/a	\$550

¹⁹¹⁵ *Monetary Units Act 2004* (Vic) ss 5, 7; Victoria Government Gazette No G 10, 11 March 2010, 449. This amount will apply until at least 30 June 2011: see Office of the Chief Parliamentary Counsel (Victoria), Penalty and Fee Units <<http://www.ocpc.vic.gov.au/CA2572B3001B894B/pages/faqs-penalty-and-fee-units>> at 4 February 2011.

¹⁹¹⁶ *Penalty Units Act* (NT) ss 3–6; *Penalty Units Regulations* (NT) reg 3.

¹⁹¹⁷ *Penalty Units and Other Penalties Act 1987* (Tas) s 4A. This amount will apply until at least 30 June 2011: see Department of Justice (Tasmania), Value of Indexed Amounts in Legislation <http://www.justice.tas.gov.au/legislationreview/value_of_indexed_units_in_legislation> at 4 February 2011.

NSW	\$1100	\$5500 ¹⁹¹⁸	\$2200 (or less if paid immediately or dealt with by penalty notice) ¹⁹¹⁹
NT	n/a	n/a	\$532
SA	\$1250	\$1250	\$1250
Tas	\$3900 or 3 months' imprisonment	\$3900 or 3 months' imprisonment \$6500 (\$13 000 for corporate offenders) if knowingly provide false or misleading information to evade jury service	\$3900 or 3 months' imprisonment \$7800 or 6 months' imprisonment if failure to attend after empanelled
Vic	\$3583.50	\$3583.50 or 3 months' imprisonment \$3583.50 (\$17 917.50 for corporate offenders) if knowingly make a false or misleading representation to evade jury service	\$3583.50 or 3 months' imprisonment \$7167 or 6 months' imprisonment if failure to attend after empanelled
WA	n/a	n/a	Such fine as the court thinks fit ¹⁹²⁰
NZ	n/a	n/a	NZ\$1000
UK	n/a	£1000 ¹⁹²¹	£100

Table 14.3: Penalties for failure to respond to a summons or to the Sheriff's questions¹⁹²²

Breaches of confidentiality

14.31 Various offences in relation to disclosing, publishing or soliciting protected information about jurors and jury deliberations are also provided for in all of the Australian jurisdictions. The Queensland penalties are not significantly different from those in the other States and Territories.

¹⁹¹⁸ *Jury Act 1977* (NSW) s 62 to be substituted by *Jury Amendment Act 2010* (NSW); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17. The \$5500 penalty will replace the current provision in *Jury Act 1977* (NSW) s 62 for a penalty of 10 penalty units (\$1100).

¹⁹¹⁹ The system of fines that applies in New South Wales is discussed in more detail at [14.78] below.

¹⁹²⁰ But see new *Juries Act 1957* (WA) s 55(1)–(3) as is proposed to be inserted by *Juries Legislation Amendment Bill 2010* (WA) cl 42. The new provision, which is proposed to replace s 55(1)–(2), will provide for a penalty of \$5000 for failure to attend as required for jury service. The Law Reform Commission of Western Australia had recommended that the penalty be increased to \$2000: Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 142, Rec 67(1).

¹⁹²¹ If the person serves while knowing that he or she is disqualified from jury service, the fine may be increased to £5000: *Juries Act 1974* (Eng) s 20(5)(d); *Interpretation Act 1978* (Eng) s 5, sch 1 (definition of 'standard scale'); *Criminal Justice Act 1982* (Eng) s 37.

¹⁹²² See [14.27] above and *Juries Act 1967* (ACT) ss 41, 42; *Jury Act 1977* (NSW) ss 61–64; *Juries Act* (NT) ss 50, 51; *Jury Act 1995* (Qld) ss 18(3), (6), 28, 68; *Juries Act 1927* (SA) ss 25, 78(1)(a); *Juries Act 2003* (Tas) ss 20(4B), 27(4), 29(12), 37(4), 54, 55, 61; *Juries Act 2000* (Vic) ss 67–72; *Juries Act 1957* (WA) s 55; *Juries Act 1981* (NZ) s 32; *Juries Act 1974* (Eng) s 20(1), (5)(a)–(c); *Interpretation Act 1978* (Eng) s 5, sch 1 (definition of 'standard scale'); *Criminal Justice Act 1982* (Eng) s 37.

	Disclosing juror's identity	Disclosing jury deliberations	Soliciting protected information from a juror
Qld	2 years' imprisonment or \$16 500 or both ((\$166 000 for corporate offenders))	2 years' imprisonment or \$16 500 or both ((\$166 000 for corporate offenders))	2 years' imprisonment or \$16 500 or both ((\$166 000 for corporate offenders))
ACT	\$5500 or 6 months' imprisonment or both ((\$27 500 for corporate offenders))	\$5500 or 6 months' imprisonment or both ((\$27 500 for corporate offenders))	\$5500 or 6 months' imprisonment or both ((\$27 500 for corporate offenders))
NSW	\$5500 or 2 years' imprisonment or both ((\$250 000 for corporate offenders))	\$2200 ((\$5500 if done for reward))	7 years' imprisonment
NT	\$11 305 or 2 years' imprisonment ((\$58 520 for corporate offenders))	\$11 305 or 2 years' imprisonment ((\$58 520 for corporate offenders))	\$11 305 or 2 years' imprisonment ((\$58 520 for corporate offenders))
SA	\$10 000 or 2 years' imprisonment ((\$25 000 for corporate offenders))	\$10 000 or 2 years' imprisonment ((\$25 000 for corporate offenders))	\$10 000 or 2 years' imprisonment ((\$25 000 for corporate offenders))
Tas	\$78 000 or 2 years' imprisonment ((\$390 000 for corporate offenders))	\$78 000 or 2 years' imprisonment ((\$390 000 for corporate offenders))	\$78 000 or 2 years' imprisonment ((\$390 000 for corporate offenders))
Vic	\$71 670 or 5 years' imprisonment ((\$358 350 for corporate offenders))	\$71 670 or 5 years' imprisonment ((\$358 350 for corporate offenders))	\$71 670 or 5 years' imprisonment ((\$358 350 for corporate offenders))
WA	\$5000	\$5000	\$5000
NZ	NZ\$10 000 or 3 months' imprisonment or both	n/a	n/a

Table 14.4: Penalties for breaches of jury confidentiality¹⁹²³

14.32 Some jurisdictions also prescribe penalties for communication with, or by, jurors during the course of a trial.

14.33 The Queensland Act provides that a person may be punished summarily for contempt of court for communicating with a juror, without the judge's leave, while the jury is kept together.¹⁹²⁴

¹⁹²³

See [14.27] above and *Juries Act 1967* (ACT) s 42C; *Jury Act 1977* (NSW) ss 68, 68A, 68B; *Juries Act* (NT) ss 49A, 49B; *Jury Act 1995* (Qld) s 70; *Criminal Law Consolidation Act 1935* (SA) ss 246, 247; *Juries Act 2003* (Tas) ss 57, 58; *Juries Act 2000* (Vic) ss 77, 78; *Juries Act 1957* (WA) ss 56A–56D; *Juries Act 1981* (NZ) s 32B. In Western Australia, it is also a contempt of court to take or publish, or cause to be taken or published, a photograph or likeness of a person summoned to attend or empanelled as a juror: *Juries Act 1957* (WA) s 57. See also *Jury Act 1977* (NSW) s 67A, which provides for a penalty of 10 penalty units (\$1100) if a person inspects the panel of jurors' names or cards containing the jurors' names.

¹⁹²⁴

Jury Act 1995 (Qld) s 54.

14.34 Similar provision is made in Tasmania.¹⁹²⁵

14.35 In Queensland, jurors are also prohibited from making inquiries about the defendant during the trial. That offence attracts a penalty of up to two years' imprisonment or \$16 500 or both.¹⁹²⁶ Similar prohibitions apply in New South Wales, with a penalty of \$5500 or two years' imprisonment or both; and Victoria, with a penalty of \$14 344.¹⁹²⁷

Influencing or threatening a juror

14.36 There are also provisions in some jurisdictions about influencing, threatening, or otherwise dealing improperly with a juror. The nature of the offences varies greatly, making direct comparisons difficult.

14.37 In South Australia, a person may be punished by up to seven years' imprisonment for threatening or stalking a juror, or inducing a juror to influence the outcome of proceedings or not to attend.¹⁹²⁸ Threatening or influencing a juror is also an offence in Tasmania, attracting a maximum penalty of \$65 000 or five years' imprisonment or both.¹⁹²⁹

14.38 In comparison, the Queensland Act prohibits unauthorised questioning of persons to 'find out how [a prospective juror] is likely to react to issues arising in a trial' or for other purposes related to a person's selection as a juror. It also prohibits the obstruction or interference with the proper formation of a jury. The maximum penalty in either case is two years' imprisonment or \$16 500 or both.¹⁹³⁰

Impersonating a juror

14.39 It is also an offence in each of the Australian jurisdictions to impersonate a juror. The Queensland penalty sits at the higher end of the range of penalties for this offence.

Qld	2 years' imprisonment or \$16 500 or both
ACT	\$5500 or 6 months' imprisonment or both
NSW	\$5500
NT	\$2261

¹⁹²⁵ *Juries Act 2003* (Tas) ss 47(3), 51(1).

¹⁹²⁶ *Jury Act 1995* (Qld) s 69A; *Penalties and Sentences Act 1992* (Qld) ss 5, 153(2), 46(1)(a).

¹⁹²⁷ *Jury Act 1977* (NSW) s 68C; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17; *Juries Act 2000* (Vic) s 78A; *Monetary Units Act 2004* (Vic) ss 5, 7.

¹⁹²⁸ *Criminal Law Consolidation Act 1935* (SA) ss 245(1), (3), 248. It is also an offence, attracting a penalty of up to seven years' imprisonment, to accept an inducement not to attend as a juror or to act in a way that might influence the outcome of the proceedings: s 245(2).

¹⁹²⁹ *Juries Act 2003* (Tas) s 63; *Penalty Units and Other Penalties Act 1987* (Tas) s 4A.

¹⁹³⁰ *Jury Act 1995* (Qld) ss 31, 67(2); *Penalties and Sentences Act 1992* (Qld) ss 153(2), 46(1)(a). The maximum penalty for a body corporate is \$166 000: *Penalties and Sentences Act 1992* (Qld) ss 5, 181A(2)(c).

SA	2 years' imprisonment (7 years' imprisonment if the person acted with the intention to influence the outcome of proceedings)
Tas	\$15 600 or 12 months' imprisonment
Vic	\$14 344 or 12 months' imprisonment
WA	Such fine as the court thinks fit ¹⁹³¹

Table 14.5: Penalties for impersonating a juror¹⁹³²

Wrongful termination of employment

14.40 It is also an offence, in most of the other Australian jurisdictions, for an employer to terminate a person's employment, or prejudice a person in his or her employment, because the person is, or will be, absent for jury service. The Queensland penalty is generally consistent with those in the other States and Territories.

Qld	1 years' imprisonment or \$16 500 or both (\$83 500 for corporate offenders)
ACT	\$5500 or 6 months' imprisonment or both (\$27 500 for corporate offenders)
NSW	\$5500 or 12 months' imprisonment or both (\$22 000 for corporate offenders) ¹⁹³³
NT	\$5320 or 12 months' imprisonment
SA	n/a ¹⁹³⁴
Tas	\$15 600 or 12 months' imprisonment (\$78 000 for corporate offenders)
Vic	\$14 344 or 12 months' imprisonment (\$71 670 for corporate offenders)

¹⁹³¹ But see new *Juries Act 1957* (WA) s 55(4) as is proposed to be inserted by *Juries Legislation Amendment Bill 2010* (WA) cl 42. The new provision, which is proposed to replace s 55(1)(c), will provide for a penalty of \$5000 for personating, or attempting to personate, a juror.

¹⁹³² See [14.27] above and *Juries Act 1967* (ACT) s 43; *Jury Act 1977* (NSW) s 67; *Juries Act* (NT) s 55; *Jury Act 1995* (Qld) s 66; *Criminal Law Consolidation Act 1935* (SA) s 245(5); *Juries Act 2003* (Tas) s 62; *Juries Act 2000* (Vic) ss 74, 82(a); *Juries Act 1957* (WA) s 55(1)(c).

¹⁹³³ *Jury Act 1977* (NSW) s 69 to be amended by *Jury Amendment Act 2010* (NSW); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17. The proposed new penalties will replace the current provision for a penalty of 20 penalty units (\$2200). See also proposed new s 69A to be inserted by *Jury Amendment Act 2010* (NSW), which will make it an offence, punishable by a maximum of 20 penalty units (\$2200), for an employer to require an employee to: use leave to which the employee is entitled to comply with a jury summons; carry out work on a day on which the employee is serving as a juror; or undertake additional hours of work to compensate for work time lost by the employee while serving as a juror. These amendments give effect to the recommendations made by the NSW Law Reform Commission: New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [14.11]–[14.19], Rec 69, 70, 71.

¹⁹³⁴ Whilst the legislation in South Australia does not contain a specific offence for wrongful termination or prejudice of a person's employment because of jury service, *Criminal Law Consolidation Act 1935* (SA) s 245(3) provides more generally that 'a person who prevents or dissuades, or attempts to prevent or dissuade, another person from attending as a juror at judicial proceedings is guilty of an offence' punishable by up to seven years' imprisonment.

WA	n/a ¹⁹³⁵
NZ	NZ\$10 000

Table 14.6: Penalties for terminating or prejudicing a juror's employment¹⁹³⁶

14.41 Provision is also made in some jurisdictions for the court to order, upon conviction for such an offence, that the employer reimburse, reinstate or compensate the employee.¹⁹³⁷

Receiving excess juror fees

14.42 Some jurisdictions also make it an offence for jurors to claim or take a payment in excess of the amount to which they are entitled under the pretence of receiving remuneration for attendance as a juror. The Queensland Act does not include an express provision dealing with this.

Qld	n/a
ACT	n/a
NSW	\$5500 ¹⁹³⁸
NT	\$532
SA	\$1250
Tas	\$15 600 or 12 months' imprisonment
Vic	\$14 344 or 12 months' imprisonment
WA	Such fine as the court thinks fit ¹⁹³⁹

Table 14.7: Penalties for receiving excess juror fees¹⁹⁴⁰

¹⁹³⁵

But see new *Juries Act 1957* (WA) s 56 as proposed to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 42. Proposed new s 56(5) will introduce a new offence for terminating an employee's employment, ceasing to remunerate an employee, reducing an employee's remuneration, otherwise prejudicing an employee in his or her employment, or threatening to take any of those actions because the employee is summoned for, or is performing, jury service. The offence will attract a maximum penalty of \$10 000 (\$50 000 for corporate offenders) and will give effect to the recommendations of the Law Reform Commission of Western Australia: Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 138, Rec 66.

¹⁹³⁶

See [14.27] above and *Juries Act 1967* (ACT) s 44AA(1); *Jury Act 1977* (NSW) s 69; *Juries Act* (NT) s 52; *Jury Act 1995* (Qld) s 69; *Juries Act 2003* (Tas) s 56(1); *Juries Act 2000* (Vic) ss 76(1), 83(1); *Juries Act 1981* (NZ) s 32A.

¹⁹³⁷

Juries Act 1967 (ACT) s 44AA(3); *Juries Act 2003* (Tas) s 56(2)–(5); *Juries Act 2000* (Vic) s 76(3)–(6). See also proposed new *Juries Act 1957* (WA) s 56(7) to be inserted by Juries Legislation Amendment Bill 2010 (WA) cl 42.

¹⁹³⁸

Jury Act 1977 (NSW) s 62(1)(e) to be inserted by *Jury Amendment Act 2010* (NSW); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17. Under the new provision, it will be an offence to provide false or misleading information or documents in connection with a claim for juror payment.

¹⁹³⁹

But see Juries Legislation Amendment Bill 2010 (WA) cl 42 which proposes to repeal *Juries Act 1957* (WA) s 55(1)(e).

¹⁹⁴⁰

See [14.27] above and *Juries Act* (NT) s 56; *Juries Act 1927* (SA) s 78(1)(d); *Juries Act 2003* (Tas) s 64; *Juries Act 2000* (Vic) ss 75, 82(b); *Juries Act 1957* (WA) s 55(1)(e).

Breaches by officials

14.43 Some forms of improper behaviour by officials in relation to jury lists and excusals are made offences in some of the other jurisdictions.

14.44 For example, falsification of records about jurors attracts a penalty of up to two years' imprisonment or \$16 500 or both in Queensland; \$71 670 or five years' imprisonment in Victoria; and such fine as the court deems fit in Western Australia.¹⁹⁴¹

14.45 In addition, acceptance of a payment or reward for excusing a person from jury service attracts a penalty of \$71 670 or five years' imprisonment in Victoria, and a fine in the amount deemed fit by the court in Western Australia.¹⁹⁴²

COMPARISON WITH OTHER LEGISLATION IN QUEENSLAND

14.46 It is desirable that the penalty regime under the *Jury Act 1995* (Qld) be consistent with other Queensland legislation, particularly legislation dealing with similar civic responsibilities.

14.47 However, it is difficult to identify any other civic obligations that are comparable to jury service; consequently, there are few readily available or meaningful points of comparison. Given the unique nature of jury service, any comparisons are, at best, imperfect.

14.48 In addition, in reviewing offences of a similar nature under other Queensland statutes, the Commission did not find any discernible or decisive trends in terms of penalty levels; penalties vary considerably across statutes depending on the particular practical and policy considerations of each context. The penalties under the Act are sometimes higher and sometimes lower than those imposed in other statutes, but it is difficult to assess whether they are significantly inconsistent.

Penalties for failing to enrol or vote

14.49 Voting obligations might be thought of as one possible point of comparison given that, like jury service, they are an incident of citizenship. In Queensland, a fine of one penalty unit (\$100) applies for a failure to vote, unless it is paid earlier in which case it is one-half of a penalty unit (\$50).¹⁹⁴³ Similarly, under the Commonwealth electoral legislation, failure to enrol attracts a one penalty unit

¹⁹⁴¹ *Jury Act 1995* (Qld) s 67(1); *Penalties and Sentences Act 1992* (Qld) ss 5, 153(2), 46(1)(a); *Juries Act 2000* (Vic) s 66(1)(a), (b), (e); *Monetary Units Act 2004* (Vic) ss 5, 7; *Juries Act 1957* (WA) s 54(a)–(c).

¹⁹⁴² *Juries Act 2000* (Vic) s 66(1)(f); *Monetary Units Act 2004* (Vic) ss 5, 7; *Juries Act 1957* (WA) s 54(d).

¹⁹⁴³ *Electoral Act 1992* (Qld) ss 125, 164; *Penalties and Sentences Act 1992* (Qld) s 5. The system of penalties that apply for failure to vote is discussed at [14.74]–[14.76] below. The penalty for failure to enrol is one penalty unit (\$100); *Electoral Act 1992* (Qld) s 150.

(\$110) fine and failure to vote a fine of \$50.¹⁹⁴⁴ These penalties are much lower than the penalty for failing to respond to a summons or notice for jury service of 10 penalty units (\$1000) or two months' imprisonment.

14.50 This may reflect some of the differences between voting and jury service obligations. Failure to vote principally erodes the voter's rights; failure to serve on a jury, however, affects the rights of other members of the community and of defendants. Further, the impact of one person's failure to vote is arguably much less, in strictly numerical terms, than the impact of a person's failure to attend for jury service.

Penalties for failing to appear when summoned as a witness

14.51 Some comparison might also be drawn with the attendance required of people summoned to appear as witnesses before Tribunals, Commissions and other bodies. However, helpful comparisons are made difficult because of the different roles of jurors and witnesses,¹⁹⁴⁵ and the significant variation of penalties across different statutes. For example, under the *Commissions of Inquiry Act 1950* (Qld) the penalty for failing to attend as a witness in response to a summons is 200 penalty units (\$20 000) or one year's imprisonment,¹⁹⁴⁶ but only two penalty units (\$200) under the *Justices Act 1886* (Qld).¹⁹⁴⁷ Under a number of other statutes, including the recently enacted *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the penalty is 100 penalty units (\$10 000),¹⁹⁴⁸ but others are as high as 1000 penalty units (\$100 000) or one year's imprisonment,¹⁹⁴⁹ and still others are set between 40 (\$4000) and 10 (\$1000) penalty units.¹⁹⁵⁰

Penalties for offences against the administration of law and justice

14.52 Given the critical role of jurors in the criminal justice system, another possible source of comparison might be the offences against the administration of law and justice under Part 3 of the Criminal Code (Qld).¹⁹⁵¹ Section 205 of the

¹⁹⁴⁴ *Commonwealth Electoral Act 1918* (Cth) ss 101, 245. In the case of a failure to vote, a person may elect to pay a fine of \$20 rather than proceed to court to have the matter determined and where a fine of up to \$50 may be imposed: s 245(5)–(10). One penalty unit is \$110: *Crimes Act 1914* (Cth) s 4AA.

¹⁹⁴⁵ Whereas the non-attendance of a prospective juror can, at least in theory, be 'made up' by the attendance of others, particular evidence ordinarily cannot be received from another person if the witness fails to attend.

¹⁹⁴⁶ *Commissions of Inquiry Act 1950* (Qld) s 5; *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁹⁴⁷ *Justices Act 1886* (Qld) s 79(1); *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁹⁴⁸ Eg *Guardianship and Administration Act 2000* (Qld) s 137; *Health Quality and Complaints Commission Act 2006* (Qld) s 109; *Legal Profession Act 2007* (Qld) s 653; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 214. See also *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁹⁴⁹ Eg *Queensland Competition Authority Act 1997* (Qld) s 183; *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁹⁵⁰ Eg *Coroners Act 2003* (Qld) s 37(6) (40 penalty units); *Mental Health Act 2000* (Qld) s 468 (40 penalty units); *Workplace Health and Safety Act 1995* (Qld) s 144 (30 penalty units); *Biological Control Act 1987* (Qld) s 41 (20 penalty units or six months' imprisonment); *Electricity—National Scheme (Queensland) Act 1997* (Qld) s 143 (\$2000); *National Gas (Queensland) Act 2008* (Qld) s 202 (\$2000); *Domestic and Family Violence Protection Act 1989* (Qld) s 39(2) (10 penalty units). See also *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁹⁵¹ Criminal Code (Qld) pt 3 (Offences against the administration of law and justice, against office and against public authority).

Code provides, for example, for imprisonment for one year for disobedience of any lawful order issued by a court or a person authorised by statute. One difficulty in making such comparisons, however, is that the offences under the *Jury Act 1995* (Qld) are generally to be dealt with summarily while most of the offences under Part 3 of the Code are indictable offences.¹⁹⁵²

14.53 Some other comparisons with the Criminal Code (Qld) offences, showing commensurate penalty levels, can nevertheless be made. For example, wrongful disclosure by a juror of jury information is subject to a penalty of two years' imprisonment; under the Code, publication or communication by a public officer of information or documents that it was the officer's duty to keep secret is also punishable by two years' imprisonment.¹⁹⁵³ Also, the penalty for impersonating a juror is two years' imprisonment, whilst impersonating a public officer or a justice is punishable by three years' imprisonment under the Code.¹⁹⁵⁴

ARE THE PRESENT PENALTIES APPROPRIATE?

14.54 Although not specifically listed as one of the fundamental legislative principles in section 4 of the *Legislative Standards Act 1992* (Qld), proportionality is one of the basic principles governing the drafting of Queensland legislation:¹⁹⁵⁵

Consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation.

...

A penalty should be proportionate to the offence. Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.

14.55 Any penalties other than the generic penalties of imprisonment and the payment of a fine should reflect the mischief that the breach provision in the legislation seeks to punish or deter:¹⁹⁵⁶

Except for punishment of a generic nature, for example, imprisonment or payment of a fine, if the punishment provided under a provision is that the person committing the offence must do or refrain from doing an act, then the act or omission required of the person must have a reasonable connection to the type and severity of the breach.

14.56 The overriding principles of enforcement provisions are set out in the *Queensland Legislation Handbook*.¹⁹⁵⁷

¹⁹⁵² Some of the indictable offences in pt 3 of the Code may, however, be dealt with summarily: see Criminal Code (Qld) ss 141–143, 552A.

¹⁹⁵³ *Jury Act 1995* (Qld) s 70(4); Criminal Code (Qld) s 85.

¹⁹⁵⁴ *Jury Act 1995* (Qld) s 66; Criminal Code (Qld) ss 96, 97.

¹⁹⁵⁵ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook* (2008) [3.6.1]–[3.6.2].

¹⁹⁵⁶ *Ibid* [3.6.4].

A provision imposing a liability or obligation must make it clear how the liability or obligation is to be enforced. In particular, if it is proposed that a breach of a provision creates a liability to a penalty, that should be made clear. However, it may not be necessary or desirable to create an offence if other legislation already covers the intended offence. In particular, if the Criminal Code provides for an offence, it is undesirable that another Act should erode its nature as a comprehensive code by providing for the same or essentially the same offence.

Appropriate provision needs to be inserted about the enforcement process to be followed. For example, for the prosecution of an offence, it should be clear whether the prosecution is to be on indictment or to be dealt with in summary proceedings.

Penalties in a Bill are presented as fines or, for more serious offences, terms of imprisonment. Fines are generally expressed as a specified number of penalty units. See the *Penalties and Sentences Act 1992*, section 5 for the value of a penalty unit. See that Act also for penalty options other than imprisonment or a fine.

Penalties must be internally consistent and also consistent with government policy and other legislation. They should reflect the seriousness with which the Parliament views a contravention of the provision to which the penalty attaches.

Offences that are dealt with summarily, that is, simple offences, and indictable offences when dealt with summarily, should not ordinarily carry a penalty greater than two years imprisonment.

Penalties for a contravention of subordinate legislation should generally be limited to not more than 20 penalty units. (Policy No. 2 of 1996 of the Scrutiny of Legislation Committee, in Alert Digest No. 4 of 1996 at pages 6–7, deals with the delegation of legislative power to create offences and prescribe penalties.)

In relation to enforcement matters generally, it should be noted that The Queensland Cabinet Handbook requires that the Department of Justice and Attorney-General be consulted about legislative proposals involving the creation of new offences or the giving of increased powers to police (see also Chapter 2.12.7) or other State officials, and proposals affecting court or tribunal processes or resources.

14.57 It is desirable, therefore, that the penalties under the *Jury Act 1995* (Qld) appropriately reflect the importance that the community attaches to the jury system, to the participation on juries of all eligible citizens, and to the protection of jurors and their deliberations. It is also important that the penalties in the Act continue to be internally consistent; changes to the penalty level for one offence need to be considered in the context of the other offences in the Act. Changes to the existing penalty levels may also necessitate changes in the procedures for dealing with offences and enforcing such penalties.

14.58 Taking into account the need for penalties to act as a deterrent, the Law Reform Commission of Western Australia recently recommended that the penalty for failure to attend for jury service in response to a summons should generally be

increased.¹⁹⁵⁸ As is discussed later in this chapter, the LRCWA also recommended a streamlined enforcement procedure which would give people the opportunity to pay a lesser fine upfront rather than having the matter pursued in court. The LRCWA preferred this fine-based approach to imprisonment:¹⁹⁵⁹

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, the Commission did not consider that imprisonment should be available as a penalty.

...

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). (notes omitted)

ARE THE PRESENT PENALTIES EFFECTIVE?

14.59 A consideration of the effectiveness of the current penalty regime under the Act raises several issues:

- Are the penalties sufficient to deter non-compliance with the Act to encourage members of the public to fulfil their civic responsibility to sit on juries from time to time?
- If not, will an increase in penalties — assuming that any such increase is not out of line with other comparable legislation — improve compliance without imposing an unreasonably strict or harsh regime of punishment?
- Would any such increased penalty regime be reasonably practicable within the current resources of the courts and the Sheriff's Office, or would it require additional resources or the use of other government facilities?
- Are there other ways to deter non-compliance that may be more effective than increased penalties, such as public education or improved enforcement procedures when breaches occur?

¹⁹⁵⁸ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 141.

¹⁹⁵⁹ *Ibid* 141–2, and see Rec 67.

14.60 The fulfilment of jury service obligations by all people who are liable to serve strengthens the justice system, and grounds it in the community more firmly by ensuring that more people come to be involved with it as jurors and that the burdens and benefits of doing so are shared more equitably and amongst as large a number of community members as possible.

14.61 Although some aspects of non-compliance may be addressed by an appropriate system of penalties, other aspects of the jury system will also affect people's willingness and ability to perform jury service. Provision for deferral of jury service and measures to ensure adequate remuneration for jury service are examples, and have been addressed elsewhere in this Report.¹⁹⁶⁰

14.62 Stakeholders interviewed as part of a juror satisfaction research project for the Australian Institute of Criminology noted that there may also be benefit in finding out why people fail to respond to summonses rather than simply imposing penalties for non-attendance.¹⁹⁶¹

With respect to citizens who fail to respond to the summons, stakeholders agreed that this was a serious matter that warranted some follow-up, although recommendations as to the type of appropriate follow-up varied, particularly regarding imposition of a financial penalty on non-responders. A few stakeholders advocated enforcement of penalties for non-attendance, but the majority of those interviewed felt it was more important to obtain an explanation and understand why citizens do not respond than to impose sanctions, as this information could inform initiatives to address the concerns or misconceptions that citizens hold about serving on juries. This information could be used to encourage more citizens to complete jury duty. As one lawyer in New South Wales stated:

Perhaps some follow-up as to why you didn't do it, what are the problems, what do you see as the difficulty is and then perhaps formulating some way to address those concerns, rather than penalising people. (NSW lawyer 4)

Other stakeholders dismissed the need for any follow-up as only citizens who are motivated to serve should perform jury duty. For example, one lawyer with this view responded:

But, people who don't respond would probably just behave that way because of a deliberate decision not to want to be involved and frankly I'd prefer to have people on the jury who have come along and manifested their intention to be involved. (NSW lawyer 3)

¹⁹⁶⁰ See Chapters 9 and 12 of this Report.

¹⁹⁶¹ Australian Institute of Criminology (J Goodman-Delahunty et al), *Practices, policies and procedures that influence juror satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 79. The 'stakeholders' were judges, prosecutors, defence counsel and jury administrators from New South Wales, Victoria and South Australia.

A POSSIBLE INFRINGEMENT NOTICE SCHEME

14.63 As noted earlier, penalties for breaches of the Act are rarely imposed. If the possibility of having to pay a fine, even a relatively large one, is more theoretical than real, the deterrent effect of such penalties may be minimal. The Commission has, therefore, considered whether provision should be made for fines, even of relatively modest amounts, to be issued as a matter of some routine, in similar fashion to ‘on-the-spot’ fines for traffic offences.

Infringement notices under the *State Penalties Enforcement Act 1999 (Qld)*

14.64 Part 3 of the *State Penalties Enforcement Act 1999 (Qld)* establishes a scheme for issuing infringement notices.¹⁹⁶² The range of offences that may be dealt with in this way includes offences under various pieces of consumer protection, environment, transport, university and other legislation.¹⁹⁶³

Issuing of infringement notices

14.65 A relevant authorised official who ‘reasonably believes’ that a person has committed an infringement notice offence may serve an infringement notice on the person.¹⁹⁶⁴ Section 15 of the Act provides that the infringement notice must be in the approved form and must state, among other things:

- the date of the notice;
- the alleged offender’s full name and address or identifying particulars;¹⁹⁶⁵
- particulars of the offence ‘that are enough to show clearly the nature of the offence’;
- the fine for the offence and how and where it may be paid;
- what the offender must do in response to the infringement notice;¹⁹⁶⁶
- that the notice may be withdrawn before or after the fine is paid;
- that, if the fine is at least the threshold amount (currently \$200),¹⁹⁶⁷ the alleged offender may apply to pay the fine by instalments; and

¹⁹⁶² See generally *State Penalties Enforcement Act 1999 (Qld)* ss 22, 25, 33, 35, 38, 41, 52, 115(3), (4).

¹⁹⁶³ Eg *Fair Trading Act 1989 (Qld)*; *Environmental Protection Act 1994 (Qld)*; *Transport Operations (Road Use Management—Road Rules) Regulation 1999 (Qld)*; *Queensland University of Technology Act 1998 (Qld)*; *Building Act 1975 (Qld)*; *Casino Control Act 1982 (Qld)*; *Dangerous Goods Safety Management Act 2001 (Qld)*; *Food Act 2006 (Qld)*. See *State Penalties Enforcement Regulation 2000 (Qld)* s 4, schs 1–5.

¹⁹⁶⁴ *State Penalties Enforcement Act 1999 (Qld)* s 13(1).

¹⁹⁶⁵ See *State Penalties Enforcement Regulation 2000 (Qld)* s 16 (Identifying particulars for alleged offender).

¹⁹⁶⁶ See [14.66] below.

- that, if the alleged offender defaults, enforcement action may be taken to recover the amount and additional fees may be payable.

Obligations and options under infringement notices

14.66 Under section 22 of the Act, a person who is served with an infringement notice must, within 28 days of the date of the infringement notice, do one of the following:

- pay the fine specified in the notice in full;
- elect to have the matter dealt with by the Magistrates Court; or
- if the offence involves a vehicle, give the administering authority, where relevant, an 'illegal user', 'known or unknown user', or 'sold vehicle' declaration.

14.67 If the fine is at least the threshold amount (currently \$200), a person may also apply to pay the fine by instalments.¹⁹⁶⁸

14.68 If the fine is paid, including by instalments, the person cannot be prosecuted in a court for the infringement notice offence.¹⁹⁶⁹

14.69 If the person fails to comply with the infringement notice (or elects to have the matter dealt with by the court), a proceeding for the offence may be started under the *Justices Act 1886* (Qld).¹⁹⁷⁰ The fact that proceedings may be commenced for non-compliance with the infringement notice does not prevent the administering authority from registering a default certificate in relation to the infringement notice offence.¹⁹⁷¹

Registration of default certificate by administering authority

14.70 If the person fails to respond in one of the required ways within the 28 day period, the administering authority may register a default certificate with the State Penalties Enforcement Registry ('SPER').¹⁹⁷² If the administering authority is entitled under an Act to retain the amount of any fine paid, the default certificate given by the administering authority to SPER must be accompanied by a

¹⁹⁶⁷ See *State Penalties Enforcement Act 1999* (Qld) s 3, sch 2 Dictionary (definition of 'threshold amount'); *State Penalties Enforcement Regulation 2000* (Qld) s 30.

¹⁹⁶⁸ *State Penalties Enforcement Act 1999* (Qld) s 22(2). In relation to the threshold amount for payment of a fine by instalments, see *State Penalties Enforcement Act 1999* (Qld) s 3, sch 2 Dictionary (definition of 'threshold amount'); *State Penalties Enforcement Regulation 2000* (Qld) s 30.

¹⁹⁶⁹ *State Penalties Enforcement Act 1999* (Qld) ss 25, 33(1). This does not apply if the infringement notice is withdrawn under s 28 of that Act.

¹⁹⁷⁰ *State Penalties Enforcement Act 1999* (Qld) s 27.

¹⁹⁷¹ *State Penalties Enforcement Act 1999* (Qld) s 27(2).

¹⁹⁷² *State Penalties Enforcement Act 1999* (Qld) s 33(1), (5).

registration fee (currently \$53).¹⁹⁷³ On registration of the default certificate, SPER becomes responsible for enforcement of the fine, and the registrar of SPER must issue an enforcement order requiring the person to pay SPER within 28 days after the date of the order. The amount stated in the enforcement order must include the amount of the registration fee paid by the administering authority.¹⁹⁷⁴

14.71 The person must, within 28 days after the date of the enforcement order, pay the amount to SPER, apply to SPER to pay the amount by instalments or to convert the amount to hours of unpaid community service, or make an election to have the matter of the offence decided in a Magistrates Court.¹⁹⁷⁵

14.72 If the person does not comply with the enforcement order, a range of enforcement actions may be taken against the person, including the issuing of an enforcement warrant against the person's property, a fine collection notice for the redirection of the person's earnings, a notice suspending the person's driver licence until the unpaid amount is paid or otherwise discharged, or an arrest and imprisonment warrant.¹⁹⁷⁶

14.73 At any time before the fine is paid or otherwise discharged under the Act, the administering authority may withdraw the infringement notice.¹⁹⁷⁷ If an infringement notice is withdrawn, the *State Penalties Enforcement Act 1999* (Qld) ceases to apply to the offence, and a proceeding for the offence may be taken against the person as if the infringement notice had not been served.¹⁹⁷⁸

Infringement notices for failing to vote

14.74 Failure to vote is an infringement notice offence for which the electoral commissioner is authorised to issue infringement notices.¹⁹⁷⁹ Failure to vote is dealt with in a two-stage process under the *Electoral Act 1992* (Qld).¹⁹⁸⁰ The first stage is the issuing of a notice under section 125 of that Act, as soon as practicable after an

¹⁹⁷³ See *State Penalties Enforcement Act 1999* (Qld) ss 3, 33(4), sch 2 Dictionary (definition of 'registration fee'); *State Penalties Enforcement Regulation 2000* (Qld) s 29.

¹⁹⁷⁴ *State Penalties Enforcement Act 1999* (Qld) ss 33, 35, 38. See also pt 3 div 3 (Obligations and options under enforcement order). Similarly, if the person defaults on the payment of an instalment within the time allowed, the instalment payment notice may be cancelled, upon which the amount of the fine will be increased by the amount of the registration fee and an enforcement order will be issued for the total of the unpaid amount: ss 36, 37.

¹⁹⁷⁵ *State Penalties Enforcement Act 1999* (Qld) s 41.

¹⁹⁷⁶ *State Penalties Enforcement Act 1999* (Qld) ss 52, 104.

¹⁹⁷⁷ *State Penalties Enforcement Act 1999* (Qld) s 28(1). If an infringement notice is withdrawn and an amount has already been paid to the administering authority or to SPER for the offence, the amount must be repaid to the alleged offender: ss 28(2)(b), 29(1)(a)(ii), (b).

¹⁹⁷⁸ *State Penalties Enforcement Act 1999* (Qld) s 28(3).

¹⁹⁷⁹ See *State Penalties Enforcement Regulation 2000* (Qld) s 4, sch 5; *Electoral Act 1992* (Qld) s 164.

¹⁹⁸⁰ See generally Electoral Commission of Queensland, Voting, 'Failure to Vote' <<http://www.ecq.qld.gov.au/voting.aspx?id=94>> at 21 February 2011.

election, to each elector who appears to have failed to vote at the election. The notice must state that:¹⁹⁸¹

- (i) the elector appears to have failed to vote at the election; and
- (ii) it is an offence to fail, without a valid and sufficient reason, to vote at an election; and
- (iii) the elector may, if the elector considers he or she has committed the offence, pay one-half a penalty unit (the **penalty**) to the commission by a specified day, not earlier than 21 days after the elector received the notice (the **appropriate day**), and, if the commission receives the payment by the appropriate day, no further steps will be taken against the elector about the offence; ...

14.75 The notice must require the elector:¹⁹⁸²

- (i) if the elector intends paying the penalty by the appropriate day—to sign the appropriate form for payment of the penalty and include payment of the penalty; and
- (ii) if the elector does not intend paying the penalty by the appropriate day—to state, in a form included in or with the notice, whether the elector voted and, if not, the reason for failing to vote; and
- (iii) to sign the form and post or give it to the commission so that it is received by the appropriate day.

14.76 If the Electoral Commission accepts the person's reason for not voting,¹⁹⁸³ or the person pays the penalty (currently \$50),¹⁹⁸⁴ no further action is taken against the person. However, if a person does not respond to the notice, or the reason for the person's failure to vote is not accepted, the matter moves to the second stage. This involves the issuing of an infringement notice for the offence, under section 164 of the *Electoral Act 1992* (Qld), of 'fail[ing] to vote at an election without a valid and sufficient excuse',¹⁹⁸⁵ which attracts a penalty of one penalty unit (\$100).¹⁹⁸⁶ The procedures described above for dealing with infringement notices will then apply.

14.77 In its Discussion Paper, the Commission suggested that it may be desirable to allow the Sheriff to issue infringement notices for certain types of offences under the *Jury Act 1995* (Qld), such as the failure to respond to a summons for jury service. The Commission noted that this would allow penalties to be issued administratively, facilitating enforcement without court action and thus at

¹⁹⁸¹ *Electoral Act 1992* (Qld) s 125(1)(a).

¹⁹⁸² *Electoral Act 1992* (Qld) s 125(1)(b).

¹⁹⁸³ Electoral Commission of Queensland, Voting, 'Failure to Vote' <<http://www.ecq.qld.gov.au/voting.aspx?id=94>> at 21 February 2011.

¹⁹⁸⁴ *Electoral Act 1992* (Qld) s 125A. See also, in relation to the amount of the penalty: *Electoral Act 1992* (Qld) s 125(1)(a)(iii); *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁹⁸⁵ See n 1979 above.

¹⁹⁸⁶ *Electoral Act 1992* (Qld) s 164(1); *Penalties and Sentences Act 1992* (Qld) s 5.

potentially less expense. It also noted that, by facilitating more frequent enforcement action, an infringement notice scheme may ensure that the seriousness of jury service obligations is recognised in the community.¹⁹⁸⁷

NSWLRC's recommendations

14.78 The NSW Law Reform Commission outlined the penalty provisions and procedures for failure to attend for jury service in its recent report on jury selection. Those provisions allow for the payment of lesser fines in the first instance.¹⁹⁸⁸

The *Jury Act* allows a court to impose a penalty not exceeding 20 penalty units (\$2200) on anyone who fails to attend for jury service without reasonable excuse.¹⁹⁸⁹ However, the Act also permits the Sheriff, in the first instance, to serve a notice on a person who fails to attend for jury service requiring the payment of 10 penalty units (\$1100)¹⁹⁹⁰ which, if paid, will apply in full satisfaction of the potentially higher court-imposed penalty.

The current practice is for the Sheriff's Office to write to a person who fails to attend, requesting an explanation. At this stage, the person may provide a satisfactory reply, or may elect to pay the lower penalty (\$1100), or choose to have the matter heard before a Local Court. If the person does none of this, the Sheriff will issue a penalty notice.¹⁹⁹¹ A penalty notice for failure to attend attracts a fine of 15 penalty units (\$1650).¹⁹⁹²

...

The Sheriff's Office tries to clarify any contentious issues before a matter goes to a Local Court and, if satisfied at that stage, it may allow the matter to be discontinued without penalty. Approximately 10 matters per month go before a Local Court, although not all result in convictions. (notes in original)

14.79 The NSW Law Reform Commission expressed concern about the need for penalties to be adequate enough to act as a deterrent, noting that some people may be 'prepared to pay a penalty rather than report for jury service or to take the chance of even paying a lesser fine if the matter is dealt with in the Local Court'.¹⁹⁹³ It also remarked on the need for education about the importance of compliance:¹⁹⁹⁴

We recognise that there is a need to balance enforcement with the risk of alienating the community, or forcing uncooperative people to serve as jurors. However, it is also necessary to ensure that there is a rigorous investigation of

1987 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [13.88].

1988 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [9.21]–[9.24].

1989 *Jury Act 1977* (NSW) s 63(1).

1990 *Jury Act 1977* (NSW) s 64(2)(a).

1991 *Jury Act 1977* (NSW) s 66. This has replaced an earlier system for summary disposal before a Magistrate: See M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994), 44.

1992 *Jury Act 1977* (NSW) s 66(2).

1993 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [9.29], and see [9.25].

1994 *Ibid* [9.30].

the validity of excuses offered, followed by the prosecution of those who wilfully, or without reasonable excuse, fail to attend, and that fines or penalties imposed are properly enforced. ... We also consider that it is important to make it clear that non-compliance with a summons is regarded as a serious failure to perform an important civic duty and, as such, a serious offence. It is also important that there be a process of following up defaulters as part of an education strategy to encourage greater compliance.

14.80 It recommended that the penalties for failure to respond to a summons for jury service should be the subject of ongoing review.¹⁹⁹⁵

14.81 Under the *Jury Amendment Act 2010* (NSW) the penalty for providing false information to the Sheriff will increase from 10 penalty units (\$1100) to 50 penalty units (\$5500),¹⁹⁹⁶ but there will be no increase in the penalty for failing to attend as required for jury service.

LRCWA's recommendations

14.82 The Law Reform Commission of Western Australia noted that the current procedure for imposing and enforcing fines for non-attendance in compliance with a jury summons is 'cumbersome and inadequate':¹⁹⁹⁷

The process involves multiple stages: a DNA ['did not attend'] investigation by the sheriff's office ...;¹⁹⁹⁸ referral of matters to the District Court; imposition of a fine by a judge; issuing of summons and notices to the person fined; consideration by a judge of any affidavits in relation to why the fine should not be enforced; and finally a decision by a judge to remit or reduce the previous fine imposed. 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). (note added; notes omitted)

1995 Ibid 167, Rec 42.

1996 See *Jury Act 1977* (NSW) s 62 to be substituted by *Jury Amendment Act 2010* (NSW).

1997 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 139.

1998 This is designed to identify those people who did not attend and did not have a valid reason for failing to do so. See Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 139:

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. 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 nonattendance. (note omitted)

14.83 The LRCWA therefore considered that the process should be ‘simplified and streamlined’ by the adoption of a modified infringement notice scheme that would continue to include an initial investigation by the Sheriff’s Office.¹⁹⁹⁹

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 service 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. (notes omitted)

14.84 The LRCWA considered that the continued practice of a ‘did not attend’ investigation by the Sheriff’s Office would ‘minimise any potential unfairness to members of the community who were unaware that they had been issued with a summons’,²⁰⁰⁰ and recommended that:²⁰⁰¹

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).

14.85 The LRCWA also recommended that the penalty for failure to attend for jury service should be set at \$2000, but that the infringement notice penalty should be \$800.²⁰⁰²

14.86 Under the Juries Legislation Amendment Bill 2010 (WA), fines for failure to attend in compliance with a jury summons will no longer need to be imposed by the court. The fine for that offence is also proposed to be set at \$5000.²⁰⁰³

DISCUSSION PAPER

14.87 In its Discussion Paper, the Commission did not reach a provisional view about the appropriateness of the level of penalties for offences under the Act, but sought submissions on the following questions:²⁰⁰⁴

1999 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Final Report (2010) 140.

2000 Ibid.

2001 Ibid 142, Rec 67(2).

2002 Ibid 142, Rec 67(1), (3).

2003 See Juries Legislation Amendment Bill 2010 (WA) cl 42, 44, which propose to repeal and replace *Juries Act 1957* (WA) s 55 and to amend *Juries Act 1957* (WA) s 59.

2004 Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [13.95]–[13.97], Questions 13-1, 13-2.

- 13-1 Are the penalties for breaches of the *Jury Act 1995* (Qld), particularly those relating to the return of a *Notice to Prospective Juror* and compliance with a summons:
- (1) appropriate and proportionate;
 - (2) effective to deter non-compliance;
 - (3) internally consistent within the *Jury Act 1995* (Qld);
 - (4) generally consistent with the level of penalties that apply under other Queensland legislation;
 - (5) generally consistent with the level of penalties that apply under the jury legislation of the other Australian jurisdictions?
- 13-2 If not, what improvements might be made to the system of penalties?

14.88 The Commission also considered that there may be some value in implementing an infringement notice system in relation to the non-return of a *Notice to Prospective Juror* and non-attendance in response to a summons. The Commission was concerned, however, that such a system may not be sufficiently flexible to avoid the imposition of penalties in circumstances where the person has a reasonable excuse for the failure. At present, failure to return the Notice or to comply with a summons is not an offence if the person has a reasonable excuse.²⁰⁰⁵ In this regard, the Commission noted the proposal made by the Law Reform Commission of Western Australia for the issue of infringement notices only after an initial investigation of the reasons for the non-attendance. The Commission did not reach a provisional view about this issue, but sought submissions on the following questions:²⁰⁰⁶

- 13-3 Should the Sheriff be empowered to issue an infringement notice for the imposition and enforcement of a fine for a failure to respond to a *Notice to Prospective Juror* or to comply with a summons?
- 13-4 If yes to Question 13-3 above, should an infringement notice be issued only if the Sheriff, after conducting an investigation, has reasonable grounds to believe that the person does not have a reasonable excuse for the failure?

CONSULTATION

14.89 One respondent suggested that fines for non-compliance with a jury notice or summons are ineffective in deterring non-compliance because they are not enforced.²⁰⁰⁷

²⁰⁰⁵ *Jury Act 1995* (Qld) ss 18(3), 28(1).

²⁰⁰⁶ Queensland Law Reform Commission, *A Review of Jury Selection*, Discussion Paper WP69 (2010) [13.98]–[13.100], Questions 13-3, 13-4.

²⁰⁰⁷ Submission 44.

anecdotally, while I was travelling the state to instruct courthouse staff, by far the most frequent comment was along the lines: 'Everyone knows that if you don't want to do jury service, you just throw the letter in the bin, no-one ever gets fined'.

...

So we can assume that in carrot versus stick, the threats in the initial correspondence have little value. Wouldn't it be better to educate and inform citizens, then make it easier to participate . . . so they are left wanting to serve?

14.90 The Queensland Law Society submitted that there is no need to change the existing penalties for breaches of the Act:²⁰⁰⁸

The Society does not believe that any changes should be made to the Jury Act in relation to breach and penalties. Our members do not report difficulties in this area and we submit that generally Queensland Citizens co-operate with the Criminal Justice System.

14.91 It expressed support, however, for provisions enabling the Sheriff to issue infringement notices, provided there are clear guidelines about when a person has a reasonable excuse for failure to attend in response to a summons:²⁰⁰⁹

The Society agrees that the Sheriff should be empowered to issue an infringement notice. It is important that all members of the public participate in jury service when summoned and the Sheriff is the appropriate person to identify any person who has failed to comply.

The Society does not oppose the Sheriff conducting some enquires into why a person has not attended to or answered the summons but there must be clear guidelines issued as to when a person has given a reasonable excuse for a failure to attend.

14.92 The Department of Justice and Attorney-General expressed support for any change that would increase participation in the jury process, although it did not specify how this might be achieved. However, the Department noted a concern that the enforcement of penalties for breach will have a negative effect on jury participation:²⁰¹⁰

[We] are supportive of any initiative that aims to increase participation by the public in the jury process. Existing breach provisions are seldom utilised on the premise that it will act as a deterrent to jury service and that enforcement is difficult and time consuming. [We] would be supportive of further investigation into this topic along with the development of any proposal for change.

2008 Submission 52.

2009 Ibid.

2010 Submission 56.

THE COMMISSION'S VIEW

14.93 In the Commission's view, with one important exception, there does not appear to be any reason to change the penalties that are presently prescribed for breaches of the Act. They appear to be set at a sufficiently high level to reflect the importance of jury service and the seriousness of the relevant offences.

14.94 The one important exception is the penalty, under section 18(3) of the Act, for failure to respond to the *Notice to Prospective Juror* by returning the completed *Questionnaire* within the time allowed. As noted at the beginning of this chapter, it appears that this is one of the most common breaches of the Act. The prospective juror notice is the first contact the Sheriff has with people in the jury district who are eligible for jury service and the first stage at which eligible people are drawn into the pool of prospective jurors for a particular jury service period. If people routinely ignore the jury notice, many of the benefits that are sought to be achieved by the recommendations made in this Report will be lost.

14.95 In the Commission's view, the system for enforcing the penalty, which requires proceedings for the offence to be taken in the Magistrates Court, is too cumbersome for an offence of this kind. As a result, prosecutions are rarely, if ever, brought, which means that there is no effective deterrent against failing to respond to the notice.

14.96 The Commission considers, therefore, that an alternative procedure should be available that would facilitate the timely and regular imposition of appropriate penalties and thereby discourage people from ignoring the prospective juror notice. The Commission is concerned, however, that any such procedure should recognise that a person may have a reasonable excuse for failing to respond to the prospective juror notice.²⁰¹¹

14.97 In this regard, the approach that is taken in relation to the failure to vote at an election without a valid and sufficient excuse has three key advantages.²⁰¹² First, by making the offence an infringement notice offence under the *State Penalties Enforcement Act 1999* (Qld), it provides an administrative procedure that enables penalties to be imposed and enforced more readily, when appropriate.

14.98 Second, the *Electoral Act 1992* (Qld) provides an intermediate administrative procedure which, without imposing an investigative burden on the Electoral Commission, ensures that an infringement notice for the full penalty, of one penalty unit (currently \$100), is not issued without first:

- giving consideration to whether the person had a valid and sufficient excuse for the failure to vote; and
- providing for a person who cannot, or does not wish, to provide a reason for the failure, to pay a penalty, but of a reduced amount (currently \$50),

²⁰¹¹ It is not an offence under s 18(3) of the *Jury Act 1995* (Qld) to fail to return the completed prospective juror questionnaire if the person has a reasonable excuse.

²⁰¹² This approach is described at [14.74]–[14.76] above.

thereby saving additional time and expense both for the person and the Electoral Commission.

14.99 Third, the prescribed penalty of one penalty unit (currently \$100) for the failure to vote is set at a level that is generally appropriate to the nature of the offence and to the imposition of penalties through an administrative, rather than a judicial, procedure.

14.100 In the Commission's view, the failure to respond to a prospective juror notice should be dealt with in the same way.

14.101 The Commission considers, therefore, that failure to return the completed prospective juror questionnaire in response to a prospective juror notice, under section 18(3) of the *Jury Act 1995* (Qld), should be made an infringement notice offence for which the Sheriff may issue an infringement notice.

14.102 The Commission considers, however, that the present penalty for that offence, at 10 penalty units (currently \$1000) or two months' imprisonment, is too high and should be reduced to two penalty units (currently \$200). Although this is a much more modest penalty than is presently prescribed, the Commission considers that it is a more appropriate penalty for an infringement notice offence and will encourage penalties to be issued more often; it is the imposition of appropriate penalties as a matter of course rather than the theoretical, but not real, threat of a possible penalty that will serve as a deterrent. The Commission also notes that a penalty of \$200 meets the present threshold under the *State Penalties Enforcement Act 1999* (Qld) for fines that may be paid by instalment.²⁰¹³

14.103 The *Jury Act 1995* (Qld) should also be amended, along the lines of sections 125 and 125A of the *Electoral Act 1992* (Qld), to provide that the Sheriff may issue an 'Apparent Failure to Respond' notice to a person who appears to have failed to respond to the prospective juror notice. The notice should require the person, within a reasonable time that is stated in the notice, to either pay the amount specified in the notice or state the reason for the person's failure to respond. The Act should provide that if, within the required time, the person pays the specified amount or provides a reason that is accepted by the Sheriff as a reasonable excuse for the failure to respond, no further action against the person is to be taken. In the Commission's view, the prescribed amount for this payment should be one penalty unit (currently \$100), which would be half of the full penalty for the offence.

14.104 This approach will provide consistency in the way in which the failure to observe the equally important civic obligations of voting and jury service are treated.

14.105 The Commission considers that, if implemented, the new penalty system should be the subject of a widespread and ongoing education campaign.²⁰¹⁴ This

²⁰¹³ See [14.67] above.

²⁰¹⁴ See, for example, Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [9.24], Rec 41, where the Litigation Reform Commission recommended that the then \$100 penalty for failure to return the jury notice be 'preceded by a public awareness campaign'.

should emphasise that jury service is an important civic obligation and a valuable means of direct participation in our system of government.

14.106 The Commission also considers that, if implemented, the effectiveness of the new penalty system should be reviewed within three years with a view to determining whether it should be extended to any other offences under the Act, including, in particular, the failure to attend in response to a summons.

RECOMMENDATIONS

14.107 The Commission makes the following recommendations:

- 14-1** Subject to Recommendations 14-2 to 14-4, the penalties that are presently prescribed for breaches of the *Jury Act 1995* (Qld) are appropriate and should be retained.
- 14-2** Section 18(3) of the *Jury Act 1995* (Qld), which provides that a person to whom a *Notice to Prospective Juror* has been given must not fail to return the completed prospective juror questionnaire to the Sheriff within the reasonable time allowed in the notice, unless the person has a reasonable excuse, should be:
- (a) amended to change the maximum penalty that is prescribed for that offence from 10 penalty units or two months' imprisonment to two penalty units; and
 - (b) added to the *State Penalties Enforcement Regulation 2000* (Qld) as an infringement notice offence for which the Sheriff may issue an infringement notice requiring the person to pay a penalty of two penalty units.
- 14-3** The *Jury Act 1995* (Qld) should be amended to include provisions, modelled on sections 125 and 125A of the *Electoral Act 1992* (Qld), to the general effect that:
- (a) the Sheriff may send a notice to a prospective juror who appears to have failed to return the completed prospective juror questionnaire requiring the person, within the reasonable time stated in the notice, to either pay one penalty unit or state the reason for the person's failure to return the questionnaire; and

(b) if, within the time stated in the notice, the person pays the one penalty unit or provides a reason that is accepted by the Sheriff as a reasonable excuse for the failure to return the completed prospective juror questionnaire, no further action against the person for failing to return the questionnaire is to be taken.

14-4 If Recommendations 14-2 and 14-3 are implemented, the new penalty system for breaches of section 18(3) of the *Jury Act 1995* (Qld) should be the subject of a widespread and ongoing education campaign.

14-5 If Recommendations 14-2 and 14-3 are implemented, the effectiveness of the new penalty system should be reviewed within three years with a view to determining whether it should be extended to any other offences under the *Jury Act 1995* (Qld), including, in particular, the failure to attend in response to a summons under section 28(1) of the Act.

Appendix A

Terms of Reference

Jury selection review

I, Kerry Shine, Attorney-General and Minister for Justice and Attorney-General and Minister Assisting the Premier in Western Queensland, having regard to:

- The critical role juries have in the justice system in Queensland to ensure a fair trial;
- The fact that jury duty is an important civic duty and those who become involved in criminal trials have an expectation that they will be determined by a judge and jury;
- It is an essential feature of the institution of juries that a jury is a body of persons representative of the wider community, to be composed in a way that avoids bias or the apprehension of bias and that one of the elements of the principle of representation is that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State;
- The importance of ensuring and maintaining public confidence in the justice system;
- The recent reports released by the New South Wales Law Reform Commission report on Jury Selection (Report 117, 2007) and Blind or deaf jurors (Report No 114, 2006) which make a number of recommendations;
- The review of the selection, eligibility and exemption of jurors currently being undertaken by the Western Australia Law Reform Commission;
- Reforms concerning the composition of juries and conditions of jury service which have occurred in other jurisdictions;²⁰¹⁵
- The Australian, New South Wales and Victorian Law Reform Commissions' Report on *Uniform Evidence Law* recommended that the Standing Committee of Attorneys-General should initiate an inquiry into the operation of the jury system, including matters such as eligibility, empanelment, warnings and directions to juries.

²⁰¹⁵

For example, Victoria and Tasmania have removed a juror's right to claim exemption from jury service and limit the categories of people who are ineligible to serve on a jury. The United Kingdom has also removed exemptions for most people and the only people who are disqualified include people in prison or in mental institutions or who have served lengthy prison sentences within a certain period.

- The provisions in the *Jury Act 1995* (Qld) prescribing those persons who are ineligible for jury service have not been reviewed or amended since 2004.

refer to the Queensland Law Reform Commission (the Commission) pursuant to section 10 of the *Law Reform Commission Act 1968* (Qld), a review of the operation and effectiveness of the provisions in the *Jury Act 1995* (Qld) relating to the selection (including empanelment), participation, qualification and excusal of jurors.

The scope of this review does not include review by the Commission of Part 6 of the *Jury Act 1995* which contains provisions about jury trial in Queensland, including, for example:

- consideration of whether juries should have a role in sentencing;
- the merits or desirability of trial by jury; or
- the requirement for majority verdicts in Queensland.

In undertaking this review, the Commission is to have particular regard to:

- Whether the current provisions and systems relating to qualification, ineligibility and excusals for jury service are appropriate, including specifically whether:
 - (a) there are any additional categories of persons who should be ineligible for jury service, such as:
 - (i) a person employed or engaged in the public sector in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration; and
 - (ii) local government chief executive officers.
 - (b) there are any categories of persons currently ineligible for jury service which are no longer appropriate;
 - (c) the ineligibility of a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror remains appropriate, particularly in the context of persons who are profoundly deaf or have a significant hearing or sight impairment, having regard to the *Anti-Discrimination Act 1991* (Qld), the *Disability Discrimination Act 1992* (Cth), and the need to maintain confidence in the administration of justice in Queensland.
- Possible improvements to proceedings for offences and a review of the appropriateness of maximum penalties under the *Jury Act 1995* (Qld), including:

- Whether the Act should be amended to specifically allow a prosecution for an offence against the Act to be commenced by complaint of the Sheriff of Queensland or someone else authorised by the Minister or Chief Executive; and
- Review the current level of maximum penalties for offences in the *Jury Act 1995* (Qld), particularly relating to the return of notices by prospective jurors and compliance with a summons requiring a person to attend for jury service and, if selected as a member of a jury, to attend as instructed by the court until discharged and whether the maximum penalties should be increased and having regard to the level of penalties for similar offences in Queensland and in other Australian jurisdictions;
- Possible alternative options for excusing a person from jury service, such as deferment;
- The extent to which juries in Queensland are representative of the community and to which they may have become unrepresentative because of the number of people who are ineligible for service or exercise their right to be excused from service, including whether there is appropriate representation of minority groups (such as Aboriginal people and Torres Strait Islanders), the factors which may contribute to under-representation and suggestions for increasing representation of these groups;
- Recent developments in other Australian and international jurisdictions in relation to the selection of jurors; and
- Any other related matters.

In performing its functions under this reference, the Commission is asked to prepare, if relevant, any legislation based on the Commission's recommendations and undertake consultation with stakeholders.

The Commission is to provide a report to the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland on its review by 31 December 2010.

Dated the 7 day of April 2008

Kerry Shine MP
Attorney-General Minister for Justice
And Minister Assisting the Premier in Western Queensland

On 17 January 2011, the terms of reference were amended to extend the reporting date from 31 December 2010 to 28 February 2011.