Queensland
Law Reform Commission

A Review of Jury Selection

Discussion Paper

WP No 69
June 2010

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The short citation for this Discussion Paper is QLRC WP 69.
Published by the Queensland Law Reform Commission, June 2010.

ISBN: 978 0 9805799 5 6

COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and questions in this Discussion Paper.

Written comments and submissions should be sent to:

Email: qlrcjuries@justice.qld.gov.au

Facsimile: (07) 3247 9045

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop Qld 4003

An appointment to make an oral submission may be made by telephoning:
(07) 3247 4544

Closing date: 30 September 2010

It would be helpful if comments and submissions addressed specific proposals and questions in the Discussion Paper.

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To the memory of Ian Davis

Full-time Commission Member

July 2008–May 2010

Postal address: PO Box 13312, George Street Post Shop, Qld 4003
Telephone: (07) 3247 4544
Facsimile: (07) 3247 9045
Email: lawreform.commission@justice.qld.gov.au
Website: http://www.qlrc.qld.gov.au

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No.	Proposals and Questions	Para
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No.	Proposals and Questions	Para
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No.	Proposals and Questions	Para
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No.	Proposals and Questions	Para
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No.	Proposals and Questions	Para
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No.	Proposals and Questions	Para
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No.	Proposals and Questions	Para
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No.	Proposals and Questions	Para
Civil jury trials		
12-1	In addition to Proposal 7-14 in chapter 7 of this Paper, 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?	12.35
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Chapter 1

Introduction

INTRODUCTION

1.1 This Discussion Paper is the first publication in the Queensland Law Reform Commission's enquiry into the selection and composition of juries under the *Jury Act 1995* (Qld), which will culminate in its report to the Attorney-General at the end of 2010.

1.2 On 7 April 2008, the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, referred to the Commission a review of the process of the selection of jurors in Queensland. The Terms of Reference are set out in full in Appendix A to this Paper.

SCOPE AND STRUCTURE OF THIS REVIEW

Issues covered by this review

1.3 The Terms of Reference for this review direct 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. The Commission is to consider whether there are any classes of people currently ineligible for jury duty who should be eligible, or any classes of people currently liable for jury service who should be ineligible. The Terms of Reference specifically mention people engaged in the administration of the criminal justice system, local government chief executive officers, and people who are blind, deaf or disabled.

- Whether alternatives or variations to compulsory 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).

1.4 In undertaking this review, the Commission is to consider recent developments in Australia and overseas, and is to work, where possible and appropriate, with other law reform commissions, and is to consult stakeholders.

Issues excluded from this review

1.5 Many aspects of the use and operation of juries in Queensland are not covered by this review.

1.6 One notable area that is not covered in this review but which is covered by separate Terms of Reference to the Commission is that of jury directions. The Commission's Report in that reference was tabled in Parliament on 14 April 2010. The Commission also published an Issues Paper and a Discussion Paper in that reference.[1]

1.7 Three areas are also expressly excluded from this review by the Terms of Reference:

- consideration of whether juries should have a role in sentencing;[2]

- the merits or desirability of trial by jury; or

- the requirement for majority verdicts in Queensland. (note added)

1.8 In relation to the second of these areas, the critical role of juries in the Queensland criminal justice system to ensure a fair trial is not in question; it is expressly acknowledged in the Terms of Reference as a background consideration to this review along with 'the importance of ensuring and maintaining public confidence in the justice system' and

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1 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009); Queensland Law Reform Commission, *A Review of Jury Directions*, Discussion Paper WP67 (2009). The New South Wales Law Reform Commission has also issued a Consultation Paper in its current review on the same topic: see New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008). The Report by the Victorian Law Reform Commission on jury directions was published in August 2009: Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (2009).

2 The New South Wales Law Reform Commission published a report on the role of juries in sentencing in August 2007. The principal recommendation in that report was that juries not be involved in the sentencing process to any greater extent than they are at present: New South Wales Law Reform Commission, *Role of Juries in Sentencing*, Report 118 (2007), Rec 1. However, there is some community support for juries to have a role in sentencing, though not the final determination of a sentence (Submission 12 in response to Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009)); or at least being informed of the sentence when it is handed down in due course (Submission 3 in response to Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009)).

> 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.

1.9 In relation to the last of these areas excluded from the present Terms of Reference, the Commission notes the changes to the *Jury Act 1995* (Qld) made in September 2008 to allow for majority verdicts in certain circumstances, and to allow for judge-only trials, dispensing with juries in exceptional cases.[3]

1.10 Other areas not covered by this reference, but which have been raised in the public media from time to time, include: the size of juries, the use of reserve jurors, access by jurors to the media (including the internet) during trials, juror misconduct and the use and admissibility of expert evidence in criminal trials.[4] Neither is the Commission asked to review the range of criminal (or civil) cases in which juries are used.

OTHER LAW REFORM PROJECTS

1.11 The role, use and composition of juries in criminal trials have been the subject of numerous reports by law reform bodies over many years in Queensland, elsewhere in Australia and in many other countries. Some deal with aspects of evidence and procedure that are not relevant to the present enquiry, but many relate to various aspects of jury selection processes.

Previous law reform projects in Queensland

1.12 Some aspects of the jury system were considered by the Queensland Law Reform Commission in 1978 in its report on practice in criminal courts.[5] The areas covered by that report included numerous evidentiary and procedural matters; the only matter that touched on juries was in Part VII of the report, which covered the discharge of jurors by a judge during a trial. This is now handled by section 56 of the *Jury Act 1995* (Qld) in terms that incorporate the Commission's recommendations. The Commission also concluded that there was at that time no need to introduce reserve jurors into Queensland courts; reserve jurors are now provided for in section 34 of the *Jury Act 1995* (Qld).[6]

1.13 In November 1984, this Commission published its *Working Paper on Legislation to Review the Role of Juries in Criminal Trials*,[7] followed in October 1985 by its report

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3 The *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld), which came into effect on 19 September 2008, amended the *Jury Act 1995* (Qld) so that it now permits majority verdicts in certain limited circumstances.

4 The last of these is the subject of a current review by the Law Commission of England and Wales, which published its Consultation Paper in April 2009: Law Commission of England and Wales, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability*, Consultation Paper 190 (2009).

5 Queensland Law Reform Commission, *Proposals to Amend the Practice of Criminal Courts in Certain Particulars*, Report 27 (1978).

6 The provisions relating to the discharge of jurors and empanelment of reserve jurors are discussed in chapter 10 of this Paper.

7 Queensland Law Reform Commission, *Working Paper on Legislation to Review the Role of Juries in Criminal Trials*, WP28 (1984).

on various aspects of the criminal justice system, including juries.[8] The Commission recommended some major reforms to the jury system:

> 2. Extensive changes to the system of exemptions from jury service are recommended. There would be no automatic exemptions. Exemption would only be granted upon application to the Sheriff and upon grounds of extreme hardship to the prospective juror or his employer or because his serving would be contrary to the public interest.
>
> 3. The abolition of the system of double challenges to the jury panel, unique to Queensland, is recommended. The system is brought into line with all the other common Law jurisdictions in which there is only one opportunity for the accused to challenge and the Crown to set aside prospective jurors.
>
> …
>
> 6. It is made an offence for any person to obtain, disclose or solicit any information as to what transpired in the jury room. The penalty provided is three years imprisonment. Proceedings can only be instituted with the consent of the Attorney-General or on a motion of a court having jurisdiction to deal with the matter.[9]

1.14 Recommendation 2 in this report was not adopted in Queensland, but it foreshadowed by some 20 years radical changes made in England and Wales in 2003 in which virtually all categories of automatic exemption from jury service were abolished.[10]

1.15 In the early 1990s, there were several other inquiries and reports in relation to the operation of the jury system in Queensland, which culminated in the introduction of the *Jury Act 1995* (Qld).

1.16 In 1990–91, the Criminal Justice Commission of Queensland (the 'CJC')[11] conducted an investigation into allegations of jury interference in relation to the District Court trials of George Herscu and Brian Austin. The investigation was triggered by concerns raised by the Special Prosecutor, the Sheriff and the Attorney-General about approaches made to a number of prospective jurors for those trials.[12]

1.17 The CJC's investigation found that there was evidence of an approach to prospective jurors by the defence in the Herscu trial but that it did not constitute contempt of court or other improper behaviour.[13] However, the CJC made the following two recommendations:

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8 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).

9 Ibid, preface. In that report the Commission also recommended the introduction of majority verdicts, though not in identical terms to the provisions enacted in September 2008 by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

10 See [1.33] below and chapter 5 of this Paper.

11 The CJC was replaced by the Crime and Misconduct Commission.

12 Criminal Justice Commission, *Report of an Investigative Hearing Into Alleged Jury Interference* (1991) 1–4.

13 Ibid 35.

> 1. That, as an interim measure, a notice is issued by the Sheriff's office with the summons to prospective jurors, warning that if any approach which is made to them causes them any concern with respect to the discharge of their duties as members of a jury panel, they should immediately notify the Sheriff of that approach.
>
> 2. That the Attorney-General of Queensland establish a committee … to consider the need for and extent of reform of the law relating to the distribution of jury lists and the inquiries which can be made in respect of prospective jurors.[14]

1.18 The CJC's investigation of juror interference revealed a diversity of opinion about the extent of permissible juror inquiries and concerns about jury selection.[15] It published an Issues Paper to canvass the need for and extent of any necessary reform with respect to those matters.[16] The focus of the Issues Paper was on jury vetting and selection, composition and empanelment. It also examined other issues such as the protection and privacy of jurors, majority verdicts, special juries and the education of juries. The CJC did not make any recommendations in the Paper but posed a number of questions for consideration, including whether:

- too many people are disqualified, exempted or excused from jury service and whether the wide categories of exemption undermine the random selection of jurors and representativeness of juries;
- the right of challenge should be limited or changed;
- police checks on prospective jurors should be made available to the prosecution and/or the defence; and
- approaches to prospective jurors to inquire about jurors' impartiality should be prohibited.

1.19 Subsequently, the Attorney-General established a committee, comprised of representatives of the legal profession and the community, to consider the issues raised in the CJC's 1991 Issues Paper.[17] Chaired by Mr P Nolan, the Committee to Review Certain Aspects of the Jury Act (the 'Nolan Committee') reported in 1992 and made a number of recommendations for change to the *Jury Act 1929* (Qld), including the following recommendations on matters of jury selection and composition:

> - That the system of making the jury lists available to the legal representatives involved in criminal trials be maintained. …
>
> ...
>
> - That judges be statutorily required to question prospective jurors en bloc prior to empanelment about bias and conflict of interest after apprising them of the nature of the case and the allegations made as part of it.

14 Ibid 36.

15 Ibid 1–2.

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

17 Criminal Justice Commission, *Report of an Investigative Hearing Into Alleged Jury Interference* (1991) 36, Rec 2; Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 2–3.

…

- That government-sourced information concerning particular persons on jury lists coming into the possession of one party should be immediately made available to the other party.

…

- That the general exemption for females be abolished.

- That section 7(1)(e) of the *Jury Act*, whereby persons of 'bad fame or repute', [*sic*] be repealed.

- That there be three categories of persons who should not/may not serve on juries, as set out hereunder.

…

(i) Disqualified Persons:

The Committee unanimously recommends that disqualification should be on the basis of criminal convictions alone ...

(ii) Ineligible Persons:

This would include persons such as —

His Excellency the Governor

Judges

Cabinet Ministers

Parliamentarians

Magistrates

Lawyers

Police Officers

'Impaired people', such as deaf, etc.

Such persons, because of their backgrounds, would not be able to appropriately serve on juries and would be barred automatically from service.

(iii) Exempt persons:

These persons will be eligible for jury service but may apply for exemption from jury service if their individual circumstances deem it necessary. Such categories of persons as medical doctors, school teachers, defence force personnel and certain other categories already in the exempt list in section 8(1) may well be included in this category. It is to be emphasised that persons in this category must apply for exemption if they wish to be excused from jury service.

…

- Action should be taken to correct the under-representation of aboriginal persons on juries; (However, the present proportion of aborigines directly reflects the number of aborigines actually enrolled to vote. Therefore, it would be more appropriate for this question to be addressed to the Minister for Family Services and Aboriginal and Islander Affairs and to the Electoral Commissioner. Of course, there is no discrimination in the jury selection process from the electoral rolls. This is purely random.)[18]

1.20 The Nolan Committee report was then referred by the Minister for Justice to the Litigation Reform Commission, which reported in August 1993.[19] That Commission examined a range of issues concerning the functioning of the jury system including:

- eligibility for jury service;
- assembly of jury panels;
- the publication of jurors' names and personal details, and jury vetting;
- challenges to and selection of juries;
- security of jurors during trials;
- secrecy of jury deliberations;
- limiting jury trials, such as smaller jury sizes and judge-only trials;
- unanimous or majority verdicts; and
- improvements in the conditions of jury service, including reimbursement.

1.21 The core recommendation was that a new Jury Act be introduced in order to effect comprehensive change.[20] The Commission's recommendations in relation to eligibility were as follows:

1. Sections 7 and 8 of the Jury Act should be repealed and replaced by a provision that will provide for one category of persons who are currently exempt from jury service.

2. Automatic exemptions should be limited to the following persons:

   (a) the Governor;

   (b) Judges and magistrates;

   (c) Members of Parliament;

   (d) police (serving members only);

   (e) members of the legal profession (admitted to practice and in fact engaged in legal work);

18 *Report of the Committee to Review Certain Aspects of the Jury Act* (1992) 5–21.

19 Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993).

20 Ibid 81–2.

(f) persons who are not Australian citizens or otherwise entitled to be on Electoral Rolls;

(g) persons who are not able to read and write the English language;

(h) persons suffering from a mental or physical disability such as to render that person incapable of effectively performing the function of a juror;

(i) persons convicted of an indictable offence; and

(j) persons aged 70 years or over.

3. The Attorney-General should seek the removal of the anomalous exemptions in favour of employees of the Commonwealth.

4. In the medium term, consideration should be given to means of including on jury lists people who do not appear on the Electoral Roll.

5. The sheriff should be given the authority to excuse jurors for all or part of a sittings.

6. Subject to the residual power of a judge to excuse jurors, the Sheriff should be empowered to dispose of all applications for excusal from jury service irrespective of when the application is made and, thus, including applications made on the day of the trial.

7. Guidelines should be formulated which the Sheriff must take into account when exercising the discretion to grant excusal from jury service …

…

8. Where an applicant for excusal is successful, the time of excusal should be limited to the particular sittings for which the excused juror has been summoned.[21]

1.22 The Litigation Reform Commission also made the following recommendations to curtail jury vetting:

13. The requirement that the Sheriff publish jury lists in a conspicuous place in the courthouse should be abolished.

14. The jury list should be available to the parties only by 5.00 pm on the afternoon preceding the trial, or on Friday if a weekend intervenes. The practice of providing copies of the list to the general public upon payment of a fee should be abolished.

15. Any information given to the Director of Prosecutions by the Sheriff, the police or the Department of Transport should be made available forthwith to the defence.

16. Subject to enquiries by the Sheriff authorised by the Jury Act, the making of enquiries concerning any juror on the published list should be prohibited except with the prior consent of a judge.[22]

21 Ibid 8–9.

22 Ibid 22.

1.23 The Commission's recommendations were implemented in part when the *Jury Act 1995* (Qld) was introduced.[23]

1.24 Also in August 1993, the CJC published a report of a public enquiry conducted by former Supreme Court judge, the Honourable WJ Carter QC into concerns about jury interference in the selection of the jury for the Bjelke-Petersen trial.[24] The Report concluded that reform was necessary in relation to pre-trial jury vetting along the lines of the Litigation Reform Commission's proposals.[25]

1.25 In October 1992, a report prepared by the Courts Division of the Department of Justice and Attorney-General on Queensland jury expenditure was also published.[26]

1.26 Following these reports, the Jury Bill 1995 (Qld) was introduced to Parliament in 1995 and took effect as the *Jury Act 1995* (Qld) in February 1997.

1.27 In December 1999 Deborah Wilson Consulting Services prepared a report on juror satisfaction in Queensland.[27]

1.28 The Commission's Terms of Reference also state that 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.'[28] No formal review of the categories of people who are disqualified from jury service was held in 2004; the amendments to the Act that year, and a history of changes to the jury legislation in Queensland relating to selection criteria for jurors, are outlined in chapter 3 of this Paper.

Current law reform projects

1.29 The Terms of Reference for this review expressly refer to the current project of the Law Reform Commission of Western Australia ('LRCWA') on jury selection. That Commission's Terms of Reference require it to examine and report on the operation and effectiveness of the system of jury selection, giving consideration to:

(i) whether the current statutory criteria governing persons who are not eligible, not qualified or who are excused from jury service remain appropriate;

(ii) the compilation of jury lists under Part IV of the *Juries Act 1957* (WA);

(iii) recent developments regarding the selection of jurors in other jurisdictions; and

(iv) any related matter.[29]

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23 See the discussion of the history of the jury legislation in chapter 3 of this Paper.

24 Criminal Justice Commission, *Report by the Honourable WJ Carter QC on His Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke-Petersen*, Report (1993) [1.1].

25 Ibid 486.

26 Policy and Research Branch, Courts Division, Department of Justice and Attorney-General (Constance Johnston), *Report on Queensland Jury Expenditure* (1992).

27 Deborah Wilson Consulting Services Pty Ltd, *Survey of Queensland Jurors*, (1999).

28 See Appendix A to this Paper.

29 Law Reform Commission of Western Australia, 'Selection, eligibility and exemption of jurors', <http://www.lrc.justice.wa.gov.au/3_jurors_tor.html > at 29 April 2010.

1.30 The LRCWA published its Discussion Paper in this reference in September 2009 and made a number of provisional proposals for reform. A summary of the key proposals is contained in chapter 5 of this Paper. The LRCWA's proposals are also discussed where relevant throughout this Paper.

1.31 Other current reviews outside Queensland include the following:

- In November 2009, the Victorian Department of Justice published a Discussion Paper on jury service eligibility.[30]
- In 2008, the Law Reform Commission of Ireland commenced a project on the law of juries, focusing on jury selection and qualification. It published a Consultation Paper on jury service in March 2010.[31]
- The Law Reform Commission of Hong Kong currently has a project relating to the criteria for selection as a juror. It published a Consultation Paper in January 2008.[32]

Other law reform projects outside Queensland

1.32 The Terms of Reference for this review also specifically direct the Commission's attention to the NSW Law Reform Commission's report on jury selection published in September 2007,[33] and its report on blind or deaf jurors published in September 2006.[34] A summary of the recommendations made in these Reports is set out in chapter 5 and both Reports are referred to where relevant throughout this Paper.

1.33 Other reviews outside Queensland that touch on issues covered by this review include the following:[35]

- In 1986, the NSWLRC published its report on juries in criminal trials,[36] and in 1984 its report on conscientious objection to jury service.[37] It recommended that conscientious objection to jury service be recognised as a ground of exemption as of right under the *Jury Act 1977* (NSW).[38] At present, neither the *Jury Act 1977* (NSW) nor the *Jury Act 1995* (Qld) provides for such a basis of ineligibility or exemption.[39]

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

31 See Law Commission of Ireland, Current Projects, The Legal System and Public Law, 1.3 Jury Service <http://www.lawreform.ie/The_LEgal_System_and_Public_Law/Default.179.html> at 14 April 2010; Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010).

32 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008).

33 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007).

34 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006).

35 Many other law reform reports and working papers of various sorts have also been published on aspects of juries that are not covered by the Terms of Reference of this review.

36 New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, Report 48 (1986).

37 New South Wales Law Reform Commission, *Community Law Reform Program: Sixth Report — Conscientious Objection To Jury Service*, Report 42 (1984).

38 Ibid [5.21].

39 See *Jury Act 1977* (NSW) s 7, sch 3. See also New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.30]–[7.34]. See the discussion of this basis of exemption in chapter 8 of this Paper.

- In 1999, the Tasmanian Department of Justice undertook a review of the *Jury Act 1899* (Tas), in particular in relation to jury selection issues.[40] That Act was later repealed and replaced by the *Juries Act 2003* (Tas).

- A review of the jury system in South Australia was conducted by the Sheriff's Office of that State in 2002.[41] Among other things, it examined the categories of ineligibility for jury service.

- In 1994, the Law Reform Committee of the Victorian Parliament was given a reference on jury selection. It published two Issues Papers in 1994 and 1995[42] and a three-volume report in 1996–97.[43] A number of the recommendations made in that report were implemented with the introduction of the *Juries Act 2000* (Vic).[44] Earlier, the Law Reform Commission of Victoria had published a Background Paper on the role of juries in criminal trials.[45]

- The LRCWA previously conducted a review of the law relating to exemption from jury service, which resulted in the publication of its report on that subject in June 1980.[46]

- In 2001, the Law Commission of New Zealand published its report on juries in criminal trials which included recommendations in relation to jury selection and eligibility.[47] It was preceded by two discussion papers.[48]

- In 2007, the UK Ministry of Justice published a research report on jury selection and composition.[49]

- Radical changes to the rules of jury service (among many other matters) were introduced in England and Wales in April 2004 by the *Criminal Justice Act 2003* (Eng) following a comprehensive report on the criminal justice system by the Honourable Lord Justice Auld published in 2001.[50] This was only the most recent in a line of major reports on the criminal justice system in the United Kingdom: these include the reports of the Committee

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40 See Tasmania, Department of Justice, *Review of the Jury Act 1899*, Issues Paper (1999) at <http://www.justice.tas.gov.au/legislationreview/reviews/completed_reviews/previous_reviews/jury_act_-_issues_paper> at 29 April 2010.

41 See South Australia, Courts Administration Authority, Sheriff's Office, *South Australian Jury Review* (May 2002) <http://www.courts.sa.gov.au/sheriff/index.html> at 29 April 2010.

42 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).

43 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report Vol 1 (1996), Vol 2 (1997), Vol 3 (1997).

44 See the Second Reading Speech of the Juries Bill 1999 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 27 May 1999, 1349 (Mrs Wade, Attorney-General). The *Juries Act 2000* (Vic) repealed and replaced the *Juries Act 1967* (Vic).

45 Law Reform Commission of Victoria, *The Role of the Jury in Criminal Trials*, Background Paper 1 (1985).

46 Law Reform Commission of Western Australia, *Exemption from Jury Service*, Report in Project No 71 (1980).

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

48 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* (Volumes 1 and 2), Preliminary Paper 37 (1999).

49 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).

50 The Hon Lord Justice Auld, *Review of Criminal Courts in England and Wales* (2001).

chaired by Lord Morris of Borth-y-Gest in 1965 and the Royal Commission chaired by Viscount Runciman of Doxford in 1993.[51] The recent changes in England and Wales are considered in detail in chapter 5 of this Paper.

- In 2009, the Scottish Government concluded a review on selected issues relating to jury service in criminal trials, including juror eligibility.[52] The Scottish Parliament is presently debating a Bill which proposes, among other things, to make amendments to the age limit for jury service and the exemption for previous jury service following from the Government's review.[53]

- The Law Reform Commission of Nova Scotia released its final report on the reform of the provincial jury system in 1994.[54]

- Also in 1994, the Jury Project — a 'panel of thirty judges, attorneys, jury commissioners, educators, journalists, and business people' — reported to the Chief Judge of the State of New York on its review of jury service in that State.[55]

METHODOLOGY OF THIS REVIEW

This Paper

1.34 The purpose of this Discussion Paper is 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 process of challenges in court, to propose some possible avenues of reform and to pose some preliminary questions to assist the Commission in its consultation.

1.35 Although juries are used very occasionally in civil trials, their primary role is in criminal trials. Accordingly, the main focus of this Paper 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.

1.36 Chapter 2 of this Paper outlines the history and the current role of juries in Queensland. In particular, the chapter describes the public functions that juries discharge and their importance in maintaining public confidence in the criminal justice system.

1.37 Chapter 3 outlines the history of legislative developments, and the current provisions in Queensland, in relation to the people who are liable to perform jury service. It

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51 The Royal Commission on Criminal Justice, *Report*, Cm 2263 HMSO (1993).

52 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); Linda Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses*, Report (2009).

53 See Criminal Justice and Licensing (Scotland) Bill, introduced into the Scottish Parliament on 5 March 2009. As at June 2010, the Bill has not yet been passed.

54 Law Reform Commission of Nova Scotia, *Final Report on Juries in Nova Scotia*, Final Report (1994).

55 The Jury Project, *Report to the Chief Judge of the State of New York* (March 1994) <http://www.courts.state.ny.us/reports/thejuryproject.pdf> at 29 April 2010.

also discusses the relevant legislative provisions in other jurisdictions on juror eligibility and liability for jury service.

1.38 Chapter 4 looks at 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. This chapter also looks at the representation of minority groups on juries, especially Indigenous Australians.

1.39 Chapter 5 identifies the principles underlying jury selection and eligibility and the principles informing the Commission's general approach to reform. It also provides an overview of recent and ongoing reforms and reform proposals in New South Wales, Western Australia, England and Wales and some other jurisdictions.

1.40 The Commission's Proposals and questions on which it is seeking submissions begin in chapter 6. Chapter 6 deals with the formal qualifications, and disqualifications, for jury service, namely electoral enrolment, citizenship, and criminal history.

1.41 Chapter 7 examines the ineligibility or exemption of individuals on the basis of their occupation or profession.[56]

1.42 Chapter 8 discusses the ineligibility or exemption of people from jury service on the basis of their age, inability to understand English, physical or mental disability, and religious or other personal beliefs.

1.43 Chapter 9 examines the grounds on which a person may seek discretionary excusal from jury service and the option of a system of deferral of jury service.

1.44 Chapter 10 examines the current processes for the selection of juries in Queensland. This covers both the selection of members of public from the electoral roll and the issue of summonses to those people to attend court, and the processes in court before a trial begins by which potential jurors may be challenged off a jury by either the prosecution or the defence.

1.45 Chapter 11 canvasses some other issues and options for reform in relation to current jury selection processes, including jury district boundaries, Indigenous representation, and juror remuneration.

1.46 Chapter 12 outlines the role of juries in civil trials.

1.47 Chapter 13 reviews the current system of penalties for breaches of the *Jury Act 1995* (Qld), particularly those relating to the obligations to attend for jury service.

1.48 This Paper also contains four Appendices:

- Appendix A sets out the Commission's Terms of Reference in relation to this review.
- Appendix B lists the individuals and organisations who have made preliminary submissions received by the Commission or with whom the Commission has held consultations.

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

- Appendix C contains relevant extracts from the *Jury Act 1995* (Qld); and
- Appendix D contains relevant extracts from other Queensland legislation and practice rules.

Submissions and consultations

1.49 The Commission invites submissions in relation to this review. Some submissions received by the Commission in response to its review on jury directions[57] have dealt with issues covered by this review; they have been referred to in this Paper where appropriate. The Commission has also received preliminary submissions from a Catholic priest, the Queensland Retired Police Association and Vision Australia, as well as from members of the public, and has had the benefit of some preliminary consultations with members of Legal Aid Queensland, the Queensland Law Society,[58] and the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd.

1.50 Submissions may be in any format and may respond to some, or all, of the issues raised in this Paper, or any other issue relevant to the Terms of Reference that might not have been covered in this Paper.

1.51 Details on how to make a submission are set out at the front of this Paper.

1.52 The closing date for submissions in response to this Paper is **30 September 2010**.

1.53 All submissions will be taken into consideration when the Commission formulates its final recommendations. At the end of this review, the Commission will publish its recommendations in its final Report, which will be presented to the Attorney-General for tabling in Parliament.

1.54 In addition, the Commission will be seeking to hold consultations as widely as possible, and invites all interested people and organisations to contact it to discuss the issues that concern them or to arrange a face-to-face consultation.

1.55 At all times during its consultations, and in relation to all submissions received by it, the Commission will be mindful of, and comply with, all restrictions on the publication of jury information.[59] All submissions received by the Commission will be dealt with in accordance with the Commission's confidentiality and privacy policy set out at the beginning of this Paper.

1.56 The Commission is to provide its Report by 31 December 2010.

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57 Queensland Law Reform Commission, *A Review of Jury Directions*, Issues Paper WP66 (2009).

58 Where relevant throughout this Paper, 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.

59 'Jury information is defined' in s 70(17) of the *Jury Act 1995* (Qld). Its publication is prohibited by s 70 of that Act.

Chapter 2

The Role and Nature of Juries in Criminal Trials

THE CENTRAL ROLE OF THE JURY IN CRIMINAL TRIALS

> 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.[60]

2.1 A central pillar of criminal justice in Queensland is that defendants accused of serious crimes should be judged fairly and impartially by a jury of their fellow citizens

60 The Hon AM Gleeson AC, 'Juries and public confidence in the courts' (2007) 90 *Reform* 12.

who deliver their verdict in accordance with the law based on the evidence led at the trial.[61]

2.2 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, and a jury should be drawn from, and be representative of, the defendant's community. 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 the twin objectives of seeking these key traits of the ideal jury.[62]

2.3 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.'[63] Its effectiveness 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.[64]

> 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.[65]

2.4 The use of juries in criminal trials serves a number of important and related functions.[66] 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. 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 lay people.

> 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.[67]

2.5 Lord Devlin, an enthusiastic supporter of the jury system, noted that the involvement of the community in the administration of criminal justice introduced a note of populism, which was not necessarily a bad thing:

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

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

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

64 Ibid.

65 The Hon Wayne Martin, 'Current Issues in Criminal Justice' (Paper presented at the Rotary District 9460 District Conference 2009, Perth, 21 March 2009) 17.

66 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). Also see the High Court's remarks set out in [2.6]–[2.8] below, and generally, for example, D Watt, *Helping Jurors Understand* (2007) §1–6.

67 Sir Patrick Devlin, *Trial by Jury* (1956) 25.

> [T]rial by jury ensured that [the people] got the sort of justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them.[68]

2.6 The High Court of Australia has commented on the role of the jury on many occasions. Deane J said the following in *Brown v The Queen*:

> [R]egardless 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 …[69]

2.7 These statements were expressed more expansively in *Kingswell v The Queen* by Gibbs CJ and Wilson and Dawson JJ:

> 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 par-

68 Ibid 159–60.

69 *Brown v The Queen* (1986) 160 CLR 171; [1986] HCA 11 [2]. See also Brennan J in the same case at [7]:

> Trial by jury is not only the historical mode of trial for criminal cases prosecuted on indictment; it is the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice. The verdict is the jury's alone, never the judge's. Authority to return a verdict and responsibility for the verdict returned belong to the impersonal representatives of the community. We have fashioned our laws governing criminal investigation, evidence and procedure in criminal cases and exercise of the sentencing power around the jury. It is the fundamental institution in our traditional system of administering criminal justice.

> ticular 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.[70]

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

> [T]he 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 inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful.[71]

2.9 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. However, the desire to give criminal justice systems legitimacy in new regimes can be seen as one impetus for the introduction of juries in post-Franco Spain and post-Soviet Russia.[72]

2.10 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.'[73] One Australian example of a jury apparently acting on its own conscience to reject a charge that it regarded as unmeritorious, though legal commentators thought that it had been made out, was the 1951 trial of author Frank Hardy for criminal libel arising out of the publication of *Power Without Glory*.[74]

2.11 Some writers, however, are a little more reserved in their support of the jury as a bulwark against oppression:

> The assumption that political liberty at the present day depends upon the institution of the jury, though still repeated by English lawyers to foreign visitors, is in truth merely folklore — of a piece with the theory that English liberty depends on the separation of powers, or (as opinion at one time had it) upon the absence of an organized police force.[75]

2.12 A jury's deliberations are expressly kept secret by law.[76] The fact that such a critical aspect of the operation of juries is hidden from public scrutiny lends the jury

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70 *Kingswell v The Queen* (1985) 159 CLR 264; [1985] HCA 72 [51]–[52].

71 *Doney v The Queen* (1990) 171 CLR 207; [1990] HCA 51 [14].

72 David Weisbrot, 'Comment' (2007) 90 *Reform* 4; Mark Findlay, 'Juries reborn' (2007) 90 *Reform* 9.

73 *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. It has also been suggested that in jurisdictions where civil juries are more common (in particular, the United States), they provide some protection against corporate power: Jacqueline Horan and David Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 184.

74 Jacqueline Horan and David Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 183; C Brennan, 'Perfect case that had to fail' (1994) 68(5) *Law Institute Journal* 344–5.

75 Glanville Williams, quoted in D Watt, *Helping Jurors Understand* (2007) 9.

76 See *Jury Act 1995* (Qld) ss 50, 70. See [2.91]–[2.94] below.

system a certain mystique and inscrutability, but creates some significant difficulties when trying to review the system in detail.

2.13 Warnings have been sounded for centuries that changes to the jury system should be undertaken cautiously:

> [I]nroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.[77]

2.14 Despite the strength of such rhetoric, major changes have been made to the jury system over time. However, its central role in the criminal justice system in Queensland and throughout Australia is not in question in this review. It is nonetheless important to re-consider and, where necessary, challenge the rhetoric and the assumptions behind the jury system to see where improvements and adaptations to modern life can be made. Over 25 years ago this Commission endorsed a warning that 'uncritical veneration' of juries should end.[78]

Jurors' perceptions of the jury system

2.15 It has been noted that the participation by ordinary members of the community in juries is their last 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.[79]

2.16 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.[80] Nonetheless, many people who have performed jury service report satisfaction with the system and their service to it.

2.17 One benefit of the involvement of members of the public in the criminal justice system as jurors is that they become involved as an integral part of the legal system, perhaps for the first time and not just as a consumer of legal services. It is not surprising, then, to find that many jurors report that their appreciation of the system, and the work done by the courts and judges in particular, improves with jury experience.

2.18 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. Even people who attended for jury service but

77 Blackstone's *Commentaries* (1769), Book IV, 344, referred to in *Kingswell v The Queen* (1985) CLR 264, 269 (Brennan J).

78 J Baldwin and M McConville, 'Research and the Jury', *Justices of the Peace of March 10, 1979*, quoted in 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) 4.

79 The Hon M Moynihan, 'Jury Trials in Queensland' (Paper presented at the Jury Research and Practice Conference, Brisbane, 14 November 2008).

80 See, for example, [5.25]–[5.30] and [11.6]–[11.18] below.

were not empanelled showed high confidence levels, though not as high as those shown by jurors.[81]

> The results revealed a strong positive correlation between overall satisfaction with the experience of jury service and confidence in the jury system … the more jurors were satisfied with their experience, the more confidence they expressed. …
>
> Differences between jurors and members of the public regarding overall confidence in the criminal justice system were pronounced … Ratings by members of the jury pool of the justice system as efficient and fair … and of its treatment of victims as fair significantly exceeded those by citizens with no experience of jury duty … Furthermore, jurors on duty were significantly more likely than members of the public to believe that defendants were treated fairly and to express confidence in the capacity of judges to perform their duties … There was very little difference in the confidence in the ability of prosecutors and defence lawyers between jury pool members and citizens with no jury experience. Overall, jurors and jury-eligible citizens were moderately confident in the abilities of prosecution (50%) and defence lawyers (52%).
>
> Particularly interesting was the apparent effect of jury service on juror confidence in judges, defence lawyers and prosecutors. A comparison of empanelled and non-empanelled juror ratings revealed higher levels of confidence in judges and defence lawyers among jurors with more in-depth exposure to judges and defence barristers, while confidence in the prosecution was not affected by more extensive experience on a jury. This difference may be interpreted as a consequence of the learning that takes place with the exposure to judges and defence barristers through the experience of jury service, although other explanations cannot be ruled out. For instance, jurors who express anti-prosecution sentiments may be disproportionately excluded. Whatever the explanation, a similar pattern emerged regarding confidence in the fairness of treatment for victims and defendants; that is, empanelled jurors expressed greater confidence in their treatment than did non-empanelled jurors and members of the general public.
>
> The results of this study indicated that most citizens support the jury system, although citizens who attended jury duty were significantly more enthusiastic about the role of juries, and their capacity to keep judges and the justice system accountable …
>
> Interestingly, jurors (both empanelled and non-empanelled) were more likely to believe that juries were less representative of the community than were jury-eligible citizens who had never completed jury service (22% vs 14%). One possible explanation is that jury pool members developed greater insight into the options for exemption and excusal than citizens less well-informed about jury service.
>
> Furthermore, jurors were less likely than community members to believe that courts overestimate people's knowledge of the criminal justice process, suggesting increased faith in the capacity of ordinary citizens to make difficult decisions following their exposure to the jury process. Empanelled jurors were more likely than both non-empanelled jurors and community participants to agree that jury service is educational and interesting. These results are consistent with the view that jury service provides a form of training in citizenship.

81 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. In all, 4765 people participated in the survey in three States; 41% were men and 59% women, aged above 18 years. A total of 1048 non-empanelled jurors (318 in New South Wales, 476 in Victoria and 254 in South Australia) and 628 empanelled jurors (156 in New South Wales, 317 in Victoria and 155 in South Australia) completed the written survey, 1676 in all. In addition, interviews were conducted with 53 judges, prosecutors, defence counsel and jury administrators: xi–xii.

> …
>
> … Most people indicated a preference for a jury trial over a trial by judge alone, irrespective of whether they were in the role of the victim or the defendant … This preference was slightly stronger among jurors than members of the general community, indicating either the positive influence of the jury experience or the filtering out from jury duty of those who are less enthusiastic about the capacity of juries.[82]

2.19 Similar results have been obtained overseas. In a survey of 361 jurors in London and Norwich conducted in 2001–02, just under two-thirds of the jurors who responded had a more positive view of the jury trial system than before doing their jury service, and there was an 'unexpected' appreciation of the work of judges in managing, organising and summing up the cases.[83]

> The most positive aspects of engaging in jury service were found to be having a greater understanding of the criminal court trial (58%), a feeling of having performed an important civic duty (41%) while 22 per cent found it personally fulfilling.
>
> …
>
> The vast majority of respondents (over 95%) considered juries very important, essential, quite important or necessary in our system of justice.
>
> Participating in jury service appears to produce a remarkable level of social solidarity amongst jurors while enhancing their sense of citizenship.[84]

2.20 There is also some evidence that goes the other way, however. In conducting research into juries in Queensland in 2001–02, Richardson was able to interview some 19 jurors out of the 192 who otherwise participated in her research.[85] Although comments from this small pool of District Court jurors may not be instructive of opinions held by jurors generally, they give some indication of the issues that concerned jurors: some felt that witnesses and the evidence were manipulated by the barristers; boredom and interruptions in the evidence were concerns for a significant number of the jurors; frustration at not being able to ask questions was also noted.

2.21 In commenting on her research, Richardson summarised her observations this way:

> Jurors consistently recognised significant flaws in the system, but were unable to 'think of a better one that would work more efficiently'. As a result of their experience, some have 'lost faith in the jury system' and reported they would not like to have a jury trial if they were charged with criminal offences.
>
> Nonetheless, although all jurors were able to identify flaws in the system, they reported that they considered jury duty to be a social responsibility and although

82 Ibid 148–52.

83 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.

84 Ibid 9.

85 Christine 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) 113–14, 264–5.

> none would volunteer to be on a jury again, predominantly if called upon to do so, they would honour their responsibility and participate in jury service again.[86]

2.22 However, jurors took their task seriously despite any shortcomings they might have felt about the system:

> Overall the task of being a juror and associated responsibilities were salient to all jurors who were interviewed. All jurors took their role very seriously and in most cases the task over-rode any other concerns. … all who commented on the task of being a juror were aware of the seriousness of their role which impacted on them significantly.[87]

2.23 This is consistent with the conclusion reached in research by the School of Psychology at the University of Queensland conducted in late 2009 for the Commission as part of its review of jury directions that 'jurors who participated in the interviews were mostly quite positive about their experience as a juror'.[88]

2.24 Given the confidentiality that surrounds jury deliberations in all Australian jurisdictions, it is very rare for any jurors to give a detailed public account of their experiences on a jury. One notable exception is that of journalist Malcolm Knox, who was a juror on a month-long trial for soliciting murder in the District Court of New South Wales in 2002. At the end of the trial, he felt:

> that I had peered into the soul of our democracy, and had come out both enlightened and disenchanted: enlightened by the discovery that I and my fellow citizens could be trusted to think clearly, a trust I'd doubted I possessed until now; and disenchanted by how many obstacles the trial process had laid in our path. I was relieved, yes, but angry too.
>
> I'd travelled a long way in that month. Having tried to get out of jury service, having believed jurors must be blithering idiots too dull or too dispensable to get out of it, having thought that to trust 12 people dragged in off the street was a system 200 years out of date, I'd arrived at a position where I now believed jurors were not only an essential safeguard to liberty but that being on a jury should be a duty that is almost impossible to evade. I walked out of the court a convert.
>
> Yet I was angry that we had been denied basic help and respect, made to feel like prisoners, enclosed in a cocoon of ignorance. Our native intelligence had been insulted, yet, paradoxically, our knowledge of the criminal trial process had been ridiculously over-estimated. I felt that we reached a satisfactory verdict despite, rather than thanks to, the court.
>
> It sometimes felt as if the court saw us, the jury, as a necessary evil.[89]

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86 Christine Richardson, 'Juries: What they think of us', *Queensland Bar News* (December 2003) 16, 17. And see Christine 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) 298–307.

87 Christine Richardson, 'Juries: What they think of us', *Queensland Bar News* (December 2003) 16; Christine 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) 295.

88 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn 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.

89 Malcolm Knox, *Secrets of the Jury Room* (2005) 3–4.

FREQUENCY OF CRIMINAL JURY TRIALS IN QUEENSLAND

2.25 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 crimes on indictment, and not all serious offences need be tried by a jury.

2.26 Statistics produced by the Australian Bureau of Statistics show that jury trials are a small minority of all criminal matters finalised in Queensland Supreme and District Courts. From 2002–03 to 2008–09, an average of only 8.3% (one in twelve) of all criminal matters resolved each year in those courts were resolved at trial (not all of which would have been jury trials). Almost three-quarters were resolved by a plea of guilty and about one in six was resolved in some other fashion (such as a plea of *nolle prosequi*):

	2002–03	2003–04	2004–05	2005–06	2006–07	2007–08	2008–09	Total	Average	
Resolved at trial										
Acquitted	243	259	307	235	217	251	257	1769	252.7	4.0%
Guilty	329	207	239	309	250	278	249	1861	265.9	4.2%
Total	**572**	**466**	**546**	**544**	**467**	**529**	**506**	**3630**	**518.6**	**8.3%**
Plea of guilty	4943	5098	4852	4469	4359	4420	4262	32403	4629.0	73.8%
Other	1115	1299	1148	1105	1017	1122	1047	7853	1121.9	17.9%
Total	6630	6863	6546	6118	5843	6071	5815	43886	6269.4	100.0%

Table 2.1: Resolution of criminal matters in Queensland courts (ABS)[90]

HISTORICAL BACKGROUND

2.27 Juries have been used in many legal systems and can be dated back to at least Periclean Athens in the 5th century BC,[91] ancient Rome and ancient Babylon,[92] though 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 (ruled 1154–89), especially to the Assizes of Clarendon in 1164,[93] at which time trial by combat and trial by ordeal were still estab-

90 Australian Bureau of Statistics, *4513.0 Criminal Courts, Australia, various years*. These data are consistent with figures in the Annual Reports of the Supreme Court of Queensland up to those for 2002–03, which included some statistics for matters in the Criminal List in the Supreme Court at Brisbane finalised in the four-year period from 1999–2000 to 2002–03. Trials accounted for less than 9% of all criminal matters finalised over this period. As all criminal matters in the Supreme Court are for indictable offences to be tried by a jury, it follows that the remaining 91% were resolved by a plea or withdrawal of the case by the prosecution or in some other fashion without a jury trial. The Commission understands that the low rate of matters tried by jury in the Supreme Court is attributable in part to the high rate of pleas in the large number of serious drug cases filed in that Court.

91 Robin Lane Fox, *The Classical World* (2005) 132, 145; Paul Woodruff, *First Democracy* (2005) 16, 32–5, 50, 109, 119, 123–4, 225.

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

93 Sir Patrick Devlin, *Trial by Jury* (1956) 7–9. Of course, the jury's role was very different then:

lished methods of determining guilt.[94] The use of juries in criminal trials was later guaranteed by the Magna Carta, subscribed by King John in 1215:

> 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.[95]

2.28 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.[96] 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.[97] It had been adopted into all Australian colonies by the time of Federation in 1901.[98] 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, and today a number of other statutes, both State and Commonwealth, also regulate the operation of the jury system in this State.[99]

CONTEMPORARY SOURCES OF THE LAW

2.29 In Queensland, the principal sources of the law governing the role and operation of the jury system are found in the *Jury Act 1995* (Qld), the Criminal Code

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> In the first place the aforesaid king Henry, by the counsel of all his barons, for the preservation of peace and the observing of justice, has decreed that an inquest shall be made throughout the separate counties, and throughout the separate hundreds, through twelve of the more lawful men of the hundred, and through four of the more lawful men of each township, upon oath that they will speak the truth: whether in their hundred or in their township there be any man who, since the lord king has been king, has been charged or published as being a robber or murderer or thief; or any one who is a harbourer of robbers or murderers or thieves. (Charter of the Assize of Clarendon, 1166, Art 1, <http://avalon.law.yale.edu/medieval/assizecl.asp> at 13 May 2010.

94 Trial by combat was still legal in England until 1819: see *Ashford v Thornton* (1818) KB 1 B & Ald 349, where, in a case between 'two citizens of the labouring class' it was held to be still part of English law: 'the general law of the land is in favour of the wager of battel, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudice, therefore, may justly exist against this mode of trial, still, as it is the law of the land, the Court must pronounce judgment for it': at 351 (Lord Ellenborough). It was repealed by Parliament in the following year: 59 Geo III c 56. See Edward J White, *A Collection of Essays upon Ancient Laws and Customs* (1913) 132–3. See also generally Sanjeev Anand, 'The Origins, Early History and Evolution of the English Criminal Trial Jury' (2005–06) 43 *Alberta Law Review* 407; Jacqueline Horan and David Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 181.

95 In the original Latin: *Nullus liber homo capiatur, vel imprisonetur, aut desseisetur de libero tenemento, vel libertatibus, vel liberis consuetudinibus suis, sut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae.* It may be argued that the concept of judgment 'by one's peers' has changed in the intervening eight centuries: see Jacqueline Horan and David Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 181–2. The current status of the Magna Carta in the law of Queensland is considered at [2.39] below.

96 The Hon Michael Black, 'The introduction of juries to the Federal Court of Australia' (2007) 90 *Reform* 14.

97 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 Michael 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.

98 *Cheatle v The Queen* (1993) 177 CLR 541 [4] (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

99 For example, the *Evidence Act 1977* (Qld), the *Evidence Act 1995* (Cth) and the Criminal Code (Qld).

(Qld), the *Evidence Act 1977* (Qld), the *Criminal Practice Rules 1999* (Qld) made under the *Supreme Court of Queensland Act 1991* (Qld), and in the common law.[100]

THE IDEAL JURY

2.30 Two qualities are sought in juries: impartiality and representativeness.[101]

2.31 A jury should be impartial: jurors must judge the defendant and arrive at their verdict fairly and honestly on the basis of the evidence before them at the trial to which they have applied the law. Jurors who cannot be impartial because of a personal connection with the case or some other personal characteristic or philosophy have no place on Australian juries. The law also excludes people who have particular characteristics imputed to them by virtue of their profession (such lawyers and police) or their status (convicted criminals).

2.32 A jury should also be representative of the community from which it is drawn. It is, of course, unrealistic to expect all juries to exhibit all the characteristics of the community from which they are selected. However, the fair administration of criminal justice requires juries overall to be representative, and any particular jury that is manifestly unrepresentative may be discharged if, in the circumstances, there is a real risk, or perception, of injustice.[102]

2.33 The combination of these two essential characteristics gives juries their social and political acceptance and their legitimacy.[103]

Impartiality

2.34 Of the two key traits of the ideal jury, impartiality is perhaps the easier to understand, though it is not necessarily easy to ensure.

2.35 Any jury, however representative, brings with it all the attitudes (and biases) that prevail in the community that it represents,[104] although individual prejudices and idiosyncrasies may not play a great role when the group dynamics of the jury room come into play.

> The reality therefore is that the jury system operates, not because those who serve are free from prejudice, but despite the fact that many of them will harbour prejudices of various kinds when they enter the jury box. … If experience had shown that British juries, made up of people drawn at random from all kinds of backgrounds, could not act impartially, the system would long since have lost all credibility. But

100 A more detailed review of the relevant legislation in Queensland and the other Australian States and Territories begins in chapter 3 of this Paper. In relation to juries in civil trials, see chapter 12 below.

101 This is a significant departure from the original reason that juries were introduced into English courts over eight centuries ago. At that time, they were valued for their personal knowledge of the individuals, property and other aspects of the background to the case, which they were expected to rely on in coming to a decision: Sir Patrick Devlin, *Trial by Jury* (1956) 7–12.

102 See *Jury Act 1995* (Qld) s 48, discussed in chapter 10 below.

103 R Gwynedd Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 163.

104 See Mark Findlay, 'The Role of the Jury in a Fair Trial' in Mark Findlay and Peter Duff (eds) *The Jury Under Attack* (1988) 167.

> Parliament must consider that it works … Juries also seem to enjoy the confidence of the general public.[105]

2.36 The fact that a representative jury reflects community attitudes (and community biases) may be part of its attraction, but this brings with it the obvious risks of injustice for defendants from minority groups or who are otherwise unpopular.

Representativeness

2.37 'Representativeness' has been defined variously. The Law Reform Committee of the Victorian parliament took the following approach:

> 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.[106] (note omitted)

2.38 That representativeness is a virtue of jury selection processes, and therefore to be sought after, seems to be unchallenged. It is fair to the defendant, fair to the victims and complainants (assuming that they come from the same or a similarly composed community), fair to (and educational for) the jurors themselves, and grants the process greater political and social legitimacy.[107] However, it invites a number of questions:[108]

- Of which 'community' is the jury to be representative — the country, the State, the jury district, or something else?
- Is representativeness to be affirmatively sought after in the jury selection process, or is it safe to rely (at least in larger urban centres) on random selection procedures?
- Do special considerations apply in smaller communities?
- How is representativeness to be assessed — in terms of sex, age, race, employment status, or educational achievements?
- Does the concept involve any suggestion that a jury should also be representative of the victim or complainant?

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105 *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [34] (Lord Rodger).

106 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report Vol 1 (1996) [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].

107 Jacqueline Horan and David Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 184–5.

108 See Michael Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62 *Law and Contemporary Problems* 69, 78–9.

- Is it necessary to seek to reconcile the concepts of representativeness and trial by one's peers? What is the position, for example, if the defendant is from a minority or other distinctive group within the community?

2.39 The last of these questions has given rise to some issues which have come before the courts. For example, a trial by one's 'peers' as that expression is found in the Magna Carta is not part of the law of Queensland, and the Magna Carta's 'guarantee' in that respect no longer holds in this State. In *R v Walker*,[109] the defendant, an Indigenous man from South Stradbroke Island, objected on appeal to the 'absence from the panel of any Nunukel people'[110] from whom he was descended and argued that 'not having been tried by a jury of Nunukel people, [he] was denied trial by his peers'.[111] The Court of Appeal rejected his arguments:

> In popular imagination a reference to *Magna Carta* invariably means the Great Charter granted by King John at Runnymede in 1215. A recent American commentator Professor Thomas G. Barnes reminds us that *Magna Carta* is 'more often cited than read'. Perhaps that is because it was written in Latin. The special edition published by the *Legal Classics Library* of Birmingham, Alabama, to which these and other remarks by Professor Barnes form an introduction, offers the following translation of ch.39:
>
> > 'No freeman 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, excepting by the legal judgment of his peers, or by the law of the land.'
>
> The edition referred to is a reprint of an historical essay by Richard Thomson published in 1829, in which, at p.228, it is suggested that 'the word Peer was probably originally derived of the Latin *Par* an equal …', adding that 'the trial by equals is of great antiquity …'. To accept that what is required by ch.39 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.
>
> It is not necessary to consider *Magna Carta* in further detail because even if, by force of s.24 of the *Australian Courts Act* 1828, the provisions of ch.39 of *Magna Carta* ever formed part of the law of Queensland, they have long since been displaced by local statutes. Disregarding those in force in New South Wales at the time of Separation, the first general enactment concerning juries and their composition in Queensland was the *Jury Act of* 1867; 31 Vic. No. 34. It was twice amended before being repealed and replaced by *The Jury Act of* 1929. Section 46 of that Act provides that 'in every case whatsoever of trial … by jury … the jurors or the jury and every trial … by them shall, as far as may be practicable, be subject to the same rules and manner of proceeding as would be observed in the High Court of Justice in England on the like trial …'. …
>
> The appellant's objection at his trial to the composition of the jury panel in the present case partook of the character of a challenge to the array because his objection was evidently directed to the whole panel of jurors: see *The Criminal Code*, s.609; and cf. *R. v. Chapman* [1952] Q.W.N. 16. … The applicant's complaint … was of

109 [1989] 2 Qd R 79.

110 *R v Walker* [1989] 2 Qd R 79, 85 (McPherson J). McPherson J characterised the appellant's objection as 'a challenge to the array because his objection was evidently directed to the whole panel of jurors'. Challenges to the array are discussed in chapter 10 of this Paper.

111 *R v Walker* [1989] 2 Qd R 79, 84 (McPherson J).

> the absence from the panel of any Nunukel people, … It is nevertheless appropriate to consider on its merits the submission in law that is now advanced.
>
> 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, which was statutory in origin, was recognised in early Queensland, although not, it seems, in New South Wales: see *R. v. Valentine* (1871) 10 S.C.R. (N.S.W.) 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 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.[112]

2.40 Similar concerns about the absence of Aboriginal people on juries in Queensland were raised in the New South Wales case of *Binge v Bennett*.[113] The defendants in that case had been charged with riot in relation to an incident occurring in Goondiwindi in Queensland. The defendants were Aboriginal residents of Boggabilla and Toomelah in the far north of New South Wales near the Queensland border. They were ordered by warrant to return to Queensland to face the charges but appealed the order under the relevant legislation on the ground that it would be unjust or oppressive to return them to Queensland because they could not get a fair trial there.[114] Among other things,

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112 Ibid 84–6 (McPherson J, Andrews CJ, Demack J concurring). 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 J, 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 challenged off 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 also [4.69] below. It might also be considered that the ethnic make-up of the community in or close to a large urban centre could be quite different from that of a town in rural Australia (in *R v Smith*, Bourke in New South Wales).

The Commission notes that an all-female jury was empanelled on 2 June 2009 for the trial in Auckland of Xue Nai Yin, accused of the murder of his wife and abandonment of their daughter in Melbourne in 2007: Andrew Koubaridis, *Xue strangled wife and fled, court told* (2009) The New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10575960> at 30 April 2010; Kerri Ritchie, *Xue faces all-female murder trial jury* (2009) ABC News <http://www.abc.net.au/news/stories/2009/06/02/2586748.htm> at 30 April 2010.

113 (1989) 42 A Crim R 93. Also see *Binge v Bennett* (1988) 35 A Crim R 273.

114 *Binge v Bennett* (1989) 42 A Crim R 93, 95, 100 (Smart J). The legislation was the former *Service and Execution of Process Act 1901* (Cth) s 18(6).

they argued that 'a fair trial could not be had in Queensland' because of 'the absence of Aboriginals from juries and their infrequent inclusion on jury panels'.[115]

2.41 Among those who gave evidence on the appeal was Mr DG Sturgess, then the Director of Public Prosecutions in Queensland:

> Mr Sturgess denied that the lack of Aboriginals on juries was due to the prosecution service standing them by.[116] He attributed such lack to them not being on the jury lists. To be placed on the jury list you have to enrol as an elector and be placed on the electoral rolls. Next, you must live within a jury district. In Brisbane this means within specified electorates and broadly they seem to cover the area within a radius of 15–20 km from the centre of Brisbane. There are specific jury districts for some cities and towns. Where there is no specification the jury district of every court town shall be the area within a radius of 10 km from the court house (s 11 of the *Jury Act* 1929 (Qld) and the proclamations made thereunder).
>
> To be eligible a citizen must not be disqualified, for example, convicted of crimes as specified or unable to read or write the English language (s 7). He must continue to reside at the address shown in the electoral rolls when the jury notice comes round. The prospective juror must complete the jury notice and return it. The notice sent to the prospective juror contains a questionnaire with the questions in small print. It does not look simple and it is not easy to read but once it is read carefully it is not complex. Overall, its appearance and questions would initially discourage people.
>
> In Mr Sturgess' opinion very few full-blood Aboriginals have taken these steps. He believed that the low level of education of Aboriginals was one factor, that, as many Aboriginal people tended to move about they were not receiving the forms, and that many of those who received them did not complete them.[117] (notes added)

2.42 Smart J concluded that the lack of Aboriginal representation on juries was not sufficient to refuse the defendants' return to Queensland:[118]

> The lack of Aboriginals on both jury panels and juries is to be greatly regretted. The present system of making up jury panels does not of itself discriminate against Aboriginals. However, it is a system which, because of their education, lifestyle and attitudes, does not readily encompass them.
>
> Even if Aboriginals did participate fully in the jury system there would, because of their relatively small numbers, be comparatively few cases in Brisbane and south-east Queensland in which they would appear on jury panels and on juries. The chance of more than one Aboriginal being selected to serve on the same jury is remote. I do not regard the lack of Aboriginals on jury panels and juries as sufficient to refuse to return the plaintiffs to Queensland. It is not the case that an all white jury or a jury not containing an Aboriginal is unable to or would not consider and determine fairly charges against Aborigines, assuming the special features of this

115 *Binge v Bennett* (1989) 42 A Crim R 93, 100 (Smart J). Also 104.

116 The prosecution practice of, and guidelines for, 'standing by' jurors are discussed in chapter 10 below.

117 *Binge v Bennett* (1989) 42 A Crim R 93, 103 (Smart J).

118 Ibid 107 (Smart J). Ultimately, Smart J quashed the order for the defendants' return, but on other grounds: see n 119 below.

> case to which I later advert in more detail were absent.[119] Indeed, the lack of Aboriginals on jury panels and juries in Brisbane and south-east Queensland plays no part in my determination of this case.[120]

2.43 In *R v A Judge of the District Courts & Shelley*,[121] the Queensland Court of Appeal 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 have 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 to be no ground for a challenge for cause, which otherwise must be proved. The only grounds for such a challenge at the time being those under section 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.'[122] The Court of Appeal 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.[123]

2.44 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,

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119 The 'special features' to which Smart J referred (at (1989) 42 A Crim R 93, 124) were the:

> provoking of the predominantly white community, or at least sections of it, the highly adverse and memorable attacks and statements attributed to the Queensland Ministers, the wide and prominent coverage given to them in the media, the stringent criticism of New South Wales Aboriginals and of the administration of Aboriginal affairs in New South Wales, the strongly unfavourable comparison with the administration of Aboriginal affairs in Queensland, the identification of the Aboriginals from Toomelah, the attribution of violent qualities ('vigilante action') to New South Wales Aboriginals in a case involving a riot in a town and the general colourful media coverage …

120 *Binge v Bennett* (1989) 42 A Crim R 93, 107 (Smart J). The Commission does not accept that there is no discrimination acting against the participation of Indigenous people in Australian juries: even if there were no direct discrimination, there is a significant amount of indirect discrimination that militates against their involvement: see the discussion of Indigenous representation in chapters 4 and 11 of this Paper.

121 [1991] 1 Qd R 170.

122 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'.

123 [1991] 1 Qd R 170, 174–5 (Connolly J, Kelly SPJ agreeing).

Only South Australia has any legislative mandate for juries to be of one sex only: see s 60A of the *Juries Act 1927* (SA):

> **60A—Jury may consist of men or women only**
>
> (1) If at the trial of any issue the court is of the opinion that, by reason of the nature of the evidence to be given or the issue to be tried—
>
> (a) the jury should consist of men only; or
>
> (b) the jury should consist of women only,
>
> the court may, despite any other provision of this Part, order that the jury for the trial of that issue be empanelled accordingly.
>
> (2) An order under subsection (1) may be made upon application by one of the parties to the trial or by the court on its own initiative.

expectations and practices.[124] Juries *de medietate linguæ* were abolished by the *Jury Act of 1884* and were subsequently no longer available to aliens in Queensland.[125]

2.45 It has been said that the combined effects of jury selection, exemption, excusal and challenge procedures 'ensure' that representativeness is never achieved.[126]

2.46 The mere fact that statistical evidence might suggest that contemporary juries in Australia are fairly representative of the community in terms of age and gender spread, education and employment status does not mean that the burden of jury service is fairly shared throughout the community generally.[127] Reform of jury selection procedures may be justified on the latter basis even if there is no evidence of any overall unfair lack of representativeness in juries generally.

HOW CRIMINAL TRIALS OPERATE

Basic concepts

2.47 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.
- They must fairly apply the law to the evidence as instructed to reach their verdict.[128]

2.48 In Queensland, generally speaking all indictable offences are to be tried by a judge and jury in the Supreme Court or the District Court,[129] although there is now scope for some indictable offences to be heard by a judge sitting alone without a jury.[130] Indictable offences are the more serious crimes such as murder and manslaughter, robbery and sexual offences. At present, people charged with indictable offences must be committed to stand trial by a magistrate in the Magistrates Court. Committal pro-

124 Jacqueline Horan and David Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 183; R Gwynedd Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 164–5.

125 *Jury Act of 1884* (Qld) s 2. The provision in ss 11 and 26 of the *Jury Act of 1867* (Qld) for 'special juries' in criminal trials, which were comprised exclusively of 'esquires accountants merchants brokers engineers architects warehousemen or commission agents' and which were sometimes used in trials involving complicated or protracted evidence, was abolished by the *Jury Act Amendment Act of 1923* (Qld) s 3(1). Also see *R v Walker* [1989] 2 Qd R 79, 86 (McPherson J; Andrews CJ, Demack J concurring).

126 Mark Findlay, 'The Role of the Jury in a Fair Trial' in Mark Findlay and Peter Duff (eds) *The Jury Under Attack* (1988) 167.

127 The demographic make-up of juries in Queensland is discussed in chapter 4 of this Paper.

128 See James RP Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (eds) *Psychology and Law: an Empirical Perspective* (2005) 407.

129 Criminal Code (Qld) ss 3(3), 300, 604; *Supreme Court Act 1995* (Qld) s 203; *District Court of Queensland Act 1967* (Qld) s 61.

130 The *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld) introduced a new division 9A (ss 614–615E) into chapter 62 of the Criminal Code (Qld) allowing for trials of some indictable offences by a judge alone.

ceedings are a form of preliminary examination of the case by a magistrate. They are not a trial of the case and the defendant is not required to lead any evidence. However, if the magistrate is satisfied that the prosecution has sufficient evidence which, if led before a jury unexplained, could lead a jury which has been reasonably directed as to the relevant law to convict the defendant of the offence, then the defendant will be committed to stand trial for that offence. A defendant may, but is not required to, enter a plea of guilty or not guilty at this stage.[131]

2.49 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.[132]

2.50 The right to a trial by jury in relation to indictable offences against Commonwealth laws is guaranteed by section 80 of the *Australian Constitution*:

> **Trial by jury**
>
> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

2.51 For this reason, trials on indictment of any offence against a law of the Commonwealth are omitted from the range of trials that may be heard by a judge alone in Queensland.[133]

2.52 The judge decides questions of law only; these will include rulings on the admissibility of evidence and other procedural questions. Many of these issues will be argued by the lawyers for each party, and determined by the judge, after the jury has left the court room so that the jury does not hear any evidence that the judge ultimately rules should not be admitted.

2.53 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.

2.54 In Queensland, the jury in a criminal trial consists of 12 people[134] but the trial may continue without the full complement of jurors provided that there are at least ten jurors.[135] Up to three additional people may be selected as reserve jurors.[136]

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131 See the *Justices Act 1886* (Qld) for the procedural requirements of committal proceedings: Criminal Code (Qld) s 554. The committal process is proposed to be significantly altered by restricting the calling and cross-examination of prosecution witnesses in favour of written statements: see Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld) pt 11, which proposes to amend the *Justices Act 1886* (Qld). The Bill was introduced to Parliament on 13 April 2010 but, as at the start of June 2010, has not yet been debated. Also see Hon M Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) ch 9 <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-civil-and-criminal-justice-system-in-queensland> at 30 April 2010.

132 Criminal Code (Qld) s 1 (Definition of 'indictment'): '*indictment* means a written charge preferred against an accused person in order to the person's trial before some court other than justices exercising summary jurisdiction.' The forms of indictment are found in sch 2 to 4 of the *Criminal Practice Rules 1999* (Qld).

133 Criminal Code (Qld) s 615D, introduced by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

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

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

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

2.55 A criminal jury has 12 members in all other Australian States and Territories, and in New Zealand.[137] There is some variation in relation to proceeding to a verdict with a lesser number,[138] and in relation to additional or reserve jurors.[139]

Preliminary matters

2.56 Before the trial itself commences, the judge will deal with a number of formal matters:

- the formal presentation of the indictment by the prosecutor;
- the hearing of any applications by jurors to be excused from jury service; and
- any preliminary rulings on law, evidence or procedure that may assist in the running of the case and which should be dealt with in the absence of the jury.[140]

2.57 A trial begins with arraignment of the defendant[141] in the presence of the panel of prospective jurors from which the jury is to be selected. The judge's associate reads the indictment to the defendant and calls upon the defendant to enter a plea of guilty or not guilty. A plea of not guilty is in effect a demand that the matter be heard and determined by a jury.[142] Section 604 of the Criminal Code (Qld) provides:

> **604 Trial by jury**
>
> (1) Subject to chapter [62] division 9A[143] and subsection (2), if the accused person pleads any plea or pleas other than the plea of guilty, a plea of autrefois acquit or autrefois convict or a plea to the jurisdiction of the court, the person is by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and is entitled to have them tried accordingly.
>
> (2) Issues raised by a plea of autrefois acquit or autrefois convict must be tried by the court. (note added)

Empanelment of jurors

2.58 The jurors are then empanelled from a pool of prospective jurors randomly selected from the electoral roll who have been summoned from the community for jury

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137 *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.

138 *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.

139 *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.

140 See RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (2004) [5.72].

141 Ibid [5.72].

142 Ibid [5.76].

143 Division 9A of ch 62 of the Criminal Code (Qld) provides for trial of indictable offences by a judge alone, and was introduced by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

service.[144] Jury service is not voluntary. It is a duty for those persons who are qualified to serve and who are not otherwise excused from service.[145]

2.59 The processes by which members of the public are selected and summoned for jury duty are covered in detail in chapter 10 of this Paper.

2.60 All potential jurors who have been summoned to attend for jury service attend an orientation session prior to empanelment, in which they are provided with some information about their role and their obligations, entitlements and other administrative matters. This is also described in more detail in chapter 10 of this Paper.

2.61 Panels of prospective jurors are then taken to the courts in which trials are to be held. As cards containing their names, occupations and residential localities are drawn in random order from a box by a court officer, and their names (or identifying numbers) are read out, each potential juror comes forward to take the oath or affirmation and to enter the jury box in the court.[146]

2.62 Before they make their oath or affirmation, they may be challenged by either the prosecution or the defence. The *Jury Act 1995* (Qld) provides for the manner in which the prosecution and the defence may each challenge prospective jurors. Challenges are discussed in chapter 10 of this Paper.

Jurors' oath

2.63 Section 50 of the *Jury Act 1995* (Qld) requires that empanelled jurors take an oath or make an affirmation to the following effect:

> You will conscientiously try the charges against the defendant (or defendants) [*or the issues on which your decision is required] and decide them according to the evidence. You will also not disclose anything about the jury's deliberations other than as allowed or required by law.[147]

2.64 This oath or affirmation emphasises two key aspects of the jurors' tasks:

- They must determine their verdict 'according to the evidence' and not, by implication, by reference to any other information that they may have or acquire in relation to the case. Furthermore, this oath or affirmation requires jurors to give a verdict in accordance with the evidence and not their own inclinations, for example, by extending mercy in an apparently deserving case.[148]

144 *Jury Act 1995* (Qld) pt 5 div 6.

145 *Jury Act 1995* (Qld) ss 5, 28.

146 See *Jury Act 1995* (Qld) ss 37, 41, 44, discussed in chapter 10 of this Paper.

147 *Oaths Act 1867* (Qld) s 22 (Swearing of jurors in criminal trials). Section 21 of that Act provides for the swearing of jurors in civil trials in similar manner: see chapter 12 below. The fact that jurors take an oath to deliver a true verdict reflects the etymology of *juror* as someone who swears an oath, and of *verdict* as the speaking of the truth.

148 The Supreme Court of Canada has, however, overturned a conviction returned by a jury as directed by the trial judge as, in the judge's determination, the only argued defence did not apply. The jury did so, though a number of the jurors were clearly reluctant to do so and had asked to be excused. The Supreme Court acknowledged the reality that 'juries are not entitled as a *matter of right* to refuse to apply the law — but they do have the *power* to do so when their consciences permit of no other course': *R v Krieger* [2006] 2 SCR 501 [27] (Fish J) (emphasis in original). See also [2.10] above.

- They must keep their deliberations confidential.[149]

Choosing a speaker

2.65 Each jury is required to choose one of its members as its speaker.[150] The *Juror's Handbook* says that this happens on the first day, usually 'during the first break after empanelling'.[151] In some trials, the judge may advise the jury to delay its choice of speaker until the jurors know each other better.[152] The speaker usually speaks for the jury in court. The speaker's role in the jury room is a matter for each jury, however. Typically, 'the speaker sees that deliberations are conducted in an orderly manner'.[153] A jury can replace the speaker with another juror.[154]

The trial begins

2.66 Once the jury has been empanelled, it is common in Queensland for the trial judge to start with a general introduction of the case to the jury, outlining the jury's role in proceedings and contrasting it with the judge's own role, identifying the key counsel, defendant, court officers and other people, and stating some of the most important aspects of the jurors' duties. For example, the judge reminds them that they are to decide the case on the basis of the evidence given in court alone, and not on any outside influences, and that they are not to make their own enquiries about the case or the defendant. The jurors are also told that they can take notes and seek assistance by asking questions through the bailiff.[155]

2.67 The judge must also ensure that the jury is informed in 'appropriate detail' of the charge or charges in the indictment. Section 51 of the *Jury Act 1995* (Qld) provides:

> **51 Jury to be informed of charge in criminal trial**
>
> When the jury for a criminal trial has been sworn, the judge must ensure the jury is informed—

149 See [2.91]–[2.94] below.

150 The speaker is also known as the 'foreman', 'foreperson' or 'jury representative' in other jurisdictions.

151 Queensland Courts, *Juror's Handbook* (2008) 14. *Criminal Practice Rules 1999* (Qld) r 48(1) sets out the following form of words to be given to the jury by the proper officer (the judge, the judge's associate or other person appointed by the judge) when giving the defendant into the charge of the jury:

> 'Members of the jury, as early as is convenient, you must choose a person to speak on your behalf. You may change the speaker during the trial and any of you is free to speak.'

This is reproduced in Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.4] <http://www.courts.qld.gov.au/2265.htm> at 30 April 2010. Other words may be used provided that s 51 of the *Jury Act 1995* (Qld), which provides that after the jury is sworn, the judge must ensure the jury is informed in appropriate detail of the charge contained in the indictment and of the jury's duty on the trial, is complied with: *Criminal Practice Rules 1999* (Qld) r 48(2).

In its recent review of jury directions, the Commission recommended a change to r 48(1) to ensure that jurors are informed of the speaker's key function but to remove any suggestion that the speaker must be chosen quickly: See Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [10.212]–[10.241], Rec 10-3.

152 See Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [10.218].

153 Queensland Courts, *Juror's Handbook* (2008) 14.

154 Ibid.

155 A model form of this introduction and direction is found in Queensland Courts, *Supreme and District Court Benchbook*, 'Trial Procedure' [5B] <http://www.courts.qld.gov.au/2265.htm> at 30 April 2010.

(a) in appropriate detail, of the charge contained in the indictment; and

(b) of the jury's duty on the trial.

2.68 The precise forms of words to be used in relation to the formalities required by section 51(a) and in other parts of a trial are set out in rules 44 to 51 of the *Criminal Practice Rules 1999* (Qld) made under the *Supreme Court of Queensland Act 1991* (Qld).[156]

2.69 The basic nature of the offences to be tried necessarily emerges from the reading of the indictment. Juries will also be given some introductory information at the start of the trial by the judge as to, for example, the elements of the offences, the burden and standard of proof or the structure of the decisions that the jury will ultimately have to make. Some outline of the evidence will also emerge from the prosecution's opening, but otherwise most of the instruction on the law and the decision-making process is usually given at the end of the trial.

Hearing of evidence

2.70 The prosecution then opens its case with an opening address in which its case is summarised.[157] The opening address may be accompanied by some form of written outline or other aide mémoire for the jury, though this is not usual.

2.71 The defendant may also make an opening statement at this stage, but this is a matter within the discretion of the court.[158]

2.72 The only requirements on defendants to give notice of any part of their defence in advance of the trial are the requirements under sections 590A, 590B and 590C of the Criminal Code (Qld) to give notice of the particulars of an alibi, particulars of expert evidence which the defendant intends to adduce at the trial, and details of evidence of a representation under section 93B of the *Evidence Act 1977* (Qld) that the defendant intends to adduce at the trial.

2.73 The prosecution witnesses are then called. Each gives his or her evidence-in-chief, is then cross-examined by the defendant or defence counsel, and may be re-examined by the prosecutor in relation to matters raised in the cross-examination.

2.74 At the close of the prosecution case, the defendant may submit to the court that there is no case to answer. Such an application is made and determined in the absence of the jury.[159] The judge must consider whether the defendant could be lawfully convicted on the basis of the evidence led by the prosecution and determine whether, as a matter of law, there is a prima facie case against the defendant. If the

156 *Criminal Practice Rules 1999* (Qld) r 47 sets out the statement to the accused of his or her right to challenge prospective jurors. It is set out in Appendix D to this Paper.

157 Criminal Code (Qld) s 619(1).

158 *R v Nona* [1997] 2 Qd R 436 (Fryberg J). This is not expressly provided for in the Criminal Code (Qld). Provisions giving an accused person leave to make an opening address were inserted into the *Crimes Act 1961* (NZ) in 2000: see Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [311]. Also see Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [3.59], [9.19]–[9.23], [9.67]–[9.78] in which the Commission recommended an amendment to the Criminal Code (Qld) to require the trial judge to invite the defendant (if represented) to make an opening statement at the close of the prosecution's opening address.

159 RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (2004) [5.83].

application is successful and the judge is satisfied that there is no case to answer, the judge will direct the jury as a matter of law to find the defendant not guilty of the offence charged.[160]

2.75 If the defendant does not make any such application at the close of the prosecution case, or if any such application fails, the defence may, but is never obliged, to lead its own evidence. Section 618 of the Criminal Code (Qld) reads:

> **618 Evidence in defence**
>
> At the close of the evidence for the prosecution the proper officer of the court shall ask the accused person whether the person intends to adduce evidence in the person's defence.

2.76 Before the defendant leads any evidence, the defence counsel (or the defendant, if unrepresented) may address the jury to outline the defence case.[161] The defendant may then testify, and any other defence witnesses may be called. The defence witnesses will give their evidence-in-chief, will then be cross-examined by the prosecutor, and may then be re-examined by the defence on matters raised in the cross-examination.

2.77 Jurors are entitled to seek to put questions to a witness, but must only do so through the judge, who will determine whether the question should be asked.

2.78 Although technological developments in recent years have changed the way in which some evidence is given in criminal trials, the majority of evidence in trials is given orally by witnesses in the witness box in the manner described above. This may be contrasted with, for example, commercial and other similar civil cases, where the evidence may be very largely, or even exclusively, documentary, and trial judges are often provided with bundles of documents prepared in advance by the parties.

2.79 Increasingly, however, evidence in criminal trials is given by means other than oral testimony in court. For example, police interviews and police searches are routinely video-recorded, and the recordings are played back in court. In cases where documentary evidence is important (such as fraud cases), jurors may be provided with bundles of documents, and documents can be displayed on video monitors in the courtroom. These monitors can be oriented or switched off so that, when necessary, documents are not displayed to any members of the public who may be present in the courtroom. Testimony from children and other protected witnesses may be taken and recorded in advance of the trial and played back to the jury during the trial itself; some witnesses may give their evidence from behind screens so that their identity is hidden from the public.[162]

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160 See Queensland Courts, *Supreme and District Court Benchbook*, 'Directed Verdict' [14] <http://www.courts.qld.gov.au/2265.htm> at 30 April 2010.

161 Criminal Code (Qld) s 619(3).

162 Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [3.66]. The Commission made a number of recommendations in chapter 10 of that report for the continued and improved use of written materials and other aids to assist jurors in criminal trials. The Commission anticipates that such materials would not be used in all trials, but in those cases for which, and to the extent that, it is considered appropriate: [10.146]–[10.147].

Matters of law and procedure

2.80 During the trial, various questions of law and procedure may arise. These include the admissibility of evidence and the qualification of certain witnesses as experts. These are heard and determined by the judge in the absence of the jury in a proceeding within the case as a whole called a *voir dire*.[163]

Addresses and summing up

2.81 Once the defendant's evidence (if any) has been completed, the parties then address the jury, each summarising the evidence and calling on the jury to convict or acquit the defendant, as the case may be. If the defendant has called any evidence, the defendant's address is first and the prosecutor has a right of reply; otherwise the prosecutor's address is first, followed by the defence's address.[164]

2.82 It is then the judge's duty to sum up the evidence in the case and give the jury its directions on the law that it is to apply. Section 620 of the Criminal Code (Qld) provides:

> **620 Summing up**
>
> (1) After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury, it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make.
>
> (2) After the court has instructed the jury they are to consider their verdict.

2.83 The content of the summing up and the directions as to the law — and of similar directions, comments and warnings that may be given at the start of, and during, the trial — were considered in detail in the Commission's recent review of jury directions.[165]

2.84 The jury then retires to consider its verdict.[166]

Verdict and sentencing

2.85 After giving its verdict, the jury is discharged. If the defendant is found guilty, he or she is convicted and will be sentenced by the judge. It is for the judge to decide the facts relevant to sentencing,[167] though the judge's view of the facts must be consistent with the jury's verdict.[168] The jury has no role in the determination of the sentence.[169]

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163 RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (2004) [5.85].

164 Criminal Code (Qld) s 619(2), (4), (5).

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

166 Criminal Code (Qld) s 620(2).

167 See *Evidence Act 1997* (Qld) s 132C.

168 See generally *Cheung v The Queen* (2001) 209 CLR 1 [4]–[5], [14], [16]–[17] (Gleeson CJ, Gummow and Hayne JJ).

2.86 As a general rule, a jury should not be concerned with the consequences of its verdict, and the parties' addresses and the judge's summing up should not advert to these issues.[170]

2.87 The jury's verdict must, generally speaking, be unanimous. This is certainly the position in the following cases:

- murder trials;
- trials for offences under section 54A(1) of the Criminal Code (Qld) relating to demands on government agencies with menaces where a mandatory sentence of life imprisonment may be imposed;
- trials for offences against a law of the Commonwealth;[171] and
- where a jury has been reduced to ten people by the time that it gives its verdict.[172]

2.88 However, in other cases a jury may be asked to deliver a non-unanimous verdict if it is unable to reach a unanimous verdict.[173] If after the 'prescribed period' the jury has not reached a unanimous verdict and the judge is satisfied that the jury is unlikely to do so after further deliberation, the judge may ask the jury to reach a non-unanimous verdict.[174] If a verdict can be reached with only one dissenting juror, that then becomes the verdict of the jury.[175]

2.89 In these circumstances, the verdict is the verdict of all but one of the jurors (ie, 11 out of a jury of 12 or ten out of a jury of 11).[176]

2.90 The 'prescribed period' is a period of at least eight hours (with breaks excluded) plus any other period that the judge considers reasonable having regard to the complexity of the trial.[177]

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169 This lack of involvement in the sentencing process is not a matter for consideration in this review: see the Terms of Reference in Appendix A to this Paper. The establishment of a Sentencing Advisory Council was announced earlier this year, with $6.7 million over four years being allocated to it in the 2010–11 State Budget: see Attorney-General and Minister for Industrial Relations, Hon CR Dick, 'Community to be given greater say on criminal sentences' (Ministerial Media Release, 7 February 2010); Queensland, *Ministerial Statements*, Legislative Assembly, 10 June 2010 (Hon CR Dick, Attorney-General and Minister for Industrial Relations).

170 *Lucas v the Queen* (1970) 120 CLR 171; [1970] HCA 14 [7]–[9] (Barwick CJ, Owen and Walsh JJ).

171 See *Cheatle v The Queen* (1993) 177 CLR 541.

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

173 This may also occur in trials for murder and under s 54A(1) of the Criminal Code (Qld) where the defendant is liable to be convicted of another offence: *Jury Act 1995* (Qld) ss 59(4), 59A(1). Majority verdicts were introduced in Queensland in 2008 by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

174 *Jury Act 1995* (Qld) s 59A(2).

175 *Jury Act 1995* (Qld) s 59A(3).

176 *Jury Act 1995* (Qld) s 59A(6).

177 *Jury Act 1995* (Qld) s 59A(6).

CONFIDENTIALITY OF JURY DELIBERATIONS

2.91 The *Jury Act 1995* (Qld) provides as a general statement that the jury in a criminal trial must not separate until it has reached a verdict or been discharged, except in accordance with the Act.[178] However, provided that there is no prejudice to the fairness of the trial, a judge may allow a jury to separate during meal or other adjournments.[179] A judge may also allow a jury to separate after it has retired to consider its verdict if that would not prejudice a fair trial.[180] It is now common in Queensland for juries to separate during the hearing of a trial and during their deliberations.

2.92 This represents a significant departure from the earlier principle that a jury must be kept together at all times to ensure that it made its decisions and came to its verdict free from any outside influence, and from earlier authorities where even trivial conversations between jurors and other people (including, in particular, other participants in the trial) gave serious cause for concern even if a judge ultimately concluded that there had been no prejudice to the fairness of the trial.[181]

2.93 When a jury is kept together, no-one outside the jury is permitted to communicate with a juror without the judge's leave.[182]

2.94 Information identifying a person as a juror in a particular proceeding must not be published.[183] Information about jury deliberations is also to be kept confidential.[184] As noted at [2.63]–[2.64] above, jurors are also required to take an oath or make an affirmation that they will not disclose anything about the jury's deliberations except as allowed or required by law.

COUNSELLING

2.95 It is acknowledged that jury service is stressful on jurors, arising out of the unfamiliarity of the environment, the importance of the decisions that they are called on to make and the horror of the evidence in the trials of some particularly appalling crimes.[185] It has been suggested that the deliberative processes in the jury room can be as stressing as the hearing of the trial itself.[186]

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178 *Jury Act 1995* (Qld) s 53(1), (2). Section 53 of the Act applies with respect to criminal juries only; it does not apply in the case of civil jury trials.

179 *Jury Act 1995* (Qld) s 53(3)–(6).

180 *Jury Act 1995* (Qld) s 53(7).

181 See MJ Shanahan, PE Smith and S Ryan, *Carter's Criminal Law of Queensland* (16th ed, 2006) [71,445.10].

182 *Jury Act 1995* (Qld) s 54.

183 *Jury Act 1995* (Qld) s 70(2).

184 *Jury Act 1995* (Qld) s 70(2)–(4). There are some exceptions to this: see *Jury Act 1995* (Qld) s 70(5)–(16). Penalties for breach of the confidentiality provisions in the other Australian jurisdictions and New Zealand are discussed in chapter 13 below.

185 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) 59–61; Noelle Robertson, Graham Davies and Alice Nettleingham 'Vicarious Traumatisation as a Consequence of Jury Service' (2009) 48(1) *Howard Journal of Criminal Justice* 1; Christine 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).

186 Noelle Robertson, Graham Davies and Alice Nettleingham 'Vicarious Traumatisation as a Consequence of Jury Service' (2009) 48(1) *Howard Journal of Criminal Justice* 8.

2.96 Queensland Courts provide a Juror Support Program to assist jurors after a trial with access to medical practitioners and psychologists.[187]

REMUNERATION OF JURORS[188]

2.97 Jurors receive allowances for their attendance in court, the rates for which are set by the *Jury Regulation 2007* (Qld). They may also be paid by their employer while on jury service, though this will depend on the attitude of the employer and, in relevant cases, on the award under which the juror is employed.[189] Jurors who are paid their normal salary or other remuneration during jury service may be required to reimburse their employers for the jury allowances that they receive.[190]

UNQUALIFIED JURORS

2.98 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'.[191] 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.[192] As the CJC noted (and as is discussed below starting at [2.100]), this would not have vitiated the verdicts in those cases.[193]

2.99 It is understandable that cases of disqualified people actually serving on juries would be rare, and even more rarely come to light. The former Sheriff has informed the Commission that there have been some instances where travel allowance claims lodged by jurors have shown that they travelled from outside the relevant jury district to serve. In appropriate cases, they are excused from further attendance or exempted, and the relevant information is updated on the lists of prospective jurors.[194]

Verdicts involving unqualified jurors

2.100 Generally speaking, verdicts delivered by juries that include people who were not qualified to serve are not impeachable. For example, under section 6 of the *Jury Act 1995* (Qld):

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187 Queensland Courts, *Juror's Handbook* (2008) 20; Queensland Courts, *Guide to Jury Deliberations* (2008) 6; Queensland Courts, 'Serving on jury' <http://www.courts.qld.gov.au/162.htm> at 30 April 2010.

188 Remuneration of jurors is discussed in greater detail in chapter 11 of this Paper.

189 See Queensland Courts, 'Excusal' <http://www.courts.qld.gov.au/161.htm> at 30 April 2010; Queensland Courts, 'Remuneration' <http://www.courts.qld.gov.au/157.htm> at 30 April 2010.

190 Queensland Courts, 'Remuneration' <http://www.courts.qld.gov.au/157.htm> at 30 April 2010.

191 Criminal Justice Commission, *Report of an Investigative Hearing Into Alleged Jury Interference* (1991) 1.

192 Ibid 25–6. The CJC did not make any substantive recommendations on this issue. That report is discussed in chapter 1 of this Paper.

193 Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 12.

194 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

> The fact that a person who is not qualified for jury service serves on a jury is not a ground for questioning the verdict.

2.101 Provisions dealing with this issue exist in all other Australian jurisdictions and in New Zealand.[195]

2.102 In the Australian Capital Territory, the Northern Territory, South Australia and Victoria this principle will not apply, and the verdict may be impeached, if the juror's lack of qualification to serve was notified to the court before the juror took the oath or affirmation.[196]

2.103 In Tasmania, the verdict may be impeached if the juror's lack of qualification to serve was notified to the court before the verdict was delivered.[197]

2.104 In New South Wales, there is an exception if a juror impersonated, or is suspected of impersonating, another person, or if there is evidence of any other attempt to deliberately manipulate the composition of the jury.[198]

195 *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.

196 *Juries Act 1967* (ACT) s 18; *Juries Act* (NT) s 13; *Juries Act 1927* (SA) s 15; *Juries Act 2000* (Vic) s 6.

197 *Juries Act 2003* (Tas) s 7.

198 *Jury Act 1977* (NSW) s 73(2).

Chapter 3

Liability to Serve as a Juror

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 a précis of the relevant legislative schemes in other jurisdictions.

THE CURRENT PROVISIONS

3.2 The *Jury Act 1995* (Qld) specifies who is qualified, eligible[199] 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 all 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).

3.3 In Queensland, the starting point is whether a person is 'qualified' to serve.[200] Qualification simply involves being a registered elector in the jury district and being 'eligible'. Unless excused,[201] a qualified person is 'liable' to perform jury service.[202]

199 Or, more accurately, ineligible.

200 *Jury Act 1995* (Qld) s 4(1).

201 For the power to excuse from jury service, see ss 19 to 23 of the Act.

202 *Jury Act 1995* (Qld) s 5.

3.4 The Act[203] 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);
>
> (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;

203 All references in this Paper 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.

(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.[204] 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.[205] 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.[206] 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.

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.

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

205 See *Jury Act 1995* (Qld) s 21.

206 See *Jury Act 1995* (Qld) s 22.

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.

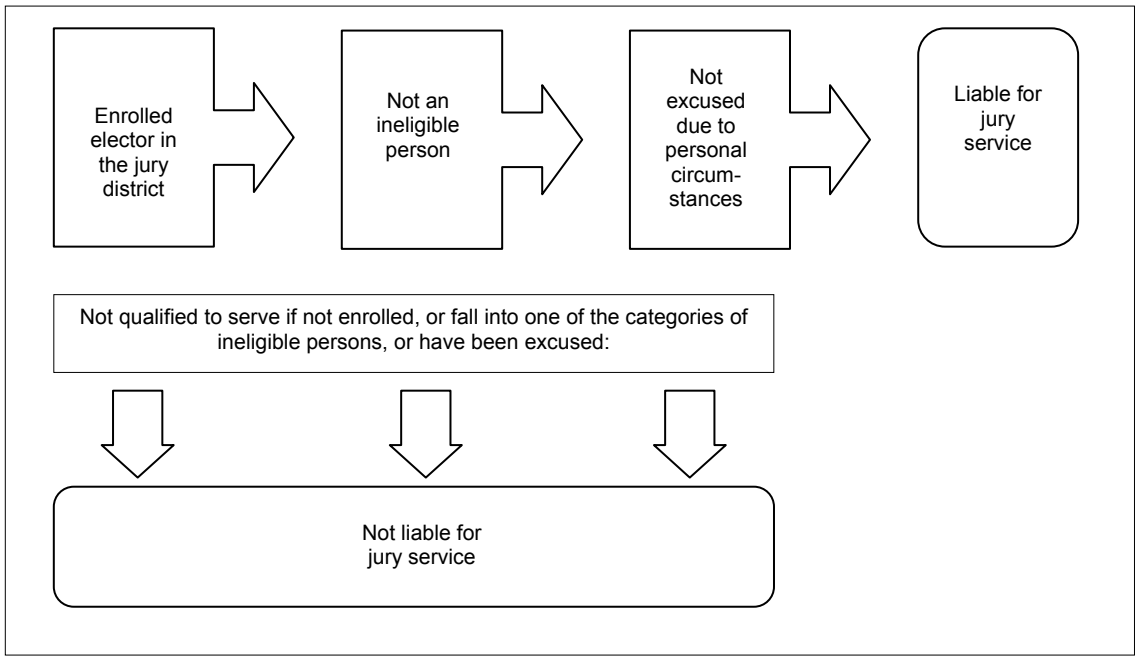

Figure 3.1: Liability to perform jury service in Queensland

HISTORY OF THE QUEENSLAND PROVISIONS

3.8 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.[207]

The Jury Acts of 1867, 1884 and 1923

3.9 Section 3 of the *Jury Act of 1867* (Qld) disqualified all men 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 [from serving] on any jury in any court or on any occasion whatsoever.

3.10 The Act of 1867, as amended by the *Jury Act of 1884* (Qld), also exempted a long list of people from 'serving upon any juries whatsoever'.[208] 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 teller 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 exercis-

207 *Jury Act 1929* (Qld) s 4, sch 1.

208 *Jury Act of 1867* (Qld) s 2.

> ing 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 all household officers and servants of the Governor all postmasters and clerks of petty sessions and all inspectors of schools ...

3.11 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',[209] 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.[210] That latter Act also provided a right of 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'.[211]

The *Jury Act 1929* (Qld)

3.12 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'[212] — and categories of exemption,[213] which were conceptually similar to the categories of ineligibility under section 4(3) of the current Act.

3.13 The list of exempted people under the 1929 Act was, even at that time, described as 'formidable',[214] and 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; and commercial travellers and journalists; as well members of the executive and judiciary and others involved in the justice system.

3.14 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.[215] However, as is discussed in more detail below, some of those categories were later re-inserted before it came into effect.

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209 *Jury Act of 1884* (Qld) s 4.

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

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

212 *Jury Act 1929* (Qld) s 7(1).

213 *Jury Act 1929* (Qld) ss 8, 8A.

214 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 November 1923, 1676 (Mr EM Hanlon).

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

The *Jury Act 1995* (Qld)

3.15 In 1993, the Litigation Reform Commission recommended that a new Jury Act be enacted in Queensland.[216] This followed a number of other reviews into the operation of the jury system in Queensland.[217] The result was the introduction into Parliament of the Jury Bill 1995 (Qld).[218]

3.16 The Bill had been intended to drastically cut the range of people exempt from jury service[219] and to:

> 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.[220]

3.17 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.

3.18 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).

3.19 In 1996, after a change of government, 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).[221] The rationale for this was explained in the Explanatory Notes to the Bill:

> 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.

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

217 Those reviews are discussed in chapter 1 above.

218 See the Second Reading Speech of the Jury Bill 1995 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1995, 210 (Hon MJ Foley, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts). Also see, generally, Queensland Parliamentary Library (K Sampford), 'Reforming Queensland's Jury System: The Jury Bill 1995', *Legislation Bulletin No 2/95* (1995).

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

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

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

> 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.[222]

3.20 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;[223] and
- detention centre employees.[224]

3.21 The Explanatory Notes accompanying those amending Bills do not clarify the reasons for the inclusion of those exemptions.[225]

3.22 The most recent amendment to section 4, in 2004, was simply a re-numbering correction.[226]

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.[227] Those provisions have remained virtually unchanged since their original enactment.[228]

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

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

224 *Juvenile Justice Amendment Act 2002* (Qld) s 154, which also 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*.

225 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.

226 *Justice and Other Legislation Amendment Act 2004* (Qld) s 3, sch. Also see Explanatory Notes, Justice and Other Legislation Amendment Bill 2004 (Qld) 27. Some of the definitions in the Act were also consequentially amended in 2009 and 2010: see *Health Legislation (Health Practitioner Regulation National Law) Amendment Act 2010* (Qld) s 124, sch (which will commence on 1 July 2010); and *Juvenile Justice and Other Acts Amendment Act 2009* (Qld) s 45. As at June 2010, those are the most recent amendments made to the Act.

227 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.

228 *Jury Act 1995* (Qld) ss 29, 30, 31, 35. Those provisions are discussed in chapter 10 below.

OTHER JURISDICTIONS

Terminology

3.24 Different jurisdictions use different terminology to describe and distinguish between the categories of people who have a duty to perform jury service and those who do not, either permanently or temporarily.

3.25 The usage of the terms 'qualification', 'eligibility' and 'excusal' and other related expressions is not wholly consistent across jurisdictions or within the academic and other literature on juries. In New Zealand, for example, the legislation provides that certain categories of people 'shall not serve on any jury in any Court on any occasion'.[229]

3.26 A number of jurisdictions, such as New South Wales, distinguish between categories of disqualification, ineligibility, and exemption or excusal as of right. The last of those categories entitles certain people to claim exemption or excusal from jury service on the basis of their standing, occupation or, sometimes, personal circumstances. In other words, they are entitled to opt out of jury service. With one exception, no such provision is made in Queensland: under the Queensland Act, a person is either qualified for jury service (and therefore liable, unless excused) or not.[230]

3.27 Like Queensland, the other Australian jurisdictions provide for discretionary excusal based on personal circumstances, and some also provide for deferral of jury service.[231]

Other Australian jurisdictions

3.28 Where relevant throughout this Paper, reference is made to comparative provisions of the other Australian jurisdictions and New Zealand. The review of other jurisdictions' legislation is not exhaustive. It assumes that provisions in other Australian jurisdictions are generally the same as, or very similar to, those in Queensland unless the contrary is noted.

3.29 The key provisions in the other Australian jurisdictions are:

- The *Jury Exemption Act 1965* (Cth) and the *Jury Exemption Regulations 1987* (Cth). These set out certain categories of people who are 'not liable, and shall not be summoned to serve as a juror'[232] or who are 'exempt from liability to serve as a juror'[233] in any Australian State or Territory.

  Other relevant federal provisions include section 147 of the *Navigation Act 1912* (Cth) and regulation 150 of the *Air Navigation Regulations 1947* (Cth).[234]

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229 *Juries Act 1981* (NZ) s 8.

230 The one exception is people over 70 years, who are ineligible unless they elect to be eligible: *Jury Act 1995* (Qld) s 4(3)(j), (4). See chapter 8 below.

231 Deferral of jury service is discussed in chapter 9 of this Paper.

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

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

234 See chapter 7 below.

- The *Juries Act 1967* (ACT). Sections 9 to 11 set out a much shorter list of categories of people who are 'not qualified' to serve as a juror[235] than in Queensland, but add a long list of categories of people who are exempt or who may claim exemption (in schedule 2, parts 2.1 and 2.2). In addition, sections 14 to 17 and 18A stipulate grounds for excusing a person from jury service.

- The *Jury Act 1977* (NSW). The categories of people who are disqualified from serving as a juror, ineligible to serve as a juror and entitled 'as of right' to claim exemption from jury service are set out in sections 5 to 8 and schedules 1 to 3. The circumstances in which a person may be excused from jury service are dealt with in sections 38 to 39. These provisions were the subject of a review by the NSW Law Reform Commission finalised in 2007[236] and are proposed to be amended by the Jury Amendment Bill 2010 (NSW).[237]

- The *Juries Act* (NT). The people who are disqualified from jury service and the several categories of people who are exempt from serving as jurors are identified in sections 9 to 11 and schedule 7. Sections 15 to 18AB make provision for people to be excused or exempted from jury service in particular circumstances.

- The *Juries Act 1927* (SA). The categories of people who are disqualified from jury service, those who are ineligible to serve as jurors, and the grounds on which a person may be excused from jury service are set out in sections 11 to 14, 16 and schedule 3.

  Other relevant provisions in South Australia are found in the *Criminal Law Consolidation Act 1935* (SA). In particular, it includes various offences in relation to conduct by or towards jurors (sections 245 to 248).

- The *Juries Act 2003* (Tas). The categories of people who are disqualified and ineligible from jury service, and the circumstances in and grounds on which a person may seek excusal (including permanent excusal) or be granted an exemption from jury service, are identified in sections 6, 9 to 16 and schedules 1 and 2. In addition, section 8 deals with applications for deferral of jury service to a later period.

- The *Juries Act 2000* (Vic). The categories of people who are disqualified from jury service and ineligible for jury service and the circumstances in which a person may be excused (including permanently) or otherwise exempted from jury service are dealt with in sections 5, 8 to 15 and schedules 1 and 2. In addition, section 7 provides for deferral of jury service. The provisions on juror eligibility were also the subject of a recent Discussion Paper by the Victorian Department of Justice.[238]

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235 *Juries Act 1967* (ACT) s 10.

236 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007). Also see New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006). Both of these Reports are discussed in detail in chapter 5 below.

237 Jury Amendment Bill 2010 (NSW), introduced to the Legislative Assembly on 3 June 2010.

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

- The *Juries Act 1957* (WA). The categories of people who are ineligible to serve as jurors and who are disqualified from jury service, and the grounds on which a person may be excused from jury service, are set out in sections 4 and 5, and the Second and Third Schedules.

  Additional provisions in Western Australia are located in the *Criminal Procedure Act 2004* (WA), part 4 division 6. For example, section 104 deals with the right to challenge a juror.

New Zealand

3.30 The key statute in New Zealand is the *Juries Act 1981* (NZ). Sections 6 to 8 set out the people who are disqualified from jury service and those who 'shall not serve' on a jury, and sections 15 to 16AA deal with excusals from jury service. Relatively recent amendments to this Act extended the grounds for excusal[239] and made provision for the deferral of jury service.[240]

England and Wales

3.31 The relevant legislation in England and Wales, the *Juries Act 1974* (Eng), was radically amended in relation to jury selection by the enactment of the *Criminal Justice Act 2003* (Eng). These changes are the most significant in any comparable jurisdiction since the current Queensland legislation came into effect, and are considered in detail in chapter 5 of this Paper. Section 1 and schedule 1 of the *Juries Act 1974* (Eng) identify the categories of people who are disqualified from jury service, sections 8 to 9 provide for excusals from jury service, and section 9A provides for the deferral of jury service in particular circumstances.

Scotland

3.32 The principal relevant statute in Scotland is the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980*. That Act specifies the people who are liable for jury service and identifies the categories of persons who are ineligible, disqualified or entitled to be excused from jury service as of right. It also provides for discretionary excusal and deferral of jury service. Some of these provisions have recently been reviewed by the Scottish Government. This is discussed in chapter 5 below.

Ireland

3.33 The relevant legislation in Ireland is the *Juries Act 1976* (Ireland). Sections 6 to 9 and the First Schedule of that Act set out a lengthy list of people who are ineligible to serve as jurors, identify the categories of people who are disqualified from jury service, list the several categories of people who are entitled to seek excusal 'as of right', and provide for the circumstances in which a person may otherwise be excused from jury

239 *Juries Amendment Act 2000* (NZ) s 9; *Juries Amendment Act 2008* (NZ) s 12(1), amending *Juries Act 1981* (NZ) s 15.

240 *Juries Amendment Act 2008* (NZ) s 11, inserting ss 14B, 14C in *Juries Act 1981* (NZ).

service. These aspects of the Irish jury legislation have recently been the subject of a Consultation Paper by the Law Reform Commission of Ireland.[241]

Hong Kong

3.34 The relevant legislation in Hong Kong is the *Jury Ordinance, Cap 3* (HK) which has recently been the subject of a Consultation Paper by the Law Reform Commission of Hong Kong.[242] In contrast to the approach of the legislation in other jurisdictions noted above, section 4 of the *Jury Ordinance, Cap 3* (HK) imposes qualifying (rather than *dis*qualifying) criteria on the liability of people to serve as jurors (such as being of 'sound mind' and 'good character'). Section 5 includes a lengthy list of people who are exempt from jury service.

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

242 See Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008).

Chapter 4

Who Serves on Juries?

INTRODUCTION

4.1 One key tenet of the criminal justice system is that a defendant's guilt is determined by a jury of his or her fellow citizens or, as it was expressed in the Magna Carta, by a jury of his or her peers.[243] That proposition may be seen as having changed over the years, as has the meaning of the words 'citizens' or 'peers', but a strong expectation remains that a jury is representative of the community from which the defendant comes.

4.2 The distinction between a jury of a defendant's peers and one that is representative of the defendant's community may be significant, especially in small communities or where the defendant is from a minority group that is under-represented either on the defendant's own jury or on juries generally.

4.3 The representativeness of Australian 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. However, the exclusion of many groups from the overall pool from which jurors are drawn, and the processes of excusal, exemption and challenge reduce the pool and may skew it in ways that undermine the overall representativeness of juries.[244] There were concerns expressed in the 1950s, and endorsed in the 1980s, that jurors were 'predominantly male, middle-aged, middle-

243 See [2.1]–[2.2], [2.39] above.

244 The jury pool may also be reduced by the disobedience of jurors and prospective jurors: see [4.82]–[4.86] below.

minded and middle-class.'[245] Concerns about the lack of representativeness of contemporary juries were noted by this Commission over a quarter of a century ago, especially in relation to challenges.[246]

4.4 Part of this concern might be based on the observation that many skilled and professional people are ineligible to serve or entitled to seek exemption or excusal. As can be seen from the statistics in this chapter, however, that is far from an accurate description of contemporary juries in Queensland.

4.5 Nonetheless, 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.[247]

A history of discrimination

4.6 For the majority of their history, juries have been extremely unrepresentative. Until comparatively recently they were composed entirely of men, and for long periods, men of property.[248] It was not until the second half of the twentieth century that some of these restrictions were removed in some jurisdictions: women were not allowed to serve on Western Australian juries until 1957,[249] and the property qualification was not removed in England and Wales until 1972, although, as the monetary limits had not been updated for decades, they had long since lost any real relevance.[250]

4.7 In Queensland, women were first permitted (but not required) to act as jurors in 1923. From 1967 until its repeal in 1997,[251] the *Jury Act 1929* (Qld) allowed women who were otherwise liable to serve as jurors to opt out: section 8(3) allowed any

245 Sir Patrick Devlin, *Trial by Jury* (1956) 20 quoted in 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) 23. At the time that Lord Devlin made these remarks, property qualifications still applied under the English jury legislation, which no doubt strengthened the middle-class and middle-aged character of English juries at the time: ibid 20–1. However, his own bias is revealed in a remark that, if the basis for eligibility for jury service were to remain narrow, 'it is no doubt right that juries should be taken out of the middle of the community where safe judgment is most likely to repose': ibid 23.

246 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) 105–9.

247 See [4.60] below.

248 See the Hon Justice Roslyn Atkinson, 'Selection of Juries: The Search for the Elusive Peer Group' (Paper presented at Jury Research and Practice Conference, Sydney, 11 December 2007) 2.

249 See former *Jury Act 1898* (WA) s 5; *Juries Act 1957* (WA) s 4. See generally S Walker, 'Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898–1957' (2004) 11(4) *E-Law Journal: Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v11n4/walker114.html> at 30 April 2010.

250 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [20].

251 The *Jury Act 1995* (Qld) commenced on 17 February 1997. All references in this Paper 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.

'female person … at any time … and from time to time by writing under … her hand, [to] inform the sheriff that … she desires to be exempt from serving on any jury.'[252]

4.8 Earlier legislation was even more discriminatory, and not just against women. Until 1930, section 1 of the *Jury Act of 1867* (Qld) provided that:

> Every man except as hereinafter excepted between the ages of twenty-one years and sixty years
>
> who shall have in his own name or in trust for him real estate of the clear value of two hundred pounds or
>
> who shall have in his own name or in trust for him the clear yearly income of fifty pounds in real estate or
>
> who shall have the clear yearly income of one hundred pounds in lands held by lease or leases for the absolute term of twenty-one years or more or
>
> who being the occupier of any land shall be rated or assessed in respect thereof to any rate or duty whatsoever on an annual value of not less than twenty-five pounds or
>
> who shall hold any land as tenant thereof to any other person at a rent of not less than fifty pounds for the year or in that proportion for any period less than a year
>
> shall be qualified and liable to serve on all juries that may be empanelled for any trial or inquiry within the jury district in which such person shall reside …

4.9 These categories of landed gentlemen were extended by section 2 of the *Jurors Act of 1877* to include every man 'who shall be the occupier of any Crown lands under lease or license from the Crown such lands being of the annual value of not less than twenty-five pounds.' This was to include the 'many lessees and licensees of Crown lands on the gold fields and elsewhere in the Colony of Queensland [who were] fit and proper persons to serve on juries but [who were] nonetheless disqualified' by the 1867 Act.[253] Property qualifications of this nature persisted in England and Wales until 1972.[254] Women had been permitted to serve as jurors in England and Wales since 1919[255] although, bound by the same property restrictions as men, few of them were in fact eligible until much later.

252 See *R v A Judge of the District Courts & Shelley* [1991] 1 Qd R 170, 173 (Connolly J) for a discussion of the history of women's rights to serve as jurors in Queensland.

253 *Jurors Act of 1877*, preamble.

254 See the Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [20].

255 *Sex Disqualification (Removal) Act 1919* (Eng).

WHO ARE THE JURORS?

Queensland

Queensland demographics

4.10 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.[256]

4.11 When the electoral roll closed for the Queensland State general election held on 21 March 2009, a total of 2,660,940 registered voters were enrolled, of whom 1,380,885 (51.89%) were women and 1,280,055 (48.11%) were men.[257]

4.12 The statistical returns published by the Electoral Commission of Queensland show that at the time of the Queensland State general election held on 9 September 2006, there were 2,484,479 voters registered in Queensland. Of them, 51.95% were women and 48.05% were men.[258] At the time of the State election on 7 February 2004, the total number of voters was 2,400,977, of whom 51.79% were women and 48.21% were men.[259]

4.13 These figures are summarised in the following table:

Date of election	Voters	%age men	%age women
7 February 2004	2,400,977	48.21	51.79
9 September 2006	2,484,479	48.05	51.95
21 March 2009	2,660,940	48.11	51.89

Table 4.1: Registered voters in recent Queensland elections (ECQ)

4.14 In slightly over five years, the population enrolled to vote grew by 259,963, some 10.82% of the 2004 figure or a little over 2% per year. However, as the population has grown, the ratio of adult men to adult women in Queensland has remained quite constant.

4.15 Of course, the overall pool of potential jurors is much smaller than this once all the people who are ineligible, permanently excused or uncontactable are taken into account.

4.16 The total resident population of Queensland at 30 June 2008 was estimated to be 4,279,400, an increase of some 98,000 (2.3%) over the preceding year.[260] The

256 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

257 Electoral Commission Queensland, *Close of Roll Figures and Deviation from Average Enrolment 2009 State General Election* <http://www.ecq.qld.gov.au/asp/index.html> at 22 April 2009.

258 Electoral Commission Queensland, *Details of Polling at Queensland General Election Held on Saturday 9 September 2006* (March 2007) 6.

259 Electoral Commission Queensland, *Details of Polling at Queensland General Election Held on Saturday 7 February 2004* (August 2004) 6.

260 Australian Bureau of Statistics, *3101.0 — Australian Demographic Statistics, Jun 2008*.

adults on the electoral roll in Queensland as at 30 June 2008[261] (which the Commission estimates to be about 2,608,000) therefore represented some 61% of the total Queensland population.

4.17 Figures from the Australian Bureau of Statistics ('ABS') provide a breakdown in that overall population at 30 June 2008 by age groups, a summary of which appears in the following table:[262]

Age group	Males	Females	Total
0–19 years	596,377	565,976	1,162,353
20–69 years	1,379,058	1,375,567	2,754,625
70+ years	162,786	199,647	362,433
Total	**2,138,221**	**2,141,190**	**4,279,411**
Total 20+ years	1,541,844	1,575,214	3,117,058

Table 4.2: Queensland population by age groups (ABS)

4.18 Accurate comparisons of these various figures are not possible as the age group divisions differ between the ABS and the Electoral Commission. However, it can be seen that the estimated number of adults enrolled to vote at 30 June 2008 (2,608,000) is equivalent to about 84% of the resident population aged over 20 years (3,117,058). A number of factors need to be borne in mind when considering these figures:

- The statistics from the ABS do not make any distinction between people aged above and below 18 years, and so people aged 18 and 19 are included in some figures and excluded from others.
- A significant number of resident adults are not entitled to be enrolled on the electoral roll, and are therefore disqualified from jury service.[263]
- 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.[264]
- The number of people aged 70 years and above (362,433) — who are in general disqualified from jury service but entitled to serve if they wish — represent 11.6% of the population aged over 20 years.

261 The Commission has estimated this figure to be about 2% less than the figure reported to be enrolled for the State election on 21 March 2009 (2,660,940), or about 2,608,000.

262 These figures are derived from the tables at Australian Bureau of Statistics, *3101.0 — Australian Demographic Statistics, Jun 2008*, 19. The ABS uses five-year age groups (0–4, 5–9, and so on). This breakdown does not allow the Commission to calculate the number of adults (people aged 18 years and above) in the population, so some approximation is to be expected in any conclusions or comments based on these figures.

263 See chapter 6 below.

264 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

4.19 The ABS's National Regional Profile for Queensland contains the following statistical information in relation to the tertiary qualifications achieved by the Queensland population aged 15 years and over at 30 June 2006.[265] They show that over half of this portion of the Queensland population had tertiary 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 tertiary qualification	**50.4%**

Table 4.3: Tertiary qualifications held by Queenslanders (ABS)

4.20 The same material from the ABS includes a breakdown of the occupations of the employed Queensland population at 30 June 2006:[266]

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 4.4: Occupations of Queenslanders (ABS)

4.21 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 (though this does not indicate how many had sufficient skill in English to allow them to serve on a jury).[267]

265 Australian Bureau of Statistics, *1.379.0.55.001 National Regional Profile, Queensland, 2002 to 2006*, Table 2: Population/People.

266 Ibid. This material does not indicate how many people were unemployed, full-time students, full-time carers or retired.

267 Ibid.

Queensland jury demographics

4.22 Relatively little information is held by the Sheriff of Queensland in relation to prospective jurors, and this is limited to the information held on the electoral roll.[268]

4.23 Some demographic information was obtained as part of the recent research on jurors' comprehension and application of jury directions and other information that was carried out by the University of Queensland for this Commission's review of jury directions. 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:

- Effectively equal numbers of women (17 or 51.5%) and men (16 or 48.5%) participated in the survey.
- The jurors ranged in age from 21 to 69, with an average age of about 43 years.
- 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.[269]
- All jurors used English as their first language.[270]

4.24 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.[271]

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268 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009. See the discussion of entitlement to enrol in chapter 6 below.

269 The survey was conducted in Brisbane only.

270 School of Psychology, University of Queensland (Blake McKimmie, Emma Antrobus and Kathryn Havas), 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials', Report (November 2009) 7–8. See also Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [2.7]–[2.18]. Similarly, a 1999 survey of 491 jurors across 14 court locations in Queensland, including Brisbane, found generally equal numbers of men (43.2%) and women (52.2%), small numbers of jurors under 25 years old (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].

271 Christine 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.

4.25 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.[272]

4.26 Participants were aged between 18 and 69, with an average age of a little over 46 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.

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

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 4.5: Queensland jurors' education (Richardson)

4.28 About two-thirds (64.06%) of the surveyed jurors had received some form of post-secondary school training or education: more than 34% had gone to university and just under 30% had undertaken some other form of tertiary education. This suggests that the jury selection process (including challenges) does not necessarily result in 'dumbed-down' juries, bearing in mind that the participants in this survey had actually heard a trial and were not merely drawn from the pool of people summoned to attend for jury service. In fact, a comparison with statistics for the Queensland population as a whole indicates that jurors are better educated than Queenslanders overall: see [4.19] above.

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

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

Table 4.6: Queensland jurors' employment status (Richardson)

4.30 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 difficulties with work caused by jury service is a basis for excusal, it might be expected that jurors would in-

272 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.

clude a higher percentage of people not in full-time or permanent employment than the adult population as a whole. The research, however, does tend to go against the assumption that juries are dominated by 'housewives and pensioners',[273] the 'unemployed and the retired'.[274]

4.31 Richardson's research did not look at the ethnic origins of the jurors, nor their first language.

4.32 The participating jurors reported on their previous experience, if any, as jurors. Most had had no prior experience as a juror[275] and just over 20% had 'experienced jury duty'[276] once or twice before. Incredibly, it appeared that one (or a very small number) had had up to nine previous experiences of jury service.[277]

4.33 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,[278] produces some geographical anomalies. For example, as the Supreme Court does not usually 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.

Elsewhere in Australia

4.34 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.[279] 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:[280]

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273 Daniel 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 30 April 2010.

274 Terry Sweetman, 'Majority pass on jury duty', *The Sunday Mail* (Brisbane) 2 May 2010, 55.

275 The precise percentage was not recorded by Richardson: see Christine 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) 116.

276 The precise percentage was not recorded by Richardson: ibid. It is unclear whether they had actually sat on juries before or simply been summoned.

277 The precise percentage was not recorded by Richardson: Christine 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) 116. The high number of previous experiences of jury duty might be accounted for in part by the fact that a person might be required to attend for jury service more than once during any given jury service period without being empanelled.

278 See *Jury Act 1995* (Qld) s 7 and *Jury Regulation 2007* (Qld) s 5, sch 1. The jury districts and their boundaries are discussed in chapter 11 below.

279 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).

280 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
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%
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%

	Jury-eligible citizens	Non-empanelled jurors	Empanelled jurors
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 4.7: Demographic data of jurors in three Australian States (AIC)

4.35 These figures do not seem to reveal any significant variation from the figures for Queensland juries produced by Richardson.[281]

New South Wales

4.36 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.[282]

> 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.[283]

4.37 Of the 1225 jurors in the survey, about 1200 answered several questions about themselves. The following figures emerged.[284]

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

4.39 The age spread was remarkably even:

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 4.8: Ages of NSW jurors (BOCSAR)

281 See [4.24] above.

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

283 Ibid 1.

284 Ibid 3–4, 15.

4.40 The jurors were also much better educated than some stereotypes would suggest, with over 41% holding a bachelor's degree or higher. This result might belie some pre-conceptions that jurors overall are not equipped intellectually to handle complex evidence or propositions of law. The comment made at [4.28] 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:

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 4.9: Educational levels achieved by NSW jurors (BOCSAR)

4.41 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:

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 4.10: Employment status of NSW jurors (BOCSAR)

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

4.43 The BOCSAR survey did not report on jurors' prior experience with the criminal justice system, if any, as jurors or otherwise.

Victoria

4.44 Studies in Victoria of civil juries conducted in 2000–01 reported by Horan and Tait[285] 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-

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

carers), which may have been overcome in turn by biases in the use of peremptory challenges.[286]

4.45 This was contrasted with an earlier study in Victoria in 1998 of criminal juries, of which only 42.5% were women.[287] Perhaps more significant was the fact that in 1998, of all people called for jury service, both civil and criminal, only 44% were women.[288]

4.46 The statistics reported by Horan and Tait compared the composition of civil juries with the overall Victorian population in several areas of demographic statistics. It is unclear to what extent, if any, there is a significant variation in the relevant results between civil and criminal juries. The Commission assumes that the overall number of civil jurors is lower than criminal jurors given the decline in the use of civil juries. However, there is no evidence other than that mentioned in the preceding paragraph as to the differences in the composition of civil and criminal juries.

4.47 The statistics revealed, perhaps unsurprisingly, an over-representation of middle-aged and older people on civil juries, though 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.[289]

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

4.48 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.[290]

286 Ibid 191.

287 Ibid 191.

288 Ibid 192.

289 Ibid 192–3.

290 Ibid 193–4.

4.49 However, the ethnicity of jurors, as measured by their place of birth, almost exactly reflected the make-up of the Victorian population.[291]

Western Australia

4.50 In its examination of data available for Western Australia, the Law Reform Commission of Western Australia ('LRCWA') found that popular perceptions that juries are largely made up of the unemployed and housewives and that professional classes are under-represented 'have little or no basis in fact':

> For example, it has been reported that Western Australian juries are populated by the unemployed and by 'housewives'. The Commission has found that this is not the case, with data showing that these categories make up only 5% of current jurors. There is also a perception that the 'professional' classes are not widely represented on juries. Again, data analysed by the Commission shows that this criticism cannot be sustained. Further, there is a perception that Aboriginal people and ethnic minorities are significantly underrepresented on juries. The available evidence does not appear to support this contention; however, existing data is limited in this regard.[292]

4.51 The LRCWA's research did find, however, 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.[293]

United Kingdom

4.52 The BOCSAR research described above does not indicate whether there was any skewing of these results in longer trials, particularly in relation to employment status and education. In this respect, a variation in jury composition has been found in research in the United Kingdom: 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.[294]

4.53 That UK research also showed that a significant number of jurors had prior court experience: 13% as witnesses, 8% as defendants, and 4% as victims. About one in five (19%) had previously served as a juror.[295]

4.54 However, significantly, over 40% claimed that they had a good knowledge of the court process before their jury service, apparently largely from the media.[296]

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291 Ibid 195. This result is discussed in more detail in chapter 8 of this Paper in the context of the ineligibility of people who are unable to read or write English.

292 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) ix. Also 45.

293 Ibid. Also 41.

294 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.

295 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) 9.

296 Ibid 7.

4.55 More recently, a detailed study of English juries has been conducted for the United Kingdom Ministry of Justice. Significantly, the results discredited a number of myths about jury participation and showed that, even taking into account disqualifications and excusals, English juries are representative of the population from which they are drawn:

> First, it is a myth that the middle classes and what Auld referred to as 'the important & clever' manage to avoid jury service. The reality is that the vast majority of middle to higher income earners actually do jury service when summoned, and that higher income earners are in fact over-represented among serving jurors. Second, it is a myth that women, young people and the self-employed are under-represented among serving jurors. In reality, gender had no significant impact on whether those summoned served or did not serve; among those serving as jurors, the proportion of men and women was exactly the same (50%). In addition, those between the ages of 18 and 24 were represented among serving jurors almost exactly in proportion to their representation in the population. Similarly, the self-employed were not under-represented, but in fact served in proportion to their representation in the population. This dispels the notion that the self-employed are virtually exempt from jury service. Third, it is a myth that juries are mostly made up of the retired and unemployed. The retired and unemployed are, in fact, under-represented among serving jurors, and in reality it is the employed that are over-represented among serving jurors.[297]

4.56 The research included a study of serving jurors in three Crown Courts over a four-week period. It found that, overall, the proportion of men to women was the same (51% to 49% respectively) and that, on individual juries, there were no all-male or all-female juries; nor were there any juries with only one male or female juror.[298] It also found that 19%, 16% and 11% of serving jurors from the three courts, respectively, had previous jury experience.[299] The study compared the age, employment status, occupation and household income of serving jurors with the respective local populations from which prospective jurors are drawn:[300]

	Blackfriars		Reading		Manchester	
	Serving jurors	Local population	Serving jurors	Local population	Serving jurors	Local population
Age						
18–24	9%	15%	16%	12%	9%	14%
25–29	15%	18%	16%	10%	10%	10%
30–44	40%	37%	32%	35%	41%	32%
45–59	26%	18%	26%	27%	32%	25%
60–64	7%	5%	7%	6%	6%	7%
65–74	2%	7%	3%	10%	3%	12%

297 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) 116.

298 Ibid 144.

299 Ibid 144–5, Fig 5.28.

300 The figures in the table are drawn 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) 134–44, Fig 5.16–5.27.

	Blackfriars		Reading		Manchester	
	Serving jurors	Local population	Serving jurors	Local population	Serving jurors	Local population
Employment status						
Employed	76%	53%	76%	61%	80%	52%
Self-employed	9%	9%	7%	9%	4%	7%
Retired	4%	8%	5%	11%	5%	13%
Student	2%	8%	7%	4%	2%	6%
Looking after family	4%	7%	3%	7%	3%	6%
Looking for work	2%	6%	2.5%	2.2%	4%	4%
Other	4%	10%	1%	5%	2%	12%
Occupation						
Professional	36%	39%	31%	29%	21%	24%
Managerial	18%	19%	16%	20%	9%	13%
Clerical	11%	13%	15%	14%	18%	14%
Sales/Services	10%	11%	12%	13%	12%	16%
Skilled	8%	6%	8%	10%	12%	11%
Other	18%	12%	19%	15%	28%	23%
Household income[301]						
Under £10K	10%		6%		12%	
£10–19K	18%		14%		27%	
£20–34K	28%		28%		30%	
£35–49K	13%		24%		1%	
£50–64K	10%		14%		7%	
£65K+	21%		14%		5%	
Prior jury service						
Prior jury service	19%		16%		11%	
No prior jury service	81%		84%		89%	

Table 4.12: Demographic breakdown of juries in the UK (UK Ministry of Justice)

301 Comparative household income data for the relevant populations was not available. However, the researchers noted that the single largest group of serving jurors — those coming from the £20,000–34,999 income group — reflected the national average for household income of just under £30,000: 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) 139.

ARE JURIES REPRESENTATIVE?

Queensland demographics

4.57 There is a persistent belief that juries are unrepresentative of the community at large, being stacked with people with nothing better to do:

> Queensland University of Technology law lecturer and barrister Nigel Stobbs said … retirees and unemployed people were generally over-represented on juries.
>
> 'The people who typically turn up for jury service are typically people who don't have to be anywhere else that week,' he said.[302]

4.58 However, the figures set out earlier in this chapter do 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, but that is perhaps to be expected as poorly educated people are more likely to be excluded from the jury lists or excused from jury service due to, for example, a poor command of English.

4.59 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.

Indigenous Australians

Statistics

4.60 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:[303]

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

302 Quoted in Daniel Hurst, 'Juries no duty for most', *Brisbane Times*, 29 April 2010 <http://www.brisbanetimes.com.au/queensland/juries-no-duty-for-most-20100428-ts8u.html> at 29 April 2010.

303 These figures are derived from the tables at Australian Bureau of Statistics, *3101.0 — Australian Demographic Statistics, Jun 2008*, 17, 27.

	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%
Australia	**20,695,516**	**516,810**	**2.50%**	

Table 4.13: Indigenous population of Australia (ABS)

4.61 Only New South Wales had a larger Indigenous population (152,685) than Queensland. 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:[304]

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	**71,950**	**72,935**	**144,885**
Total 20+ years	35,431	37,912	73,343

Table 4.14: Indigenous people in Queensland (ABS)

4.62 If these figures are compared with those set out in Table 4.2 above (bearing in mind that the figures for the Indigenous population relate to 2006 and those for the total population to 2008), it emerges that Indigenous people represent about 3.5% of the total Queensland population[305] and about 2.5% of the population aged over 20 years.

Indigenous representation on juries

4.63 The Commission has no statistics or other information available to it that reveal the number of Indigenous people called for jury service or sitting on Queensland juries.

4.64 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.[306]

4.65 The research also involved interviews with judges, prosecutors, defence counsel and jury administrators:[307]

304 These figures are derived from the tables at Australian Bureau of Statistics, *3101.0 — Australian Demographic Statistics, Jun 2008*, 26–7.

305 See also Australian Bureau of Statistics, *1.379.0.55.001 National Regional Profile, Queensland, 2002 to 2006*, Table 2: Population/People.

306 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.

307 Ibid 78.

> 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:
>
> > 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)

4.66 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.

4.67 In practice, Indigenous Australians are under-represented on juries in Queensland;[308] this may be for a number of reasons, including under-representation on the electoral roll and within jury districts.[309]

4.68 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.[310] In Western Australia, Martin CJ has made the following observations:

> 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.[311]

4.69 The absence of Indigenous jurors in a trial of an Indigenous man in Bourke, New South Wales, led to the trial judge discharging the whole of the jury because it was unrepresentative; the three Indigenous members of the jury panel had been peremptorily challenged by the prosecutor.[312] The judge expressed his reasons this way:

> Mr Crown [Prosecutor], Mr Parker [counsel for the defendant], Members of the Jury, something has happened in this case which has caused me to delay the hearing and I am sorry for that delay but it is something which worries me immensely and continues to worry me. It is the second time that it has happened in a court in which I have had the duty of presiding in the West and it is this: the accused man is obviously of Aboriginal blood, equally obviously there were three members of the jury panel called who were of Aboriginal blood and none of those three remains.

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308 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

309 See chapter 11 below.

310 The Hon Justice Roslyn 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.

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

312 *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].

> The reason why none of those three remains is because each of them was challenged by the Crown Prosecutor.
>
> The Crown Prosecutor, like the counsel for the accused, has an absolute right of challenge with a certain number of jurors and does not have to give any reason and I have not the power to ask the Crown Prosecutor for his reasons and I think, for a number of reasons, it would not be proper for me to do so.
>
> The fact remains that the Crown Prosecutor is a person well known to you as an honourable citizen, an honourable Crown Prosecutor and I am not in the slightest criticising his action nor impugning it in any way whatsoever; but whilst that fact remains the other fact remains that it is a very important principle of our system of justice that justice must not only be done, it must appear quite clearly to be done.
>
> What has been worrying me for the last one and a half hours is that if I allow the situation to continue some members of our community, of our country, may think that appearances suggest that justice is not being done. I believe that justice will be done, I have every confidence in my fellow citizens whether they are white or black that are called into juries and I have no doubt that justice will be done but I think some citizens, as I say, may feel otherwise.
>
> A judge has heavy responsibilities and one of the judge's powers under those responsibilities is to discharge a jury and to stop a trial and require it to go on another day, or another time with another jury, for any reason which he, in his discretion, thinks proper.
>
> I have given this considerable thought and as I say I am considerably worried but I am quite certain in my own mind that the proper thing for me to do to avoid the possibility that some of the citizens of our beloved country may think that justice will not be done is to discharge you members of the jury from further service and to put an end to the trial for the time being. The trial will go on at some other time and place as the Honourable Attorney General appoints but it will not come on today.[313]

United Kingdom

4.70 Recent research conducted for the United Kingdom Ministry of Justice specifically examined ethnic representation on juries. It included a survey of more than 15,000 individuals summoned for jury service.

4.71 Significantly, the survey found that the proportion of 'black and minority ethnic'[314] people summoned for jury service was generally representative of the relevant juror catchment area.[315] It also found that there was no difference in the overall rate of excusal from jury service between black and minority ethnic people summoned for jury service and all other summoned jurors. Similarly, there was little difference in the rates of deferrals and actual service. There was, however, a greater proportion of black and minority ethnic people who were disqualified from service:[316]

313 [1982] *Aboriginal Law Bulletin* [8].

314 The Commission uses the expression 'black and minority ethnic' because it is the expression used by the UK Ministry of Justice in its report: see 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) 1, note 1, 28, Table 2.1.

315 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) 83.

316 Ibid 102, Fig 4.19.

	All jurors	White jurors	Black and minority ethnic jurors
Disqualified	8%	5%	15%
Deferred	17%	18%	15%
Excused	28%	23%	28%
Served	47%	54%	42%

Table 4.15: Ethnic breakdown of juries in the UK (UK Ministry of Justice)

4.72 Of those black and minority ethnic people who were summoned but did not serve, 24% were disqualified on the basis of non-residence and 21% were excused for language reasons.[317] Ethnicity was found to be relevant to whether or not a summoned juror actually served only when in combination with language:

> The only ethnic/language group where more did not serve than served was BME jurors who had a language other than English as their first language. This is not surprising, as those without a sufficient command of English are excused from jury service. There was also an increased likelihood of not serving among Black jurors summoned for jury service. However, when the socio-economic background of Black jurors was examined in more detail along with their reasons for not serving, it was clear this higher rate of not serving reflected either a lack of qualification to serve or economic difficultly in serving. The largest group of Black jurors summoned who did not serve were disqualified because they had not been resident for the required period. Most of the remaining Black jurors who did not serve were in the lowest income brackets and were economically inactive (looking after a family or looking for work), situations where all jurors (regardless of ethnicity) were less likely to serve.[318]

4.73 Importantly, the research differentiated between low and high ethnicity courts:

> Only a minority of courts (20 of the 94 Crown Courts in England and Wales) can be considered High Ethnicity Courts, where ethnic minorities comprise over 10% of the local population in the juror catchment area, and there is therefore a valid expectation that ethnic minorities will be in the jury pool and on juries. The overwhelming majority of Crown Courts (74 of 94) are Low Ethnicity Courts, where the BME population level in the juror catchment area is below 10%, and this results in there being little likelihood of BME jurors serving on a jury in the vast majority of Crown Courts in this country. This is not because the summoning process fails to reach ethnic minorities. There simply are not sufficient BME population levels in most juror catchment areas to summon any significant number of BME jurors to serve on juries. This distinction between courts is crucially important to understanding the relationship between ethnicity and juror summoning in Crown Courts in England and Wales.[319]

4.74 As to high ethnicity courts, the research found that, even after disqualifications and excusals, juries actually serving were still 'racially mixed'.[320] As can be seen in the following table, the overall proportion of black and minority ethnic jurors was roughly representative of the community, although this did 'not necessarily translate into every

317 Ibid 102–3, Fig 4.20.

318 Ibid 117.

319 Ibid 193.

320 Ibid 199–200.

jury being strictly representative of the black and minority ethnic population in the court catchment area'.[321]

	Blackfriars		Reading		Manchester	
	Serving jurors	Local population	Serving jurors	Local population	Serving jurors	Local population
White	78%	67%	91%	90%	96%	89%
Black	8%	14%	0.6%	1.7%	1.6%	1.7%
Asian	8%	12%	5.6%	6.1%	1.2%	6.5%
Mixed	3.5%	3.6%	1.9%	1.5%	0.8%	1.6%
Other	2.3%	2.8%	0.9%	0%	0.4%	1%
Total black and minority ethnic	24%	33%	9%	10%	12%	11%

Table 4.16: Ethnic breakdown of juries and local populations (UK Ministry of Justice)

RATES OF EXCUSAL OR EXEMPTION

4.75 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:[322]

	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 4.17: Rates of Australian juror excusal and exemption (AIC)

321 Ibid 156. The figures in the table are drawn from ibid 123–4, 127–30, Fig 5.7, 5.9, 5.11.

322 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.

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

> 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%).[323]

4.77 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.[324]

4.78 As discussed in chapter 5 of this Paper, 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 Justice confirmed that the amendments prompted a 'substantial increase' in the overall rate of participation among those summoned for jury service:

> 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.[325]

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

Table 4.18: Juror participation rates (UK Ministry of Justice)[326]

4.79 After the 2004 amendments, the main reasons for not serving were medical (34%), child care (15%), work (12%) and age (11%).[327] Other reasons cited were mental disorder, non-residence and criminal history (disqualifications), language difficulty, care of the elderly and religion (excusals). For 'black and minority ethnic' people

323 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.

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

325 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.

326 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.

327 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.

summoned for jury service, the main reasons for not serving were disqualification on the basis of non-residence (24%) and excusal on the basis of language difficulty (21%).[328] These were followed by child care (17%) and medical (15%) as reasons for excusal.

4.80 The following statistics were also reported by *The Times* in London on 24 July 2007:

- From April 2006 to March 2007, 441,788 jurors were summoned, of whom 181,098 (41%) were eventually supplied to the courts.
- Over 300,000 people failed to serve when summoned, though many of these had simply deferred their service.
- Nonetheless, 38,000 (about 8.5%) did not reply to their summons and some 19,000 summonses were not delivered.[329]

4.81 In the same article, it was reported that there were 130,000 police officers eligible for jury duty. At present, the Commission does not have any statistics that would allow it to assess what numerical impact the inclusion of police officers would have had on the pool of potential jurors in England and Wales.

RATES OF DISOBEDIENCE

4.82 In Queensland, there is little detailed information about the rates of disobedience by prospective jurors in relation to their obligations under the *Jury Act 1995* (Qld). It was estimated in about 2007 that the rate of failure to respond to the *Notice to Prospective Juror* and the attached *Questionnaire for Prospective Juror*[330] was between 10% and 20%, and rate of failure to attend in answer to a summons was between 5% and 7%.[331]

4.83 Similarly, research in the United Kingdom showed a response rate to jury summonses of 85%, with 10% of summonses not answered and 5% returned as undeliverable.[332]

4.84 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.[333]

328 Ibid 102–3, Fig 4.20.

329 Frances Gibb, 'Should the police be reporting for jury duty?', *The Times* (London), 24 July 2007, <http://business.timesonline.co.uk/tol/business/law/article2124565.ece> at 11 May 2010.

330 These documents are described in chapter 10 of this Paper.

331 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

332 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.

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

4.85 A much worse result was reported by the Law Commission of New Zealand: it was estimated that in 2001, between 15% and 25% of people summoned for jury service in New Zealand attended.[334]

4.86 Although it may be possible to collect raw figures of failure to respond to juror questionnaires, notices and summonses, many of the people who fail to respond are likely to fall outside most statistical analyses: they have moved or are otherwise not contactable; their command of English is so poor that they ignore or cannot understand the notices sent to them; or they are simply disinclined to participate. Most significantly, perhaps, it is impossible to obtain any real data about the reasons for their non-participation, which could be many. As has been pointed out, 'it cannot be assumed that all non-returns represent a wilful attempt to avoid jury service'.[335]

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

335 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

INTRODUCTION

5.1 This chapter outlines the key elements of the Commission's overall approach to reform that underpin its proposals in later chapters of this Paper, and gives an overview of recent reforms, and reform proposals, made in other Australian and some overseas jurisdictions.

GUIDING PRINCIPLES

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

- 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;[336]

5.3 These matters point to a number of underlying principles that should inform choices about juror selection and eligibility, and the Commission's approach to this review.

Right to a fair trial

5.4 Foremost among these principles is the right of an accused to a fair trial or, as Article 14 of the *International Covenant on Civil and Political Rights* puts it, the entitlement to 'a fair and public hearing by a competent, independent and impartial tribunal established by law'.[337]

5.5 With respect to jury trials,[338] an accused thus has a right to an impartial, independent and competent jury, and one that is seen to be so.[339] While perfect adherence to these three 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 trial[340] — the system of selecting jurors and the conduct of jury trials should include all the safeguards that can be provided.[341]

Competence

5.6 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.

Independence

5.7 The independence of the jury is in part secured by its being comprised of lay representatives of the community. Independence also requires jurors to be independent of the executive and the legislative branches of government.[342] The doctrine of the separation of powers, which requires, for the protection of individual liberty,[343] that none

336 The Terms of Reference are set out in Appendix A to this Paper.

337 *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). A similarly worded guarantee is contained in the European Convention on Human Rights: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 005; 213 UNTS 228, Art 6 (entered into force 3 September 1953).

338 Trial by jury is guaranteed for indictable offences under Commonwealth laws by s 80 of the Australian *Constitution*, and for most indictable offences against the criminal law of Queensland, by s 604 of the Criminal Code (Qld).

339 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; [1986] HCA 11 [2] (Deane J).

340 Eg *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).

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

342 See, for example, P Mahoney, 'Right to a fair trial in criminal matters under Article 6 ECHR' (2004) 4(2) *Judicial Studies Institute Journal* 107, 116–17.

343 Eg *R v Davison* (1954) 90 CLR 353, 381 (Kitto J).

of the three branches of government — legislative, executive and judicial — exercise the functions of either of the others,[344] may form a basis for excluding certain people from jury service. From a constitutional basis alone, the range of people who should be excluded from jury service, while fairly limited, would include:

- the Governor;
- sitting members of the legislature; and
- sitting judicial officers of the Supreme Court, District Court and Magistrates Court.

5.8 This criterion also requires jurors to be, and be seen to be, independent from the other agencies involved in the administration of the criminal justice system and the investigation, enforcement and prosecution of crime, such as the Police and Office of the Director of Public Prosecutors.

Impartiality and random selection

5.9 Impartiality requires that jurors are, and are seen to be, independent of the parties, not having a personal interest in the case or a bias against one of the parties.[345] It may require that certain prospective jurors be excluded from the jury. There is thus a potential tension between the principles of impartiality and representativeness that needs to be balanced. 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'[346] is said to achieve a kind of 'diffused impartiality'[347] that is harder to attain with a single-person tribunal.

5.10 The procedure for summoning prospective jurors is also directly influenced by the principle of random selection. The principles of impartiality and random selection impact on the permissible extent of involvement of the prosecution and defendant in the empanelment of juries. The system of challenges is also informed by prospective jurors' rights to privacy and safety.[348]

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344 See generally Thomson Reuters, *The Laws of Australia* (at 27 May 2010) 'Separation of powers' [19.1.63].

345 See, for example, *Pullar v United Kingdom* [1996] ECHR 22399/93, [29]–[30]; *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [14]–[17] (Lord Bingham). The test to be applied 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). Also see [2.34]–[2.36] above.

346 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.

347 *Thiel v Southern Pacific Co* 66 SCt 984 (1946), quoted in 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. Also see, for example, *R v Munday* (1984) 14 A Crim R 456, 457–8 (Street CJ), quoted with approval in *R v Glennon* (1992) 173 CLR 592, 614 (Brennan J):

> Every Australian worthy of citizenship can be relied upon to discharge properly and responsibly his duty as a juror. Particularly is this so in the context of being one of a number or group of others all similarly charged with this responsible duty. I have great faith in the multiple wisdom and balance reflected in the verdict of a jury.

348 These issues are discussed in chapter 10 of this Paper.

Representativeness

5.11 The notion of a jury that is broadly representative of the community is of fundamental importance.[349] It stems, in part, from another important principle informing jury selection: society's right to call upon its members to perform jury service and the concomitant duty of those so called to fulfil this role.

5.12 Jury service, like voting, is one of the few formal means by which the community, at once collectively and individually, has the opportunity to participate directly in civic life. It is an important form of democratic participation that helps ensure public confidence in, and grant legitimacy to, the criminal justice system. It also helps ensure an impartial tribunal, a key aspect of a fair trial.

5.13 It has also been noted that the representativeness of the jury enhances 'the collective competency of the jury'.[350]

5.14 Related to representativeness is the notion that juries should be comprised of ordinary, lay people, in many jurisdictions to the exclusion of all lawyers.[351]

Non-discrimination

5.15 The duty to perform jury service is regarded by some as so important that they have gone so far as to argue that it is an entitlement, rather than a mere obligation.[352] 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,[353] and the principles of non-discrimination and equality of opportunity for all people are well-recognised.[354] The characterisation of jury service as a basic civil duty (or entitlement) may thus require that people with disabilities, for example, ought not be excluded from jury service arbitrarily or unjustifiably.

5.16 The exclusion from jury service of people who are excluded from the electoral roll might be justified, however, on the basis that the eligibility for these two fundamental civic rights and duties should be kept in parallel. This would entail excluding from jury service:

- non-citizens, including long-time and permanent residents who are otherwise eligible for citizenship; and

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349 See generally [2.37]—[2.46] above.

350 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [133].

351 Eg *Brown v The Queen* (1986) 160 CLR 171, 202 (Deane J); *Doney v The Queen* (1990) 171 CLR 207, 214 (Deane, Dawson, Toohey, Gaudron, McHugh JJ); *Report of the Departmental Committee on Jury Service*, Cmnd 2627, HMSO (1965) (the 'Morris Report') [99].

352 See Jacqueline Horan and David 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].

353 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).

354 Eg *Disability Discrimination Act 1992* (Cth); *Anti-Discrimination Act 1991* (Qld).

- people barred from voting due to their criminal record, at least for the time that they are so barred.

APPROACHES TO REFORM

5.17 The representative nature of the jury is a common thread running through all these key principles. They suggest that the appropriate point of departure is that all adults should be available, and liable, for jury service. The pool of potential jurors should be as large as circumstances and principle permit for at least two reasons:

- to keep juries overall as representative as possible; and
- to share the burden (and benefits) of jury service as widely as possible.

5.18 This needs to be balanced, however, against the need for certain exclusions from jury service as safeguards of impartiality, independence and competence.

5.19 Furthermore, because jury service is inevitably an inconvenience for almost everybody, something more than mere inconvenience ought to be demonstrated to establish a basis for excusal. The processes of excusal can deal with an individual's particular circumstances,[355] but that is clearly a more time- and effort-consuming exercise than the automatic disqualification of whole professions.

5.20 There should, therefore, be a clear rationale for the exclusion — permissive or mandatory, permanent or temporary — of any group from the pool of potential jurors. Inevitably, some grounds for exclusion will be clearer than others and will apply to some groups more clearly than others. Whatever the rationale, however, it must sound in one or more of the general principles enunciated above.

Increasing the pool of prospective jurors

5.21 It has been argued that the greater the scope for avoiding jury duty (due to a large range of categories of exemption and grounds for excusal, including inadequate remuneration) the greater the negative impact on the representativeness of juries and the fairness of the jury system.[356]

5.22 To the extent that representativeness supports the principles of a fair trial, the civic nature of jury service and the principle of non-discrimination, it might be thought that one objective of reform in this area should be to increase the general pool of potential jurors, perhaps by eliminating all categories of automatic exemption except those required as safeguards of impartiality and independence. This view emerged from a relatively recent study of practices, policies and procedures affecting juror satisfaction in New South Wales, Victoria and South Australia conducted for the Australian Institute of Criminology:

355 As can a system of deferral, if one were introduced. See chapter 9 below.

356 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.

With respect to the jury pool, stakeholders[357] voiced concerns that the fact that many individuals are not required to complete jury duty (due to categories for excusal and inadequate pay) introduces a lack of representativeness, which negatively impacts the fairness of the jury process. … In terms of how the categories might be amended, most interviewees recommended that all individuals, except those participating in the criminal justice system, be permitted to perform jury duty. There was some disagreement regarding eligibility of judges and lawyers as jurors, as their presence could potentially overwhelm others in the jury room, and have a negative or prejudicial influence on jury deliberations.

Consensus emerged that if the prospective jury pool was larger and more flexible in allowing deferrals for individuals who, for good reason, are not available to complete jury duty at the time of the initial summons, representativeness would improve. The difficulty in developing concrete rules for exclusions was noted, as flexibility is needed to excuse particular cases, such as individuals who seek excusal for serious employment or financial issues. These were acknowledged as difficult to avoid in a changing society in which many people are unable to dedicate sufficient time to jury duty without risking serious financial loss. However, the overall consensus was that the existing categories for exemption are too broad and that the system should be amended to make it far more inclusive of individuals who have previously not been required to serve to ensure that jury service is a fair process which targets a wider range of individuals in the community. One judge noted:

> There are plenty of occupations of people who historically have been exempted or excused from serving on juries who to my mind no longer have any entitlement. (NSW judge 3)

Many stakeholders indicated that juries seem to be representative of the broader community in terms of age and gender. With respect to other dimensions such as education and occupation, they commented that it is very difficult to determine whether juries are representative, as details of occupation or educational attainment are not disclosed in New South Wales. However, there is some concern that juries are not representative on these dimensions and that juries lack representation from specific occupational groups, such as self-employed workers:

> They are among the category of people who in my experience claim exemption frequently and I have sympathy for it. I mean people who are self employed in a business without very many staff are in real difficulty in a trial of any length. (NSW judge 2)

The difficulty of this issue was further highlighted by a lawyer:

> We don't get a full representation but I'm not quite sure what the solution is because there are some people who are probably more important to a community working and looking after families than they are sitting on juries. (NSW lawyer 1)

…

Almost all stakeholders agreed that more members of the community should be encouraged to serve as jurors:

357 'Stakeholders' here include judges, prosecutors, defence counsel and jury administrators: ibid 14.

> [Jury service] should just be seen as one of the most important services that they could perform and be encouraged by all parts of society to fulfil that service the best way they can. (NSW lawyer 4)[358] (note added)

5.23 Some former jurors who responded to the Commission's recent review on jury directions also 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.[359]

No longer an 'onerous chore best avoided'

5.24 If jury service is regarded on the one hand as an important civil duty and an essential element of the criminal justice system that anchors it in the community as a whole, but on the other as an 'onerous chore best avoided',[360] then one key objective of any reform of the jury selection process should be to alleviate the burden and thus reduce the desire to avoid it.

5.25 There is no civil obligation imposed on Australians that is comparable to jury service. None has the same burdensome nature — and the same potential to disrupt a citizen's life for months on end without adequate financial or other compensation — as jury service. The duty to vote arises infrequently and typically occupies an hour or less one Saturday every 12 to 18 months. Significant resources are expended by the Electoral Commissions around Australia to ensure that all eligible people can and do vote. Awareness campaigns are launched in all media before each election reminding people to ensure that they are correctly enrolled.[361] Polling booths are set up in remote locations and in hospitals and aged care facilities. Postal and absentee voting facilities are available for perhaps weeks in advance of the voting day itself. There is no comparable public education process for jury service. But the time and effort required of individuals to vote is minuscule by comparison with jury service.

5.26 The fine for failing to vote without a good excuse is one penalty unit, $100.[362] In Queensland, even failing to complete and return a juror questionnaire to the Sheriff is punishable by a fine of ten penalty units ($1000) or two months' imprisonment.[363] The difference suggests that even preliminary administrative aspects of jury service are regarded as more important, and warrant more severe enforcement methods and punishment, than failing to vote.

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358 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) 77–8. These comments from stakeholders from NSW were echoed by their counterparts in Victoria (ibid, 80) and South Australia (ibid, 84).

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

360 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) 2.

361 See Electoral Commission Queensland, *Details of Polling at Queensland General Election Held on Saturday 9 September 2006* (March 2007) A3–A4.

362 *Electoral Act 1992* (Qld) s 164(1). Section 5 of the *Penalties and Sentences Act 1992* (Qld) provides that one penalty unit is equivalent to $100. The relevant sections of the latter Act are set out in Appendix D to this Paper.

363 *Jury Act 1995* (Qld) s 18(3). See chapter 13 below for a review of the penalties that apply under the *Jury Act 1995* (Qld).

5.27 Richardson's research on Queensland jurors noted their frustration with the inconvenience of jury service, in particular their inability to plan their lives while on call for jury service:

> The thing that was most irritating was you had to ring and find out whether you were needed in court, because even if you weren't on the trial you had to go in because you were booked for a month.[364] … So you had to [telephone the court] two or three times to make sure that you heard your number properly because she would rattle it off in such a hurry to get through all the numbers ... You wouldn't always be called the next day. It would be very strange, sometimes you'd go on a Monday and you wouldn't be called again until Thursday. If you were on a trial of course you knew you had to be there. So I thought it was very poor, and I thought there must be another system that they could do. … And then the other comment was 'Well, you can look it up in the paper', … you could ring after five o'clock to find out. I liked to know the night before what I was doing. I didn't particularly want to rush out in the morning, run to get the paper, and then see if my trial was listed. So, I didn't consider it, looking in the paper. I wanted to find out the night before, you know, when I was going to be needed.
>
> …
>
> I guess the other thing it must be a … big inconvenience for some people to attend jury service … because … they don't pay you very much. I was lucky because my work would keep paying me … I actually … just took some flexi time off for it.[365] (noted added)

5.28 It has also been pointed out that negative reports about jury service in the media can create perceptions of jury service in the minds of prospective jurors that may act as a disincentive to serve. These perceptions could be reinforced by the attitudes of people who seek to avoid jury service, successfully or otherwise. The overseas research reviewed by the Australian Institute of Criminology stressed that the solution lay not in lessons about the importance of jury service but in demystification about the system.[366]

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

- The financial remuneration paid to jurors is scant, even derisory, 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

364 In Brisbane, the jury service period has since been reduced to two weeks but in regional centres the period varies depending on the frequency and length of court sittings: Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

365 Christine 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) 317–8.

366 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) 6.

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.[367] Until a trial has ended, a juror is discharged, or a particular jury service 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 generally — and the extraordinary length of exceptionally complex trials — places unique demands on jurors.

- The particular duties placed on jurors — that they determine the guilt or innocence of a fellow member of their community in relation to allegations that might be extremely distressing — are unusual and can be extremely 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, whereas any other person can relieve the stress of a day's work or other demands in conversation with their families and close friends.

5.30 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. Consideration is thus given in this Paper to such matters as the frequency and duration of jury service, deferral of jury service, remuneration and penalties for non-attendance.[368]

Some practical considerations

5.31 A note of pragmatism should be sounded. A major objective of any review of eligibility for jury service is the need to keep the pool of potential jurors as large as possible.

5.32 For that reason, more attention might be paid to large groups whose exclusion or inclusion might have an appreciable numerical impact on the pool of potential jurors. It may simply not be worthwhile to include a small group if the members of that group are going to prove to be inevitably susceptible to challenge. For example, in late April 2010 in Queensland there were 24 judges on the Supreme Court, 42 judges on the District Court and 87 magistrates, a total of 153 individuals. Their numerical contribution to the overall pool of jurors is minute. If their inclusion is controversial and if they are likely to be routinely challenged off or excused, as a matter of pragmatism, there might be no value in making them liable to serve.

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367 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: Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009; and Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

368 See chapters 9, 11 and 13 of this Paper.

5.33 The position may not be so clear-cut with other problematic groups which are much larger, such as practising lawyers and police officers. As discussed later in this chapter, their inclusion in juries in England has proved to be controversial. Including people in jury pools or on juries if their presence is not generally accepted — or, worse, might consistently be a basis of appeal — could be entirely counter-productive and simply create difficulties in the administration of the criminal justice system without any countervailing benefits such as an appreciable increase in the pool of jurors.

5.34 Similarly, the Juries Sub-Committee of the Law Reform Commission of Hong Kong expressed the view in its recent Consultation Paper that there may be little point in making certain people eligible if they would invariably be granted a discretionary excusal:

> The Sub-committee acknowledges the force of the arguments put forward in support of the Auld Report's recommendation to abolish automatic exemptions from jury service, and accepts as persuasive the fact that the legal position in England and Wales now reflects the Auld Report's view. Nevertheless, the Sub-committee considers that practical considerations outweigh the theoretical merits of the Auld Report's approach. If the reality is that certain categories of persons would invariably be granted a discretionary exemption from jury service on application to the court, there would seem little point in making them nominally subject to jury service at all. The need to consider individual applications for exemption, even in straightforward cases where the granting of an exemption is not in doubt, would impose an additional burden on the court's time with little concomitant benefit. It is therefore our view that if certain categories of persons would invariably be entitled to exemption from jury service, they should be statutorily exempted.[369]

REFORMS IN OTHER JURISDICTIONS

5.35 The Terms of Reference[370] direct the Commission to have regard to reforms that have occurred in other jurisdictions, including those in England and Wales, and, in particular, to the reports of the NSW Law Reform Commission on jury selection and blind or deaf jurors,[371] and the review of jury selection and eligibility currently being undertaken by the Law Reform Commission of Western Australia.[372]

5.36 The many reform projects that have recently been conducted in other jurisdictions on jury selection and eligibility issues are identified in chapter 1 of this Paper. The remaining part of this chapter outlines in more detail the reform proposals in New South Wales and Western Australia, the changes made in England and Wales, the recent review of the Scottish Government and the proposals of the Law Reform Commission of Ireland. The Commission has had regard to these developments in formulating its own proposals and they are discussed where relevant throughout the rest of the Paper.

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369 Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.56]. It also proposed, at ibid, that:

> A member of an exempt category of persons should be given the right to apply to be included in the list of jurors if he so wishes, and it would be a matter for the trial judge to decide whether to include him in a particular trial.

370 The Terms of Reference are set out in Appendix A to this Paper.

371 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).

372 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009).

5.37 There has been a general trend in reforms and reform proposals in these and other jurisdictions towards increasing the pool of prospective jurors, eliminating unnecessary or unsupportable automatic exclusions, and clarifying and confining the circumstances in which excusal from jury service is available. The main underlying concern has been with improving the representativeness of juries and the rates of participation in jury service. Some steps have already been taken in this direction in Queensland.[373]

5.38 In its 1996 Report on jury service in Victoria, the Law Reform Committee of the Victorian Parliament made the following principal recommendation for the reduction of the categories of ineligibility:

> The categories of ineligibility and excusal as of right should be repealed in favour of a system which renders all members of the Victorian community, who are enrolled to vote for the Legislative Assembly and are not disqualified, liable for jury service regardless of their status or occupation, unless their exemption or excusal is justified by some overriding principle. The overriding principles are:
>
> (a) The need to maintain the separation of powers between the executive, legislative and judicial branches of government.
>
> (b) The need to ensure, as best as can be, that an accused person receives, and is generally perceived to receive, a fair trial from an impartial tribunal.
>
> (c) The need to maintain respect for the justice system.
>
> (d) The need to ensure that public health and safety are not adversely affected by service on a jury.
>
> (e) The need to provide for special cases where jury service on a particular occasion, or at any time, would cause undue hardship to the person or the public served by the person.[374]

5.39 The Law Reform Committee also recommended the development of guidelines for the discretionary excusal of a person from jury service so that the criteria would be 'generally known and applied consistently'.[375]

5.40 Not all of that Committee's recommendations were implemented, but with the introduction of the *Juries Act 2000* (Vic) the list of people entitled to excusal as of right was significantly reduced — removing doctors, dentists, pharmacists, teachers and local government office-holders — and the grounds for discretionary excusal were set out in more detail.[376]

5.41 Similarly, in 2003, the *Jury Act 1899* (Tas) was repealed and replaced by the *Juries Act 2003* (Tas) which removed a number of automatic exemptions from jury service, such as those for army and navy officers, bank managers and tellers, clergymen, dentists and medical practitioners, newspaper editors and reporters, pharmacists,

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373 See the history of reform proposals and legislative provisions set out in chapters 1 and 3 of this Paper.

374 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report Vol 1 (1996) Rec 16.

375 Ibid [3.190], Rec 48.

376 See former *Juries Act 1967* (Vic) s 4(3), sch 4, repealed by *Juries Act 2000* (Vic); and second reading speech of the Juries Bill 2000 (Vic): Victoria, *Parliamentary Debates*, Legislative Council, 22 March 2000, 418–2 (Hon MR Thomson, Minister for Small Business).

pilots, masters of trading vessels, and teachers.[377] A number of similar exemptions had also been removed from the *Juries Act 1927* (SA) by amendments made in 1984.[378]

5.42 The Victorian Department of Justice has taken up the issue again quite recently. In November 2009 it published a Discussion Paper seeking submissions on the possibility of further reducing the list of people who are ineligible for jury service and reducing the period of ineligibility due to a person's former involvement in an excluded profession. In particular, it has raised the possibility of removing or amending the ineligibility of lawyers and their employees, police and judicial office-holders:

> The exclusion of a person who is, or has been within the last ten years, a member of the occupations listed in Schedule 2 [of the *Juries Act 2000* (Vic)] appears to be directed largely at complying with the principles of maintaining the separation of powers, ensuring a fair trial and maintaining public confidence in the administration of justice. However, it is arguable that a number of occupational groups, such as non-practising lawyers, employees of law firms, bail justices and court reporters could be removed from Schedule 2 without infringing these principles. In addition, there may be scope for reducing the current period of ineligibility for former members of these occupational groups from 10 years to, say, three years.[379] (note added)

5.43 England and Wales have gone the furthest in this regard, removing virtually all of the categories of automatic exclusion and excusals as of right, including those for judges, lawyers and police officers. Lord Justice Auld, in his review of the criminal courts of England and Wales, also stressed that claims for discretionary excusal:

> should be tested carefully according to the individual circumstances of each claim, otherwise there could be a reversion to the present widespread excusal of such persons by reason only of their positions or occupations.[380]

5.44 In contrast, the NSW Law Reform Commission has recommended, and the Law Reform Commission of Western Australia has proposed, the removal of a number of exemptions but the retention of some, albeit limited, exclusions as necessary safeguards of competence, impartiality and independence. In particular, these cover people who are integrally connected with the administration of the criminal justice system.[381] As the NSW Law Reform Commission expressed it:

> 4.2 The NSW categories of occupational ineligibility for jury service can be traced to the 1965 report of the UK Departmental Committee on Jury Service, which recommended that ineligibility by reference to occupational category should apply to those connected with the administration of law and justice.[382] The suggested rationale lies in the desirability of preserving community confidence in the impartiality of the criminal justice system.

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377 See former *Jury Act 1899* (Tas) s 7, sch 1; and *Juries Act 2003* (Tas) ss 6(3), 73, sch 2, as passed. 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).

378 See *Juries Act 1927–1974* (SA) s 13, sch 3; *Juries Act Amendment Act 1984* (SA) s 37, sch 3.

379 Victoria, Department of Justice, *Jury Service Eligibility*, Discussion Paper (2009) 5.

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

381 Eg New South Wales Law Reform Commission, *Jury Selection*, Report 11 (2007) ch 4, Rec 9–21; and Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) ch 4, Proposals 12–31. Also see [5.22] above.

382 United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service*, Cmnd 2627 (1965), [101].

> 4.3 We take the view that the categories of people who are excluded from serving as jurors should be governed by this consideration, and that this heading 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.[383] (note in original)

5.45 Both of those Commissions have also advocated the removal of the categories of exemption or excusal 'as of right' and the clarification of the grounds for discretionary exclusion.[384]

5.46 A similar approach has been proposed by the Law Reform Commission of Ireland. It has provisionally recommended the retention of a number of categories of occupational ineligibility on the basis of their connection with the administration of justice, but the removal of the numerous categories of excusal as of right in favour of a general right of excuse for cause for which evidence must be provided.[385]

5.47 The Law Reform Commission of Hong Kong has also proposed the removal of all but a limited number of exemptions, including those for certain people involved in the administration of justice such as judges and magistrates, police officers, barristers-at-law and solicitors 'in actual practice', probation officers and correctional service officers.[386]

5.48 In contrast, the Scottish Government has preferred that the list of ineligible persons remain unchanged, noting the particular importance of exemptions for people who work within the justice system.[387]

5.49 Other changes aimed at improving and encouraging participation in jury service have also been advocated or implemented, such as the provision for deferral of jury service.[388] Calls have also been made for improvements to juror remuneration and for appropriate penalties for non-compliance with jury summonses.[389] The Law Commission of New Zealand concluded, for example, that:

> Broadly, it is our view that too many people are failing to answer their summons for jury service, and a twofold approach is needed to deal with this. First, it must be made easier for people to serve. To that end jurors need better payment, proper reimbursement of travel costs, the ability to defer service, and protection of employment ... Secondly, it must be made clear that failure to answer a jury summons with-

383 New South Wales Law Reform Commission, *Jury Selection*, Report 11 (2007) [4.2]–[4.3].

384 Ibid [6.3], [7.14], Rec 26, 27, 31, 33; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Proposals 45, 46.

385 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.31], [3.37], [3.41], [3.43], [3.45], [3.49], [3.60], [3.84], [3.91], [3.94], [3.96], [3.115]–[3.116].

386 Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.59], Rec 9.

387 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) 3.

388 Eg *Juries Act 2003* (Tas) s 8; New South Wales Law Reform Commission, *Jury Selection*, Report 11 (2007) Rec 32; Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) 193, Rec A67; The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [40]. Also see the summary of legislative provisions for deferral of jury service discussed in chapter 9 of this Paper.

389 See chapters 11 and 13 of this Paper.

> out seeking to be excused is not acceptable. That means that those who fail to answer the summons should be identified and subjected to realistic penalties.[390]

NSWLRC's Reports

5.50 The NSW Law Reform Commission ('NSWLRC') has in the last several years completed two projects on jury selection and eligibility issues; the first dealt with a broad range of jury selection issues, and the second dealt specifically with the inclusion on juries of people who are blind or deaf.

Report on jury selection

5.51 The NSWLRC was given Terms of Reference in 2006 to 'inquire into and report on the operation and effectiveness of the system for selecting jurors under the *Jury Act 1977*.'[391] The Terms of Reference directed that Commission to have regard to:

- Whether the current statutory qualifications and liability for jury service remain appropriate;
- Alternative options for excusing a person from jury service;
- Recent developments in other Australian and international jurisdictions in relation to the selection of jurors; and
- Any other related matter.

5.52 The NSWLRC published an Issues Paper in its review in November 2006[392] and its final Report in September 2007.[393]

5.53 In its Report, the NSWLRC made 74 recommendations for changes to the qualification, ineligibility and excusal of jurors; identification and summoning of jurors; empanelment and discharge of jurors; and a range of practical matters about the conditions of jury service. The NSWLRC's main concern was to enhance the representativeness of juries and improve jury service participation and willingness of people to serve as jurors:[394]

> 1.5 In conducting our review, a number of broad concerns about the jury system have been brought to our attention, including that:
>
> - juries have become unrepresentative of the community because of the numbers of people who are either disqualified, ineligible to serve, or who exercise their entitlement to be excused as of right or apply to be excused for good reason;
> - the conditions of service and financial hardship have operated as an impediment for many people;

390 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [137].

391 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) xi.

392 New South Wales Law Reform Commission, *Jury Service*, Issues Paper 28 (2006).

393 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007).

394 Ibid [1.5]–[1.7].

- the burden of serving on juries is being shared inequitably or in circumstances where the resource is not used to best economic and efficient advantage; and

- the current categories for disqualification, ineligibility, and exemption are very broad and may not achieve the objectives of the system.

1.6 In addressing these concerns, we have, in some respects, gone beyond the bare consideration of jury composition and eligibility. This is because many of the aspects of jury service, including management of the system by the Sheriff, the payment of allowances, and practical conditions associated with the fact of service impact significantly on the willingness of people to serve, and on the justification for the preservation of the existing categories of disqualification, ineligibility and exemption. For similar reasons, we have considered several allied questions concerning the selection, summoning and empanelment of jurors, and the retention or discharge of jurors or juries after empanelment, since these have a direct relevance for the make up of the jury.

1.7 This Report strongly supports a system of people being tried by juries that are impartial and representative of the community. The system of jury selection, empanelment and management needs to achieve a fair sharing of the burdens of jury service, and to ensure that those who are eligible to serve as jurors are not disenfranchised arbitrarily or because of unnecessary practical impediments. We also bear in mind that jury service entails the responsible performance of a civic duty, which can involve jurors in personal inconvenience, financial hardship and personal stress in deciding whether an accused is guilty of an offence that may result in imprisonment. The more the system is designed to accommodate the concerns and needs of jurors, and positively encourage them to serve, the less likely it is that some will seek exemption on the grounds of inconvenience or hardship, or simply ignore their obligations.[395] (note in original)

5.54 The general approach of the NSWLRC's recommendations was as follows:

- The number of automatic exclusions from jury service should be reduced in order to widen the jury pool and spread the burden of jury service, and those that remain should be dealt with under a single heading, removing the distinction between disqualification and ineligibility.[396]

- Exclusions on the basis of criminal history are appropriate as safeguards of impartiality and public confidence, but should be defined with greater precision and with greater regard for the principle that 'people who have served their time, undertaken rehabilitation, and become eligible voters once again' should be allowed 'to become fully functioning members of society'.[397] Some types of conviction and imprisonment warrant longer exclusions from jury service than do others.[398]

- Exclusion on the basis of occupation should be limited to people who 'have an integral and substantially current connection with the administration of justice, most particularly criminal justice, or with the formulation of

395 Redfern Legal Centre, *Submission*, 12; NSW Young Lawyers, *Submission*, 1; Legal Aid Commission of NSW, *Submission*, 2–3 [made to the NSWLRC].

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

397 Ibid [3.19].

398 Ibid ch 3, Rec 3–7. See chapter 6 below.

policy affecting its administration, and to those who perform special or personal duties to the State',[399] such as judicial officers and practising lawyers in the criminal justice system. There should be no permanent exclusions on the basis of occupation. Some occupational exclusions, such as those for judges and police, should be extended for three years after the termination of the position or office.[400]

- The ability to read and communicate in English sufficiently to enable the proper carrying out of the duties of a juror should be a precondition to qualification for jury service and the Sheriff and the judge should be able to discharge from service a person who does not meet this condition.[401]

- 'Sickness, infirmity or disability which renders a person unable to discharge the duties of a juror' should be dealt with as a matter of discretionary excusal, rather than as a ground of automatic exclusion.[402]

- There should no longer be any entitlement to claim exemption or excusal as of right on the basis of occupation, profession or calling or on the basis of personal characteristics or circumstances, except in relation to previous jury service. Instead, these people should have to apply for discretionary excusal for good cause.[403]

- Excusal for good cause should be defined to encompass undue hardship or serious inconvenience to the person, his or her family, or the public; disability that, without reasonable accommodation, would render the person unsuitable for or incapable of serving effectively as a juror; and perceived lack of impartiality because of a conflict of interest or other knowledge or acquaintance.[404] The Sheriff should be able to excuse a person either for a set period or permanently.[405]

- Potential jurors who otherwise satisfy the grounds for excusal should be allowed to defer their jury service to a date in the following 12 month period.[406]

- To ensure the Sheriff has accurate, up-to-date information about people on the electoral roll, the Sheriff should have real-time access to the existing electoral roll or to a 'smart' (real-time) electoral roll if one is established in New South Wales.[407]

399 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.3].

400 Ibid ch 4, Rec 9–21. See chapter 7 below.

401 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.2]–[5.10], Rec 23.

402 Ibid [5.11]–[5.16], Rec 24.

403 Ibid ch 6, Rec 26–28.

404 Ibid [7.14]–[7.15], Rec 31.

405 Ibid [7.40]–[7.42], Rec 29, 34.

406 Ibid [7.16]–[7.23], Rec 32.

407 Ibid [8.26]–[8.31], Rec 36.

- The right of peremptory challenge should be kept under review to ensure that it does not involve a distortion of the jury selection process and the fairness of criminal trials.[408]

- The allowances for jury service should be increased, a capped additional amount should be available as compensation for jurors who can demonstrate a loss of earning or income, and consideration should be given to reimbursement for reasonable childcare expenses.[409]

- A review should be established to examine the formation of a separate division of the Sheriff's office or a separate jury commissioner's office that would enhance the ability 'to manage the jury system in the most cost effective and efficient way'.[410]

5.55 Legislation to implement these recommendations was introduced to parliament at the beginning of June 2010, but has not yet been debated.[411] Significantly, the amending legislation proposes:

> (a) to change the categories of persons disqualified from jury service or ineligible to undertake jury service, and
>
> (b) to remove certain exemptions as of right from jury service and enable, instead, a person to apply for an exemption from jury service for 'good cause' (a term which is defined)[412]

5.56 The NSWLRC also made recommendations for provision to allow up to three additional jurors to be empanelled for trials expected to take more than three months. Such provision was made by the *Jury Amendment Act 2007* (NSW).[413] The *Jury Act 1995* (Qld) also provides for up to three additional jurors to be empanelled as reserve jurors.[414]

5.57 The NSWLRC also recommended express provision for the discharge of jurors for cause or because of irregularities in empanelment,[415] which were implemented by the *Jury Amendment Act 2008* (NSW).[416] Queensland also has provisions for the dis-

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408 Ibid [10.12]–[10.42], Rec 44.

409 Ibid ch 12, Rec 58–62.

410 Ibid [15.30]–[15.34], Rec 73. Such an independent commission was established in Victoria under the *Juries Act 2000* (Vic) ss 60–64.

411 Jury Amendment Bill 2010 (NSW), introduced to the Legislative Assembly on 3 June 2010, and introduced to Legislative Council on 9 June 2010. And see New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2010, 1–5 (Mr B Collier, Parliamentary Secretary); Legislation Review Committee, Legislative Assembly, *Legislation Review Digest No 8 of 2010* (2010) 25–48. Some of the proposed amendments differ in detail from the NSWLRC's recommendations.

412 Explanatory Note, Jury Amendment Bill 2010 (NSW) 1.

413 See *Jury Amendment Act 2007* (NSW) s 3, sch 1; *Jury Act 1977* (NW) ss 19, 42(1A), 55G; New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.43]–[10.61], Rec 45–50. While the NSWLRC had recommended that no further peremptory challenges should be available in those circumstances, the amendments conferred an additional peremptory challenge on both the Crown and each defendant in trials for which additional jurors are to be empanelled.

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

415 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 11, Rec 52–56.

416 See the second reading speech of the Jury Amendment Bill 2008 (NSW): New South Wales, *Parliamentary Debates*, Legislative Council, 15 May 2008, 7681 (Hon J Hatzistergos, Attorney General and Minister for Justice).

charge of jurors for cause.[417]

Report on blind or deaf jurors

5.58 In 2002, the NSW Law Reform Commission received Terms of Reference to:

> inquire into and report on whether persons who are profoundly deaf or have a significant hearing or sight impairment should be able to serve as jurors in New South Wales and, if so, in what circumstances.[418]

5.59 The Terms of Reference asked the NSWLRC to consider both the *Anti-Discrimination Act 1977* (NSW) and the *Disability Discrimination Act 1992* (Cth) and to have regard to 'the need to maintain confidence in the administration of justice'.[419]

5.60 The NSWLRC released a Discussion Paper in 2004 and its final Report in 2006.[420] Its principal recommendations were:

> (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.[421]

5.61 The NSWLRC considered that the exclusion of blind or deaf people from jury service should not be automatic but a matter for case-by-case consideration. The decision should take into account the circumstances of the particular trial and the availability of 'reasonable adjustments'[422] such as the use of sign language interpreters, computer-aided real time transcription, conversion of documents into audio format, or the printing of documents in Braille.[423] 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':[424]

> The Commission finds that, so long as all appropriate and reasonable adjustments are made available, neither blindness nor deafness is inherently inimical to jury service. It may be that, in individual cases, it is inappropriate to empanel a blind or deaf juror. A blanket prohibition however, as currently exists, is excessive and unneces-

417 *Jury Act 1995* (Qld) ss 46, 56.

418 See New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) vi.

419 Ibid.

420 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004); New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006). See generally NSW Law Reform Commission, Digest of Law Reform Commission References, '103. Jurors' <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/digest.103> at 10 May 2010.

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

422 Ibid [2.82], [3.18], [4.3].

423 Ibid [2.11]–[2.15], [3.3]–[3.6].

424 Ibid [4.10].

> sary. It mandates the exclusion of a class of citizens from participating in one of the rights and responsibilities of citizenship purely on the basis of a disability, and precludes any enquiry as to the actual ability of a member of that class to effectively perform in that role. This, in the Commission's view, is unacceptable. While the Commission understands that practical difficulties may at times hamper implementation (eg unavailability of interpreters), this is a separate matter that does not have any bearing on the principles at stake.
>
> Nearly all submissions supported the view that eligibility for jury service should depend on an individual's ability to carry out the task. …
>
> The Commission's principal recommendation is, therefore, that a person who is either blind or deaf be eligible and qualified for jury service, and that any exclusion be considered on an individual basis, taking into account the person's ability to discharge the duties required in the circumstances of the particular trial, and the availability of reasonable adjustments, if required. There should be a presumption favouring the provision of reasonable adjustments, unless doing so would be unduly impractical for court administrators.[425] (notes omitted)

5.62 The NSWLRC also made ancillary recommendations in relation to interpreters and stenographers to ensure the continued integrity of jury deliberations:

> (d) that interpreters and stenographers allowed by the trial judge to assist the deaf or blind juror should swear an oath faithfully to interpret or transcribe the proceedings or jury deliberations;
>
> (e) that interpreters or stenographers allowed by the trial judge to assist the deaf or blind juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements pertaining to the secrecy of jury deliberations;
>
> (f) that offences be created, in similar terms to those arising under s 68A and 68B of the Act,[426] in relation to the soliciting by third parties of interpreters or stenographers for the provision of information about the jury deliberations, and in relation to the disclosure of information by such interpreters or stenographers about the jury deliberations.[427] (note added)

5.63 Finally, the NSWLRC made a number of practical recommendations:

- that guidelines should be developed by the Sheriff for the provision of sign language interpreters and other aids for blind or deaf jurors;[428]
- that a blind or deaf person who receives a jury summons or notice of inclusion on the jury roll should be required to return a form either claiming exemption or 'notifying the Sheriff of the reasonable adjustments required by the person to participate as a juror';[429] and

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425 Ibid [4.1]–[4.3].

426 *Jury Act 1977* (NSW) ss 68, 68B create offences for disclosure of information about jurors and jury deliberations. Cf *Jury Act 1995* (Qld) s 70.

427 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 59, Rec 1 (d)–(f).

428 Ibid 60, Rec 2.

429 Ibid 60, Rec 3. This would mean the Sheriff and trial judge would be forewarned of potential difficulties and given the opportunity to ensure that reasonable adjustments could be made: [4.8].

- that professional awareness activities focusing on 'practical measures to facilitate the inclusion of blind or deaf persons as jurors' be made available to judicial officers and court staff with materials and guidelines developed by the Judicial Commission of New South Wales.[430]

5.64 As at May 2010, the NSWLRC's recommendations have not been implemented.

NSW empirical study on deaf jurors

5.65 As part of its project on blind or deaf jurors, the NSWLRC also commissioned a pilot empirical study on access to courtroom proceedings by deaf jurors through Australian Sign Language ('Auslan') interpreting. It was the first of its kind to test the efficacy of sign language interpretation for deaf jurors; earlier studies had focused on deaf witnesses, defendants or complainants.[431] The results were published in 2007.[432]

5.66 The study involved the provision of a judge's summing up in a simulated trial environment.[433] The summing up was simultaneously read by the 'judge' and translated by a professionally accredited interpreter into Auslan.[434] The summing up, which comprised excerpts from the summing up given in a real criminal trial, was delivered to 12 'jurors', six deaf and six hearing.[435] The study first tested the accuracy of the Auslan interpretation of the legal concepts in the judge's summing up.[436] Secondly, it tested and compared the deaf and hearing jurors' comprehension of the summing up.[437] Thirdly, the participants were interviewed about their experience in the study and their thoughts on being a juror.[438]

5.67 On comparison with the original source text, the first component of the study showed that the Auslan interpretation of the legal concepts in the summing up was 87.5% accurate.[439]

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430 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 61, Rec 4.

431 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) viii.

432 Ibid.

433 The research also involved a preliminary study testing the accuracy of a translation from English to Auslan of an excerpt from a judge's summation but did not simulate a courtroom situation: 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) ch 4.

434 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) [5.22].

435 Ibid [5.2]. The 'jurors' were selected to represent a cross-section of people across age, gender, education, employment and first language and to exclude hearing people with a background in law, sign language or deafness: [5.15], [5.26]–[5.27], App G. The summation excerpts were taken from a 2003 Supreme Court trial involving charges of manslaughter, affray, and endangering the safety of a person on the railway. They were chosen by the NSW Law Reform Commission 'on the basis that they incorporated sufficient legal terminology and important facts of the case' for the purpose of the study: [5.3].

436 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) [5.13]–[5.14].

437 Ibid [5.1]–[5.2]. As to the measures taken to simulate a trial environment, see ibid [4.8], [5.4]–[5.8].

438 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) [5.21].

439 Ibid [5.34]. The interpretation was compared with the source text by first undertaking a 'back-translation' of the interpretation into written English: [5.13], [6.2].

5.68 Secondly, the results of the comprehension test showed little significant difference between the overall comprehension levels of hearing and deaf jurors:[440] hearing jurors answered almost 78% of the questions correctly and deaf jurors answered 75% correctly.[441]

5.69 Whether hearing or deaf, most participants answered questions of fact correctly.[442] For deaf jurors, then, 'the facts of the case had been interpreted clearly and correctly and had been understood'.[443] Both hearing and deaf jurors, however, had difficulty with some of the legal concepts such as 'beyond reasonable doubt'.[444] This indicated that legal concepts, or questions about them, may be difficult for both hearing and deaf jurors.[445] These trends were confirmed by both deaf and hearing participants' views that the facts were easier to follow than the parts of the summing up that used repetitive and legalistic language.[446] They are also generally consistent with the results of other research on juror comprehension of judge's instructions.[447] As the NSWLRC commented:

> An expectation that a deaf juror will have a near faultless understanding of the instructions, when all indications are that the average juror does not, carries the risk of demanding more from a deaf juror than from his/her hearing counterparts.[448]

5.70 Finally, in the interviews conducted with participants, deaf jurors 'expressed the desire to carry out their civic duty' to perform jury service and to 'participate in the judicial system on an equal footing with hearing people'.[449] When asked what assistance they would require, deaf jurors responded that they would need written materials and interpreters with court experience.[450]

5.71 The researchers concluded that legal facts and concepts can be translated from English into Auslan and that relying on sign language interpreters to access information in court does not disadvantage deaf jurors as they are able to understand the judge's summing up as well as hearing jurors:[451]

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440 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) [5.36]. The deaf and hearing 'jurors' were tested on their comprehension of the summation excerpts with a series of true/false, multiple choice and open-ended questions: [5.16]–[5.20], App F.

441 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].

442 Ibid [6.13].

443 Ibid [6.13].

444 Ibid [5.35], [6.18].

445 Ibid [6.18].

446 Ibid [5.40].

447 See generally, for example, JRP Ogloff and VG Rose, 'The comprehension of judicial instructions' in N Brewer and KD Williams (eds), *Psychology and Law: An Empirical Perspective* (2005). This issue was examined in Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) Vol 1 ch 4 and 5.

448 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [2.43].

449 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) [5.46]. Also ibid 48, Fig 7.

450 Ibid 49, Fig 8.

451 Ibid [7.2].

> In sum, results show that both the deaf and hearing 'jurors' equally misunderstood some terms and concepts. Nonetheless, all the findings show that legal facts and concepts can be conveyed in Auslan effectively enough for deaf people to access court proceedings and to understand the content of legal texts to the same extent as hearing people. The results also show that deaf people are willing to serve as jurors, and are confident that they can access the necessary information through interpreters (with extra support from written notes) in order to make an informed decision as a juror.[452]

5.72 The researchers thus recommended, among other things, that:

> deaf people be permitted to serve as jurors in criminal cases in NSW, with access provided through a team of interpreters, and additional support through the provision of written documents (in advance) and access to a transcript at the end of each trial day.[453]

5.73 The researchers acknowledged the limitations of their study, noting in particular the small sample size and the conduct of the study outside the context of a real court trial.[454] They also noted that further research is needed on deaf jurors' ability to participate in jury deliberations.[455]

LRCWA's Consultation Paper

5.74 The Terms of Reference given to the Law Reform Commission of Western Australia ('LRCWA') in 2007 require it to give consideration to:

> (i) whether the current statutory criteria governing persons who are not eligible, not qualified or who are excused from jury service remain appropriate;
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> (ii) the compilation of jury lists under Part IV of the *Juries Act 1957* (WA);
>
> (iii) recent developments regarding the selection of jurors in other jurisdictions; and
>
> (iv) any related matter.[456]

5.75 The LRCWA published a Discussion Paper, *Selection, Eligibility and Exemption of Jurors*, in September 2009.[457] In it, the LRCWA made 51 proposals for reform. The main thrust of its proposals is to broaden the pool of potential jurors, having regard to the need for appropriate exclusions to maintain the independence, impartiality, competence and lay nature of juries. The key objectives of its proposals are to:

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452 Ibid [5.47].

453 Ibid [8.1].

454 Ibid [7.1], [8.2]. But see also ibid [5.4]–[5.8] as to the measures that were taken to simulate a trial environment.

455 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) [8.2].

456 Law Reform Commission of Western Australia, 'Selection, eligibility and exemption of jurors', <http://www.lrc.justice.wa.gov.au/3_jurors_tor.html> at 10 May 2010.

457 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009). The paper is available on the LRCWA's website: <http://www.lrc.justice.wa.gov.au/3_jurors_pub.html> at 10 May 2010.

- confine the categories of ineligible occupations to those intimately involved with the administration of justice;
- remove permanent ineligibility on the basis of occupation;
- abolish excusal as of right;
- confine the grounds for discretionary excusal; and
- introduce a system of deferral.

5.76 The LRCWA has also dealt with a number of other issues including jury vetting, penalties for non-compliance with summonses, and jury allowances. Its main proposals can be summarised as follows:[458]

- Ineligibility is properly based on the principle of independence. The current list of ineligible occupations is too wide and should be confined to 'those people who are intimately involved in the administration of justice' and whose presence might be seen to compromise the jury's status as an independent, impartial and competent lay tribunal. No occupation or office should render a person permanently ineligible.[459]
- The upper age limit on jury service is best understood in terms of liability, rather than eligibility or excuse, and should be raised to 75 years.[460]
- Disqualification from jury service is properly based on competence and impartiality and should encompass criminal history — defined by using a combination of offence-based and sentence-based classifications[461] — and mental incapacity — linked to the definitions used in mental health legislation.[462] Physical incapacity should not be a basis of disqualification but should instead be dealt with as a matter of excusal.[463]
- Excusal as of right should be abolished and the grounds for excusal for cause should be limited to substantial public inconvenience or personal hardship; disability, sickness or inability to communicate in English; and perceived impartiality because of some conflict of interest or other knowledge or acquaintance. Guidelines for determining whether a person ought to be excused from jury service should be developed.[464]
- A deferral scheme should be introduced so that valid, but temporary, excuses can be accommodated.[465]

458 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 17.

459 Ibid ix, 17, ch 4, App A, Proposal 12–31.

460 Ibid ix, 17, 53–6, App A, Proposal 10 and 11.

461 Ibid x, 17, 82–91, App A, Proposal 32–36.

462 Ibid x, 17, 98–100, App A, Proposal 42.

463 Ibid x, 17, 100–3, App A, Proposal 43.

464 Ibid ix–x, 17, 108–19, App A, Proposal 45–47.

465 Ibid x, 17, 120–2, Proposal 48.

- Jury vetting practices that may lead to infringements of juror privacy, inappropriate contact and risks to juror safety should not be permitted; the jury pool list should be available for inspection by the parties only on the morning of the trial, jurors' street addresses should be removed from the jury pool list, and lawyers for the prosecution should not be authorised to check the criminal background of persons on the jury pool list.[466]

- An infringement notice system should be introduced to redress the drawn-out process of penalising people for failure to comply with a jury summons.[467]

- To dispel the widespread misconception that jurors in Western Australia are inadequately compensated for their loss of income, funding for regular community awareness strategies should be provided; Western Australia has the most generous system of juror allowances in Australia.[468]

5.77 In coming to its proposals, the LRCWA was guided by the following six principles:[469]

- Juries should be independent, impartial and competent.

- Juries should be randomly selected and broadly representative.

- Wide participation in jury service should be encouraged.

- Adverse consequences of jury service should be avoided.

- Laws should be simple and accessible.

- Reforms should be informed by local conditions.

Changes in England and Wales

5.78 Wholesale changes to the basis of jury selection in England and Wales were made by the *Criminal Justice Act 2003* (Eng). That Act removed virtually all categories of automatic ineligibility to serve on juries under the *Juries Act 1974* (Eng). 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; the amended position in England represents one end of a spectrum of possible approaches, while those jurisdictions that have maintained several categories of ineligibility and automatic exemption are representative of the other.

466 Ibid 35–40, App A, Proposal 4 and 5.

467 Ibid x, 17, 131–4, App A, Proposal 51.

468 Ibid x, 127, App A, Proposal 49. See also ibid Proposals 8 and 39. Juror remuneration is discussed in chapter 11 of this Paper.

469 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 16–17.

5.79 In effect, every adult in England and Wales between the ages of 18 and 70 who is registered as an elector and has been ordinarily resident in the United Kingdom for at least five years is now liable for jury service other than the 'mentally disordered' and those who are disqualified by their criminal record.[470]

5.80 Any person who has been summoned for jury service may apply for excusal if he or she has attended in response to a summons (whether or not he or she actually sat on a jury) within the preceding two years (or any longer period that the Lord Chancellor may prescribe).[471]

5.81 Discretionary excusal is also available if a person who has been summoned can show 'to the satisfaction of the appropriate officer that there is good reason why he [or she] should be excused'.[472] Special provision is also made in relation to full-time serving members of the armed forces.[473]

5.82 The *Juries Act 1974* (Eng) also makes express provision for discretionary deferral, though, again, the Act does not give any guidance as to the criteria that need to be satisfied other than 'good reason', nor the period for which any attendance may be deferred, although the Lord Chancellor is directed by the Act to issue 'guidance' in this respect.[474] As with excusal, special provision is made for full-time serving members of the armed forces.[475]

5.83 A judge has power under the Act to discharge a person who has attended in response to a summons because the person is incapable of 'acting effectively as a juror' due to disability or insufficient understanding of English.[476]

5.84 The changes introduced by the *Criminal Justice Act 2003* (Eng), which took effect from 5 April 2004, gave effect to the recommendations made by Lord Justice Auld in his 2001 Report on the criminal courts in England and Wales. His Report was the most recent in a number of criminal justice inquiries which had recommended changes to juror eligibility and excusals.

Morris Committee Report (1965)

5.85 The question of exclusion from jury service under the former *Juries Act 1870* (Eng) was considered by a Committee chaired by Lord Morris of Borth-y-Gest, which reported in 1965.[477] That Committee concluded that people involved in the administration of the law and the police should continue to be excluded from jury service.

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470 *Juries Act 1974* (Eng) s 1, sch 1 pt 1, 2.

471 *Juries Act 1974* (Eng) s 8(1), (2).

472 *Juries Act 1974* (Eng) s 9(2).

473 *Juries Act 1974* (Eng) s 9.

474 *Juries Act 1974* (Eng) s 9AA. See Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010.

475 *Juries Act 1974* (Eng) s 9A.

476 *Juries Act 1974* (Eng) ss 9B, 10.

477 *Report of the Departmental Committee on Jury Service*, Cmnd 2627, HMSO (1965).

Ineligibility because of connexion with the administration of law and justice

103. The present law exempts many of those who practise the law or are concerned with the business of the courts. It seems to us clearly right that such persons, and all others closely connected with the administration of law and justice, should be specifically excluded from juries. At present there is no statutory provision prohibiting a police officer, for example, whose name happens by mistake to be marked on the register as eligible for jury service, from actually serving. This is most unsatisfactory. 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. It is impossible, whether desirable or not, to ensure that jurors have no previous knowledge of the law before they begin to hear a case. Many persons without formal legal training, for example, know enough about the way our courts function to be able to make a shrewd guess as to whether the accused has a previous criminal record; and one cannot entirely prevent by legislation the use of such knowledge in the jury room.

104. Nevertheless, it seems to us necessary to secure the exclusion from juries of any person who, in the words of one memorandum submitted to us, 'because of occupation or position, has knowledge or experience of a legal or quasi-legal nature which is likely to enable him to exercise undue influence over his fellow jurors'. If justice is not only to be done but to be seen to be done, such persons must not be allowed to serve on juries lest the specialist knowledge and prestige attaching to their occupations might cause them to be what has been described to us as 'built-in leaders'.[478]

5.86 The Committee's views were summarised by the House of Lords in *R v Abdroikof* in this way:

> The Morris Committee, however, considered that two occupational groups, exempt under the old law, should continue to be ineligible: those professionally concerned in the administration of the law, and the police. The committee was concerned that the trial jury should remain a lay tribunal, comprising ordinary, responsible members of the public, not dominated by lawyers; and it recognised problems of partiality, and perceived partiality if those professionally committed to the prosecution side of the adversarial trial process were to sit as members of trial juries. The committee's thinking is clear in paras 103 and 104 of their report:
>
> …
>
> The committee accordingly recommended that those in widely-drawn categories of lawyers and police officers should be ineligible. One problem concerned civilian employees of the police, of whom the committee said:
>
> > '110. We have suggested that the description of the police who should be ineligible should be drawn rather more widely than under the present law relating to exemptions. The case for doing so is self-evident. A more difficult problem arises over civilian employees of police forces. The Commissioner of Police of the Metropolis expressed the view to us that civilian staff could, where appropriate, be dealt with by excusal as at present. We do not doubt that in practice this is so. But we think there is much force in the contention of the Association of Chief Police Officers that "all civilian employees in the police service who have been employed for some length of time, no matter in what capacity, become identified with the service through their everyday con-

478 Ibid [103]–[104].

> tact with its members. As such they become influenced by the principles and attitudes of the police, and it would be difficult for them to bring to bear those qualities demanding a completely impartial approach to the problems confronting members of a jury". We find this convincing, and we have little doubt that civilian employees in the police service, including traffic wardens, should be ineligible.
>
> 111. We are aware that any proposals dealing with such matters can be criticised on grounds of inconsistency. There is no wholly satisfactory line which can be drawn between those who in the interests of preserving the jury as an impartial lay element should be ineligible, and those whose connexion as a profession or occupation with the administration of law and order is sufficiently tenuous to justify their not being excluded. But our recommendations have been made after a detailed consideration of the claims of the various occupations concerned.'[479]

5.87 The *Juries Act 1870* (Eng) was repealed and replaced by the *Juries Act 1974* (Eng). Until amended in 2004, it provided for a familiar regime of eligibility, disqualification and excusal:

- All adults registered as electors between the ages of 18 and 70 years ordinarily resident in the United Kingdom for at least five years were qualified and, if summoned, liable to serve as jurors unless otherwise held to be ineligible or disqualified under the Act (section 1).

- Four groups were ineligible under Schedule 1 Part I:

  - past and current members of the judiciary (including registrars and assistant registrars of any court, and tribunal members);

  - others connected with the administration of justice (including practising lawyers, their clerks and legal executives employed by them; the Director of Public Prosecutions and staff; civil servants concerned wholly or mainly with the day-to-day administration of the legal system; court officers and staff; coroners; court reporters; governors, chaplains, medical officers and other officers of penal establishments, probation hostels or bail hostels; probation officers and assistants; police officers; people employed by forensic science laboratories; and any person who fell into one of these categories during the preceding ten years);

  - the clergy (men in holy orders, regular ministers of any religious denomination; and vowed members of any religious order living in a monastery, convent or other religious community); and

  - people with a mental disorder.

- People disqualified under Schedule 1 Part II were those who had at any time been sentenced to life imprisonment or detained at Her Majesty's pleasure anywhere in the United Kingdom; those who had served a sentence of imprisonment or been detained anywhere in the previous ten

479 *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [9].

years; and those in respect of whom a probation order had been made in the preceding five years.

- People who had attended for jury service within the preceding two years were excused (section 8).

- Section 9 gave certain categories of people the right to seek to be excused from service for 'good reason': people over 65 years of age; peers and peeresses; members of the House of Commons; parliamentary officers; members of the Scottish Parliament, the Scottish Executive, the European Parliament and the National Assembly for Wales; the Auditors General for Scotland and Wales; full-time serving members of the armed forces, medical practitioners, dentists, nurses, midwives, vets and pharmacists; and practising members of a religious body the tenets or beliefs of which are incompatible with jury service (Schedule 1, Part III).

- A judge could discharge a person from service if there was doubt about his or her ability to act effectively due to a physical disability or insufficient understanding of English (sections 9B and 10).

- Section 9A introduced the right to seek deferral for 'good reason'.[480]

Runciman Royal Commission Report (1993)

5.88 The operation of juries was also considered by the Runciman Royal Commission on criminal justice in England and Wales, which reported in 1993. In its Report, that Commission stated that it did not feel that it had any strong basis to recommend changes concerning eligibility to serve on juries except in relation to clergymen and members of religious orders, whom it recommended be removed from the list of ineligible persons.[481]

Report by Lord Justice Auld (2001)

5.89 In September 2001, Lord Justice Auld reported on his review of the criminal courts of England and Wales.[482] The report covered juries as only one of many aspects of the criminal justice system that were under review.

5.90 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'.[483] His sweeping recommendations were subsequently incorporated into the jury legislation by section 321 and schedule 33 of the *Criminal Justice Act 2003* (Eng), which radically amended the *Juries Act 1974* (Eng) in respects relevant to this Commission's review. His conclusions read:

> Thus, in my view, there is a strong case for removing all the present categories of ineligibility based upon occupation, that is, those in Groups A — the Judiciary, B — others concerned with the administration of justice and C — the clergy, in Part I of Schedule 1 to the 1974 Act. Any difficulty or embarrassment that the holding of any

480 *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [9].

481 Section 9A of the *Juries Act 1974* (Eng) was introduced by *Criminal Justice Act 1988* (Eng) s 120.

482 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001).

483 Ibid ch 5, [31].

such office may pose in a particular case can be dealt with under the courts' discretionary power of excusal. As to the categories of disqualification for those with a criminal record who have received particular types of sentence, as set out in Part II of Schedule 1 to the Act, I see no reason for change. …

Accordingly, I recommend that:

- 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 disqualified from jury service.

…

I recommend that:

- 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.[484]

Lawyers, police and judges

5.91 On the question of the exclusion of lawyers and police, Lord Justice Auld wrote:[485]

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484 Ibid ch 5, [34], 149, 151–2.

485 Ibid ch 5 [28]–[30]. The reference to Article 6 in [30] of this quotation from the Auld Report is apparently a reference to Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 005; 213 UNTS 228 (entered into force 3 September 1953), which reads:

ARTICLE 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3 Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and the facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

28 As to those who practise law or are concerned with the business of the courts and otherwise with administration of the law and justice, the Morris Committee had recommended before the 1974 Act that they should continue to be excluded from jury service. It was not of that view because such persons would readily deduce from what was and was not said in the proceedings whether the defendant had a criminal record. The Committee acknowledged that many without formal legal training knew enough about the workings of the courts to make a shrewd guess about that. But it considered that such persons' specialist knowledge and the prestige attached to their occupations would enable them unduly to influence their fellow jurors. For that reason,[486] it recommended a considerable widening of the categories of exclusion (to which the 1974 Act gave effect); and the Runciman Royal Commission, reporting in 1993, recommended no change.[487]

29 The most commonly voiced objection to removing the ineligibility of all or most of those connected with the courts and the wider administration of justice is the one not relied on by the Morris Committee — that they would be able to deduce from the lack of reference to a defendant's good character, that he has previous convictions. In my view, such concern is unreal for the reason given by the Morris Committee. It is widely known that a defendant is generally entitled to keep quiet in court about his past if it is bad and to make much of it is good. Any juror who has served before will know that, and any juror who sits for the first time will soon become aware of it if he does not already know. The second main objection — the one relied upon by the Morris Committee — that such persons, by reason of their status or position could unduly influence their fellow jurymen, is unlikely today. People no longer defer to professionals or those holding particular office in the way they used to do. Experience in the USA where, in a number of States, judges, lawyers and others holding positions in the criminal justice system have sat as jurors, is that their fellow jurors have not allowed them to dominate their deliberations.[488] A number of them have also commented on how diffident they would have felt about trying to do so since, despite their familiarity with court procedures, they found the role of a juror much more difficult than they had expected.

30 There is also the anxiety voiced by some that those closely connected with the criminal justice system, for example, a policeman or a prosecutor, would not approach the case with the same openness of mind as someone unconnected with the legal system. I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have. Take, for example shopkeepers or house-owners who may have been burgled, or car owners whose cars may have been vandalised, many government and other employees concerned in one way or another with public welfare and people with strong views on various controversial issues, such as legalisation of drugs or euthanasia. I acknowledge that there may be Article 6 considerations in this. But it would be for the judge in each case to satisfy himself that the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias so as to distin-

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(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

486 The Morris Report, paras 103–115.

487 Save as to the excusal of clergymen and members of religious orders; *Royal Commission on Criminal Justice*, Ch 8, para 57.

488 Note the greater scope for challenging jurors in USA and the strong warnings as to impartiality that American judges give potential jurors before the challenge process.

> guish him from other members of the public who would normally be expected to have an interest in upholding the law. Provided that the judge was so satisfied, the over-all fairness of the tribunal and of the trial should not be at risk.[489] (notes as in original)

5.92 Lord Justice Auld applied his egalitarian approach to judges, concluding that they did not warrant automatic exemption:

> 31 As I have said, I consider that there is a strong case for removal of all the categories of ineligibility based on occupation. My one reservation has been as to judges. I say that, not because I consider that they are too grand for the task or that their work is so important that they could not be spared for it. On the contrary, I consider that it would be good for them and the system of jury trial if they could experience at first hand what jurors have to put up with. In particular, it would surely help them see how well or badly they and all those concerned in the process assist jurors in their task. And I have been heartened by the knowledge that judges have sat on juries or been potential jurors in the USA.[490] A number have spoken warmly of the experience. They include Judith S Kaye, the Chief Judge of the State of New York, Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court and Justice Breyer, of the Supreme Court of the USA who gave an account at the American Bar Association Meeting in London in July 2000 of his jury service.
>
> 32 There are two main reasons why I have hesitated over the notion of judges as jurors. First, some observers of and participants in the scene might regard the innovation as little more than a gesture, or as one New York columnist described it in its early days there, 'a foolish experiment in injudicious pseudo-egalitarianism'. But, if it is well meant and, as I believe, capable of contributing both to the work of individual juries and to improvement of the jury system as a whole, it should be considered. A more practical difficulty is that potential judge/jurors may often know or be known to the trial judge or advocates or others involved in the trial. This could be regarded as compromising their independence and/or, dependent on their seniority or personality, as inhibiting the judge or advocates in their conduct of the case. However, such problems could be dealt with as and when they arise by discretionary excusal rather than a blanket ineligibility by reason of their occupation. They would be in no different position in that respect from all others concerned with the administration of justice if my recommendation for the general removal of ineligibility is adopted. For those reasons, I have come to the conclusion that it would be wrong to single out the judges for special treatment in this respect.[491] (notes as in original)

Clergymen

5.93 He took a similar view in relation to clergymen:

> 33 As to the ineligibility of clergymen, the 1974 Act reflected the Morris Committee's recommendation for no change because of the possible embarrassment to them flowing from their pastoral role and compassionate instincts.[492] However, there are many others in the community with similar roles and instincts. Like the Runciman Royal Commission[493] I consider that there is no justifica-

489 See eg *Pullar v United Kingdom* (1996) 22 EHRR 391, which stated that jury trial was not unfair where an employee of a key prosecution witness was a member of the jury.

490 Eg in Colorado, Connecticut, Illinois, District of Columbia, New York and Wisconsin.

491 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [31]–[32].

492 The Morris Report, para 118–121.

493 *Royal Commission on Criminal Justice*, Ch 8, para 57.

> tion for excluding them from jury service unless they find it incompatible with their tenets or beliefs. Provision has since been made for the excusal as of right of 'a practising member of a religious society or order the tenets of which are incompatible with jury service',[494] but I am not sure that that is quite what the Commission intended.[495] It seems to me that this would be more appropriately dealt with by way of discretionary excusal rather than an entitlement by reference simply to claim membership of a religious body.[496] (notes as in original)

Excusal and deferral

5.94 Lord Auld saw a distinction between excusal as of right following earlier jury service within the preceding two years, and a right to seek discretionary excusal or deferral where it is 'vital' that people summoned perform their duties over the period covered by the summons:[497]

> **Excusals as of right and discretionary excusal**
>
> 35 In addition to persons who within specified periods have previously served on a jury or who have been excused by a court from doing so,[498] a large range of persons are entitled to excusal from sitting on a jury if they claim it. They include persons over 65 and members of certain religious bodies to whom I have referred and two groups of persons who, by reason of their public duties or medical responsibilities, might find it difficult to undertake jury service. The first group includes, Peers and Peeresses, Members of Parliament and full-time members of the armed forces. The second consists of medical practitioners, dentists, nurses, midwives, veterinary practitioners and pharmaceutical chemists.[499] The two groups reflect the reasoning and recommendations of the Morris Committee that excusal as of right should be granted to an occupation where it is in the public interest because of the special and personal duties to the State that it involves or because of the special and personal responsibilities of its individual members for the immediate relief of pain and suffering.[500]
>
> 36 Excusal as of right of those over 65 is relatively new, having been introduced by a statutory amendment in 1988.[501] But it seems to me that the increasing number and better health of persons over that age justify treating them as other potential jurors under the qualifying limit of 70, namely, fit to serve unless they can show that they are so physically or mentally unfit as not to be able to act effectively as jurors. No doubt, claims by persons over 65 on that account would be sympathetically considered.
>
> 37 As to the main two categories of persons excusable as of right, I consider that 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. As the Morris Committee acknow-

494 *Juries Act 1974*, Sch 1, Pt. III, implementing the Runciman Royal Commission's recommendation.

495 *Royal Commission on Criminal Justice*, Ch 8, para 57 and recommendation 217.

496 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [33].

497 Ibid ch 5 [35]–[40].

498 *Juries Act 1974*, s 8.

499 Ibid, Sch 1 Pt. III.

500 The Morris Report, para 148.

501 *Criminal Justice Act 1988*, s 119(2).

ledged,[502] 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. Invidious choices of that sort can be avoided, and the jury strengthened, by replacing excusal of right in such cases with discretionary excusal or deferral.

38 The remaining category of excusal as of right is that of persons who have served on a jury or who have attended to serve on a jury within two years before the service of the summons or who are within a period of excusal granted by the court.[503] If my recommendations as to the composition of juries are adopted, many more jurors should become available for service than at present, with a consequent reduction in the need to expose them as often to selection for jury service. With that in mind, once patterns of jury usage for each court catchment area have emerged and the Central Summoning Bureau has developed more sophisticated computer controls, consideration could be given to permitting local increases in the period of excusal of right under this head. Such a proposal, it seems to me, would be more flexible and fair to those who wish to do jury service than another suggestion made in the Review. It was for the creation of three jury qualification lists, one for those who have never served on a jury, a second for those who have served once, and a third for those who have served more than once, and for random selection from the first list until it was exhausted, then from the second and then the third.

39 As to discretionary excusal or deferral, an officer of the court may excuse or defer the attendance of a person summoned for jury service if he is satisfied that there is good reason for doing so. There is a right of appeal to the court in the event of refusal.[504] The present scope for excusal accounts, as I have indicated, for 38% of those currently summoned for jury service who are able to avoid it. It is taken up in the main by those who are self-employed or in full-time employment who can make out a case for economic or other hardship for themselves or others if they have to give up their work for even a short period, and also by parents who are unable to make alternative arrangements for the care of their children. If, as I recommend, the main categories of ineligibility and all of excusal as of right are abolished, there will be more work for officials and judges in deciding whether to grant discretionary excusals or deferrals in such cases when sought. The claims will be at least as pressing as many claims for discretionary excusal already are. But they should be tested carefully according to the individual circumstances of each claim, otherwise there could be a reversion to the present widespread excusal of such persons by reason only of their positions or occupations. I hope that much of the present pressure to avoid jury service may go if, in accordance with these and other of my recommendations, people are asked to do it less often, for shorter periods, with more consideration for their personal commitments and under better conditions than now.

40 Where a claim for excusal appears to be well founded, the Central Summoning Bureau officers should aim to deal with it by way of deferral rather than excusal. I am much attracted by the regime successfully introduced in New York and many other USA courts of requiring the claimant to offer and make arrangements to do his jury service at some alternative time suitable to him or her. In certain counties in New York State, for example, an automated telephone system enables jurors to 'postpone' their first summons for up to six months, usually to a specific date of their choice. Subsequent applications for deferral should be considered against clear, published criteria and, if granted,

502 The Morris Report, para 147.

503 *Juries Act 1974*, s 8.

504 Ibid, ss 9 and 9A.

> for a specific period, with scope for an extended period where appropriate. Only if a request for deferral is not practicable or reasonable should the Bureau normally refuse it or consider its power of excusal.[505] (notes as in original)

5.95 Lord Justice Auld's discussion of the rights of disabled, blind and deaf people, and people with a limited understanding of English, to serve as jurors is considered in chapter 8 of this Paper.

Ramifications of 2004 changes

5.96 One of the principal aims of the 2004 amendments was to increase the rate of participation in jury service, especially amongst middle-class professionals. Empirical research conducted for the UK Ministry of Justice confirmed that the 2004 amendments resulted in a substantial increase in the overall rate of participation among those summoned for jury service.[506] It is not surprising, however, that the inclusion of lawyers, judges and police officers on English juries after 2004 has proved to be controversial.

Lawyers and judges as jurors

5.97 The major concern about lawyers being on juries was the fear that they would dominate a jury's deliberations and overwhelm the non-lawyers with their professional views on the evidence, the law and the guilt of the defendant.[507] Concerns have also been expressed that legally trained jurors might be able to understand issues that other jurors would not pick up.[508]

5.98 Others, including the Lord Chief Justice, Lord Woolf, were concerned that judges and lawyers serving on juries might deliberate on the basis of their own understanding of the law and not as directed by the trial judge: they were instructed by the Lord Chief Justice to follow the trial judge's directions when acting as jurors, and to 'avoid the temptation to correct guidance they perceive to be inaccurate'.[509] In a similar vein, Judge Hyam, the Recorder of London, said while rejecting a senior counsel's application to be excused from jury service:

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505 [At the time of Justice Auld's Report] the present jury summons states 'You will only be excused if the jury summoning officer is satisfied that it will not be reasonable to expect you to do jury service during the next year.'

506 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. See [4.78] above.

507 See the Morris Report cited at [5.85] above; The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [28]; R Gwynedd Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 166–7; 'Police officers and lawyers as jurors—United Kingdom' (2008) 12 *International Journal of Evidence and Proof* 160, 160; Robert Verkaik, 'Barrister told to turn up for jury despite rejections', *The Independent*, 17 June 2004 <http://license.copyright.net/user/viewFreeUse.act?fuid=Mjc4MzU4NQ%3D%3D> at 25 February 2009.

508 See Robert Verkaik, 'Barrister told to turn up for jury despite rejections', *The Independent*, 17 June 2004 <http://license.copyright.net/user/viewFreeUse.act?fuid=Mjc4MzU4NQ%3D%3D> at 25 February 2009.

509 See R Gwynedd Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 169; Clare Dyer, 'No escaping jury duty, lawyers told', *The Guardian*, 17 June 2004 <http://www.guardian.com.uk/uk/2004/jun/17/ploitics.politicalnews/print> at 25 February 2009.

> A professional person sits on a jury in the capacity of a private citizen. As such, he must do his duty according to law — he must give a true verdict according to the evidence.[510]

5.99 Lord Woolf wrote to judges on 14 June 2004 to give some guidance to those judges who are called for jury service.[511] He reminded them that they had to comply with the law and serve on juries unless they could demonstrate a good reason to be excused, and that only 'extreme circumstances' would justify excusal or deferral. Those circumstances could include significant judicial commitments that might interfere with the administration of justice[512] or knowledge of the parties involved. Nonetheless, this might be grounds only for deferral or transfer to another court.

5.100 Lord Woolf also advised judges on their conduct as jurors. It was a matter for the discretion of the individual judge-juror whether and when to disclose the fact he or she is a judge, but it was inappropriate that this information be withheld.

> Whilst it may not be appropriate to volunteer such information immediately, either to fellow members of the jury or to the judge presiding in the case, it is neither necessary nor appropriate to conceal this fact. It is for each jury to decide who to elect as foreman, but judges should have in mind that judges who serve as jurors should expect to be treated as equal members of the jury and should not be accorded any special status on account of their judicial office.[513]

5.101 The key points were that judge-jurors should make sure that they are not accorded any special treatment, and that they should behave as members of the tribunal of fact, accepting unquestioningly the judge's directions on matters of law, irrespective of their own views. There is a suggestion that a written question put to the judge in the normal way might be a solution to this dilemma. Nothing, however, detracted from judge-jurors bringing 'their general knowledge of life to bear on the deliberations of the jury'.[514]

5.102 As it turns out, most of the subsequent reported problems appear to have been with the repeated rejection of lawyers as jurors.[515] Just two months after the amend-

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510 Quoted in Robert Verkaik, 'Barrister told to turn up for jury despite rejections', *The Independent*, 17 June 2004 <http://license.copyright.net/user/viewFreeUse.act?fuid=Mjc4MzU4NQ%3D%3D> at 25 February 2009; and in R Gwynedd Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 169. See also 'Judge and jury', *TheLawyer.com*, 23 August 2004 <http://www.thelawyer.com/cgi-bin/item.cgi?id=111658&d=pndpr&h=pnhpr&h&f=pnfpr> at 10 May 2010.

511 Lord Woolf, 'Observations for judges on being called for jury service', Text of a letter from the Lord Chief Justice to the Judiciary', 15 June 2004 <http://www.judiciary.gov.uk/publications_media/general/juryservice.htm> at 10 May 2010. See also R Gwynedd Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 169–70; Clare Dyer, 'No escaping jury duty, lawyers told', *The Guardian*, 17 June 2004 <http://www.guardian.com.uk/uk/2004/jun/17/ploitics.politicalnews/print> at 25 February 2009.

512 This is, of course, an argument, appropriately adapted, that is in principle available to many other professional groups who perform vital community functions.

513 Lord Woolf, 'Observations for judges on being called for jury service', Text of a letter from the Lord Chief Justice to the Judiciary', 15 June 2004 [11] <http://www.judiciary.gov.uk/publications_media/general/juryservice.htm> at 10 May 2010.

514 R Gwynedd Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 170.

515 See Clare Dyer, 'No escaping jury duty, lawyers told', *The Guardian*, 17 June 2004 <http://www.guardian.com.uk/uk/2004/jun/17/ploitics.politicalnews/print> at 25 February 2009; Robert Verkaik, 'Barrister told to turn up for jury despite rejections', *The Independent*, 17 June 2004 <http://license.copyright.net/user/viewFreeUse.act?fuid=Mjc4MzU4NQ%3D%3D> at 25 February 2009; 'Judge and jury', *TheLawyer.com*, 23 August 2004 <http://www.thelawyer.com/cgi-bin/item.cgi?id=111658&d=pndpr&h=pnhpr&h&f=pnfpr> at 10 May 2010.

ments came into effect in April 2004, Andrew Prynne QC, who had been summoned for jury service the day after the new laws took effect, sought to be excused from the remainder of the period for which he had been summoned after he had been rejected from three juries in the central London criminal court because he knew the lawyers or judges involved in the cases. He had originally been summoned to attend at his local provincial court but had asked to be transferred to London to avoid colleagues.[516] His application was refused, and he was told by the court that he had to continue to make himself available as required by the summons.[517] He eventually served as a juror on a half-day grievous bodily harm trial.[518] Mr Prynne, a personal injury specialist, was quoted as saying:

> I'm a great believer in the jury system and one of the reasons why people have had such confidence in it in the past is because lawyers weren't allowed … 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.[519]

5.103 One might expect that problems of this nature (where potential lawyer-jurors and judge-jurors know the participants in the trial) would arise more often in a smaller jurisdiction where the profession is also much smaller.

5.104 In July 2004, Lord Justice Dyson sat as a juror, acting as foreman.[520]

5.105 By way of comparison, there is apparently no bar in principle on lawyers serving as jurors in the United States.[521]

Police as jurors

5.106 The role of police officers and lawyers associated with the Crown Prosecution Service (the equivalent of the Office of the Director of Public Prosecutions) has understandably been more problematic, and cases concerning police officers acting as jurors have reached the House of Lords[522] although a clear resolution of the principles involved has not necessarily yet been achieved.

5.107 The risk of a perceived or possible actual bias on the part of a police-juror — whether or not that person has any personal involvement with the case in question or any of its participants — has been commented on in many places.[523] More so than with judge- and lawyer-jurors, they represent a marked departure from the clear separation

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516 Robert Verkaik, 'Barrister told to turn up for jury despite rejections', *The Independent*, 17 June 2004 <http://license.copyright.net/user/viewFreeUse.act?fuid=Mjc4MzU4NQ%3D%3D> at 25 February 2009.

517 Clare Dyer, 'No escaping jury duty, lawyers told', *The Guardian*, 17 June 2004 <http://www.guardian.com.uk/uk/2004/jun/17/ploitics.politicalnews/print> at 25 February 2009; Robert Verkaik, 'Barrister told to turn up for jury despite rejections', *The Independent*, 17 June 2004 <http://license.copyright.net/user/viewFreeUse.act?fuid=Mjc4MzU4NQ%3D%3D> at 25 February 2009; 'Judge and jury', *TheLawyer.com*, 23 August 2004 <http://www.thelawyer.com/cgi-bin/item.cgi?id=111658&d=pndpr&h=pnhpr&h&f=pnfpr> at 10 May 2010.

518 'Judge and jury', *TheLawyer.com*, 23 August 2004 <http://www.thelawyer.com/cgi-bin/item.cgi?id=111658&d=pndpr&h=pnhpr&h&f=pnfpr> at 10 May 2010.

519 Ibid.

520 Ibid.

521 See ibid.

522 *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37. See the discussion of this case starting at [5.109] below.

523 *Report of the Departmental Committee on Jury Service*, Cmnd 2627, HMSO (1965) [99]; *R v Khan* [2008] EWCA Crim 531 [15].

of the roles in the criminal justice system between the investigators, the prosecutors, the parties themselves and their lawyers, the judges and the jury. Each has a clear and distinct role that does not overlap with the role of other participants. This separation of responsibilities provides a series of in-built checks on mistakes or excesses of power that any one of these may seek to exercise, whether by intention or not.

5.108 Of course, if there is any actual connection between a police-juror and the police investigating that particular case, even a slight one, the apprehension that that juror will be improperly biased or privy to information other than the evidence led at the trial will be heightened. That would be the case with any juror who was personally familiar with the case for whatever reason. The real and crucial need for justice to be seen to be done has fuelled much of the criticism of police-jurors in England since 2004, just as it fuelled opposition to their introduction over many years in the past.[524]

R v Abdroikof, R v Green, R v Williamson

5.109 The key case on these questions is the House of Lords decision in *R v Abdroikof, R v Green, R v Williamson* in 2007.[525] Three appeals were heard together:

- Abdroikof had been convicted of attempted murder by a jury that included a serving police officer who had had no contact with the prosecutors or police involved in the case. He informed the judge of his position when the judge was given a note after the jury had retired to consider its verdict. The juror was concerned that he had to report for duty on the following Monday and might then have come into contact with police involved in the case. The judge ordered the police officer not to report for police duty, and informed counsel. No further action was taken.[526]

- Green was convicted for assault occasioning actual bodily harm. While searching Green, a police sergeant pricked himself on a needle that Green had used to inject himself with heroin. There had been a significant conflict between the defendant's and the sergeant's evidence as to what had happened (which was a critical point of distinction between this case and Abdroikof's). It later emerged by accident some time after the trial that a police-juror on the jury had worked in the same borough as the sergeant at the time of the incident and in the same police station, though they were not personally known to each other.[527]

- Williamson was convicted of rape by a jury that included a solicitor who worked for the Crown Prosecution Service ('CPS'). Before the trial that juror had written to the court in accordance with a CPS directive,[528] explaining his role as advising police on charging for out-of-hours work; he had previously practised as an advocate but had not conducted a trial in the relevant court. Defence counsel challenged the inclusion of this juror,

524 *Report of the Departmental Committee on Jury Service*, Cmnd 2627, HMSO (1965) [99]; *R v Khan* [2008] EWCA Crim 531 [15].

525 [2007] 1 WLR 2679, [2007] UKHL 37.

526 *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [3].

527 Ibid [4].

528 See ibid [12].

> which was overruled by the trial judge. The juror was chosen as the foreman of the jury.[529]

5.110 In each case the Court of Appeal had ruled that there had been no breach of the defendant's right to a fair trial.[530] It had acknowledged that 'perfect fairness was unattainable'.[531] The Court of Appeal also stressed the fact that there were 12 jurors, at least ten of whom had to be satisfied of the verdict, which was 'a real protection against the prejudices of an individual juror'.[532]

5.111 The House of Lords dismissed Abdroikof's appeal 5:0 but upheld the other two by a 3:2 majority.

5.112 In giving the leading judgment, Lord Bingham re-stated two bedrock principles. In relation to the first, he cited 'one of the best known principles of English law' enunciated by Lord Hewart CJ in *R v Sussex Justices, Ex parte McCarthy*,[533] which has been approved by the European Court of Human Rights:[534]

> [I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[535]

5.113 He also cited various tests of the perception of partiality:

> Lord Denning MR, in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, 599, said:
>
> > 'The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand …'
>
> … Following the decision of the Court of Appeal in *In re Medicaments and Related Classes of Goods (No 2*) [2001] 1 WLR 700, the accepted test is that laid down in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, para 103: 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. As the House pointed out in *Lawal v Northern Spirit Ltd*, above, para 14, 'Public perception of the possibility of unconscious bias is the key', an observation endorsed by the Privy Council in *Meerabux v Attorney General of Belize* [2005] UKPC 12, [2005] 2 AC 513, para 22. The characteristics of the fair-minded and informed observer are now well understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious: see *Lawal v Northern Spirit Ltd*, above, para 14; *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53.[536]

529 *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [5].

530 [2005] 1 WLR 3538.

531 Ibid [32]. See *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [18].

532 [2005] 1 WLR 3538 [30]. See *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [18].

533 [1924] 1 KB 256, 259.

534 *Delcourt v Belgium* (1970) 1 EHRR 355, 369 [31].

535 *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [14].

536 Ibid [15].

5.114 Lord Bingham outlined his conclusions this way:

> 23. It must in my view be accepted that most adult human beings, as a result of their background, education and experience, harbour certain prejudices and predilections of which they may be conscious or unconscious. I would also, for my part, accept that the safeguards established to protect the impartiality of the jury, when properly operated, do all that can reasonably be done to neutralise the ordinary prejudices and predilections to which we are all prone. But this does not meet the central thrust of the case made by … the appellants: that these cases do not involve the ordinary prejudices and predilections to which we are all prone but the possibility of bias (possibly unconscious) which, as he submits, 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.
>
> 24. This is not an argument I feel able, in principle, to dismiss. It is not a criticism of the police service, but a tribute to its greatest strength, that officers belong to a disciplined force, bound to each other by strong bonds of loyalty, mutual support, shared danger and responsibility, culture and tradition. The Morris Committee thought it self-evident that officers could not be, or be seen to be, impartial participants in the prosecution process, a disqualification which in the judgment of ACPO (accepted by the committee) extended to civilian employees of the police. The facts revealed in the recent case of *R v Pintori* ([2007] EWCA Crim 1700, 13 July 2007, unreported) perhaps suggest that this is not an out-dated perception. Serving police officers remain ineligible for jury service in Scotland, Northern Ireland, Australia, New Zealand, Canada, Hong Kong, Gibraltar and a number of states in the United States, the remainder of the states providing a procedure to question jurors on their occupations and allegiances. But Parliament has declared that in England and Wales police officers are eligible to sit, perhaps envisaging that their identity would be known and any objection would be the subject of judicial decision.
>
> 25. In the case of [Abdroikof], it was unfortunate that the identity of the officer became known at such a late stage in the trial, and on very short notice to the judge and defence counsel. But had the matter been ventilated at the outset of the trial, it is difficult to see what argument defence counsel could have urged other than the general undesirability of police officers serving on juries, a difficult argument to advance in face of the parliamentary enactment. It was not a case which turned on a contest between the evidence of the police and that of the appellant, and it would have been hard to suggest that the case was one in which unconscious prejudice, even if present, would have been likely to operate to the disadvantage of the appellant, and it makes no difference that the officer was the foreman of the jury. In the event, confronted with this question at very short notice, defence counsel raised no objection. I conclude, not without unease, that having regard to the parliamentary enactment the Court of Appeal reached the right conclusion in this case, and I would dismiss the appeal.
>
> 26. [Green's] case is different. Here, there was a crucial dispute on the evidence between the appellant and the police sergeant, and the sergeant and the juror, although not personally known to each other, shared the same local service background. In this context the instinct (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair-minded and informed observer to be a real and possible source of unfairness, beyond the reach of

> standard judicial warnings and directions. The second appellant was not tried by a tribunal which was and appeared to be impartial. It cannot be supposed that Parliament intended to infringe the rule in the *Sussex Justices* case, still less to do so without express language. I would allow this appeal, and quash the second appellant's conviction.
>
> 27. In the case of [Williamson], no possible criticism is to be made of [the lawyer-juror], who acted in strict compliance with the guidance given to him and left the matter to the judge. But the judge gave no serious consideration to the objection of defence counsel, who himself had little opportunity to review the law on this subject. It must, perhaps, be doubted whether Lord Justice Auld or Parliament contemplated that employed Crown prosecutors would sit as jurors in prosecutions brought by their own authority. It is in my opinion clear that justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor. … The third appellant was entitled to be tried by a tribunal that was and appeared to be impartial, and in my opinion he was not. The consequence is that his convictions must be quashed. This is a most unfortunate outcome, since the third appellant was accused of very grave crimes, of which he may have been guilty. But even a guilty defendant is entitled to be tried by an impartial tribunal and the consequence is inescapable. I would allow the appeal and remit the case to the Court of Appeal with an invitation to quash the convictions and rule on any application which may be made for a retrial.[537]

5.115 The House of Lords was split 3:2 in the appeals by Green and Williamson. Lord Rodger and Lord Carswell would have dismissed all three appeals. Lord Rodger concluded that:

> 38. In these circumstances I can see no reason why the fair-minded and informed observer should single out juries with police officers and CPS lawyers as being constitutionally incapable of following the judge's directions and reaching an impartial verdict. It must be assumed, for instance, that the observer considers that there is no real possibility that a jury containing a gay man trying a man accused of a homophobic attack will, for that reason alone, be incapable of reaching an unbiased verdict, even though the juror might readily identify with a fellow gay man. Despite this — if Mr Green's appeal is to be allowed — the observer must be supposed to consider that there is, inevitably, a real possibility that a jury will have been biased in a case involving a significant conflict of evidence between a police witness and the defendant, just because the witness and a police officer juror serve in the same borough or the juror serves in a force which commits its work to the trial court in question. Similarly, if Mr Williamson's appeal is allowed, the observer must be taken to consider that the same applies to any jury containing a CPS lawyer whenever the prosecution is brought by the CPS. In my view, an observer who singled out juries with these two types of members would be applying a different standard from the one that is usually applied.
>
> 39. For no good reason, the observer would be virtually ignoring the other 11 jurors. Moreover, he would be ignoring the fact that Parliament must have been just as well aware as this House of the bonds of loyalty and of the esprit de corps uniting police officers on the side of law and order. After all, these were precisely the reasons for the previous bar on them serving as jurors. The fair-minded observer could not disregard the fact that, knowing this, Parliament has none the less judged it proper in today's world to remove the bar and to rely on the officers' commitment to uphold the law, in these cir-

537 Ibid [23]–[27].

cumstances by complying with their oath or affirmation and following the judge's directions, like any other juror.

40. Equally, if he singled out the jury with the CPS lawyer, the observer would be looking only at that lawyer's formal employment relationship with the large CPS organisation. At the same time he would be choosing to ignore the obvious reality that one of the qualities required of any CPS lawyer is an ability to assess evidence and to take proper decisions based on his assessment of the evidence, regardless of any pressure from the investigating police officers or from the media. Quite routinely, he may have to differ from colleagues in the same service. He will be well aware that in many cases that are prosecuted, for various reasons the evidence turns out to be less cogent than anticipated and an acquittal is the proper verdict. A fair-minded and rational observer might just think that such a person would be capable of bringing his realism, objectivity and skills to bear when acting as a juror. Why, at the very least, should the observer assume that they would desert him?

41. On the other hand, if the observer did take the view that police officers are inherently and irredeemably biased in assessing the evidence of a police witness from the same borough, it is hard indeed to imagine him considering that they could act impartially in weighing the evidence of other prosecution witnesses against someone whom they would regard as the kind of villain they were fighting every day. Drawing distinctions of that kind among the verdicts of the juries in the three cases under appeal strikes me as not very realistic and as being likely to produce fine distinctions which should have no place in this area of the law.

42. In short, the observer who concluded that there was no real possibility that, after giving his high-profile press conference, the auditor in *Porter v Magill* [2002] 2 AC 357 was biased would be straining at a gnat if he found that there was a real possibility of bias just because a jury contained a police officer or CPS lawyer.

43. 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. Moreover, any requirement for police officers and CPS 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.

44. For my part, I consider that, although the fair-minded and informed observer would see that it was possible that a police officer or CPS lawyer would be biased, he would also see that the possibility of the jury's verdict being biased as a result was no greater than in many other cases. In other words, 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. In respectful agreement with the Court of Appeal and Lord Carswell, I therefore see no reason to conclude that any of the appellants had an unfair trial or that the verdicts should be quashed.[538]

538 Ibid [38]–[44].

5.116 Baroness Hale generally agreed with Lord Bingham, but added her own comments about the role of members of the CPS as jurors:

> It is inconceivable that the Director of Public Prosecutions could sit as a juror in a case prosecuted by the CPS, irrespective of whether or not he had been personally involved in the decision to prosecute. There would be no objection to his sitting in a case prosecuted by some other person or authority. The same must apply to a CPS lawyer, who is employed to decide upon whether or not to prosecute and to conduct the prosecutions decided upon. Whether the same would apply to other CPS employees, whose role in the prosecution process or whose connection with the organisation is rather more peripheral, is a separate question which does not arise here. One could imagine that it might not apply to temporary or short term employees in junior positions unless the prosecution were brought by the office in which they served. There would, of course, be no objection to CPS lawyers or other employees serving on juries in prosecutions brought by other persons or authorities. This view is consistent with Parliament's lifting the ban upon members of the DPP's staff serving on juries, while leaving intact the common law and Convention rules against bias.[539]

5.117 One point on which all of their Lordships agreed was that the mere fact that a juror was a serving police officer did not disqualify that person from serving as a juror, which follows clearly enough from the legislation.[540]

R v Khan

5.118 Similar issues, and a consideration of *R v Abdroikof*, arose in six appeals heard together by the English Court of Appeal in 2008 in *R v Khan*.[541] Those cases involved convictions by juries that contained serving police officers, employees of the Crown Prosecution Service and a prison officer. In it, Lord Phillips, delivering the judgment of the Court, made a distinction between bias towards a party and bias towards a witness.

> Just because a juror feels partial to a particular witness does not mean that the juror will be partial to the case in support of which that witness is called. …
>
> Where an impartial juror is shown to have had reason to favour a particular witness, this will not necessarily result in the quashing of a conviction. It will only do so if this has rendered the trial unfair, or given it an appearance of unfairness. To decide this it is necessary to consider two questions:
>
> > i) Would the fair minded observer consider that partiality of the juror to the witness may have caused the jury to accept the evidence of that witness? If so
> >
> > ii) Would the fair minded observer consider that this may have affected the outcome of the trial?
>
> If the answer to both questions is in the affirmative, then the trial will not have the appearance of fairness. If the answer to the first or the second question is in the negative, then the partiality of the juror to the witness will not have affected the safety of the verdict and there will be no reason to consider the trial unfair.

539 Ibid [51].

540 Ibid [24]–[25] (Lord Bingham), [44] (Lord Rodger of Earlsferry), [46] (Baroness Hale of Richmond), [68] (Lord Carswell), [83 (Lord Mance); *R v Khan* [2008] EWCA Crim 531 [24].

541 *R v Khan* [2008] EWCA Crim 531.

> In considering the first question one must have regard to the possibility that the individual juror may have influenced his or her fellow jurors when evaluating the evidence of the witness in question. None the less the Strasbourg court has recognised the obvious fact that the existence of a body of jurors selected at random provides some safeguard against the disposition of one of them to accept the evidence of a particular witness — *Pullar v UK* (1996) 22 EHRR 391 at paragraph 40.[542]

5.119 When looking at the role of police-jurors, after considering the varying principles that appeared to emerge from the majority in *R v Abdroikof*, the Court of Appeal held that:

> Our conclusion is, as already expressed, that the fact that a police juror may seem likely to favour the evidence of a fellow police officer will not, automatically, lead to the appearance that he favours the prosecution. If the police evidence is not challenged or does not form an important part of the prosecution case, we do not consider that it will normally do so. None the less it will be appropriate to quash the conviction if, but only if, the effect of the juror's partiality towards a brother officer puts in doubt the safety of the conviction and thus renders the trial unfair.[543]

5.120 The Court of Appeal dismissed all appeals based on jury bias. It added some remarks about 'precautionary measures', however:

> It is undesirable that the apprehension of the jury bias should lead to appeals such as those with which this court has been concerned. It is particularly undesirable if such appeals lead to the quashing of convictions so that re-trials have to take place. In order to avoid this it is desirable that any risk of jury bias, or of unfairness as a result of partiality to witnesses should be identified before the trial begins. If such a risk may arise, the juror should be stood down.
>
> We considered attempting to give guidance in this judgment as to the steps that should be taken to ensure that the risk of jury bias does not occur. However, it seems to us that these will involve instructions to be given by the police, prosecuting and prison authorities to their employees coupled with guidance to court officials. It would be ambitious to attempt to formulate all of this in a judgment without discussion with those involved. There is one matter, however, that should receive attention without any delay. It is essential that the trial judge should be aware at the stage of jury selection if any juror in waiting is or has been, a police officer or a member of the prosecuting authority, or is a serving prison officer. Those called for jury service should be required to record on the appropriate form whether they fall into any of these categories, so that this information can be conveyed to the judge. We invite all of these authorities and Her Majesty's Court Service to consider the implications of this judgment and to issue such directions as they consider appropriate.[544]

Present practices

5.121 The Courts Service for England and Wales has issued a set of guidelines for deciding applications for excusals and deferrals. The guidelines generally provide that deferral is to be preferred to excusal:

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542 Ibid [9]–[11]. See 'Jurors in occupations connected with the administration of justice—United Kingdom' (2008) 12 *International Journal of Evidence and Proof* 252, 253.

543 *R v Khan* [2008] EWCA Crim 531 [29].

544 Ibid [131]–[132].

> The normal expectation is that everyone summoned for jury service will serve at the time for which they are summoned. It is recognised that there will be occasions where it is not reasonable for a person summoned to serve at the time for which they are summoned, in such circumstances, the summoning officer should use his/her discretion to defer the individual to a time more appropriate. Only in extreme circumstances, should a person be excused from jury service.[545]

5.122 However, the guidelines also provide that applications for excusal should normally be granted if they are made on the basis of insufficient understanding of English, or by members of religious or other organisations whose ideology or beliefs are incompatible with jury service; and are to be considered 'sympathetically' if they are made on the basis of financial hardship incurred by a student, on the grounds of physical disability, or by shift workers.[546]

5.123 At present, police officers and other 'Criminal Justice System' staff are advised to provide details of their occupation, employer and workplace location when completing their jury summons and to check their organisation's human resources policy regarding jury service.[547] The guidelines also advise that such persons should be transferred to other courts or trials to overcome concerns about their connection with a case or have their service deferred, rather than be excused:

> 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. Paragraph 4 above applies.[548]
>
> There are additional considerations which apply to certain categories of potential jurors involved in the administration of justice. Those categories are:
>
> (1) employees of the prosecuting authority;
>
> (2) 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.
>
> (3) serving prison officers summoned to a court, who are employed at a prison linked to that court or who are likely to have special knowledge of any person, involved in a trial.
>
> Potential jurors falling into category (1), (2) or (3) should be excused from jury service unless there is a suitable alternative court/trial to which they can be transferred. For example an employee of the Crown Prosecution Service should not

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545 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' (2009) [4] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010. See also ibid [2], which provides that 'Excusal from jury service should be reserved only for those cases where the jury summoning officer is satisfied that it would be unreasonable to require the person to serve at any time within the following twelve months.'

546 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' (2009) [6], [8], [12], [13], [21] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010.

547 See Her Majesty's Courts Service (United Kingdom), *Guide to Jury Summons*, 4 <http://www.hmcourts-service.gov.uk/docs/infoabout/juryservice/jury_summons_guide09dec.pdf>; and Her Majesty's Courts Service (United Kingdom), Jury Service, 'CJS staff and court service' <http://www.hmcourts-service.gov.uk/infoabout/jury_service/cjs_staff.htm> at 10 May 2010.

548 Paragraph [4] of the guidelines is set out at [5.121] above.

> serve on a trial prosecuted by the CPS. However, they can serve on a trial prosecuted by another prosecuting authority, such as the Revenue and Customs Prosecution Office. Similarly, a serving police officer can serve where there is no particular link between the court and the station where the police juror serves.[549] (note added)

5.124 The Criminal Practice Direction on juries does not specifically refer to the discharge or excusal of lawyer-, police- or judge-jurors, but refers more generally to the requirement for judges to be alert to the need for jurors with 'professional and public service commitments' to be discharged or excused in some cases:

> The effect of section 321 Criminal Justice Act 2003 was to remove certain categories of persons from those previously ineligible for jury service (the judiciary and others concerned with the administration of justice) and certain other categories ceased to be eligible for excusal as of right (such as members of Parliament and medical professionals). Jury service is an important public duty which individual members of the public are chosen at random to undertake. The normal presumption is that everyone, unless mentally disordered or disqualified, will be required to serve when summoned to do so. This legislative change has, however, meant an increase in the number of jurors with professional and public service commitments. One of the results of this change is that trial judges must continue to be alert to the need to exercise their discretion to adjourn a trial, excuse or discharge a juror should the need arise. Whether or not an application has already been made to the jury summoning officer for deferral or excusal it is also open to the person summoned to apply to the court to be excused. Such applications must be considered with common sense and according to the interests of justice. An explanation should be required for an application being much later than necessary.
>
> Where a juror appears on a jury panel, it may be appropriate for a judge to excuse the juror from that particular case where the potential juror is personally concerned with the facts of the particular case or is closely connected with a prospective witness.[550]

Further proposals

5.125 Some further proposals for change to the English position have also been mooted since the 2004 reforms.

5.126 It has been suggested, for example, that the present disqualification of 'mentally disordered persons'[551] from jury service is too broadly defined and presents a barrier to

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549 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' (2009) [18] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010. The last two paragraphs of guideline [18] were added in 2009.

550 Ministry of Justice (United Kingdom), Consolidated Criminal Practice Direction, Part IV Further Directions applying in the Crown Court, 'IV.42 Juries', [IV.42.1]–[IV.42.2] <http://www.justice.gov.uk/criminal/procrules_fin/contents/practice_direction/pd_consolidated.htm> at 10 May 2010. Also see, generally, for example, G Slapper and D Kelly, 'The Jury' in *The English Legal System: 2009/2010* (10th ed, 2009) [8.4.2].

551 At present, the disqualification of 'mentally disordered persons' from jury service applies to:

- a person who suffers *or has suffered* from mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind on account of which the person is resident in a hospital or similar institution or regularly attends for treatment by a medical practitioner;
- a person for the time being under guardianship or subject to a community treatment order; and
- a person who has been determined by a judge to be incapable of managing and administering his or her affairs by reason of mental disorder: see *Juries Act 1974* (Eng) sch 1 pt 1; *Mental Health Act 1983* (Eng) s 1(2) (definition of 'mental disorder').

community involvement and civic participation.[552] The United Kingdom Government has indicated that the modernisation of the provision would be considered;[553] no further action has yet been taken, although calls for it to be addressed have recently been renewed.[554]

5.127 Most recently, the Ministry of Justice has published a consultation paper seeking responses on whether the upper age limit (of 70 years) for jury service should be raised to 75 or 80 years or abolished altogether and, in either case, whether there should be a 'right of self-excusal' for people over 70 years.[555]

A review by the Scottish Government

5.128 Subsequent to the changes made in England and Wales, the Scottish Government undertook a review of a number of aspects of the criminal jury system, specifically:

- the upper age limit for jurors;
- the lists of occupations whose members are excused from jury service as of right or who are ineligible for jury service;
- the period of entitlement to excusal as of right following jury citation;
- juror compensation;
- jury size;[556] and
- trial without a jury.

5.129 It published a consultation paper in September 2008 on these issues followed by an analysis of consultation responses in January 2009.[557] The review concluded with

552 Office of the Deputy Prime Minister (United Kingdom), Social Exclusion Unit, *Mental Health and Social Exclusion*, Report (June 2004) [27]–[28] <http://www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/publications_1997_to_2006/mh.pdf> at 6 April 2010; Ministry of Justice (United Kingdom), *Secretary of State's Report on Disability Equity 2008–2011* (2008) 77–8 <http://www.justice.gov.uk/publications/disability-equality.htm> at 6 April 2010.

553 Office of the Deputy Prime Minister (United Kingdom), Social Exclusion Unit, *Mental Health and Social Exclusion*, Report (June 2004) [16] <http://www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/publications_1997_to_2006/mh.pdf> at 6 April 2010; Ministry of Justice (United Kingdom), *Secretary of State's Report on Disability Equity 2008–2011* (2008) 78 <http://www.justice.gov.uk/publications/disability-equality.htm> at 6 April 2010.

554 See, for example, Denis Campbell, 'Call to lift ban on jury service for people with mental illness: Barristers join forces with mental health charity to urge rethink', *The Guardian* (London) 10 January 2010; 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_uturn_on.html> at 10 May 2010.

555 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) <http://consultations.cjsonline.gov.uk/Default.aspx?conid=2> at 10 May 2010.

556 In Scotland, criminal juries ordinarily comprise 15 jurors.

557 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials*, Consultation Paper (2008); Linda Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses*, Report (2009).

a paper published in December 2009 outlining the Government's views and proposals.[558] In contrast with England, the proposals for change were limited:

> Of the 20 issues for debate raised in the consultation, those relating to age limits for jury duty and the occupations which should be routinely excused from jury service attracted the most attention. The consultation process revealed consensus on a number of areas, including that the upper age limit for jurors should be increased from 65 to 70; and that the period of entitlement to excusal as of right be reduced from 5 to 2 years for those individuals who, following citation, attend court but are not selected by ballot to serve on a jury. These measures require legislative change and the Government has included both in the Criminal Justice and Licensing Bill which was introduced to Parliament on 5 March 2009.[559] Section 68 of the Bill as introduced contains the provisions to raise the age limit and section 69 of the Bill as introduced changes the period of entitlement to excusal.
>
> On the question of compensation for jury service, the majority of respondents agreed that jurors should receive enhanced compensation for losses incurred. This will require a change to the relevant secondary legislation.[560] (note added)

5.130 The Scottish Government did not, however, propose any change to the list of ineligible people or the list of persons entitled to excusal as of right:

> The Government does not intend to amend either the 'ineligible for jury service' list or the list of those occupations that are eligible to apply for 'excusal as of right'. The responses to the consultation do not indicate a strong appetite for change to the current lists of those who are ineligible for jury service and those who may apply for excusal as of right. There was a strong indication from respondents that it would be unwise to open up jury duty to those who work within the justice system. Only 4 out of the 51 consultees who provided a response recommended scrapping the current list of persons who are excusable from jury service as of right.[561]

5.131 The Scottish jury legislation provides that the following persons are ineligible for jury service:

- members of the judiciary;
- others concerned with the administration of justice including advocates and solicitors, members of the police force, prison officers, and parole board members; and
- the mentally disordered.[562]

5.132 It also provides that the following persons are excusable as of right:

- peers, peeresses, and members of the House of Commons and the House of Lords;

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

559 See Criminal Justice and Licensing (Scotland) Bill, introduced to Scottish Parliament on 5 March 2009. As at June 2010, the Bill has not yet been passed.

560 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [3]–[5].

561 Ibid [6].

562 *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1, sch 1 pt I.

- members of the Scottish Parliament and of the Scottish Executive;
- the Auditor-General;
- full-time serving members of the armed forces;
- practising medical professionals;
- ministers of religion; and
- persons who have served or attended for jury service in the preceding five years.[563]

5.133 The points that emerged during consultation on this question were summarised as follows:

- Several respondents commented that little appeared to have been gained from the England and Wales experience of removing the ineligibility criteria by virtue of occupation.
- One-third (32%) of those who provided a view favoured retaining the status quo on restrictions on eligibility to serve on a jury.
- Some respondents felt that the current list could be reduced although others suggested additions to the list.
- Many respondents agreed that excluding those who may have knowledge of a case was important not only in order to maintain impartiality, but also to demonstrate that justice was being done.
- Only 4 of the 51 consultees who provided a view recommended scrapping the current list of persons excusable from jury service as of right.
- A small number of respondents recommended adding more categories to the persons excusable as of right.[564]

5.134 The Scottish Government outlined the following competing considerations of removing the categories of occupational exemption, as has been done in England and Wales, in its consultation paper:

> 4.10 The Government is clear that the objectivity and impartiality of jurors should not be compromised. It will welcome views on whether this goal is best met by setting some occupational category exclusions to eligibility (and if so, what those categories should be) or whether it would be preferable to consider possible conflicts of interests on a case by case basis. If the second, it would also be helpful to have views on how best to minimise the administrative costs arising from the processing of applications for excusal close to the trial date (since conflicts may only become apparent when the name of the parties involved in a trial allocated to proceed on a particular date are known often only on the morning of the trial).

563 *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1, sch 1 pt III.

564 Linda Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses*, Report (2009) 23. The respondents to the Scottish Government's consultation paper included both individuals, including members of the public, and organisations, many with criminal justice experience: 8–9.

4.11 The implications of abolition (or restriction) of the categories of excusal as of right also need careful consideration. There would inevitably be new burdens — for employers and for individuals. Employers of jurors previously enjoying excusal as of right would incur agency fees to hire temporary staff in any case where excusal was not granted. This burden would probably fall most heavily on the public sector where employers have traditionally continued to pay their employees whilst on jury duty. Individuals would also be affected: all those who had previously relied on excusal as of right would have to make a reasoned case for exemption by applying to the relevant clerk of court.

4.12 A further consideration is that (as with applications for exemption on grounds of conflict of interest), the administration of juror selection would become more bureaucratic. People in many walks of life whose work impinges on others (and particularly those whose work affects vulnerable groups and children) might claim excusal on grounds that the harm done to others by their absence outweighs any advantage derived from their inclusion in the juror pool. There would need to be clear criteria for admitting and assessing all such applications for excusal. And hard cases, falling out with the rules, would still need to be considered on their merits. The Scottish Court Service would need capacity to evaluate and process a larger number of applications than at present.

4.13 This raises a further issue about the actual scale of benefit that could be expected from a move to restrict or abolish excusal as of right. The putative gains lie in enlarging the juror pool and securing more representative juries. But it is interesting to note that, in England and Wales, the pattern of the previous excusals as of right has to some extent, been replicated, at least in relation to some of the more obviously public service-focused occupations in healthcare such as hospital consultants and doctors.[565] Spreading the liability to jury service would at first sight appear to contribute significantly to enlarging the pool of jurors. But that benefit will evaporate if applications for excusal are made, and granted, at roughly the same rate and across largely the same occupations as at present. Indeed, removing the restrictions applying to certain occupations and placing all on the same footing might increase demands for excusal: whereas under the current system many of those who do not benefit from excusal as of right consider themselves absolutely duty bound, they may in the absence of those categories feel free to seek excusal. If the impact of change were simply to further reduce the juror pool, little would have been achieved.[566] (note added)

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565 Applications for excusal by shift workers and night workers, for example, are to be dealt with sympathetically (see and Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications', [12] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010), and doctors are advised that the following factors may justify a request for excusal or deferral:

- if there would be implications for service delivery if the doctor attended court;
- if the doctor's colleagues are on leave during the time the doctor has been summoned and/or the doctor works in a hospital, department or practice where there would be difficulty finding cover;
- if there would be difficulty hiring a locum to cover in the doctor's absence;
- if the doctor has specialist expertise that cannot be provided by the doctor's colleagues or it would be difficult to hire a locum to cover in the doctor's absence;
- if extended time away from work would require the doctor to re-train;
- if the doctor is regularly cited to appear in court (for example to give evidence in court as an expert witness);
- if the doctor and/or the doctor's colleagues would suffer severe financial loss as a result of the doctor's service: see British Medical Association, Jury Service: Guidance for Medical Practitioners Summoned for Jury Service (November 2005) 5–6 <http://www.bma.org.uk/employmentandcontracts/independent_contractors/managing_your_practice/juryservice05.jsp> at 6 April 2010.

566 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials*, Consultation Paper (2008) [4.10]–[4.13].

5.135 The Scottish Government did, however, make a proposal for more efficient management of claims for excusal by requiring prospective jurors to apply for excusal as of right when they are first notified that they may be called to serve, rather than at the subsequent 'citation' (summons) stage.[567]

Proposals of the Law Reform Commission of Ireland

5.136 The Law Reform Commission of Ireland is currently undertaking a review of the law relating to juries as part of its part of Third Programme of Law Reform.[568] In March 2010, it published a Consultation Paper on jury service, the first publication in its review.[569]

5.137 It makes a number of provisional recommendations that deal with juror qualification, ineligibility and excusal, the parties' rights of challenge, remuneration for jury service, and offences relating to jurors and juries. Its main proposals are summarised as follows:

- the existing blanket excusal from jury service of many professionals and public servants should be replaced by an individualised excusal 'for good cause'
- jury panels should be based on the electoral registers for local and European elections, allowing not only Irish citizens but also EU citizens and long-term residents (of 5 years) to be selected for jury service
- jurors should be allowed deferral of service for up to 12 months
- no person should be prohibited from jury service on the basis of physical disability alone; that capacity be recognised as the only appropriate requirement for jury service; and that reasonable accommodation be put in place for hearing-and-visually impaired jurors to assist them in undertaking the duties of a juror
- fluency in English should be introduced as a requirement for all jurors
- persons convicted of serious criminal offences should continue to be disqualified for jury service, and this should be extended to those convicted of similar offences outside the State
- the Commission invites submissions as to whether persons who are awaiting trial on criminal charges should continue to be eligible for jury service
- the Commission questions whether the number of objections to jurors without the need to give any reason for both the prosecution and the defence should be reduced from the existing seven each
- the Commission invites submissions as to whether some expenses should be paid to jurors, especially self-employed jurors, to cover their direct costs

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

568 Law Reform Commission of Ireland, *Third Programme of Law Reform 2008–2014*, Report 86 (2007) 9, 11.

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

- the Courts Service should provide to jurors information explaining why jurors should not carry out independent investigations or internet searches about a case

- the Commission invites submissions as to whether the right to inspect the jury panel should be amended.[570]

5.138 The Law Reform Commission of Ireland has been guided in its review by the importance of the jury in the court system, the need to reinforce public confidence in jury deliberations and to prevent possible jury misconduct, and the requirement for the jury to be broadly representative of society.[571]

> As to the actual nature of jury service, the Commission agrees with the analysis of Walsh J in the *de Burca* case[572] that jury service is not correctly described as involving an enforceable individual right; it is more accurately described as a duty that falls on members of the population of the State. While not a right as such, the Commission nonetheless considers that jury service should be valued and supported to the greatest extent possible by the State. Thus any proposals for reform in this area should facilitate the constitutional requirement of representativeness, including the removal, to the greatest extent possible, of potential barriers to jury service.[573] (note added)

570 Law Reform Commission of Ireland, Latest News, Consultation Paper on Jury Service, 'Specific recommendations' <http://www.lawreform.ie/news/consultation-paper-on-jury-service.289.html> at 10 May 2010.

571 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [17].

572 *de Burca v Attorney General* [1976] IR 38.

573 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [18].

Chapter 6

Qualification for Jury Service

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.[574] At present, qualification for jury service is determined by enrolment as an elector within the relevant jury district and eligibility for service; and one of the categories of ineligibility is having a particular criminal history.[575] Electoral enrolment and criminal history commonly inform the criteria for qualification for jury service in most other jurisdictions and are the subject of this chapter.

ELECTORAL ENROLMENT

6.2 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 classes of ineligible people specified in section 4(3) of the Act:[576]

> **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

574 See the Terms of Reference set out in Appendix A to this Paper.

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

576 *Jury Act 1995* (Qld) s 4(1), (2). 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).

(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).

6.3 This is reflected in all Australian jurisdictions[577] although there is some variation in relation to jury districts and similar organisational matters.

6.4 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.[578] Pursuant to 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).

6.5 Sections 64 and 65 of the *Electoral Act 1992* (Qld) provide that a person is required to be enrolled in the electoral district in which he or she has lived for a month if eligible for enrolment under the *Commonwealth Electoral Act 1918* (Cth), and must notify a change of address within a given electoral district within 21 days:

64 Entitlement to enrolment

(1) A person is entitled to be enrolled for an electoral district if the person—

(a) either—

(i) is entitled to be enrolled under the Commonwealth Electoral Act for the purposes of that Act in its application in relation to an election within the meaning of that Act; or

(ii) is not so entitled, but was entitled to be enrolled under the *Elections Act 1983* on 31 December 1991; and

(b) lives in the electoral district and has lived in it for the last month.

(2) However, subsection (1)(b) does not deny a person the entitlement to be enrolled for an electoral district if the person did not live in the electoral district for the last month merely because the person was imprisoned.

…

577 *Juries Act 1967* (ACT) s 9; *Jury Act 1977* (NSW) s 5; *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* (UK) s 1; *Juries Act 1976* (Ireland) s 6; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(a).

578 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).

65 Enrolment and transfer of enrolment

…

(2) A person who—

(a) is entitled to be enrolled for an electoral district; but

(b) is not enrolled on the electoral roll for the district;

must give notice to an electoral registrar for the district in the form and way approved by the commission.

(3) If a person who is enrolled on an electoral roll for an electoral district changes address within the electoral district, the person must, within 21 days, give notice to an electoral registrar for the district in the form and way approved by the commission.

6.6 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.[579] 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;[580] people who have been convicted of treason or treachery and have not been pardoned;[581] and people who, 'by reason of being of unsound mind, [are] incapable of understanding the nature and significance of enrolment and voting'.[582]

6.7 A person who is serving a sentence of imprisonment[583] 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.[584] However, these people recover their entitlement to enrol after serving their sentence.

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579 *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).

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

581 *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).

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

583 A person is serving a sentence of imprisonment only if (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: *Commonwealth Electoral Act 1918* (Cth) s 4(1A) (definition of 'sentence of imprisonment'). Also see *Electoral Act 1992* (Qld) s 101(4).

584 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 10 May 2010.

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]):

6.8 People who are entitled to enrol are obliged to do so.[585]

6.9 There is some concern, however, that some people who are eligible to enrol decline to do so. Participants in a research project on juror satisfaction conducted for the Australian Institute of Criminology in 2007 commented that:

> emphasising and educating the community about citizenship and the importance of jury duty could play a vital role in encouraging more citizens to participate in jury service.[586]

6.10 The Law Reform Commission of Western Australia has also proposed that resources be provided for 'ongoing and regular awareness raising strategies' to improve juror participation in regional areas.[587]

6.11 The Australian Electoral Commission has a number of strategies for continuous review of the electoral roll to ensure it is 'as up to date as possible at any given point in time'[588] 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.[589] Enrolment forms are made widely available.[590] Provision is also made to streamline the enrolment of new citizens[591] and to deal with the removal of names from the roll when someone is no longer entitled to enrolment or is deceased.[592] As at June

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> 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: see *Crime and Misconduct and Other Legislation Amendment Act 2006* (Qld) s 35G.

585 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).

586 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.

587 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 43–4, Proposal 8. Also see New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [13.16].

588 Australian Electoral Commission, About Electoral Roll, 'Electoral Roll Review' <http://www.aec.gov.au/Enrolling_to_vote/About_Electoral_Roll/Roll_review.htm> at 10 May 2010.

589 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 10 May 2010; Australian Electoral Commission, *Annual Report 2008–2009* (2009) 31–7. Until 1998, the electoral roll was reviewed only biennially and by door-knock.

590 Australian Electoral Commission, *Annual Report 2008–2009* (2009) 31. 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.

591 See [6.18] below.

592 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 10 May 2010. Also see *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.

2009, approximately 92% of all eligible voters were enrolled.[593]

6.12 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.[594] A Commonwealth Parliamentary Committee has suggested several reasons for this:

> 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.[595] (notes omitted)

6.13 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.[596]

6.14 At present, the Australian Electoral Commission is establishing a new Indigenous Electoral Participation Program to improve Indigenous participation in the electoral system. The program, which has been allocated funds of $13 million over four years, is expected to be implemented by July 2010:

> The program will target Indigenous people in remote, rural and urban areas Australia wide. The objectives are:
>
> - to improve electoral knowledge in Indigenous communities, and
> - to encourage Indigenous people to participate in the electoral system (in particular, to increase enrolment levels, voter turnout and formal voting).[597]

6.15 Increasing Indigenous representation on the electoral roll may be one of the most important means for improving Indigenous representation on juries.

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593 Australian Electoral Commission, *Annual Report 2008–2009* (2009) 30.

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

595 Ibid [5.8]–[5.11].

596 Ibid [5.30]–[5.33].

597 Australian Electoral Commission, Information for Indigenous Australians, 'Indigenous Electoral Participation Program' <http://www.aec.gov.au/Voting/indigenous_vote/index.htm> at 1 June 2010.

Citizenship

6.16 In 1992, the Australian Law Reform Commission noted that:

> 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.[598]

6.17 To overcome this, the ALRC suggested that people should be encouraged to take up citizenship[599] and recommended that 'when migrants become citizens, they should be given an opportunity to register immediately on the electoral roll'.[600]

6.18 The current procedure is for new citizens to be given the opportunity to enrol at their citizenship ceremonies:

> **New citizens**
>
> The AEC's primary avenue to encourage new citizens to enrol is the citizenship ceremony. AEC staff in all states and territories attend citizenship ceremonies to provide electoral information and assist with the completion of enrolment forms. Each new citizen is given an enrolment form which has been pre-filled with their personal details. They can return their completed forms immediately through the AEC staff member or the local council representative at the ceremony.[601]

6.19 In the year 2008–09, 92% of new citizens eligible for enrolment were enrolled within three months of becoming citizens.[602] The Australian Electoral Commission hopes to increase this to meet its target of 95% and the possibility of automatic enrolment consequent upon citizenship is being considered:

> In its *Report on the conduct of the 2007 federal election and matters related thereto*, the Joint Standing Committee on Electoral Matters recommends amending the Electoral Act:
>
> > *to allow that a person who makes an application to become an Australian citizen in accordance with the Australian Citizenship Act 2007, be provisionally enrolled on the Commonwealth Electoral roll at the time of making the application for citizenship, where they provide proactive and specific consent to opt in, with voting entitlement gained automatically once Australian citizenship has been granted.*
>
> During 2009–10, the AEC will investigate how this recommendation to provide automatic enrolment for new citizens could be implemented if the amendment was

598 Australian Law Reform Commission, *Multiculturalism and the Law*, Report 57 (1992) [10.44].

599 Ibid [10.57].

600 Ibid [10.63].

601 Australian Electoral Commission, *Annual Report 2008–2009* (2009) 36. Also see 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 10 May 2010; 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 10 May 2010.

602 Australian Electoral Commission, *Annual Report 2008–2009* (2009) 34–5, 36.

made, as part of the AEC's strategy to ensure that all Australians who are eligible to vote are able to do so.[603]

6.20 The requirement for citizenship, however, means that non-citizen permanent residents are precluded from electoral enrolment and thus 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[604]) were Australian citizens,[605] indicating at least some gap in citizenship take-up. In the fifteen years between 1991 and 2006, the rate of uptake has wavered between 60 and 74% (see Table 6.1 below).[606]

6.21 In general, citizenship rates are influenced by the length of stay in Australia: the 'longer overseas-born people reside in Australia and, consequently, the older they get, the more likely it is that they have acquired Australian citizenship'.[607] Among the largest sources of overseas-born Australian citizens have been former citizens of the United Kingdom and New Zealand.[608] Despite this, Australian residents born in those countries have had among the lowest overall take-up rates of citizenship, while those from non-English-speaking countries, such as Greece and Vietnam, have had the highest uptake (see Table 6.1 below).

6.22 It has been suggested that Australians born in the United Kingdom and New Zealand may feel 'less need to make a choice of national identity' because of the 'shared language, and strongly similar legal, political, and industrial arrangements of Australia and the other Anglo-American countries'.[609] Informal agreement between Australia and New Zealand also allows New Zealanders to enter and remain in

603 Ibid 36. Also see existing provisions for provisional enrolment of citizenship applicants: *Commonwealth Electoral Act 1918* (Cth) ss 99A, 99B. Legislation for automatic (or 'smart roll') enrolment for new voters has recently been introduced in New South Wales: *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* (NSW).

604 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).

605 B Pink, *2008 Year Book Australia*, Australian Bureau of Statistics No 90, Cat No 1301.0, 460.

606 In 2007–08, the number of permanent migrants to Australia was 173,294. In the same year, the number of permanent additions (that is, the sum of permanent arrivals and permanent onshore visa grants) to Queensland's population was 39,710 people, most coming from New Zealand, the United Kingdom, South Africa, India and China. At the 2006 Census, 22% of Queensland's population were overseas-born. See Department of Immigration and Citizenship Australia, *Population Flows: Immigration Aspects 2007–08* (2009) 25, 108, 119 <http://www.immi.gov.au/media/publications/statistics/popflows2007-08/> at 10 May 2010.

607 D Trewin, *2007 Year Book Australia*, Australian Bureau of Statistics No 89, Cat No 1301.0, 389, 389. And see M Evans, 'Choosing to Be a Citizen: The Time-Path of Citizenship in Australia' (1998) 22(2) *International Migration Review* 243.

608 B Pink, *2008 Year Book Australia*, Australian Bureau of Statistics No 90, Cat No 1301.0, 460. For example, in 2007–08, the top four former nationalities of people granted Australian citizenship were the United Kingdom (22.6%), India (7.5%), China (6.9%) and New Zealand (5.6%): see Australian Government, Department of Immigration and Citizenship, 'Australian Citizenship Statistics' <http://www.citizenship.gov.au/resources/facts-and-stats/stats.htm> at 22 April 2009. For comparative figures for the years 1994–95 to 2005–06 see, respectively, the 1997 to 2008 Australian Bureau of Statistics publications of the *Year Book Australia* available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1301.0> at 10 May 2010.

609 M Evans, 'Choosing to Be a Citizen: The Time-Path of Citizenship in Australia' (1998) 22(2) *International Migration Review* 243, 258.

Australia indefinitely without citizenship.[610] This, and the fact that permanent residents are entitled to many of the same rights and privileges as citizens, is also likely to influence citizenship uptake.[611]

6.23 The following table sets out statistics on citizenship take-up rates for 1991 to 2006, by country of birth, drawn from Census data from the Australian Bureau of Statistics.[612]

Country of Birth	1991	1996	2001	2006
Former Yugoslavia	89.2%	87.5%		
Greece	93.9%	96.1%	97.1%	97.2%
Vietnam	71.4%	88.5%	95.3%	93.7%
Philippines			90.4%	88.1%
Italy	76.9%	78.8%	79.5%	80.5%
Netherlands	75.3%	77.7%	78.3%	78.0%
South Africa				77.1%
Germany	73.2%	75.8%	76.5%	74.4%
India				67.8%
China	49.0%	48.6%	80.3%	67.0%
United Kingdom	50.4%	60.5%	65.6%	65.9%
New Zealand	23.9%	32.3%	37.3%	39.4%
Total overseas-born	**60.3%**	**67.8%**	**47.4%**	**72.9%**

Table 6.1: Citizenship take-up rates by country of birth

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, and in 2008–09 educational resource packages on citizenship were distributed to all schools across Australia.[613] The Department of Immigration and Citizenship reports that between 2006–07 and 2008–09, citizenship conferrals increased by 10%.[614]

610 See Department of Immigration and Citizenship Australia, *Population Flows: Immigration Aspects 2007–08* (2009) ch 5, 81 <http://www.immi.gov.au/media/publications/statistics/popflows2007-08/> at 10 May 2010; and Ministry of Foreign Affairs and Trade New Zealand, 'The Trans-Tasman Travel Arrangement' <http://www.mfat.govt.nz/Foreign-Relations/Australia/0-trans-tasman-travel-arrangement.php> at 1 June 2010.

611 For example, permanent residents are entitled to social security and Medicare benefits: *Social Security Act 1991* (Cth) ss 7 (definition of 'Australian resident'), 94(1)(e), 198(4), 500(1)(b), 568(c), 593(1)(g)(ii); *Health Insurance Act 1973* (Cth) ss 3(1) (definitions of 'eligible person' and 'Australian resident'), 10(1).

612 The statistics are taken from W McLennan, *1997 Year Book Australia*, Australian Bureau of Statistics No 79, Cat No 1301.0, Table 5.33 (Citizenship rates, by country of birth—1991); W McLennan, *1998 Year Book Australia*, Australian Bureau of Statistics No 80, Cat No 1301.0, Table 5.42 (Citizenship rates, by country of birth—1996); D Trewin, *2003 Year Book Australia*, Australian Bureau of Statistics No 85, Cat No 1301.0, Table 5.48 (Citizenship rates, Overseas-born people resident in Australia for two years or more—2001); B Pink, *2008 Year Book Australia*, Australian Bureau of Statistics No 90, Cat No 1301.0, Table 14.40 (Overseas-born people resident in Australia for two years or more—2006).

613 Department of Immigration and Citizenship Australia, *Annual Report 2008–09* (2009) [2.3.2].

614 Ibid 187.

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'[615] and considered that 'the basic qualification for jury service should include non-citizen permanent residents',[616] 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'.[617] There are also likely to be privacy concerns involved with the use of information from alternative databases.

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 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'.[618]

6.27 The Australian position can be contrasted with that in New Zealand. Section 74 of the *Electoral Act 1993* (NZ) provides that 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 and, subject to the other qualifications and exemption, entitled to serve as jurors under the *Juries Act 1981* (NZ).

6.28 In Hong Kong, the relevant jury service qualification requirement is 'residency'.[619] 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 has recently considered this qualification and expressed the view that a minimum residency period of three years should apply:

> 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.[620]

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.[621]

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615 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.7].

616 Ibid [3.11].

617 Ibid.

618 Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [2.12]–[2.13].

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

620 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.15]–[5.17].

621 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*, Consultation Paper (2008) [5.15].

6.30 In Ireland, jurors are drawn from the list of electors for general elections.[622] The Law Reform Commission of Ireland has recently proposed, however, 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 considered this appropriate to increase the diversity and representativeness of juries.[623]

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:

> 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.[624] (note omitted)

LRCWA's proposals

6.32 In its Discussion Paper, the Law Reform Commission of Western Australia considered whether liability for jury service should be extended to non-citizen residents to increase the representation of people from culturally and linguistically diverse backgrounds on juries. However, it was 'not convinced that the basic criterion of citizenship for liability for jury service in Western Australia should be changed'.[625]

6.33 The LRCWA observed that it is questionable whether migrant groups are in fact under-represented in Western Australian juries.

> Records maintained by the Sheriff's Office in Western Australia show that at least 29% of jurors who completed an exit survey following jury duty in Perth were overseas born. This compares favourably to the general Western Australian community, which at the last census recorded 27.1% of overseas-born residents (including non-citizens).[626] (notes omitted).

6.34 The LRCWA also observed that the extent to which people from linguistically diverse backgrounds — whether as overseas-born citizens or non-citizen permanent residents — are represented on juries is likely to be affected by the qualification that jurors understand English; exclusion on this basis is perhaps more likely to apply to non-citizen residents than citizens who have lived in Australia for a longer period.[627] It

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

623 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [2.49]–[2.56].

624 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].

625 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 52.

626 Ibid 50.

627 Ibid 50–1.

also recognised the difficulties identified by the Victorian and New South Wales Law Reform Commissions in obtaining accurate lists of non-citizen permanent residents for the purpose of jury service summonses.[628]

QLRC's provisional views and proposals

6.35 In the Commission's provisional 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.

6.36 While it does not include 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[629] and procedures are adopted to ensure the roll is kept as up to date as possible.

6.37 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.

6.38 Moreover, maintaining electoral enrolment as the threshold for jury service qualification serves to keep juror and voter eligibility in tandem.

6.39 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 is the best approach; increased participation in civic society of non-citizens is not an issue that is unique to jury service.

6.40 In the Commission's view, therefore, a person should continue to be 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.

6.41 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 the subject of discussion in chapters 7 and 8 of this Paper and, in relation to criminal history, the remainder of this chapter.

Proposal

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.

628 Ibid 51.

629 See n 585 above.

CRIMINAL RECORD DISQUALIFICATION

6.42 Disqualification on the basis of a criminal record applies in all jurisdictions, although it is differently expressed in each Australian jurisdiction.

6.43 In general, people convicted of indictable offences or offences punishable by imprisonment, or who have been sentenced to imprisonment (or to particular periods of imprisonment), in any Australian State or Territory are ineligible (or not qualified) for jury service.[630] Similar provisions are found in New Zealand, England and Wales, Ireland, and Scotland.[631]

6.44 In Queensland, section 4(3)(m) and (n) of the *Jury Act 1995* (Qld) provides:

> (3) The following persons are not eligible for jury service—
>
> …
>
> (m) a person who has been convicted of an indictable offence,[632] whether on indictment or in a summary proceeding;
>
> (n) a person who has been sentenced (in the State or elsewhere) to imprisonment. (note added)

6.45 Thus, people who have been convicted of an indictable offence, or who have been sentenced to imprisonment, are permanently ineligible for jury service. There is no provision for them to become eligible again after a certain period has elapsed after being convicted or completing their term of imprisonment. Neither is a minimum sentence length required to trigger ineligibility: any sentence of imprisonment is sufficient to exclude the person from jury service.

6.46 In contrast, in most of the other Australian jurisdictions, absolute disqualification from jury service applies with respect to certain types of convictions or periods of imprisonment only and, for other convictions or periods of imprisonment, most jurisdictions put a time limit on the disqualification.

6.47 Some jurisdictions also disqualify people who are subject to community service, parole, good behaviour or other such orders.[633] In addition, although the wording differs, some jurisdictions disqualify people who are remanded in custody or released

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630 *Jury Act 1995* (Qld) s 4(3)(m), (n); *Juries Act 1967* (ACT) s 10(a); *Jury Act 1977* (NSW) s 6(a), sch 1; *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).

631 *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).

632 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.

633 For example, *Jury Act 1977* (NSW) s 6(a), sch 1 cl 3 disqualifies a person currently bound by a parole order, community service order, apprehended violence order, an order disqualifying the person from driving a motor vehicle, an order committing the person to prison for failure to pay a fine, or a recognizance to be of good behaviour or keep the peace. Also see *Juries Act 1927* (SA) s 12(1)(e); *Juries Act 2003* (Tas) s 6(2), sch 1 cl 2.

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.[634]

6.48 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 corrections order. Nor does it expressly exclude a person who is currently serving a term of imprisonment (although this is implied) or who is currently subject to a community-based or other court order imposed as a result of a criminal charge or conviction.

6.49 The following table summarises the criminal record disqualifications that apply in the other Australian jurisdictions. It also includes a summary of the provisions recently recommended and proposed 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 one year of imprisonment.	—	—	—
NSW	—	Within the last 10 years has served a sentence of imprisonment (other than for failure to pay a fine).	Within the last 3 years has been found guilty of an offence and detained in a detention centre or institution for juvenile offenders.	Is bound by an order pursuant to a criminal charge or conviction including a parole order, community service order, apprehended violence order, driving disqualification order, order committing the person to prison for failure to pay a fine, recognizance to be of good behaviour or keep the peace, or a remand in custody or release on bail pending trial or sentence.

634 See *Jury Act 1977* (NSW) s 6(a), sch 1 cl 3(c); *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 cll 6, 7. Also see *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].

	Permanent disqualification	7 to 10 year disqualification	2 to 5 year disqualification	Disqualification while serving a sentence or subject to an order
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 10 years since completion of the sentence have not passed.	Has served a sentence/s of imprisonment aggregating less than 3 years but more than 6 months and 5 years since completion of the sentence have not passed. Has served a sentence of detention and 3 years since completion of the sentence have not passed.[635] 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 2 years since completion 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 *Mental Health (Criminal Procedure) Act 1990* (NSW), bound by an order pursuant to or consequent upon a criminal charge or conviction[636] including a driving disqualification for a period of 12 months or more.
NT	Sentenced to a term of imprisonment for a capital offence.	Sentenced to imprisonment (other than for a capital offence) and less than 7 years have elapsed 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.	Within the last 10 years has served the whole or part of a term of imprisonment or detention or been on parole or probation.	Within the last five years 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.[637]	—	Convicted of an indictable offence and sentenced to imprisonment for a term not less than 3 months, and 5 years since completion of the sentence have not passed.	Is subject to a community service order, probation order or undertaking to appear; is undergoing a term of imprisonment whether or not wholly or partly suspended; or is remanded in custody.

635 The NSWLRC also recommended that this should not apply if the sentence is later quashed on appeal, converted to a non-custodial sentence, or becomes the subject of a pardon: see [6.99] below.

636 The NSWLRC listed a number of specific orders intended to be covered by this provision: see [6.110] below.

637 *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.

	Permanent disqualification	7 to 10 year disqualification	2 to 5 year disqualification	Disqualification while serving a sentence or subject to an order
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.[638]	Within the last 10 years has been sentenced to imprisonment for 3 months or more (excluding a suspended sentence).[639]	Within the last 5 years 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. Within the last 2 years 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.
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.	—	Within the last 5 years 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.	In the last 10 years has been convicted of an indictable offence and sentenced to imprisonment.	In the last 5 years 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. In the last 3 years has been subject to a community order or a sentence of detention.	Is on bail, subject to imprisonment for unpaid fines, or subject to ongoing court order following conviction for an offence[640] including a driver licence disqualification of 12 months or more.

638 *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.

639 *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.

640 The LRCWA also listed some other specific orders intended to be covered by this provision: see [6.111] below.

	Permanent disqualification	7 to 10 year disqualification	2 to 5 year disqualification	Disqualification while serving a sentence or subject to an order
			In the last 2 years has been convicted of an offence and subject to a youth community-based, intensive supervision or conditional release order.	

Table 6.2: Criminal record disqualifications from jury service in Australia[641]

6.50 The Queensland provision differs from the approach taken under the former *Jury Act 1929* (Qld) which had provided that:

- 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.[642]

6.51 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[643]	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[644]	Has been convicted of treason, sedition or sabotage and has not been pardoned.	Within 7 years of nomination has been convicted of an offence against ss 59 or 60 of the Criminal Code (Qld).[645]	Within 2 years of nomination has been convicted of an offence and sentenced to imprisonment for more than 1 year.[646]	Is subject to a term of imprisonment or detention, periodic or otherwise.[647]

641 See n 630 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*, Discussion Paper (2009) 82–91.

642 See former *Jury Act 1929* (Qld) s 7(1)(b), (2), (3), (4). That Act also disqualified undischarged bankrupts and 'anyone who is of bad fame or repute': s 7(1)(c), (e).

643 *Commonwealth Electoral Act 1918* (Cth) ss 93(8)(b), (c), 93(8AA). See [6.6], [6.7] above.

644 *Parliament of Queensland Act 2001* (Qld) s 64(2); *Constitution of Queensland Act 2001* (Qld) s 21(1)(c).

645 The offences under ss 59 and 60 of the Criminal Code (Qld) deal with bribery of a member of the Legislative Assembly.

	Permanent disqualification	7 to 10 year disqualification	2 to 5 year disqualification	Disqualification while serving a sentence or subject to an order
		Within 10 years has been convicted of a disqualifying electoral offence.[648]		

Table 6.3: Criminal record disqualifications for voting and eligibility for election to Parliament in Queensland

6.52 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.

6.53 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.[649]

The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld)

6.54 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.[650]

646 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).

647 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).

648 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').

649 See, for example, Australian Institute of Judicial Administration (M Findlay et al), *Jury Management in New South Wales* (1994) 5–6. At 30 June 2009, Indigenous prisoners represented 25% 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* (2009) Cat No 4517.0, 8.

650 *Jury Act 1995* (Qld) ss 10(3), 12(1)–(3).

6.55 Section 12 of the *Jury Act 1995* (Qld) provides that the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) does not apply to such inquiries.[651] 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. It provides that a conviction on which the person had either not been ordered to serve any period of custody or had been so ordered but for a period not exceeding 30 months[652] is not to be disclosed and must be disregarded[653] if the rehabilitation period for the conviction has expired and not been revived.[654] This does not apply, however, if the person's criminal history is expressly required to be disclosed or had regard to by law,[655] as is the case under the *Jury Act 1995* (Qld).

6.56 The rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) differs depending on the type of conviction and whether the person was convicted as an adult or as a child:

- For a conviction of an adult upon indictment, the rehabilitation period is the later to expire of 10 years or the period ending on the date an order of the court made in relation to the conviction has been satisfied;
- For a conviction other than on indictment, or of a child, the rehabilitation period is the later to expire of five years or the period ending on the date an order of the court made in relation to the conviction has been satisfied.[656]

6.57 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':[657]

> Obviously, it is not appropriate to provide automatic rehabilitation to people who persistently commit criminal offences, or to those who are guilty of very serious offences. The principles of this scheme will be limited to certain classes of offenders, who will henceforth be able to assert, in most circumstances, that they have not been convicted of a criminal offence. Gone should be the injustice dealt to those in our community who have made retribution for a criminal act committed perhaps at an early age or perhaps once only in a lifetime. Social, as well as most of the legal disabilities associated with criminal convictions, should be overcome.

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651 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.

652 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2).

653 By a person or authority charged with the function of assessing a person's fitness to be admitted to a profession, occupation or calling or for any other purpose: *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9(1).

654 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 6, 9(1). A conviction is revived if the person incurs a subsequent conviction: s 11.

655 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9(1). Also see ss 4, 7.

656 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1) (definition of 'rehabilitation period'). The five or 10 year period commences on the date the conviction is recorded. 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 (Hon DM Wells, Attorney-General).

657 Queensland, *Parliamentary Debates*, Legislative Assembly, 12 March 1986, 4110 (Hon NJ Harper, Minister for Justice and Attorney-General).

> Obviously, a qualifying standard is required, and it is considered that severity of penalty should be the means of determining whether rehabilitation is to apply.
>
> …
>
> Incentive is provided by automatic rehabilitation taking place only if, at the expiration of a specified period, no further convictions have been incurred by the offender.
>
> It is proposed that the scheme should apply to all members of the community, regardless of whether they were adult or juvenile at the time of conviction. However, it is considered that the rehabilitation period for a juvenile should be one-half of the adult period. This is an added incentive to young people.

6.58 Pursuant to 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.

6.59 The Irish jury legislation also contains disqualifications for people who have been sentenced to particular terms of imprisonment.[658] The Law Reform Commission of Ireland has recently proposed that those disqualifications should be consistent with the approach taken to spent convictions:

> 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.[659]

Graduated periods of exclusion

6.60 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. The rationale for disqualification on the basis of a person's criminal record in England and Wales was considered by the Morris Committee in 1965:

> 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.[660]

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

659 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [5.21]. And see Law Reform Commission of Ireland, *Spent Convictions*, Report 84 (2007).

660 *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the 'Morris Report') [134]. Also see, 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].

6.61 It has been noted, however, that:

> 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.[661]

6.62 The Queensland provision renders any person who has ever been convicted of an indictable offence or been sentenced to imprisonment ineligible for jury service. It thus 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.

6.63 Indictable offences — crimes and misdemeanours — are distinguished from, and are generally more serious than, simple and regulatory offences.[662] They cover, however, a 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, indecent treatment of children under 16, torture, kidnapping for ransom, robbery, burglary, sabotage, piracy, arson, incest, murder and manslaughter).[663]

6.64 A person cannot generally be prosecuted or convicted of an indictable offence 'except upon indictment'.[664] However, a number of indictable offences, involving less serious behaviour or attracting smaller penalties, can be dealt with summarily by a magistrate.[665] The range of indictable offences that are capable of being dealt with summarily is also proposed to be expanded to encompass, among other things, all indictable offences in the Criminal Code (Qld) with a maximum penalty of three years or less.[666]

6.65 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.

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661 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).

662 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.

663 Criminal Code (Qld) ss 70, 72, 73, 80, 120, 210, 222, 230, 302, 305, 310, 320A, 354A, 409, 411, 419, 461, 469A.

664 Criminal Code (Qld) s 3(3).

665 Criminal Code (Qld) ss 552A, 552B. These include assaults; offences relating to escape from lawful custody; stealing, fraud or receiving property valued at no more than $5000; offences relating to damage or destruction of property valued at no more than $5000; offences relating to animals, skins or carcasses; unlawful drink spiking; dangerous operation of a vehicle; and unlawful stalking without a circumstance of aggravation.

666 Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld) ss 17, 62 which propose to substitute new ss 552A, 552B and insert new ss 552BA, 552BB in the Criminal Code (Qld) and new s 14 in the *Drugs Misuse Act 1986* (Qld). The Bill was introduced to Parliament on 13 April 2010 but has not yet been debated. Other indictable offences that will be dealt with summarily under the amendments will be certain property offences (other than certain serious property offences such as robbery and arson) where the value of the property involved is less than $30,000 or where the defendant pleads guilty; and possession of dangerous drug offences with a maximum penalty above 15 years, on the prosecution's election, but only if the prosecution does not allege a commercial purpose.

6.66 As noted above, this contrasts with the position in the other Australian jurisdictions and in relation to voters and Members of Parliament.[667]

6.67 In keeping with the principles of non-discrimination, and in recognition of the possibility and opportunity for rehabilitation and reintegration of offenders, it may be desirable to consider restricting the bases on which a person is permanently ineligible and, perhaps, providing other bases of ineligibility that lapse after a certain period of time. The Morris Committee commented that, whilst any such specification 'is certain to be to some extent arbitrary',[668] the question remains:

> Is society justified in branding a person who has been punished, and must be presumed to have expiated his offences, as irresponsible and not to be trusted to carry out one of the duties of citizenship?[669]

6.68 The use of graduated or differentiated categories would also be consistent with the recent recommendations and proposals of the NSW Law Reform Commission and the Law Reform Commission of Western Australia. These are discussed below and are summarised, together with the provisions that currently apply in all Australian jurisdictions, in Table 6.1 above.

NSWLRC's recommendations

6.69 One of the current grounds of disqualification in New South Wales is where a person has served any part of a sentence of imprisonment at any time in the last 10 years.

6.70 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:

> 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.[670]

6.71 In particular, the NSWLRC noted the following concerns arising from the broad scope of the provision:[671]

- 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;

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667 See [6.51] above.

668 *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the 'Morris Report') [141].

669 Ibid [131].

670 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.23].

671 Ibid [3.13].

- 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,[672] 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 hearing[673] 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 her mental health, was found fit to be tried, and then acquitted after a regular trial;[674] 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.[675] (notes in original)

6.72 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:

> 3.19 Two substantially competing principles need to be balanced:
>
> - allowing people who have served their time, undertaken rehabilitation, and become eligible voters once again to become fully functioning members of society; and
>
> - ensuring that juries remain impartial and that the public retains confidence in them.
>
> 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.[676] (notes omitted)

6.73 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.[677] In its view:

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672 *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).

673 Pursuant to *Mental Health (Criminal Procedure) Act 1990* (NSW) s 23.

674 *Mental Health (Criminal Procedure) Act 1990* (NSW) s 30.

675 Pursuant to *Crimes Act 1914* (Cth) s 20BB or s 20BC.

676 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.19].

677 Ibid [3.23], Rec 4. See [6.93] below.

> 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.[678]

LRCWA's proposals

6.74 The Law Reform Commission of Western Australia also noted that the disqualification 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.[679]

> In essence, the scope of any exclusionary category based on criminal history requires a balancing exercise between maintaining public confidence in the jury system (by excluding people who are perceived as lacking impartiality) and recognising the principle of rehabilitation (by ensuring that reformed offenders can participate in ordinary civic duties).[680]

6.75 The LRCWA considered that the need to maintain public confidence in the system 'is the strongest argument' for disqualification.[681]

6.76 It cautioned, however, that it is important to remember that some offenders can reform and resume productive lives. It noted, for example, that the criminal history disqualification on Members of Parliament in Western Australia is limited to convictions on indictment for offences carrying a penalty of more than five years' imprisonment.[682]

6.77 The LRCWA 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'.[683] 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.[684]

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678 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.28].

679 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 83–4.

680 Ibid 82 citing Victorian Parliamentary Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.23].

681 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 84.

682 Ibid 83–4.

683 Ibid 84.

684 Ibid 89.

6.78 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.

6.79 The LRCWA thus preferred a combined approach and one that uses graduated categories:[685]

> The Commission believes that the best way to ensure that the disqualifying provisions operate fairly and maintain public confidence in the jury system is to use a combination of offence-based and sentenced-based classifications. Further, the legislative criteria should continue to distinguish between those convictions that are so serious as to justify permanent disqualification and those which only demand temporary exclusion from jury service. In other words, there should be graduated categories: the most-serious convictions resulting in permanent disqualification, other convictions resulting in disqualification for a specified period, and less-serious convictions resulting in disqualification for a lesser period of time.[686] (note in original)

Who should be permanently ineligible?

6.80 In almost all of the other Australian jurisdictions, and in Queensland, provision is made for certain offenders to be disqualified or ineligible for jury service for life. Queensland's provision, however, is the most far-reaching.

6.81 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.

6.82 One marker of the seriousness of an offence is the offence classification: indictable offences are generally more serious than simple and regulatory offences. The current exclusion applies to convictions for indictable offences, whether on indictment or in a summary proceeding;[687] it also applies where a person has been sentenced to imprisonment, in Queensland or elsewhere, regardless of the classification of the offence.[688]

6.83 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.[689]

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685 Ibid 85.

686 Some Australian jurisdictions adopt a 'sliding differential scale': NSWLRC, Jury Selection, Report 117 (2007) [3.16].

687 *Jury Act 1995* (Qld) s 4(3)(m).

688 *Jury Act 1995* (Qld) s 4(3)(n).

689 *Legislative Standards Act 1992* (Qld) s 4. Also see Queensland Government, *Queensland Legislation Handbook* (2nd ed, 2004) [2.12.4].

6.84 Under the Criminal Code (Qld), the maximum penalties prescribed for indictable offences range from one, two, three, five, seven, ten, 12,[690] 14,[691] 20[692] and 25[693] years' imprisonment to life imprisonment[694] and, for murder, mandatory life imprisonment or imprisonment for an indefinite term.[695] Generally, a summary offence should not attract a penalty greater than two years' imprisonment.[696]

6.85 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 referrable 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.[697] The *Jury Act 1995* (Qld) also contains offences relating specifically to jury service, including impersonation of a juror and publication of jury information.[698]

NSWLRC's recommendations

6.86 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 imprisonment[699] 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:[700]

690 Criminal Code (Qld) ss 408A, 408C.

691 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.

692 Criminal Code (Qld) s 210 (for indecent treatment of a child who is under 12 or who is a lineal descendant of the offender).

693 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.

694 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.

695 Criminal Code (Qld) ss 302, 305.

696 Queensland Government, *Queensland Legislation Handbook* (2nd ed, 2004) [2.12.4]. Summary offences against the laws of the Commonwealth do not attract a period of imprisonment greater than 12 months: *Crimes Act 1914* (Cth) s 4H.

697 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.

698 Breaches and penalties under the Act are discussed in chapter 13 of this Paper.

699 The NSWLRC also made recommendations to clarify what is meant by a 'sentence of imprisonment': see [6.94] below.

700 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.23], and see Rec 4.

- any offence for which life imprisonment is the maximum available penalty;
- any offence constituting a 'terrorist act' punishable under State or Federal law;[701] 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.[702] (notes in original)

LRCWA's proposals

6.87 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 and proposed that a person should be disqualified from jury service if the person:[703]

> 1. Has *at any time* been convicted of an indictable offence (whether summarily or on indictment) and been sentenced to death; strict security life imprisonment; life imprisonment; or imprisonment for a term exceeding 2 years[704] or for an indeterminate period.[705] (notes and emphasis in original)

6.88 The LRCWA sought submissions, however, on whether the current cut-off of two years' imprisonment should be extended, for example, to three years.[706]

Who should be ineligible for a limited period?

6.89 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

6.90 People who are serving sentences of imprisonment of three years or more are removed from the electoral roll and will therefore be omitted from the initial pool of potential jurors. People who are serving lesser sentences will remain on the electoral roll and thus potentially in the pool for jury service. However, the provision that excludes a person who has at any time been sentenced to imprisonment will have the effect of rendering them ineligible to serve. In any event, a person who is in custody will be unable to attend court for jury service.

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701 See *Criminal Code* (Cth) Part 5.3.

702 *Crimes Act 1900* (NSW) Part 7.

703 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 90, Proposal 36.

704 The Commission [LRCWA] has invited submissions as to whether this period should be extended: see Invitation to Submit G [in the LRCWA's Discussion Paper].

705 Unless he or she has received a free pardon; the conviction and/or sentence has been overturned on appeal; or the conviction is a spent conviction within the meaning of the *Spent Convictions Act 1988* (WA).

706 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 85–6, Invitation to Submit G.

6.91 The question also 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 corrections or supervision orders and suspended sentences of imprisonment; some offenders may be released from imprisonment on parole; and some may be held in detention under a continuing detention or supervision order even though their sentence of imprisonment has ended.[707]

NSWLRC's recommendations

6.92 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.[708]

6.93 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',[709] 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:

> 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.[710]

6.94 The NSWLRC also considered that the legislation should clarify what is meant by a 'sentence of imprisonment' and recommended the following:

> 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.[711]

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707 See *Penalties and Sentences Act 1992* (Qld); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Youth Justice Act 1992* (Qld).

708 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.9]–[3.11], Rec 3.

709 *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].

710 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.23], Rec 4.

711 Ibid.

6.95 The NSWLRC also considered the position of people who are subject to 'limiting terms' under the *Mental Health (Criminal Procedure) Act 1990* (NSW). 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.[712]

LRCWA's proposals

6.96 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 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:[713]

> For example, a person could have been fined for fraud in the District Court and be qualified for jury service the following day, while a person who was sentenced to a Community Based Order for disorderly conduct four years ago is disqualified from serving as a juror. Further, an adult offender convicted and sentenced in 2002 for sexual assault would qualify for jury service, while a young offender sentenced to a Youth Community Based Order in 2005 for stealing would be disqualified.[714]

6.97 With respect to adult offenders, the LRCWA proposed a more differentiated sliding scale of disqualifications arising from criminal convictions or sentences of imprisonment. It proposed that a person should be disqualified from jury service if he or she:

> 2. Has in the *past 10 years* been convicted of an indictable offence (dealt with either summarily or on indictment) and been the subject of a sentence of imprisonment (including an early release order such as parole, suspended imprisonment or conditional suspended imprisonment).[715]
>
> 3. Has in the *past 5 years*:
>
> (a) been convicted of an offence on indictment (ie, by a superior court);
>
> (b) been the subject of a sentence of imprisonment (including parole or another early release order, suspended imprisonment or conditional suspended imprisonment); or
>
> …
>
> 4. Has in the *past 3 years*:
>
> (a) been subject to a community order under the *Sentencing Act 1995* (WA); or

712 Ibid [3.25], Rec 5.

713 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 86.

714 Ibid 87. Also see ibid 91, Table B.

715 Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

…[716]

Juvenile offenders

6.98 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. The Law Reform Commission of Western Australia has recently proposed 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.[717] A shorter period of exclusion for juvenile offenders would also be consistent with the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

NSWLRC's recommendations

6.99 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:

> 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.[718]

6.100 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:

> 3.32 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.[719]
>
> …
>
> 3.36 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

716 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 90, Proposal 36.

717 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [5.29].

718 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.39]–[3.39], Rec 6.

719 Information supplied [to the NSWLRC] by Jennifer Mason, Director General, Department of Juvenile Justice, 1 May 2007.

> rights, is important. However, the rate of recidivism for young offenders is high. A study of 5,476 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.[720]
>
> 3.37 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.[721] 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.
>
> 3.38 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.[722] (notes in original)

LRCWA's proposals

6.101 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.[723] In relation to juvenile offenders, the LRCWA proposed that a person should be disqualified if he or she:

> 3. Has in the *past 5 years*:
>
> …
>
> (c) been subject to a sentence of detention (including a supervised release order) of 12 months or more in a juvenile detention centre.[724]
>
> 4. Has in the *past 3 years*:
>
> …
>
> (b) been subject to a sentence of detention (including a supervised release order).

720 S Chen, T Matrugliou, 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.

721 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).

722 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.36]–[3.38].

723 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 87 citing New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.36].

724 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).[725] (note in original)

People who are subject to a criminal court order

6.102 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.[726] Persons charged with an offence may also be subject to orders in relation to bail.[727]

6.103 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:

> 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.[728]

6.104 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.[729]

NSWLRC's recommendations

6.105 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.[730]

6.106 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

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725 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 90, Proposal 36.

726 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).

727 See *Bail Act 1980* (Qld).

728 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].

729 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [5.50].

730 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.43].

detached consideration to the question of guilt of others'.[731] 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.[732]

6.107 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.[733]

6.108 The NSWLRC thought 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:

> 3.59 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 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.[734] (notes omitted)

6.109 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.[735]

6.110 The NSWLRC therefore made the following recommendations:

> A person should be excluded from jury service when he or she is currently bound by an order made in NSW or elsewhere pursuant to or consequent upon a criminal charge or conviction not including an order for compensation.
>
> All currently available orders that meet this description in NSW should be identified in a non-exhaustive statutory list.
>
> The non-exhaustive list should include express reference to:
>
> - an apprehended violence order under *Crimes Act 1900* (NSW) s 562ZU;
> - a disqualification from driving a motor vehicle, but only where the disqualification is for 12 months or more;

731 Ibid [3.66].

732 Ibid [3.69].

733 Ibid [3.52].

734 Ibid [3.59].

735 Ibid [3.44]–[3.46], [3.72].

- an order committing a person to prison for failure to pay a fine, but only so as to disqualify that person during the currency of the imprisonment;
- a remand in custody pending trial or sentence;
- a release pending trial or sentence, including a release under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11, whether on bail or not;
- a bond under s 9 or s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW);
- a parole order;
- a community service order;
- an extended supervision order;
- an order under anti-terrorism legislation;
- a probation order;
- a child protection order;
- a child protection registration requirement;
- a non-association or place restriction order; and
- a requirement to participate in pre-trial diversionary programs, intervention programs, circle sentencing or other forms of conferencing.[736]

LRCWA's proposals

6.111 The Law Reform Commission of Western Australia proposed that a person should be disqualified from jury service if the person:

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;[737] 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);

736 Ibid [3.72], Rec 7.

737 The Commission [LRCWA] notes that a person serving imprisonment for unpaid fines would not be practicably able to serve as a juror in any event.

> (iii) a Good Behaviour Bond or a Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA); or
>
> (iv) a drivers licence disqualification for a period of 12 months or more.[738] (note in original)

6.112 The LRCWA noted that, while unconvicted accused who are on bail or remanded in custody are presumed innocent until proven guilty, the immediacy of their association with the criminal justice process, and the need to maintain public confidence in the jury system, warrants their exclusion:

> This approach does not mean that an unconvicted accused is presumed guilty but rather recognises that people charged with criminal offences may be perceived to be biased against the police or the prosecution (irrespective of their guilt or innocence).[739] (note omitted)

6.113 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.[740]

6.114 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.[741]

QLRC's provisional views and proposals

6.115 The Commission considers that the need for juries to be, and be seen to be, impartial and to maintain public confidence in the jury system is such that it is necessary for people who have engaged in particular criminal conduct or who have otherwise had particular contact with the criminal justice system to be excluded from jury service.

6.116 It is the Commission's provisional view, however, that 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 made ineligible with reference to criminal history should not be unduly broad and 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.

6.117 The Commission's provisional view is that people who have been convicted of an indictable offence, or sentenced to imprisonment, should be excluded permanently, as is presently the case, but that what this means should be clarified and narrowed.

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738 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 90, Proposal 36.

739 Ibid 87.

740 Ibid 88, Proposal 33 and 34.

741 Ibid 89, Proposal 35.

6.118 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. This includes, for example, offences for assault and stealing.[742] At present, the disqualification in the *Jury Act 1995* (Qld) applies to convictions for indictable offences 'whether on indictment or in a summary proceeding'. The Commission proposes that this be amended to apply only to convictions made on indictment, excluding those convictions made in a summary proceeding which involve relatively minor criminal behaviour.

6.119 In addition, 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 proposes that this be altered so that if the person has been convicted of an offence and sentenced to imprisonment but the rehabilitation period under that legislation has expired, neither the conviction, nor the sentence of imprisonment flowing from it,[743] can be taken into account to render the person ineligible for jury service. This is especially important to recognise 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 equally important for adults who have offended once but subsequently rehabilitated. The Commission notes that the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) applies only to a particular class of convictions.

6.120 Finally, the Commission's provisional view is that a person who is currently on parole or on bail awaiting trial or sentence, or who is currently subject to a non-custodial sentence such as a suspended sentence of imprisonment or a community service order should be ineligible to serve for the period of the order. This should apply in addition to a person who is currently serving a sentence of imprisonment.

Proposals

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.

742 See [6.64] above.

743 Except to the extent that the person is currently serving a sentence of imprisonment.

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.**

Question

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)?**

Chapter 7

Ineligibility or Exemption: Occupational Categories

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:

- 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.[744]

7.2 In light of the principles set out in chapter 5 and, in particular, the objectives of increasing the pool of prospective jurors and thus the representativeness of juries, and spreading the burden of jury service fairly among the community, there may be some categories of ineligibility that ought to be removed, or some categories that should be narrowed. It might even be fair to say that, given the sweeping changes made in England and Wales, clear and compelling reasons — whether of principle or pragmatics — should be shown why any of the existing categories of automatic exclusion ought to be maintained.

7.3 This chapter considers ineligibility on the basis of occupation or profession. Exemptions on the basis of age, competence and religious or personal beliefs are considered in chapter 8.

CURRENT OCCUPATIONAL EXEMPTIONS

7.4 The legislation in Queensland does not confer a right to 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;
>
> (c) a local government mayor or other councillor;

744 See the Terms of Reference set out in Appendix A to this Paper.

(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);

(h) a detention centre employee;

(i) a corrective services officer;

…

7.5 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. Both are premised on the principles of independence and impartiality. As the Terms of Reference for this review note, it is essential that juries are 'composed in a way that avoids bias or the apprehension of bias'.

SHOULD THERE BE ANY OCCUPATIONAL BASIS FOR EXEMPTION?

7.6 In its 1980 working paper on juries in criminal trials, the Law Reform Commission of Canada noted three basic grounds for the exclusion of certain groups of people from jury service:

> First, certain persons should be excluded by reason of their position, and the knowledge gained therefrom, because they might be able to exert undue influence on other jurors (lawyers and judges). Second, certain persons should be excluded because they would appear, to the public at least, to have an occupational bias towards guilt or innocence (law enforcement personnel). Third, certain persons should be excluded because they perform vital services in society and it would be wasteful to have their time taken up sitting on a jury. The first two grounds for disqualifying person from serving on the jury are valid and are reflected in the enumeration of persons who are disqualified. With respect to the third ground, however, it is doubted whether any person, other than legislators and Cabinet Ministers, occupies such a strategic position in society that he or she should be automatically exempt from assuming the responsibilities of jury service. Therefore this ground has not been used as a justification for disqualifying persons from serving on the jury. To the extent that it is a hardship for some people to serve on the jury or to the extent that some people have an important and immediate public function to perform, they will be able to apply for an exemption …[745]

7.7 The elevated position accorded to people who 'perform vital services in society' should not, perhaps, be accepted without examination. Whatever the importance in society of people in particular professions or occupations, there are no doubt many others whose role is no less critical. Legislators, for example, might properly be excluded but on the basis of concerns about independence and their constitutional position rather than because of the importance or demands of their role.

745 Law Reform Commission of Canada, *The Jury in Criminal Trials*, Working Paper 27 (1980) 42–3.

7.8 As was discussed in chapter 5, the position in England and Wales following the Report and recommendations of Lord Justice Auld is that there is no longer any automatic exemption or entitlement to exemption from jury service based on occupation.

7.9 The English approach of total occupational eligibility has been rejected, however, by the Scottish Government[746] and the Law Reform Commission of Ireland.[747] It has also been rejected, most recently in Australia, by the Law Reform Commission of Western Australia. It agreed, instead, with the conclusion reached by the New South Wales Law Reform Commission in its 2007 Report on jury selection that:[748]

> occupational ineligibility be confined to officers or employees who 'have an integral and substantially current connection' with:
>
> - 'the administration of justice, most particularly criminal justice'; or
> - 'the formulation of policy affecting [the administration of justice] and to those who perform special or personal duties to the state'.[749] (note in original)

7.10 In the LRCWA's view, total occupational eligibility is neither justified in principle, nor required, in Western Australia. Protection of the independence, impartiality and lay composition of the jury, and thus of public confidence in the jury system, requires that justice-related occupations continue to be excluded from jury service.[750]

> The failure of the Auld review (and the subsequent Criminal Justice White Paper) to properly appreciate the importance of the rationales underlying justice-related occupational exclusions has left the jury system in England vulnerable to criticism that it is not properly independent or impartial. A number of appeals have been advanced on the basis of apparent bias in cases where police officers and prosecutors have served on juries and several have succeeded. Practical difficulties have also emerged, with some barristers called for jury service being continuously rejected because they know the judge or barristers in the case. …
>
> It is the Commission's strongly held view that, even without the attendant practical difficulties, the underlying rationale of juror independence from the justice system and the status of the jury as an impartial lay tribunal preclude adoption of the English approach in this jurisdiction. …
>
> In addition, the Commission considers that the English approach is not *required* in Western Australia. The primary reason advanced by Parliament for the English amendments was that potential jurors were being excused at such a rate that juries were considered to be 'dominated by housewives and the unemployed' and no longer representative of the community. Although a similar criticism has been made of Western Australian juries in the popular press, an analysis of data maintained by the Sheriff's Office reveals that this criticism cannot be sustained. Of the 1,985 people who responded to the juror survey in 2008–2009 only 2% were Centrelink recipients and only 3% listed their employment status as 'home duties'. A further 25% of respondents were employed in the public sector with 3% self-funded

746 Scottish Government Criminal Justice Directorate, *The Modern Scottish Jury in Criminal Trials: Next Steps*, Report (2009) [6]. See the discussion of that report in chapter 5 above.

747 See Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.28], [3.29]–[3.99].

748 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 60.

749 NSWLRC, *Jury Selection*, Report 117 (2007) 62.

750 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 60, 62.

> retirees and 2% students. The majority (57%) of respondents were employed in the private sector representing an extremely diverse occupational cross-section of the community including professionals, managers, supervisors and administrators, tradespersons, technicians, salespeople and apprentices.[751] (notes omitted)

7.11 As the comments from judges and others involved professionally in jury trials indicate, there is a significant body of opinion that, although the overall pool for 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.[752]

7.12 The most commonly cited reason for excluding lawyers and judges from juries is the risk that they would unduly influence jury deliberations. Police officers are excluded on the basis that they may be biased or prejudiced to a greater extent than other jurors. Similar concerns are likely to arise with respect to others who work in the criminal justice system as a result of the insights and views they have developed in their professional capacities: court officers and staff such as the Sheriff, bailiffs, court reporters and judges' associates; legal staff of the Director of Public Prosecutions; and corrective services and detention centre officers and employees. Certainly, in a number of jurisdictions they are exempted from jury service.

7.13 Aside from these more concrete concerns, there is a more general argument of principle. When the state accuses a citizen of a crime, the question of his or her guilt is to be determined by an impartial arbiter, independent of the interested parties. That independent adjudicator is the jury, a body of citizens, representative of the community at large, independent of the state and of the rest of the machinery of the criminal justice system. The participation on juries of people employed in administering the criminal justice system — and, by extension, those involved in penal administration — would thus arguably undermine the perceived fairness of the system as a whole.

7.14 Prior to Lord Justice Auld's Report, the Departmental Committee chaired by Lord Morris concluded that:

> 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.[753]

7.15 It may also be argued that people who work in the administration of the criminal justice and penal systems should be exempt from the additional obligation of jury service as they already contribute — in a professional and thus ongoing capacity — to the maintenance of this aspect of civil society.

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751 Ibid 62–3.

752 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) 77; New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.2]–[4.3]. 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.

753 *Report of the Departmental Committee on Jury Service*, Cmnd 2627, HMSO (1965) [103].

QLRC's provisional views and proposals

7.16 The Commission is inclined to agree 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. Mere inconvenience or importance of profession is an inappropriate basis for exclusion. 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 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.

7.17 The Commission has sought in this chapter to evaluate the existing categories of occupational ineligibility, and to identify and assess other particular occupational categories, with direct reference to these two general principles. Specific proposals in relation to the ineligibility of the Governor, Members of Parliament, local government councillors, judges and magistrates; and lawyers, legal and other public sector officers and staff, and police officers are made below.

Proposal

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.

OPTING OUT OF JURY SERVICE?

7.18 In a number of jurisdictions, certain categories of people are entitled to exemption from jury service if they claim it (sometimes also called 'excusal as of right'). This applies, variously, for example, to practising doctors and pharmacists, full-time

emergency service personnel, and religious officials.[754] While they remain eligible to serve, those persons are effectively permitted to opt out of jury service.

7.19 With one exception, no similar provision making jury service voluntary is made in Queensland. The exception applies to people who are 70 years of age or older. They are ineligible unless they elect to remain eligible. This is a system of 'opting in' and appears to be unique in Australia. In most of the other jurisdictions, persons over a certain age remain eligible but are entitled to claim exemption or excusal as of right.[755] The Commission has proposed the adoption of a similar position in chapter 8 of this Paper.[756]

7.20 Whether an entitlement to opt out of jury service should be extended to any other groups remains to be considered. No doubt some professional groups might consider an exemption would be to their, and the community's, benefit. However, given the need to ensure a fair sharing of the burden of jury service, it may be difficult to justify such an entitlement when any real hardships can be dealt with by way of discretionary excusal or deferral.

7.21 Following the recommendations of Lord Justice Auld, the former right to claim exemption in England and Wales has been removed. Lord Justice Auld drew on the following comments made by the Morris Committee some four decades ago:

> 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.[757]

7.22 The Law Reform Commission of Western Australia also considered that there should no longer be any categories of excusal as of right. As it explained, the underlying justification for those categories is the same as for excusal for cause, namely, that jury service would be unduly onerous or inconvenient. The assumption underpinning excusal as of right, however, is that 'membership of the category alone is sufficient to establish undue hardship or substantial inconvenience', even though this is not necessarily always the case.[758] The LRCWA noted that excusal as of right 'potentially

754 See *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 7, sch 3; *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.

755 See chapter 8 below. Like Queensland, however, South Australia, Western Australia and England and Wales continue to impose an upper age limit (of 70 years) on eligibility for jury service.

756 See [8.42] and Proposal 8-2 below.

757 *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the 'Morris Report') [147]. And see the Right Honourable Lord Justice Auld, *Review of Criminal Courts in England and Wales*, Report (2001) [37], set out in chapter 5 above.

758 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 108, 113, Proposal 45.

undermines the representative nature of juries' and 'means that the burden of jury service is not being shared equitably'.[759]

7.23 The NSW Law Reform Commission also recommended that there should no longer be any entitlement to claim exemption or excusal as of right on the basis of occupation, profession or calling. Instead, those persons should have to apply for discretionary excusal for good cause on a case-by-case basis.[760] A similar approach has been proposed by the Law Reform Commission of Ireland.[761]

QLRC's provisional views and proposals

7.24 The Commission is attracted to the view that there is no need or justification in Queensland to create any separate categories of occupational exclusion that would confer an automatic right to exemption or excusal if claimed (as distinguished from certain categories of people who are ineligible for jury service). It would be unfair to confer a right on people in some occupations to effectively decide for themselves whether or not to perform jury service. It would be inconsistent with the interests of enhancing jury representativeness and ensuring a fair sharing of the burden of jury service, and of treating jury service as the important civic duty that it is. It also bears the stigma of privilege, which leads to public cynicism about the perceived ability of the well-positioned to avoid a duty that ordinary people are forced to bear. Claims for excusal grounded on inconvenience or hardship should be dealt with as a matter of discretionary excusal in the individual circumstances.

7.25 The Commission has made a similar provisional proposal in chapter 8 below in relation to automatic exemption on the basis of personal circumstances.

Proposal

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.

PERMANENT OR TEMPORARY INELIGIBILITY?

7.26 There is no clear consensus across Australia as to which categories of people should be completely barred from jury service or for what period of time. It is necessary to consider whether occupational exclusion should be permanent or should apply only while the person holds a particular position or office, and (in appropriate cases) whether the right and obligation to serve should be restored after a lapse of time.

759 Ibid 112.

760 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 6, Rec 26.

761 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.107]–[3.116].

7.27 The Law Reform Commission of Western Australia considered the period for which occupational ineligibility should apply in its Discussion Paper.[762] In its view, the 'primary underlying rationale' for occupational ineligibility 'that jurors be, and be seen to be, independent of government and of the administration of justice' provides no ground for permanent ineligibility. It noted that only three Australian jurisdictions (Queensland, Western Australia and New South Wales) make provision for permanent ineligibility and that permanent ineligibility was not recommended by the NSW Law Reform Commission in its 2007 Report on jury selection. It therefore proposed that 'no occupation or office should render a person permanently ineligible for jury service'.[763]

7.28 The LRCWA did consider, however, that the ineligibility of some occupations should continue for a period of five years after the person's employment in the occupation has ended. In its view, this extra period of ineligibility is necessary to 'preserve public confidence in the impartiality of the criminal justice system' and the independence of the jury. The LRCWA proposed that this should apply with respect to:[764]

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

7.29 The NSW Law Reform Commission also rejected the notion of permanent occupational ineligibility. It recommended that for most categories of occupational ineligibility, the disqualification from jury service should apply only during the currency of the person's employment or office. However, for some occupational categories — including judicial officers, police officers, Crown Prosecutors, Public Defenders, Director and Deputy Directors of Public Prosecutions and Solicitors for Public Prosecutions — it

762 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 60–1.

763 Ibid 60–1, Proposal 12.

764 Ibid 61, App A, Proposals 13 to 16, 22, 24, 26 to 29.

recommended that ineligibility should be extended beyond that period, but only for three years, and not five as the LRCWA has more recently proposed.[765]

7.30 In a preliminary consultation with the Commission, a member of the Queensland Law Society's Criminal Law Section commented that retired judges, lawyers, and police officers may remain influential in the jury room, so that permanent exclusion may be appropriate.[766]

QLRC's provisional views and proposals

7.31 The Commission is tentatively of the view that no category of occupational ineligibility should be permanent. In most cases, the ineligibility should apply only while the person holds the relevant office or is relevantly employed.

7.32 In some cases, however, it may be thought necessary to extend the period of ineligibility for a period after the person has left office to ensure sufficient distance between the person and his or her former profession. This will depend on the reason for the person's initial exclusion. If the exclusion is made on a constitutional basis alone, the need for exclusion would come to an end when the person ceases to hold the position. If, on the other hand, the exclusion is based on concerns arising from the person's professional experience or connection with the criminal justice system, the appearance of justice may require a limited continuation of the ineligibility after the person has left the position. The Commission has thus asked, later in this chapter, whether some particular categories of ineligibility should extend for a period of, for instance, three years after the person leaves office.

Proposal

7-3 No occupation, office or profession should render a person permanently ineligible for jury service.

THE GOVERNOR

7.33 The Governor is ineligible for jury service in Queensland.[767] This exemption applies only while the office of Governor is held and does not extend to former Governors.

7.34 The holders (and in some cases, former holders) of vice-regal office are also excluded from jury service in the other Australian jurisdictions and in New Zealand.[768] Those exclusions, or rights to claim exemption, are extended in some jurisdictions to:

765 See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 4.

766 Queensland Law Society, Criminal Law Section, Submissions 26, 26A.

767 *Jury Act 1995* (Qld) s 4(3)(a). 'Governor' is not defined in that Act, but under the *Acts Interpretation Act 1954* (Qld) does not include the Deputy Governor or Acting Governor: *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'Governor', para (a)).

768 *Jury Exemption Act 1965* (Cth) s 4(1), sch; *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6(b), sch 2; *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).

- the Lieutenant Governor;[769]
- the official secretary to the Governor-General or Administrator;[770]
- household officers and members of staff of the Governor-General;[771] and
- spouses or domestic partners of the Governor and Lieutenant Governor.[772]

7.35 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 exempt from jury service in Queensland.

7.36 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.[773]

7.37 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.[774] The person to whom the Governor's powers may be delegated as Deputy Governor, or who must govern the state as Acting Governor, is:

> (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.[775]

769 *Juries Act 1927* (SA) s 13(c), sch 3.

770 *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.

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

772 *Juries Act 1927* (SA) s 13(c), sch 3.

773 See *Constitution Act 1867* (Qld) ss 11A, 11B; *Constitution of Queensland 2001* (Qld) ss 27–39. And see generally Queensland Department of Premier and Cabinet, *Executive Council Handbook*, 'The Governor' [1.1]–[1.3] <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/exec-council-handbook/governor.aspx> at 11 May 2010.

774 *Constitution of Queensland 2001* (Qld) ss 40, 41.

775 *Constitution of Queensland 2001* (Qld) ss 40(2), 41(3).

7.38 Queensland has not had an appointed Lieutenant-Governor for over 50 years,[776] so the Deputy Governor or Acting Governor will be either the Chief Justice or the next most senior judge of the Supreme Court.

7.39 The NSW Law Reform Commission recommended, in its recent report on jury selection, that the Governor, and any person acting as the Governor, should be excluded from jury service 'because the holder of that office represents the Crown, in whose name prosecutions are conducted'.[777] It also recommended that members and officers of the Executive Council should be excluded from jury service because of their direct involvement in the promotion and passage of legislation and the enforcement and administration of laws.[778]

QLRC's provisional views and proposals

7.40 The Governor should continue to be ineligible for jury service in Queensland during the currency of his or her appointment.

7.41 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',[779] and it is therefore unnecessary at this time to make separate provision for the ineligibility of the Deputy Governor or Acting Governor.

7.42 Ineligibility should not, however, be extended to cover the Governor's household or other staff.

7.43 Members of the Executive Council should also be ineligible as they are Members of Parliament; they are discussed below.

Proposals

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.

776 See Queensland Department of Premier and Cabinet, *Executive Council Handbook*, 'Absence of Governor' [3.3] <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/exec-council-handbook/meetings/absence.aspx> at 11 May 2010.

777 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.6], Rec 9.

778 Ibid [4.15]–[4.16], Rec 11.

779 See [7.68] below.

MEMBERS OF PARLIAMENT

7.44 Members of Parliament are excluded from jury service in all Australian jurisdictions, including Queensland, and in New Zealand.[780] In Queensland, the ineligibility of parliamentarians applies only while the person holds office and does not extend to former Members of Parliament. The *Jury Act 1995* (Qld) defines 'member of parliament' to mean:

> (a) a member of the Legislative Assembly; or
>
> (b) a member of the Commonwealth Parliament.[781]

7.45 Queensland has only one house of parliament — the Legislative Assembly — from whose members the Speaker, members of Parliamentary Committees, Parliamentary Secretaries, and Ministers are exclusively drawn. The Ministers comprise the Cabinet, the 'principal decision-making body of the government'.[782] The Ministers also collectively form the Executive Council which advises and is presided over by the Governor.[783]

7.46 The 'parliamentary service' in Queensland, which is responsible for providing administrative and support services to the members of the Legislative Assembly, comprises:

> (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.[784]

780 *Jury Act 1995* (Qld) s 4(3)(b); *Jury Exemption Act 1965* (Cth) s 4(1), sch; *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6(b), sch 2; *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). Also see *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).

781 *Jury Act 1995* (Qld) s 3, sch 3 Dictionary.

782 Queensland Department of Premier and Cabinet, *Cabinet Handbook*, 'The cabinet and collective responsibility' [1.2] <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/cabinet-handbook/process/collective-resp.aspx> at 11 May 2010.

783 See *Constitution Act 1867* (Qld); *Constitution of Queensland 2001* (Qld); *Parliament of Queensland Act 2001* (Qld). And see generally Queensland Department of Premier and Cabinet, *Cabinet Handbook; Executive Council Handbook*; *Parliamentary Procedures Handbook* <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks.aspx> at 11 May 2010.

784 *Parliamentary Service Act 1988* (Qld) s 23. And see ss 18, 24. And see generally Queensland Parliament, Parliament Overview, 'Elected Officers' <http://www.parliament.qld.gov.au/view/education/overview.asp?SubArea=structure_officers> at 11 May 2010.

7.47 These officers and employees are currently eligible for jury service, although officers of Parliament used to be exempt under section 8(1)(p) of the former *Jury Act 1929* (Qld).

7.48 In some jurisdictions, exemption is extended to parliamentary officers and employees such as:

- Parliamentary office holders, typically including the clerks of the chambers, deputy clerks, sergeants-at-arms and committee secretaries.[785]
- Advisers and private secretaries of parliamentary members or ministers.[786]

7.49 One rationale for the automatic exemption of parliamentarians may be that they perform important public duties with the consequence, firstly, that their absence from those duties would be detrimental to their constituencies and, secondly, perhaps, that they ought to be exempted from the additional civic duty of jury service given their ongoing public service in other areas.

7.50 Certainly, parliamentarians perform important public functions. It may be more difficult to assert, however, that those duties are any more pressing or urgent than, say, those of an emergency service worker, a health professional, or small business operator. There would seem no obvious reason why the concerns of public inconvenience or personal hardship could not be met by discretionary excusal or deferral.

7.51 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:

> As to the main two categories of persons excusable as of right, I consider that 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. As the Morris Committee acknowledged, 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. Invidious choices of that sort can be avoided, and the jury strengthened, by replacing excusal of right in such cases with discretionary excusal or deferral.[787] (note omitted)

7.52 The ancient common law parliamentary privilege that prevents Members from being compelled to withdraw from parliament to attend at court has been identified as a basis for claiming exemption or excusal from jury service, but this is perhaps insufficient to warrant the complete ineligibility of parliamentarians.[788] In any event, if the exemption from jury service for Members of Parliament is to be preserved, the basis on which this is done should be clearly identified rather than left, even partly, in the shadows of ancient tradition, which may or may not warrant continued observance in the 21st century.

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785 *Jury Exemption Regulations 1987* (Cth) reg 7(2)(f), (g), (k); *Juries Act 1967* (ACT) s 11(1) sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6(b), sch 2; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1. Also see *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II under which such persons are excusable as of right.

786 *Juries Act 1967* (ACT) s 11(1) sch 2 pt 2.1; *Jury Exemption Regulations 1987* (Cth) reg 7(2)(c).

787 The Right Honourable Lord Justice Auld, *Review of Criminal Courts in England and Wales*, Report (2001) [37].

788 See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.17]–[4.20].

7.53 Importantly, however, there is a constitutional argument for excluding sitting parliamentarians from jury service given the need to safeguard the independence of the jury.[789] Parliamentarians constitute the legislative and political arm of government. Their involvement in debating and passing laws should preclude them from sitting in judgment, as jurors, of people accused of breaking those laws.

NSWLRC's recommendations

7.54 In its Report on jury selection, the NSW Law Reform Commission recommended that Ministers of the Crown, as members of the Executive Council, should continue to be ineligible for jury service:

> Reasons for this position include:
>
> - 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.[790]

7.55 It expressed the view, however, that 'the case for the continued ineligibility of Members of Parliament' is 'not as strong as that for Ministers of the Crown (as members of the Executive Council)'.[791]

> Barring any other grounds for ineligibility, or any right to be excused, they can always apply to be excused for cause, particularly if the trial is itself a high profile trial.[792] In individual cases where a Member of Parliament has made public pronouncements in relation to the criminal law, or in relation to a course of criminal activity, which may give rise to an apprehension of bias he or she could be stood aside, excused for cause or even challenged for cause.[793] (note in original)

7.56 The NSWLRC considered that the ineligibility of Members of Parliament should, therefore, be repealed, except in relation to Ministers of the Crown. It did not, however, recommend this change. Instead, it proposed that the matter be left to Parliament's consideration:

> Our preferred position is to recommend the repeal of the ineligibility that currently applies to Members of Parliament, although preserving it for those members who are Ministers of the Crown. However, we recognise that in so doing, the common law immunity from jury service that attaches to Members of Parliament may remain. The preservation of this immunity, and its extent, is more properly one for Parliament itself to determine. Accordingly we recommend that Parliament should give consideration to the question of the preservation of the statutory ineligibility and common law immunity of its members in relation to jury service and the extent of that immunity.[794]

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789 See [7.16] and Proposal 7-1 above.

790 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.15].

791 Ibid [4.30].

792 See also the 'high public profile' excuse, Recommendation 33(l), Chapter 7 [of the NSWLRC's Report].

793 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.30].

794 Ibid [4.31], Rec 12.

7.57 The NSWLRC also recommended that parliamentary officers and other staff should be made eligible for jury service:

> We do not see sufficient reason for the continuation of this category of ineligibility. It includes staff members whose position is not dissimilar from that of the personal staff of ministers or of public servants, who are currently eligible to serve, as well as those whose responsibilities have nothing to do with the development of policy or legislation. It will still be possible for people within this category to seek to be excused when parliamentary duties necessitate their personal attendance, for example, during sittings.[795] (note omitted)

LRCWA's proposals

7.58 In contrast, the Law Reform Commission of Western Australia proposed that members of the Legislative Assembly or Legislative Council should remain ineligible for jury service during the term of their office and for a period of five years after leaving office.[796] It considered the exclusion appropriate 'to preserve public confidence in the independence and impartiality of the criminal justice system':

> In this regard the Commission's view remains unchanged from its 1980 report on this matter where it said:
>
> > The Commission considers it inappropriate that a person who is involved in the making of laws should be able to serve on a jury which may be called upon to decide whether there has been a breach of any such law.[797] (note omitted)

7.59 The LRCWA considered the additional five year period of ineligibility 'prudent, in the interests of preserving public confidence' given that 'political influence may exist (or be seen to exist) beyond a member's term of office'.[798]

7.60 In relation to parliamentary officers, however, the LRCWA expressed concern that their exclusion may cast the net too wide and that the exigencies that may affect parliamentary officers who are called for jury service could be adequately met by deferral of jury service. It therefore proposed that such people should be made eligible for jury service.[799]

QLRC's provisional views and proposals

7.61 Members of Parliament should continue to be ineligible for jury service in Queensland while they hold office.

7.62 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. Their ineligibility is consistent

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795 Ibid [4.34], Rec 13.

796 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 73, Proposal 24.

797 Ibid 73 citing Law Reform Commission of Western Australia, *Report on Exemption from Jury Service*, Project No 71 (1980) 17.

798 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 73.

799 Ibid 73, Proposal 25.

with the Commission's proposal, at the start of this chapter, 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.[800]

7.63 The ineligibility should not be extended to cover officers and employees of the parliamentary service.

Proposal

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.

DIRECTORS-GENERAL OF GOVERNMENT DEPARTMENTS

7.64 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.[801]

7.65 At present in Queensland, such persons are eligible for jury service, although chief executives of government departments used to be exempt under section 8(1)(i) of the former *Jury Act 1929* (Qld). Chief executives of government departments are also excluded from jury service in the ACT as are senior public servants of the Commonwealth.[802]

7.66 One argument for the exclusion of such persons 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.

QLRC's provisional views and proposals

7.67 In the Commission's provisional view, Directors-General of Queensland government departments, and other senior public servants, should remain eligible for jury service in Queensland. There does not appear to be a strong justification for the alteration of the existing position and the Commission is concerned to avoid unnecessarily restricting the pool of potential jurors.

800 See [7.16] above and Proposal 7-1.

801 Submission 26A.

802 See [7.228] below.

Proposal

7-7 Directors-General of Queensland Government departments and other senior public servants should remain eligible for jury service.

JUDGES AND MAGISTRATES

7.68 Section 4(3)(d) of the *Jury Act 1995* (Qld) provides that a person who is or was a judge or magistrate[803] (in this State or elsewhere) is ineligible for jury service.

7.69 Judges and magistrates are exempt from jury service in all Australian jurisdictions and in New Zealand.[804] In many jurisdictions, including Queensland, this expressly covers both current and former judges and magistrates.[805] In Queensland, the ineligibility also covers people who are judges or magistrates in Queensland or in any other jurisdiction.

7.70 In Queensland, the Act defines 'judge' as a Supreme, District or Childrens Court judge 'or another judicial officer with authority to preside at a trial', being a trial by jury.[806] In some jurisdictions, other similar categories are expressly exempt or disqualified, such as coroners,[807] Masters,[808] and justices performing court duties.[809]

7.71 The automatic exclusion of judges from jury service was, however, removed in England and Wales in 2004. Lord Justice Auld considered the exclusion of judges from jury service in his 2001 Report, suggesting that potential difficulties of bias could be dealt with 'as and when they arise by discretionary excusal rather than a blanket ineligi-

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803 A 'magistrate' means a magistrate appointed under the *Magistrates Act 1991* (Qld): *Acts Interpretation Act 1956* (Qld) s 36.

804 *Jury Exemption Act 1965* (Cth) s 4(1), sch; *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6(b), sch 2; *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(1)(a), 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. Also see *Juries Act 1976* (Ireland) s 7, sch 1 pt 1; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt I; *Jury Ordinance, Cap 3* (HK) s 5(1)(ab), (b)(i).

805 This applies in Queensland and New South Wales, and in the Northern Territory and Tasmania, the exemption extends to those who held that office in the previous 10 years: see n 804 above.

806 *Jury Act 1995* (Qld) s 3, sch 3 Dictionary (definitions of 'judge' and 'trial').

807 *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6(b), sch 2 pt 2.1. In Queensland, all magistrates automatically hold office as coroners: *Coroners Act 2003* (Qld) s 82. However, some coroners are not magistrates and would not, therefore, be covered by the ineligibility of magistrates: see *Coroners Act 2003* (Qld) s 83.

808 *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Juries Act 1957* (WA) s 5(1)(a), 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.

809 *Juries Act 1927* (SA) s 13(c), sch 3 (justices of the peace who perform court duties and their spouses or domestic partners); *Juries Act 2003* (Tas) s 6(3), sch 2 (justice approved as constituting a court of summary jurisdiction under s 23AB of the *Justices Act 1959*); *Juries Act 1957* (WA) s 5(1)(a), sch 2 pt 1 (justice of the peace); *Juries Act 1981* (NZ) s 8(e) (justices who have agreed to make themselves available from time to time to exercise summary jurisdiction of District Courts). In Queensland, all persons who hold (or have held) office as a magistrate or judge of the Supreme or District Court also automatically hold office as a justice. Not all justices, however, are magistrates or judges and would not, therefore, be ineligible for jury service under s 4(3)(d) of the *Jury Act 1995* (Qld): see *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19. Also see [7.214] below.

bility'.[810] That report, and the subsequent changes made in England and Wales, are discussed in chapter 5.

7.72 One of the commonly cited reasons for the exclusion of judges is the perceived risk that a judge-juror would hold sway in the jury room by virtue of his or her specialist legal knowledge and occupational (and social) position of authority. Lord Justice Auld rejected this argument, believing that 'people no longer defer to professionals or those holding particular office in the way they used to do'.[811] There is room for doubt about this, however, given the well-documented tendency of people to defer to those in perceived positions of authority.[812] While the Commission is not aware of any studies that have specifically evaluated this in the context of juries, some research nevertheless indicates 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.[813] It is generally regarded, for instance, that the jury speaker can hold considerable sway. Among the factors that have been found to influence selection of the speaker are previous jury experience, higher socio-economic status or leadership qualities, and the person's initiation of discussion.[814] Other studies on jury directions have shown, however, that jurors give considerable weight to the trial judge's guidance;[815] the extent to which this may counteract the influence of other jurors remains unclear.

7.73 Aside from the question of influence, there is also a risk of perceived prejudice or bias in having judges serve on juries. Firstly, it has been conjectured that judges may have some difficulty acting in their capacity as private citizens divorced from their working knowledge of the law and the rules of evidence and procedure.[816] It may be thought unlikely that a person could, by choice alone, cast off their embedded knowledge, experience and training upon which they daily rely in carrying out their jobs. Indeed, one of the stated strengths of the jury system is that jurors bring together their cumulative experiences in the community. The difference with judges is that, unlike other jurors, their professional experience is specific to the operation of court trials.

7.74 On the other hand, it might be thought that such experience would prove beneficial to jury room discussions. Judges may be more adept, for example, at not pressing prematurely for a result.

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810 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [32].

811 Ibid [29].

812 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. Expertise is a form of authority; the appearance of authority is enough and can be derived from 'purely symbolic' triggers such as titles and clothing, even if the person is not, in fact, an expert: Ibid 386.

813 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.

814 See generally A Kapardis, *Psychology and Law: A Critical Introduction* (2003, 2nd ed) [4.4]; DJ Devine et al, 'Jury decision making: 45 years of empirical research on deliberating groups' (2001) 7(3) *Psychology, Public Policy, and Law* 622, 696. The selection of the jury speaker is often ad hoc and sometimes later regretted: see Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) Vol 1 [10.218], [10.227]–[10.228].

815 See, for example, Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) Vol 1 [5.29] and the references cited there.

816 See, for example, the Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [29]. And see [5.98] above.

7.75 Secondly, there is an increased likelihood that judge-jurors would know the trial judge and counsel, and would need to be excused. Indeed, in Queensland (unlike the United Kingdom perhaps), all judges are known to one another. This may prompt concerns that a judge-juror would not be, or would not be seen to be, properly impartial or independent. Again, Lord Justice Auld rejected this as an argument for automatic exclusion, suggesting it could adequately be dealt with by way of case-by-case excusal and deferral. However, if judge-jurors routinely seek excusal or are challenged on this basis, any benefit in making them eligible may be lost.

7.76 Thus, the Law Reform Commission of Ireland proposed that holders of judicial office should remain ineligible. It noted, in particular, 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.[817] The Scottish Government has also declined to remove the ineligibility of judges.[818]

7.77 Perhaps most significantly, there is also a concern that the inclusion of judges would blur the distinction between the institutions of judge and jury. Juries are commonly thought of as the lay, rather than the professional, element of the trial system. That is, they represent the direct involvement of the community at large in a system that is otherwise administered by legal and judicial actors. In its 1996 report on jury service, the Victorian Law Reform Committee concluded that judges should remain ineligible, largely on the basis that 'one of the fundamental characteristics of trial by jury is that the trial be by a jury comprised of lay persons'.[819] The possible presence of a judge, albeit in a personal capacity, on a jury might also in some sense be seen to offend the independence of the institutions of judge and jury by undermining the traditional separation of their roles.

7.78 In any event, there may be little real benefit to the representativeness of juries from the eligibility of judges given that they comprise so small a group.[820]

NSWLRC's recommendations

7.79 The NSW Law Reform Commission recommended that judicial officers and acting judicial officers should continue to be ineligible for jury service. The main reasons the NSWLRC considered this appropriate were that:

- 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;
- Judicial officers are therefore highly likely to be challenged off or exempted for cause;

817 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.32]–[3.41].

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

819 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.75].

820 Numbering only 153 in late April 2010: see [5.32] above. At the same time there were also a total of 26 members of the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court of Australia resident in Queensland. They are exempt from jury service under the *Jury Exemption Act 1965* (Cth) — see [7.224] below — which is outside the scope of this review.

- Even if challenged off or exempted, the calling away of judicial officers for jury service 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.[821]

7.80 The NSWLRC did not consider, however, that the ineligibility of judicial officers should be permanent. Instead, it recommended that judicial officers should be ineligible 'during the currency of their commission and for three years from the date of the termination of their last commission'.[822] It considered that this would 'provide a reasonable period of absence from direct contact with the criminal law and from those who are involved in its administration' and would allow judicial officers, who have retired early, to perform jury service, subject to the need to apply for excusal 'if they feel that they are still too close to the judge, or the lawyers, or the parties involved'.[823]

LRCWA's proposals

7.81 In its Discussion Paper, the Law Reform Commission of Western Australia proposed that judicial officers — specifically, judges and magistrates, masters of the Supreme Court, and the State Coroner — should continue to be ineligible for jury service, but only while holding office and for a period of five years from the date of termination of his or her last commission in that office.[824]

7.82 The LRCWA noted that the eligibility of judges and magistrates 'would compromise the nature of the jury as being comprised of lay people, which is recognised as a "fundamental characteristic" of juries'.[825] It could also have implications for the independence and impartiality of juries; for example, judge-jurors may unduly influence other jurors and may be 'unable to divorce themselves from their judicial role'.[826] The LRCWA also observed that there are 'significant practical difficulties' in making judicial officers eligible to serve as jurors:

> 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. This has proven to be a problem in England, where judges who are not excused completely from jury service (usually after several attempts) are referred to a court where they are less likely to be known. But in Western Australia, where the judiciary and legal profession is significantly smaller, finding a trial where the judge-juror is unknown to the trial judge or the barristers and solicitors involved in the trial would be very slim. This would not only waste the trial court's time, but also that of the judge-juror who would be unable to perform his or her judicial duties while waiting to be selected on a trial, which in all likelihood he

821 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.11]–[4.12].

822 Ibid [4.13], Rec 10.

823 Ibid [4.13]–[4.14].

824 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 64–8, Proposal 13 to 16.

825 Ibid 64 citing *Report of the Departmental Committee on Jury Service* (Morris Committee), Cmd 2627 (1965) 34.

826 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 64.

> or she would be excused from. It is also possible that a judicial officer may be called for jury service on a particular trial without realising that he or she had dealt with the accused in the past. Discovery of such dealing may leave the verdict open to appeal for being unsafe. To suggest that judicial officers should nonetheless be eligible for jury service in the face of these realities would be to condone unnecessary interruption to the administration of justice in this state.[827] (notes omitted)

7.83 The LRCWA considered that the same sorts of arguments would apply with equal force to Masters of the Supreme Court, even though they do not preside over criminal trials; that the State Coroner is 'close enough to the administration of criminal justice' to warrant exclusion on the same terms as a judicial officer; and that justices of the peace who have in the last five years exercised the jurisdiction of the Magistrates Court would also be closely enough connected to the administration of criminal justice to warrant exclusion from jury service.[828]

QLRC's provisional views and proposals

7.84 Judges and magistrates should continue to be ineligible for jury service. The ineligibility should not, however, be permanent, as is presently the case.

7.85 Consistently with the Commission's general proposed position, judges should continue to be excluded from jury service on the basis that their involvement as jurors may compromise the independence of the jury from the judicial arm of government and the impartiality of the jury because of judges' role in the administration of criminal justice.[829]

7.86 Arguably, judges and magistrates should be ineligible only while they hold office, since it is only because they hold that office that they are excluded, on a constitutional basis, from jury service. Once the office is no longer held, the reason for exclusion is lost. Concerns about their particular professional experience and expertise, however, may provide reason for retired judges and magistrates to remain ineligible for some limited period of time, such as three or five years. This would be consistent with the proposals of the NSW Law Reform Commission and the Law Reform Commission of Western Australia.

Proposal

7-8 Section 4(3)(d) of the *Jury Act 1995* (Qld) should be amended to provide that a person who is a judge or magistrate (in the State or elsewhere) is ineligible for jury service.

Question

7-9 Should a person who *has been* a judge or magistrate in the preceding three years also be ineligible for jury service?

827 Ibid 65.

828 Ibid 65–8.

829 See [7.16] above and Proposal 7-1.

LOCAL GOVERNMENT MAYORS AND OTHER COUNCILLORS

7.87 In Queensland, the Act provides that 'a local government mayor or other councillor' is ineligible for jury service.[830] This applies only while the person holds office and so does not apply to former mayors or councillors.

7.88 Although the scope of that exemption is not entirely clear, it would appear that it covers councillors only rather than council employees, however senior.[831]

7.89 The former *Jury Act 1929* (Qld), section 8(1)(q), also used to exempt 'members of local governments'.

7.90 No other Australian jurisdiction currently has a similar exemption. In Victoria, for example, the previous entitlement to excusal as of right for 'mayors, presidents, councillors, town clerks and secretaries of municipalities' was repealed in 2000 along with a number of other occupational categories.[832] Those changes were based on the recommendations of the Victorian Law Reform Committee,[833] which considered that excusal for people in such occupations would 'more appropriately' be dealt with 'on an individual basis'.[834]

7.91 The basis for granting this exclusion in Queensland — which was inserted into the Act in 1996, after it was first enacted but before it took effect — was explained by the Explanatory Notes to the Bill as putting local government councillors 'on a similar level to that occupied by Members of Parliament, with whom they share many significant characteristics'.[835]

QLRC's provisional views and proposals

7.92 Local government mayors and other councillors should no longer be ineligible for jury service or otherwise automatically exempt from jury service.

7.93 Local government mayors and councillors do not share the same constitutional position as Members of Parliament. The asserted 'significant characteristics' that they share with parliamentarians are not so obvious or significant that the Commission is persuaded that they should remain exempt.

830 *Jury Act 1995* (Qld) s 4(3)(c).

831 See generally *Local Government Act 1993* (Qld) ch 4 pt 1 (Membership of local governments), ch 16 (Local government staff).

832 *Juries Act 1967* (Vic) s 4, sch 4 cl 13 which Act was repealed and replaced by *Juries Act 2000* (Vic).

833 See Juries Bill 2000 (Vic) Second Reading Speech: Victoria, *Parliamentary Debates*, Legislative Council, 22 March 2000, 418 (Hon MR Thomson, Minister for Small Business).

834 Law Reform Committee of Victoria, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.161].

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

Proposal

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.

LOCAL GOVERNMENT CHIEF EXECUTIVE OFFICERS

7.94 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.[836] They are not councillors but presumably employees of the relevant local government body, and do not fall into the existing category of ineligibility for local government councillors.

7.95 People holding these or similar positions are not ineligible, disqualified or otherwise exempt in any other Australian jurisdiction.

7.96 In Ireland, chief officers of local authorities, health boards and harbour authorities are entitled to be excused as of right.[837] 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.[838]

QLRC's provisional views and proposals

7.97 Local government chief executive officers should not be made ineligible or otherwise automatically exempt from jury service.

7.98 The ineligibility of local government CEOs might be thought a logical extension of the current ineligibility of local government mayors and councillors. Local councillors, in turn, were made ineligible for jury service due to a perceived similarity between their position and that of parliamentarians.[839] The Commission has proposed that local government mayors and councillors, however, should no longer be ineligible or exempt from jury service.[840]

7.99 In any case, the comparison with parliamentarians is of no consequence here: the relevant comparison in relation to local government CEOs is with parliamentary officers and employees, who are not (and are not proposed by the Commission to be) covered by any ineligibility or exemption in Queensland.

836 The Terms of Reference are set out in Appendix A to this Paper.

837 *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.

838 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.107], [3.115]–[3.116].

839 See [7.91] above.

840 See [7.92]–[7.93] and Proposal 7-10 above.

7.100 No doubt local government CEOs 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 CEOs should be singled out from all those other groups of people for whom jury service might, on a particular occasion, cause substantial public inconvenience or personal hardship.

Proposal

7-11 Local government chief executive officers should remain eligible for jury service in Queensland.

PRESIDING MEMBERS OF THE LAND AND RESOURCES TRIBUNAL AND MEMBERS OF THE QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

7.101 Under the Queensland Act, a person who is a presiding member of the Land and Resources Tribunal is ineligible for jury service.[841] As with judges and magistrates, this disqualification applies to former as well as current presiding members.

7.102 This exemption is unique to Queensland, although exemptions in relation to various Tribunals, Commissions and Boards of Inquiry are included in some of the other jurisdictions.[842]

7.103 This is the only tribunal in Queensland whose members are expressly made ineligible for jury service. It is unclear why this is so.

7.104 In 2007, the jurisdiction of the Land and Resources Tribunal was removed to the Land Court, and the Tribunal was abolished with effect from 31 December 2011.[843] Members of the Land Court are not presently ineligible for or exempt from jury

841 *Jury Act 1995* (Qld) s 4(3)(e). This exemption was inserted by *Justice and Other Legislation (Miscellaneous Provisions) Act 2002* (Qld) s 27. Neither the Explanatory Notes to the amending legislation, nor the parliamentary debate on its passage, explain the reason for including the exemption. However, the same legislation also amended the *Land and Resources Tribunal Act 1999* (Qld). One of those amendments (s 31) aligned the retirement age of presiding members of the Land and Resources Tribunal with that of Supreme and District Court judges. It was explained that the amendment 'restates the status quo and accords with government policy that presiding members' appointment conditions are to be equivalent to those of Supreme and District Court judges': Explanatory Notes, Justice and Other Legislation (Miscellaneous Provisions) Bill 2002 (Qld) 11. The exemption of presiding members of that Tribunal from jury service may similarly have been thought appropriate given the exemption of judges from jury service. Previously, s 8(1)(c) of the former *Jury Act 1929* (Qld) exempted judges and members of the Land Court from jury service.

842 See [7.182] below.

843 See *Land Court and Other Legislation Amendment Act 2007* (Qld); *Land and Resources Tribunal Act 1999* (Qld) s 82A. See also S Webbe and P Weller, *Brokering Balance: A Public Interest Map for Queensland Government Bodies (An Independent Review of Queensland Government Boards, Committees and Statutory Authorities)*, Part B Report (March 2009) 113; and Department of the Premier and Cabinet, Independent Review of Government Boards, Committees and Statutory Authorities, 'Government Response to Part B Report' [97] <http://www.premiers.qld.gov.au/publications/categories/reviews/review-gov-boards.aspx> at 1 June 2010, in which the continuation of the Land and Resources Tribunal until its expiry in 2011 was recommended and supported.

service.[844] The current ineligibility provision, however, will continue to exempt former presiding members of the Tribunal.

7.105 Presiding members of the Land and Resources Tribunal are lawyers; so are many of the members of the Land Court.[845] Those persons would therefore presently be ineligible, even without a specific exemption, as lawyers who are engaged in legal work under section 4(3)(f) of the *Jury Act 1995* (Qld).

QLRC's provisional views and proposals

7.106 The Commission does not consider that former presiding members of the Land and Resources Tribunal should continue to be ineligible for jury service. Nor does the Commission consider that presiding or other members of the Land Court should be ineligible for jury service.

7.107 Other than inconvenience, there seems little reason to make members of the Land Court ineligible. Whilst its members perform judicial functions, the Land Court is not a tribunal of criminal jurisdiction, the members of no other tribunal are singled out for ineligibility, and there would seem to be no greater risk of undue influence or partiality arising from a members' professional standing than with other jurors from a professional background.

7.108 Consistently with the Commission's proposal at [7.147] below, that the ineligibility of lawyers should generally be limited to lawyers who work in criminal law, the Commission considers that there is no basis for the exclusion of members of the Land Court.

7.109 The Commission has also considered the position of members of the Queensland Civil and Administrative Tribunal ('QCAT') and has come to the same provisional view. Members of QCAT perform judicial and quasi-judicial functions, but not in relation to criminal matters. The President and Deputy President of QCAT are to be, respectively, a Supreme Court Judge and District Court Judge, and all magistrates are deemed to be ordinary members of QCAT.[846] As such, those members will be ineligible for jury service on the basis of being a judge or magistrate; the Commission does not consider that any other members of QCAT need be made ineligible for jury service.

Proposals

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.

844 *Jury Act 1995* (Qld) s 4(3)(d) applies to a person who is or has been a judge or magistrate. A 'judge' is defined as 'a Supreme Court judge, a District Court judge, a Childrens Court judge or another judicial officer with authority to preside at a trial'; a 'trial' is defined as 'trial by jury': s 3, sch 3 Dictionary.

845 See *Land and Resources Tribunal Act 1999* (Qld) s 8(1)(a); *Constitution of Queensland 2001* (Qld) s 59(1); *Land Court Act 2000* (Qld) s 16(4)(a); *Legal Profession Act 2007* (Qld) s 5(2).

846 See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 171(2), 175(1), 176(1), 178, 180(3), 181(3).

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.

LAWYERS

7.110 At present, lawyers 'actually engaged in legal work' are ineligible to serve as jurors in Queensland.[847]

7.111 Lawyers who are either admitted to practice,[848] or who hold a current practising certificate,[849] are also exempt or disqualified in all of the other Australian jurisdictions and in New Zealand.

7.112 In Queensland, the legislation expressly provides that lawyers are ineligible for jury service only if they are actually engaged in legal work. Similar provision is made in the Australian Capital Territory and South Australia.[850] This is not restricted, however, to lawyers practising criminal law or involved in the administration of the criminal justice system; it equally covers any legal practitioner working exclusively, for example, in tax or conveyancing.

7.113 In some jurisdictions, the exclusion extends to lawyers' employees and articled clerks or graduate clerks.[851] Section 8(1)(e) of the former *Jury Act 1929* (Qld) also exempted 'barristers-at-law, solicitors, and conveyancers, and their clerks'.

7.114 While the Law Reform Commission of Hong Kong proposed that barristers and solicitors in actual practice should continue to be excluded from jury service, it proposed that the current exemption of barristers' and solicitors' clerks be removed.[852] A similar proposal was recently made by the Law Reform Commission of Ireland.[853]

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847 *Jury Act 1995* (Qld) s 4(3)(f). 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'. Also see *Legal Profession Act 2007* (Qld) s 5.

848 *Jury Act 1977* (NSW) s 6(b), sch 2; *Juries Act 2000* (Vic) s 5(3), sch 2; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1. Also see *Legal Profession Act 2004* (NSW) ss 4, 5; *Legal Profession Act 2004* (Vic) ss 1.2.1, 1.2.2(a); and *Legal Profession Act 2008* (WA) ss 3, 4(a) (definitions of 'Australian lawyer').

849 *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 1981* (NZ) s 8(f). Also see *Legal Profession Act* (NT) s 6 (definition of 'Australian legal practitioner'); *Legal Practitioners Act 1981* (SA) s 5 (definition of 'legal practitioner'); *Legal Profession Act 2007* (Tas) ss 4, 6 (definition of 'Australian legal practitioner'); and *Lawyers and Conveyancers Act 2006* (NZ) s 6 (definition of 'lawyer').

850 See n 849 above. Also see *Juries Act 1967* (Ireland) s 7, sch 1 pt I; *Jury Ordinance, Cap 3* (HK) s 5(1)(d) under which barristers and solicitors in actual practice are, respectively, ineligible or exempt for jury service.

851 *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Juries Act 2000* (Vic) s 5(3), sch 2. Also see *Juries Act 1967* (Ireland) s 7, sch 1 pt I under which solicitors' apprentices, solicitors' clerks and other persons employed on work of a legal character in solicitors' officers are ineligible for jury service; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(d), sch 1 pt I under which advocates' clerks and solicitors' apprentices and legal trainees are ineligible to serve; and *Jury Ordinance, Cap 3* (HK) s 5(1)(d) under which clerks of practising barristers and solicitors are exempt from jury service.

852 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.59](d).

853 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.59]–[3.62].

7.115 The automatic exclusion of lawyers, and their clerks and legal executives, has been removed in England and Wales. The English changes and the views of Lord Justice Auld on this issue are discussed in chapter 5 of this Paper. After consideration of the English position, the Scottish Government has indicated, however, that it intends to retain the ineligibility of advocates and solicitors.[854]

7.116 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.[855]

7.117 The Commission does not have access to more recent figures for the number of lawyers in Queensland. However, some idea of the number of solicitors and barristers in Queensland can be gleaned from the membership figures of the peak professional bodies for the legal profession.

7.118 As at May 2010, there were 8649 members of the Queensland Law Society (of whom 7971 held practising certificates)[856] and 1233 members of the Bar Association of Queensland (of whom 1001 held practising certificates)[857] — 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.[858]

7.119 The principal concern with allowing lawyers to serve as jurors seems to be that lawyers would unduly influence a jury's deliberations because of their assumed expertise. No doubt some lawyer-jurors would go out of their way to let other jurors express their views fairly and fully. And there are no doubt many juries dominated by particular individuals through sheer strength of personality, obstinacy or rudeness who are unburdened by any particular knowledge or skill.

7.120 It would be natural to expect lawyer-jurors to factor into their own deliberations their professional and social background and experience. We expect that of every other juror. We also expect every other juror to put aside any personal leanings they might have that might unfairly influence their thinking — this is to be accomplished in part on the basis of some words from the judge, no matter how ineffective they might be to counteract a lifetime's ingrained patterns of thinking. It is unusual that we should assume lawyers to be incapable of doing the same, or at least more incapable of doing so than anyone else. Lawyers — and judges — might in fact find it easier to uphold their duty as jurors by analogy with their professional duty to the court.

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

855 Australian Bureau of Statistics, *Legal Practices 2007–08*, Cat No 8667.0. The survey found that legal services businesses and organisations in Australia employed a total of 42,840 practising barristers and solicitors. Of these 34,587 (81%) were employed in solicitor or other legal services businesses such as patent attorney practices; 3869 (9%) were in barrister practices; 2455 (6%) were employed in government solicitor and public prosecutor offices; and 1929 (4.5%) were employed in community legal centres or legal aid commissions.

856 Correspondence from Queensland Law Society to Queensland Law Reform Commission, 20 May 2010.

857 Correspondence from Bar Association of Queensland to Queensland Law Reform Commission, 20 May 2010.

858 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.

7.121 Another concern with lawyer-jurors, however, is that the possibility of their presence on juries may erode the notion of lay participation and, with it, public confidence in the jury system. Juries are lauded as being comprised of lay people, independent of the parties and, more widely, of the system itself. Lay participation is an important aspect of the notion of the jury system as a form of direct community participation, as opposed to professional involvement, in civic society and in the justice system in particular.

7.122 In a preliminary consultation with the Commission, a member of the Criminal Law Section of the Queensland Law Society also commented that one of the risks of allowing lawyers (or judges or police officers) to serve on juries is the risk of creating further appeal points.[859] It may be, for instance, that because of the relatively small size of the legal profession, the chances that a lawyer-juror would have an interest in, a connection with, or extraneous information relevant to the counsel, the parties or the case would be heightened, and that such a juror may not be impartial.[860] The Commission notes, however, that if lawyers were expressly made eligible to serve on juries, something more than the fact of being a lawyer would be needed to show an apprehension of bias.[861]

7.123 The questions that need to be considered in relation to the possible inclusion of lawyers in Queensland juries include these:

- Would the non-expert nature of Queensland juries be at risk by allowing lawyers to act as jurors?
- If so, do the statistics suggest that this would be a severe or an occasional dilution?
- Is the apprehension that lawyers are likely to be so overbearing or influential in the juryroom simply a prejudice or is it based on a realistic perception of possible injustice — given that overbearing people and people who are persuasive by their personality alone are no doubt present on Queensland juries, and no doubt exercise their influence irrespective of the quality of their own forensic and decision-making skills and those of their fellow jurors?

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859 Queensland Law Society, Criminal Law Section, Submissions 26, 26A.

860 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). 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.

861 See, for example, the House of Lords decisions in *R v Abdroikof, R v Green, R v Williamson* [2007] 1 WLR 2679, [2007] UKHL 37, discussed in chapter 5 of this Paper. The appeal in *R v Abdroikof*, which was dismissed by 5:0, concerned a juror who was a serving police officer but who did not have any connection with the prosecutors or the police involved in the case. In contrast, the appeals in *R v Green* and *R v Williamson*, which were upheld by a 3:2 majority, concerned, respectively, 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 defendant's), and a solicitor-juror who had worked for the Crown Prosecution Service, which was the prosecuting authority in the case.

- In any event, what is inherently wrong with lawyers acting as jurors — they are no less members of the community than anyone else. It is a curious feature of this debate that such value is placed on the non-expert skills of jurors when in so much else in life (and in the law) we are guided by experts, however their expertise may be judged.

7.124 At the start of this chapter, the Commission proposed, as a general approach to occupational ineligibility, that only those categories of people whose presence on a jury would, or would be seen to, compromise the independence and impartiality of the jury should be excluded because of their constitutional position or their involvement in the administration of criminal justice, such as through the provision of legal services in criminal cases.[862] In light of this, the Commission has considered whether lawyers should be ineligible from jury service only to the extent that they are involved in criminal work or, in the public sector, in providing special legal services to the state.

Lawyers involved in criminal cases

7.125 Lawyers work in many different areas. Some lawyers practice with little, if any, contact with the criminal courts and have little, if any, experience of or expertise in criminal law.[863] Their experience in the legal profession would not, of itself, seem necessarily to carry an inherent risk of bias or prejudice any greater than that of other jurors.

7.126 The position is different, however, for lawyers working in the criminal justice system, particularly in prosecutorial positions, where the perception and risk of partiality is more substantial.

Private practice

7.127 Solicitors and barristers in private practice who work in criminal law are primarily involved in criminal defence work, although barristers may also accept briefs to appear on behalf of the Crown. Some may work in criminal law only very occasionally, although many lawyers in private practice specialise in criminal law.

7.128 Precise figures on the number of lawyers in Queensland who practise or specialise in criminal law are not available. A number of solicitors and barristers self-identify, however, as criminal lawyers. As at May 2010, for instance, 439 members of the Bar Association of Queensland identified themselves as specialising, among other things, in criminal law.[864]

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862 See [7.16] above and Proposal 7-1.

863 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].

864 Correspondence from Bar Association of Queensland to Queensland Law Reform Commission, 20 May 2010. The Queensland Law Society was not able to provide the Commission with information about the number of its members who practise in criminal law: Correspondence from Queensland Law Society to Queensland Law Reform Commission, 20 May 2010. However, 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 18 solicitors who identified that they had attained specialist accreditation in criminal law: Queensland Law Society, 'Find a Solicitor by Online Referral' <http://www.qls.com.au/content/lwp/wcm/connect/QLS/You+%26+Your+Solicitor/Find+a+Solicitor/Find+a+Solicitor+by+Online+Referral> at 21 May 2010. Specialist accreditation is not available through the Bar Association of Queensland.

7.129 It may not be the case, as the NSW Law Reform Commission has pointed out, that criminal defence lawyers would be especially biased against the prosecution or its evidence.[865] Nor is it the case that an individual lawyer-juror with knowledge of the case or the people involved in it could not be dealt with by excusal or challenge.

7.130 However, the need for juries to be seen to be impartial may justify the continued ineligibility of criminal defence lawyers given their professional involvement in the administration of criminal justice. The fact that they may tend to be identified with defendants' interests rather than those of the prosecution would not necessarily mitigate the perceived unfairness of allowing them to sit on juries. The community's interest in fair trials encompasses an interest not only in the presumption of innocence but in the rightful conviction of the guilty.

Public sector

7.131 In some jurisdictions, specific exemptions are provided for people employed in the administration of, and lawyers actively involved in, the criminal justice system. This often 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).[866]

7.132 In New South Wales and Victoria, this ineligibility covers people employed or engaged in the public sector in the 'provision of legal services in criminal cases'. In a number of jurisdictions, the exemption is much wider, covering all public sector employees 'in the administration of justice'.[867] In New South Wales, the exemption extends to people who have at any time been a Crown Prosecutor, Public Defender, Director or Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions.

7.133 Under section 8(1)(j), (l) and (m) of the former *Jury Act 1929* (Qld), any person employed by the Department of Justice, the Police Department or the Department of the Attorney-General used to be exempt from jury service.

7.134 Similar provisions are not currently made in Queensland. To the extent that people holding (or who have held) these positions are lawyers engaged in legal work, they are covered by the ineligibility of lawyers under section 4(3)(f) of the Act. That provision is not wide enough, however, to cover other public sector employees or officers who are involved in the administration of the criminal justice system.

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865 See [7.142] below.

866 *Jury Exemption Regulations 1987* (Cth) reg 5(2)(a); *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.2; *Jury Act 1977* (NSW) s 6(b), sch 2; *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(h)(i), (haa). Also see *Juries Act 1976* (Ireland) s 7, sch 1 pt I; *Jury Ordinance, Cap 3* (HK) s 5(1)(b)(v). Prior to the amendments in England and Wales in 2004, 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, however, has recently proposed that the Director of Public Prosecutions and his or her staff should continue to be ineligible in Ireland: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.46]–[3.49]; *Juries Act 1976* (Ireland) s 7, sch 1 pt I.

867 This applies in New South Wales, the Northern Territory, South Australia, Tasmania and Victoria: see n 866 above.

7.135 Criminal lawyers, and others involved in the provision of legal services in criminal cases, are employed in several areas of the Queensland public sector, including, principally, the Office of the Director of Public Prosecutions and Legal Aid Queensland.[868]

Crown lawyers

7.136 The public sector also includes lawyers, and others, who provide legal services to the Crown. While they may not provide legal services in criminal matters very often, or at all, the lawyers and others employed by Crown Law and by various Departmental agencies, such as the Office of General Counsel of the Department of Justice and Attorney-General, provide special legal services exclusively to government. Their professional commitment to the legal interests of government may, therefore, justify their exclusion from jury service in order to safeguard the appearance of independence and impartiality.[869]

NSWLRC's recommendations

7.137 In its jury selection Report, the NSW Law Reform Commission considered that the current exclusion of Australian lawyers is 'unjustifiably wide' and recommended that, as a general class and subject to some exceptions in relation to people involved in the provision of legal services for criminal cases or the administration of the criminal justice system, lawyers should be made eligible for jury service:[870]

> 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.[871] 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.[872] (note in original)

7.138 Because of their 'very close connection with the administration of the criminal justice system, both in relation to the prosecution of individual cases and the development of policy', the NSWLRC considered that Crown Prosecutors, Public Defenders, Directors or Deputy Directors of Public Prosecutions, and Solicitors for Public Prosecutions should continue to be ineligible for jury service. It also considered, again because

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868 Both the Office of the Director of Public Prosecutions and Legal Aid Queensland are independent statutory authorities. They receive funding, however, from the Queensland Government and have reporting responsibilities to the Minister for Justice and Attorney-General. The Director and Deputy Directors of Public Prosecutions are appointed by the Governor in Council and are employed under the *Director of Public Prosecutions Act 1984* (Qld); other officers of that office are employed under the *Public Service Act 2008* (Qld). Members of the Legal Aid Board and the Chief Executive Officer of Legal Aid are appointed by the Governor in Council and all employees of that office are employed under the *Legal Aid Queensland Act 1997* (Qld) and not under the *Public Service Act 2008* (Qld). See *Director of Public Prosecutions Act 1984* (Qld) ss 5, 16, 17, 19, 23; *Legal Aid Queensland Act 1997* (Qld) ss 42, 49, 53, 63, 64, 70.

869 The Law Reform Commission of Ireland has proposed, for instance, that the Attorney General and those of his or her staff who undertake work of a legal nature should continue to be ineligible: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.44]–[3.45]; *Juries Act 1976* (Ireland) s 7, sch 1 pt I.

870 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [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].

871 See NSW Bar Association, *Submission*, [14] [made to the NSWLRC].

872 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.41].

of their intimate connection with the administration of justice, that the Solicitor General, Crown Advocate and Crown Solicitor should also be ineligible.[873] To ensure a 'sufficient period of separation from direct involvement in the criminal law', the NSWLRC recommended that the period of ineligibility should extend for three years after the person ceases to hold office.[874]

7.139 The NSWLRC also recommended that lawyers and paralegals employed or engaged in the public sector in the provision of legal services in criminal cases should be ineligible for jury service during the period of their employment or engagement:[875]

> The argument for their continued ineligibility is much the same as that for police officers. The prosecution or defence of criminal cases is their primary day-to-day concern and they are too intimately connected with the matters that are likely to come before the courts. Their presence on a jury would inevitably give rise to an appearance of bias if their office or position were known, and inevitably they would be subject to a challenge for cause.[876]

7.140 Lawyer-jurors might also be subject to peremptory challenge or excusal on the basis that they know the lawyers or judge involved in the trial and would be in a perceived position of conflict of interest.[877]

7.141 The NSWLRC's recommendation would cover lawyers and paralegals employed or engaged by the Director of Public Prosecutions, the Solicitor for Public Prosecutions, the Legal Aid Commission, and the Aboriginal Legal Service. The NSWLRC did not consider, however, that there was sufficient justification to extend this basis of exclusion to administrative or clerical staff of those offices as they are not directly involved in matters that go before the courts.

7.142 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:

> 4.54 … We recognise that any test of ineligibility depending on a criterion of 'substantial involvement in the practice of the criminal law' or some similar criterion, would potentially raise questions of degree. This could give rise to a doubt about their eligibility, and consequently about the regularity of the empanelment of the jury. These factors, if identified during or after a trial, could, under the current law, give rise to the discharge of the jury during the trial, or to a post verdict appeal against conviction on the basis that a juror was improperly empanelled.
>
> 4.55 In deciding on the exclusion of this group of lawyers, a number of points should be considered. Previously, one reason advanced for excluding defence lawyers from juries was that, because of particular police practices, such as verballing and the planting of exhibits, they were likely to be antagonistic towards the police to the point where they might routinely reject their evidence. However, modern methods of gathering evidence, including taped interviews with suspects, surveillance footage, telephone and listening device intercepts, and scientific analysis have made juries less reliant on the kinds of evidence given by police that attracted

873 Ibid [4.43].

874 Ibid [4.45].

875 Ibid [4.46]–[4.51].

876 Ibid [4.48].

877 See [7.122] above.

> criticism in the past. In eliminating undesirable police practices, they have removed one of the chief grounds for lawyers' alleged antagonism towards the police.[878]
>
> 4.56 Additionally, a characterisation of lawyers in private practice as being unable to give an unbiased consideration to all of the evidence presented in a case unfairly stigmatises them and falsely assumes that they have less interest in maintaining law and order than other members of the community.
>
> 4.57 In any case, the practice of the criminal law in NSW is so structured that those who specialise or practice substantially in this field, are readily identifiable, and will be likely to self identify, so that no difficulty should arise if someone with an obvious connection with the accused or witnesses is summoned or presents for empanelment and does not apply to be excused. Otherwise, the case for the maintenance of an appearance of justice is less compelling than that which would apply to lawyers employed or engaged in the public sector in the provision of legal services in these cases.[879] (note in original)

LRCWA's proposals

7.143 The Law Reform Commission of Western Australia also considered the ineligibility of lawyers in its recent jury selection Discussion Paper. It concluded that 'on balance, the risk of prejudice to an accused by allowing lawyers to serve as jurors is too high', even if they are non-criminal lawyers.[880]

7.144 It noted the 'traditional justification' for excluding lawyers: the possibility that lawyer-jurors may, even unwittingly, unduly influence other jurors and that this possibility may lead to a perception of tainted verdicts. It also observed the practical difficulties of empanelling lawyer-jurors, and the risk of challenges on appeal, 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 be prejudicial to the defendant.[881]

7.145 The LRCWA considered, however, that the 'more persuasive argument' is that:

> permitting practising lawyers to serve as jurors goes against the fundamentally lay nature of a jury. While the Commission is not convinced that a lawyer-juror would necessarily dominate a jury's deliberation, there is a real danger that fellow jurors may seek a lawyer-juror's guidance on legal issues rather than that of the judge.[882]

7.146 At present in Western Australia, 'Australian lawyers' are permanently ineligible for jury service. The LRCWA proposed that, instead, the ineligibility should be confined to those people holding current practising certificates in Australia, including practising government lawyers.[883]

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878 See M Cunneen, 'Getting it right: Juries in criminal trials' (2007) 90 *Reform* 43, 43.

879 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.54]–[4.57].

880 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 69–70.

881 Ibid 68–9.

882 Ibid 69.

883 Ibid 70, Proposal 17, which reads: 'That the exclusion of lawyers from jury service be confined to Australian legal practitioners, within the meaning of that term in the *Legal Profession Act 2008* (WA) s 5(a)'.

QLRC's provisional views and proposals

7.147 As a general class, lawyers should be made eligible for jury service. However, lawyers who work in criminal law or who provide special legal services to the state should continue to be ineligible. The exclusion should also cover paralegals who work in criminal law.

7.148 The Commission is inclined to the view that those people should generally remain ineligible only if actually engaged in the provision of criminal legal services.

7.149 However, the Commission is considering whether, in order to ensure the appearance of sufficient distance between the person and his or her former professional position and identification with the state, former criminal lawyers should remain ineligible for a limited period of, say, three years. This may especially be the case in relation to those who hold particular appointments for the provision of special legal services to, or on behalf of, the state.

7.150 The Commission acknowledges that, like many other categories of ineligibility, the new categories it proposes here, particularly in relation to criminal lawyers in private practice, will rely on self-identification and exclusion. However that exclusion is worded, it will be open to some interpretation. The Commission does not anticipate, however, that this would cause such difficulties in practice as to outweigh the merits of having such a provision.

Proposals

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;

(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.

Question

7-16 Should any of the following people also be ineligible for jury service:

(1) a person who *has been*, in the preceding three years, a Director or Deputy Director of Public Prosecutions or a Crown Prosecutor?

(2) a person who *has been*, in the preceding three years, a Crown Solicitor, Deputy Crown Solicitor, Crown Counsel or Assistant Crown Solicitor?

(3) a person who *has been*, in the preceding three years, a lawyer or paralegal employed or engaged in the public or private sector in the provision of legal services in criminal cases?

POLICE OFFICERS

7.151 In Queensland, a person who is or has been a police officer, in this State or elsewhere, is ineligible for jury service.[884]

7.152 Police officers are also exempt or disqualified in all the other Australian jurisdictions and in New Zealand.[885] In Queensland and New South Wales, the ineligibility also applies to former police officers. In Tasmania, the exemption applies to a person who has been a police officer within the last ten years.

7.153 In Queensland, the disqualification applies to people who have served as police officers 'in the State or elsewhere'.[886] Their ineligibility is therefore presumably based on some assumptions about their professional biases or the risk of their being unduly influential in jury deliberations, and not (or not only) on the risk of their being familiar with the participants in any particular trial.[887]

7.154 In addition, a number of the jurisdictions exempt people whose duties are connected with criminal investigation or law enforcement.[888] The Commonwealth legislation also exempts from jury service people employed by the Commissioner of the Australian Federal Police and employees of the Australian Police Staff College and the National Police Research Institute.[889]

7.155 The automatic exclusion of police from jury service has, however, been removed in England and Wales. These and similar changes are discussed in chapter 5

884 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.

885 *Jury Act 1995* (Qld) s 4(3)(g); *Jury Exemption Act 1965* (Cth) s 4(1), sch; *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6(b), sch 2; *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). Also see *Juries Act 1976* (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)(b)(vi), (x), (m).

886 *Jury Act 1995* (Qld) s 4(3)(g).

887 See, for example, *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the 'Morris Report') [103]–[104].

888 This applies in New South Wales, South Australia, Tasmania and Victoria. Also, in the Northern Territory, the exemption applies to public sector employees who are under the direct control of the Commissioner of Police. See n 885 above.

889 *Jury Exemption Regulations 1987* (Cth) reg 5(g), (j).

of this Paper. The Scottish Government, however, has recently indicated that it intends to retain the ineligibility of police officers.[890]

7.156 As at 30 June 2009, the Queensland Police Service employed 10,277 police officers.[891] This equates to approximately 0.39% of the total number of adult Queenslanders on the electoral roll.[892]

7.157 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 which ought to be avoided.

7.158 Aside from specific instances like those, however, it may be thought that police officers would be no more susceptible to prejudices or biases than any other potential juror. Lord Justice Auld suggested as much in recommending that police officers be made liable to perform jury service in England and Wales:

> There is also the anxiety voiced by some that those closely connected with the criminal justice system, for example, a policeman or a prosecutor, would not approach the case with the same openness of mind as someone unconnected with the legal system. I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have.[893]

7.159 A significant body of research has, however, demonstrated that 'police as a group are generally suspicious and primed to see deception in other people'[894] and 'tend to make prejudgments of guilt, with confidence, that are frequently in error'.[895] In the United States, police training has been found to enhance this 'guilt-presumptive process': trained investigators 'were significantly less accurate, more confident, and more biased toward seeing deception'.[896] Thus, 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. This is not a criticism of police, but a reflection of the nature of their profession and training.

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

891 Queensland Police Service, *Annual Report 2008–2009* (2009) 5. In the same period, the Service employed 368 police recruits and 3982 staff members.

892 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.

893 The Right Honourable Lord Justice Auld, *Review of Criminal Courts in England and Wales*, Report (2001) [30].

894 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. Also see, for example, J Masip et al, 'Generalized communicative suspicion (GSC) among police officers: Accounting for the investigator bias effect' (2005) 35(5) *Journal of Applied Social Psychology* 1046.

895 SM Kassin, 'The psychology of confessions' (2008) 4 *Annual Review of Law and Social Science* 193, 198. See also, for example, R Elaad, 'Effects of feedback on the overestimated capacity to detect lies and the underestimated ability to tell lies' (2003) 17 *Applied Cognitive Psychology* 349; E Garrido, J Masip and C Herrero, 'Police officers' credibility judgments: Accuracy and estimated ability' (2004) 39 *International Journal of Psychology* 254.

896 SM Kassin, 'The psychology of confessions' (2008) 4 *Annual Review of Law and Social Science* 193, 198. It has been noted, however, that the prevalent interrogation techniques in which police officers in the United States are trained differ from the expectation in the United Kingdom and Australia that police officers will interview suspects with an open mind: see D Dixon, 'Regulating police interrogation' in T Williamson (ed), *Investigative Interviewing: Rights, Research and Regulation* (2006) 318, 321 <http://books.google.com.au/books?id=enMMwLYsx74C&printsec=frontcover> at 11 May 2010.

7.160 Whether or not this holds for police in Queensland, the presence of police officers on juries may well be seen to offend against the traditional separation of functions and powers in the criminal justice system. Police officers are not merely employed in the administration of justice but are 'professionally committed' to the investigation and prosecution of crimes.[897] Regardless of whether an individual officer is directly connected with a particular case or a trial's participants, and whether or not he or she personally is biased towards the prosecution, 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.

7.161 The Law Reform Commission of Ireland has expressed the view that serving members of the police force should continue to be ineligible for jury service:

> since members of police forces have strong occupational cultures, there is scope for a likelihood of at least a perception of bias if Gardaí [members of the Irish police force] were permitted to serve on juries.
>
> …
>
> Additionally, the Commission considers that it is important to maintain community confidence in the impartiality, fairness and unbiased nature of the jury system. The Commission considers that confidence in trial by jury will be called into question if members of the An Garda Síochána [the Irish police force] were eligible for selection as jurors.[898]

7.162 It could also be argued that police officers should be exempt from the additional obligation to serve on a jury on the basis that they already contribute to the maintenance of the criminal justice system in a professional capacity.

7.163 If police officers were to remain ineligible for jury service, the question remains whether that ineligibility should persist for former police officers.

NSWLRC's recommendations

7.164 At present, the legislation in New South Wales provides that any person who has at any time been a police officer is ineligible for jury service, as is:[899]

> A person 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.

7.165 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:

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897 *R v Abdroikof* [2007] 1 WLR 2679, [2007] UKHL 37 [23] (Lord Bingham).

898 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.82]–[3.83].

899 *Jury Act 1977* (NSW) s 6(b), sch 2 cll 8, 10.

> It is our view that serving members of the core law enforcement agencies mentioned at the commencement of this section who are actually engaged in criminal investigation and law enforcement should continue to be ineligible. 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.[900]

7.166 The NSWLRC recommended that the ineligibility of those individuals should extend for three years after they have retired from the relevant position:

> 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,[901] 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. We recommend that in this case the period of ineligibility be one of three years from retirement.[902] (note in original)

7.167 The NSWLRC did not consider, however, that the ineligibility should extend to clerical or administrative staff of those agencies.[903]

LRCWA's proposals

7.168 In its Discussion Paper, the Law Reform Commission of Western Australia proposed that police officers should continue to be excluded from jury service during their employment and for a period of five years thereafter. It also proposed that the Commissioner of Police should be expressly excluded from jury service for the same period.[904]

> Taking into account the experience in England, the Commission is strongly of the view that the current exclusion of police officers from jury service during the term of their employment and for five years thereafter should remain in place. In coming to this conclusion, the Commission finds the following points to be persuasive:
>
> - the integral role that police officers play in the detection and investigation of crime and prosecution of criminal charges;
> - the fact that police officers have ready access to information that may concern an accused or witness and that is not available to lay jurors and may not be adduced in evidence;
> - the potential for partiality of police-jurors toward the prosecution or the evidence of fellow officers, whether real or apparent;

900 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.71], and see Rec 17.

901 NSW Police, *Annual Report 2005–2006*, 19, 109, 110.

902 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.72].

903 Ibid [4.77].

904 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 73–4, Proposal 26.

- the risk of unsafe verdicts should a police-juror know or be known to a witness or prosecutor or an accused in a trial;[905]

- the appearance to an accused that he or she would not receive a fair trial where a police-juror was empanelled; and

- the need to preserve public confidence in the impartial administration of criminal justice.[906] (note added)

7.169 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 independent from government as the prosecuting authority', and 'might be seen to have a bias toward the prosecution case'.[907]

> 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.[908]

7.170 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.[909]

Preliminary submissions

7.171 The Queensland Retired Police Association has made the following points in a preliminary submission to the Commission in relation to the fact that section 4(3)(g) of the *Jury Act 1995* (Qld) disqualifies former police officers from jury service:

- Police officers should be entitled to serve on juries, but they should be entitled to opt out of service if summoned.

- It is discriminatory against, and an affront to, former police officers to prevent them from serving on juries if they wish.

- Many police officers leave the police service after serving for only a few years, unlike in the past, when many remained in the service until retirement.

- Their training and experience would make former police officers effective jurors.[910]

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905 Any person who knows or is known by a witness, whether or not a police officer, should be excluded from sitting on a jury in that particular trial.

906 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 74.

907 Ibid.

908 Ibid.

909 Ibid citing *R v Khan* [2008] ECWA Crim 531. Also see chapter 5 of this Paper.

910 The Queensland Retired Police Association Inc, Submission 17.

QLRC's provisional views and proposals

7.172 Police officers should continue to be ineligible for jury service. It should not, however, continue to be a permanent exclusion but should apply only to serving police officers and, perhaps, to any person who has been a police officer in the last three years. The extension of the ineligibility for a limited period of time after the police officer has left office would be consistent with the proposals of the NSW Law Reform Commission and the Law Reform Commission of Western Australia, and may be appropriate to secure the appearance of justice given concerns about the risk of perceived bias and the identification of police officers with the prosecution of offenders.

Proposal

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.

Question

7-18 Should a person who *has been*, in the preceding three years, a police officer also be ineligible for jury service?

DETENTION CENTRE EMPLOYEES AND CORRECTIVE SERVICES OFFICERS

7.173 Provisions in all Australian jurisdictions exempt or disqualify correctional service and detention service officers from jury service.[911] In Queensland, the ineligibility applies to former and current detention centre employees and corrective services officers in this State and elsewhere.[912] In addition, some jurisdictions exempt parole board members from jury service.[913] Members of Parole Boards, who decide applications for parole of prisoners, are not, however, ineligible in Queensland.[914]

911 *Jury Act 1995* (Qld) s 4(3)(h), (i); *Juries Act 1967* (ACT) s 11(1) sch 2 pt 2.1; *Jury Act 1977* (NSW) s 6(b), sch 2; *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. Also see *Juries Act 1981* (NZ) s 8(h)(ii), (ha), (hb); *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; *Jury Ordinance, Cap 3* (HK) s 5(1)(b)(vii), (x), (xii). In New South Wales, South Australia, Tasmania and Victoria, this exemption applies to people whose duties are connected with penal administration or the punishment of offenders.

912 See *Jury Act 1995* (Qld) s 3, sch 3 Dictionary (definitions of 'corrective services officer' and 'detention centre employee').

913 This applies in the Northern Territory and Western Australia: see n 911 above.

914 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 11 May 2010.

7.174 Recent amendments in England and Wales have removed the previous automatic exclusion of probation and penal establishment officers from jury service.[915] In contrast, the ineligibility of prison officers and parole board members is to be retained in Scotland,[916] and the Law Reform Commission of Ireland has proposed that prison officers and probation officers should remain ineligible.[917]

NSWLRC's recommendations

7.175 The NSW Law Reform Commission considered that the continued ineligibility of people employed or engaged in the public sector in penal administration is appropriate but that this should be confined to the following specific groups of people who have direct and regular contact with offenders:

- Corrective Services Officers and Juvenile Justice Officers; and
- Employees, members and officers of the Department of Corrective Services, the Parole Board, the Serious Offenders Review Council, the Mental Health Review Tribunal, the Probation and Parole Service, and Justice Health, who have direct access to prisoners or information about prisoners.[918]

7.176 The NSWLRC considered that these exclusions were required because of the risks of perceived bias, identification and possibly even personal harm that may result from having them serve on juries.[919]

7.177 It did not consider that clerical or support staff without direct access to offenders should be ineligible.

LRCWA's proposals

7.178 The Law Reform Commission of Western Australia also proposed that the ineligibility of members of review boards involved in the release of prisoners, detainees or mentally impaired accused in Western Australia — namely, the Mentally Impaired Accused Review Board, the Prisoners Review Board and the Supervised Release Review Board — should be maintained. It considered their connection to the administration of the criminal justice system sufficient to justify their ineligibility from jury service for the period of their commission and for five years thereafter.[920]

QLRC's provisional views and proposals

7.179 Detention centre employees and corrective services officers should continue to be ineligible for jury service.

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915 These and similar changes are discussed in chapter 5 of this Paper.

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

917 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.89]–[3.91], [3.92]–[3.94].

918 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.86]–[4.88], Rec 19.

919 Ibid [4.87].

920 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 76, Proposal 28.

7.180 The ineligibility should, however, no longer be permanent but should apply only during the currency of the person's employment or appointment. The Commission also notes that it may be appropriate to extend the ineligibility for a limited period of time, such as three years, after the person has ceased to be so employed. This would be consistent with the proposal of the Law Reform Commission of Western Australia.

7.181 The Commission also considers that the members of a Parole Board should be made ineligible for jury service. This would be consistent with the position in some other jurisdictions and with the proposals of the NSW Law Reform Commission and the Law Reform Commission of Western Australia. Parole Board members do not, however, work as closely or intensively with prisoners as do corrective services and detention centre employees and are generally to be appointed for a term of up to three years only (although they may be reappointed for another term).[921] In the Commission's view, the ineligibility of Parole Board members should apply, therefore, only for the period of the person's appointment.

Proposal

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.

Question

7-20 Should a person who *has been*, in the preceding three years, a detention centre employee or corrective services officer also be ineligible for jury service?

OTHER POSSIBLE EXCLUSIONS

7.182 A number of other categories of occupation or similar circumstances which entitle people to exemption or excusal from jury service are specifically covered in legislation outside Queensland. The following list is indicative only and does not necessarily refer to all the qualifying criteria or definitions, which vary in detail across jurisdictions:[922]

- court officers and staff such as court reporters, judges' associates, bailiffs and registrars;
- members of Industrial Relations Commissions, Crime or Corruption or other Commissions or Boards or Committees of Inquiry;

921 See *Corrective Services Act 2006* (Qld) ss 217, 220, 231, 234.

922 See, variously, *Jury Exemption Act 1965* (Cth) s 4(1), sch; *Jury Exemption Regulations 1987* (Cth) regs 4, 5, 7; *Juries Act 1967* (ACT) s 11, sch 2; *Jury Act 1977* (NSW) ss 6, 7, sch 2, 3; *Juries Act* (NT) s 11(1), sch 7; *Juries Act 1927* (SA) s 13(c), sch 3; *Juries Act 2000* (Vic) s 5(3), sch 2; *Juries Act 1957* (WA) s 5(a)(i), (c)(i), sch 2; *Juries Act 1981* (NZ) s 8(h). Also see *Juries Act 1967* (Ireland) ss 7, 9, sch 1 pt I, II; *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1, sch 1; *Jury Ordinance, Cap 3* (HK) s 5(1).

- senior public servants;
- Ombudsmen and, in some cases, employees of the Ombudsman;
- employees of the government of a foreign country or of an international organisation;
- practising doctors, dentists, pharmacists, veterinarian surgeons, nurses and midwives, psychologists, chiropractors, physiotherapists and osteopaths;
- emergency service personnel;
- judges' spouses and partners;
- spouses or partners of members of the police force;
- professors, lecturers, and school principals and teachers;
- newspaper editors.

7.183 Section 8(1) of the former *Jury Act 1929* (Qld) also used to exempt:

- certain government department officers and employees;
- the chairperson and officers of the Totalisator Administration Board and officers of the Parliamentary Commissioner for Administrative Investigations;
- members of the defence forces;
- the masters and crews of ships actually trading, licensed sea pilots and aircraft pilots regularly employed as such on Australian aircraft;
- medical practitioners, dentists, pharmacists, nurses, nursing aides and physiotherapists 'being duly registered or enrolled and in actual practice';
- members of the Queensland Ambulance Service and fire brigade members;
- university professors and lecturers, registrars of universities, inspectors of schools, school-masters and school-teachers actually employed as such, directors, registrars and academic staff of colleges of advanced education, and principals, secretaries and instructional staff of rural training schools;
- journalists 'bona fide actually employed in court reporting'; and
- mining managers and engine drivers actually employed as such.

7.184 Even if not expressly covered by the Queensland legislation, many of the people exempted or entitled to exemption in other jurisdictions or under the former

Queensland legislation may nevertheless be entitled to be excused (either permanently or on a particular occasion) under section 21 of the *Jury Act 1995* (Qld), but any such excusal would presumably be based on their particular circumstances, or particular difficulties associated with their positions, at the time that they are required to serve.[923]

7.185 For example, the rationale for emergency services and health professionals to be excused as of right from jury service — that they cannot be spared from their occupations because of the risk to the community if they were unavailable — was dismissed by the Law Reform Commission of Western Australia, who pointed out that most such professionals are entitled to take leave and that medical services are delivered in so many diverse ways that an individual patient would not be left stranded were one of their usual health professionals temporarily absent.[924]

> The Commission acknowledges that many emergency services personnel and health professionals will justifiably seek to be excused from jury service. In many cases it would be inconvenient to the public to require emergency services personnel and health professionals to undertake jury service. However, membership of the particular occupational group should not of itself be a sufficient basis to be excused. The person's specific work responsibilities and commitments and their specialist skills should be considered along with the availability of suitable substitutes during the likely jury service period.[925] (note omitted)

7.186 Similarly, the position in England and Wales since 2004 is such that, while there are no longer any exemptions as of right, people may be excused if they can show there is a 'good reason'.[926] This is discussed in chapter 5 of this Paper.

QLRC's provisional views

7.187 The Commission is not inclined to advocate the re-introduction of any of the categories of ineligibility that have already been removed from the legislation in Queensland, or the introduction of new categories of occupational ineligibility that are not 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.

7.188 Nevertheless, having regard to the Commission's general proposal that people who are involved in the administration of the criminal justice system should be excluded from jury service, the Commission has given consideration to some of the other categories of exemption that apply in other jurisdictions.

Other people involved with the criminal justice system

7.189 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 discussed earlier in this chapter, such as public sector lawyers who work in criminal law and corrective services offi-

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923 The criteria for discretionary excusal from jury service are discussed in chapter 9 of this Paper.

924 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 109.

925 Ibid.

926 *Juries Act 1974* (Eng) s 9. Also s 9A (Discretionary deferral).

cers, as well as other government department employees, such as policy or legislation officers and officers of the courts.

7.190 For example, the Victorian legislation provides the following 'catch-all' category of ineligibility:

> 1. A person who is or, within the last 10 years, has been—
>
> …
>
> (f) 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;[927]

7.191 Similar provisions apply in New South Wales,[928] Tasmania,[929] the Northern Territory[930] and South Australia,[931] except that they do not apply to former employees or officers. For example, in addition to public sector employees in the Office of the Ombudsman, the Office of the Director of Public Prosecutions, and the Legal Aid Commission, 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[932]

7.192 The Western Australian legislation provides perhaps the widest category of ineligibility for public sector employees. It excludes a person who is or has been in the last five years:

- 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));

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927 *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(f).

928 *Jury Act 1977* (NSW) s 6(b), sch 2 cl 8. It provides the following category of ineligibility:

> A person 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.

929 *Juries Act 2003* (Tas) s 6(3), sch 2 cl 4. It provides the following category of ineligibility:

> A person whose duties or activities, whether paid or voluntary, are connected with the investigation of indictable offences, the administration of justice or the punishment of offenders.

930 *Juries Act* (NT) s 11(1), sch 7.

931 *Juries Act 1927* (SA) s 13(c), sch 3 cl 2. It provides the following category of ineligibility:

> Persons employed in a department of the Government, or employed by a body prescribed by regulation, whose duties of office are connected with the investigation of offences, the administration of justice or the punishment of offenders.

932 *Juries Act* (NT) s 11(1), sch 7.

- 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).[933]

7.193 In its Discussion Paper, the Law Reform Commission of Western Australia proposed that this provision be confined to cover only those people whose work is 'integrally connected with the administration of criminal justice'. It considered this exclusion appropriate because 'a reasonable person might not perceive them to be sufficiently independent or impartial in a criminal trial':[934]

> Applying the principle that occupational exclusions should be confined to those whose presence on a jury might compromise, or be seen to compromise, the jury's status as an independent, impartial and competent lay tribunal, the Commission believes that the current provision should be significantly narrowed. It is the Commission's opinion that the provision should be confined to those employees and service providers whose work is integrally connected with the administration of criminal justice including (but not limited to) the detection, investigation or prosecution of crime; the management, transport or supervision of offenders; the security or administration of criminal courts or custodial facilities; the direct provision of support to victims of crime; and the formulation of policy or legislation pertaining to the administration of criminal justice.[935]

7.194 The LRCWA proposed that such people remain ineligible during the term of their employment or contract and for five years thereafter.

7.195 The Queensland legislation does not presently contain any similar provisions. However, section 8(1) of the former *Jury Act 1929* (Qld) used to exempt 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.[936]

7.196 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 commissions[937] or other commissions and boards of inquiry;[938] and

- court officers, including court reporters.[939]

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933 *Juries Act 1957* (WA) s 5, sch II pt 1 cl 2(o); *Jury Pools Regulations 1982* (WA) reg 10.

934 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 77, Proposal 29.

935 Ibid 77.

936 See former *Jury Act 1929* (Qld) s 8(1)(i), (j), (l), (m).

937 *Jury Exemption Regulations 1987* (Cth) regs 5(h), 7(2)(b); *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. Also see New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 4, Rec 17, 20; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) ch 4, Proposal 27.

938 Eg *Juries Act 1967* (ACT) s 11(1), sch 1 pt 2.1 cll 23, 24; *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1.

QLRC's provisional views and proposals

7.197 It is the Commission's provisional view that 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 proposed the continuation of exclusions) for judges and magistrates, police officers, corrective services and detention centre officers, and lawyers engaged in the public sector in criminal work. The Commission has also proposed the exclusion of Parole Board members.

7.198 As at 30 June 2009, the Department of Justice and Attorney-General employed 3740 people, including 3223 full time equivalent positions, covering a range of job types:

> 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.[940]

7.199 Also in the financial year ending in June 2009, Queensland Corrective Services employed 3467 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);[941] and the Queensland Police Service employed 14,627 personnel, including 3982 general staff members in addition to the 10,277 police officers and 368 police recruits.[942] The exclusion of all of those people would thus have a significant impact on the jury pool.

7.200 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 interests in prosecuting crimes, would not be so direct as to make those persons absolutely unsuitable for jury service.

7.201 The provisions for excusal, 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.

7.202 The Commission is not aware of any systemic difficulties associated with the fact that these people are currently eligible for jury service and does not, therefore, consider the re-introduction of such a wide class of exclusion to be justified.

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939 *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).

940 Department of Justice and Attorney-General, *Annual Report 2008–09* (2009) 67.

941 Department of Community Safety, *Annual Report 2008–09* (2009) 73, 74.

942 Queensland Police Service, *Annual Report 2008–09* (2009) 5.

7.203 The Commission does consider, however, that it may be appropriate to nominate some further specific categories of exclusion for 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.

7.204 The Commission is also interested in receiving submissions on whether there are any other officer-holders or persons engaged or employed in the public sector in the administration of criminal justice who should be made ineligible for jury service.

Proposal

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.

Crime and Misconduct Commission

7.205 By virtue of Commonwealth legislation, the Chief Executive Officer, examiners and staff of the Australian Crime Commission are exempted from performing jury service in Queensland courts.[943] 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.[944]

7.206 At present, however, commissioners, officers and employees of the Crime and Misconduct Commission of Queensland remain eligible for jury service (except to the extent they fall within another category of ineligibility, for example, for 'lawyers engaged in legal work').

7.207 The Crime and Misconduct Commission in Queensland performs three major functions: the 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 administration of criminal justice, and public misconduct.[945] It is headed by a body of Commissioners, and includes Assistant Commissioners, senior officers and a range of other staff.[946]

7.208 The Crime and Misconduct Commission is monitored by the Parliamentary Crime and Misconduct Committee (comprised of members of the Legislative Assembly) which is assisted by the Parliamentary Crime and Misconduct Commissioner. The Par-

943 *Jury Exemption Regulations 1987* (Cth) reg 5(2)(h). That legislation also exempts Secretaries appointed to a Royal Commission or Committee of Inquiry: *Jury Exemption Regulations 1987* (Cth) reg 7(2)(b). Similarly, in the ACT, people appointed to Royal Commissions, Boards of Inquiry and Judicial Commissions are exempt from jury service, as are public servants for the period that they are made available to any such commission or board: *Juries Act 1967* (ACT) s 11(1) sch 2 pt 2.1.

944 *Juries Act 1957* (WA) s 5(a)(i), sch 2 pt 1.

945 *Crime and Misconduct Act 2001* (Qld) ss 4, 5, ch 2.

946 See Crime and Misconduct Commission, Queensland, *Annual Report 2005–2006* (2006) 19–20.

liamentary Crime and Misconduct Commissioner investigates complaints against the CMC and its officers and reviews the CMC's activities.[947]

7.209 As discussed at [7.164]–[7.167] 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 during the period of their employment and for three years thereafter.[948]

7.210 In its recent Discussion Paper, the Law Reform Commission of Western Australia also considered that the ineligibility of the Commissioner and the Parliamentary Inspector of the Corruption and Crime Commission should continue 'as such officers cannot properly be seen to be independent of the state and its interests'. It also proposed that, because of their involvement in the detection and investigation of crime, corruption and misconduct or prosecution of particular charges, officers 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'[949] should also be ineligible. It proposed that the ineligibility should apply during the term of employment and for a period of five years thereafter.[950]

QLRC's provisional views and proposals

7.211 In the Commission's provisional view, the Commissioner and officers of the Crime and Misconduct Commission, 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. It is unnecessary and unduly restrictive, however, to extend the ineligibility to cover clerical, administrative or support staff of that Commission.

7.212 As with police officers, the Commission is inclined to consider that the ineligibility should apply during the currency of the person's office or employment and, arguably, for a period of three years thereafter. The extension of the ineligibility for a limited period of time after the person has ceased to hold the position would be consistent with the proposals of the NSW Law Reform Commission and the Law Reform Commission of Western Australia.

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947 The Parliamentary Crime and Misconduct Commissioner is a person who has served, or is eligible to serve, as a judge of the Supreme Court of Queensland or another State, the High Court or the Federal Court. As such, the Commissioner would, at present, be ineligible for jury service by virtue of being either a lawyer or a former judge. See *Crime and Misconduct Act 2001* (Qld) s 304.

948 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.71], Rec 17.

949 The LRCWA proposed this particular formulation because it may not be possible for these officers to disclose the nature of their work, and thus the basis of their claim for ineligibility, to the Sheriff because of the special secrecy and confidentiality obligations that bind them: Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 76.

950 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 75–6, Proposal 27.

Proposal

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 than in a clerical, administrative or support staff role, is ineligible for jury service.

Question

7-23 Should a person who *has been*, in the preceding three years, a Commissioner of the Crime and Misconduct Commission, or employed or engaged by the Crime and Misconduct Commission other than in a clerical, administrative or support staff role, also be ineligible for jury service?

Officers of the court

7.213 Officers of the Supreme, District and Magistrates Courts in Queensland (those courts having criminal, as well as civil, jurisdiction) include:[951]

- 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;[952]
- 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;[953]
- Shorthand reporters and recorders who are charged with reporting and recording proceedings of the court;[954] and

951 An 'officer of the court' is 'an individual involved in the administration of the affairs of the court': LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 1 June 2010). 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.

952 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) s 22C; *Magistrates Courts Act 1921* (Qld) s 3; *Magistrates Act 1991* (Qld) pt 9A; Magistrates Court, Practice Direction No 1 of 2008, 'Judicial Registrars—Power concerning prescribed applications and matters' (Chief Magistrate, Judge MP Irwin, 3 January 2008); *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 19(2), 29(3), (4).

953 *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. Also see, 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').

954 *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 empanelling of juries in criminal cases.[955]

7.214 Other officers who are conferred with quasi-judicial powers are justices of the peace who have jurisdiction, among other things, to deal with simple offences under the *Justices Act 1886* (Qld).[956]

7.215 In a number of jurisdictions, court officers are specifically excluded from jury service:

- In South Australia and Victoria, court reporters are expressly excluded.[957]
- In Western Australia, the legislation specifically excludes a person who is or has been in the last five years a Sheriff or officer of the Sheriff; a bailiff or assistant bailiff; or an associate or usher of a judge of the Supreme Court, Family Court or District Court.[958]
- More generally, the legislation in the ACT exempts 'public servant[s] in the staff of the Supreme Court or Magistrates Court',[959] the South Australian legislation excludes 'persons employed in the administration of courts',[960] and the New Zealand legislation excludes 'officers' of the High Court or District Court.[961]

7.216 No similar provisions are made in Queensland.

7.217 In the view of the Law Reform Commission of Western Australia, the exclusion of court officers is warranted on the basis of the connection of their roles 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' and will be acquainted with advocates; the 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.[962] In the case of the Sheriff, the LRCWA considered an extension of the ineligibility for a period of five years after termination of the person's office was appropriate to 'ensure sufficient independence' from the Sheriff's jury management role.[963]

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955 *Supreme Court Act 1995* (Qld) s 210; *District Court of Queensland Act 1967* (Qld) s 36; *Criminal Practice Rules 1999* (Qld) rr 44, 46, 47, 48, 51.

956 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3), (4). Also see, for example, *Peace and Good Behaviour Act 1982* (Qld) s 4.

957 *Juries Act 1927* (SA) s 13(c), sch 3 cl 2; *Juries Act 2000* (Vic) s 5(3), sch 2 cl 1(m).

958 *Juries Act 1957* (WA) s 5(a)(1), sch 2 pt 1 cl 2(e)–(g).

959 *Juries Act 1967* (ACT) s 11(1), sch 1 pt 2.1 cl 16.

960 *Juries Act 1927* (SA) s 13(c), sch 3 cl 2.

961 *Juries Act 1981* (NZ) s 8(h)(iv).

962 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 70–3.

963 Ibid 72.

7.218 The LRCWA proposed, 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.[964]

QLRC's provisional views and proposals

7.219 In the Commission's provisional view, officers of the Supreme, District and Magistrates Courts who are associated with the administration of the criminal courts should be ineligible for jury service for the currency of their office. This should include shorthand reporters and recorders, Sheriffs, registrars, and judges' associates.

Proposal

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.

Spouses of ineligible people

7.220 As noted above, the spouses of some ineligible people are also made ineligible for jury service in some jurisdictions.

7.221 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.[965] However, any such challenge could only take place if the challenging party were aware of the prospective juror's status in this regard.

QLRC's provisional views and proposals

7.222 Spouses of those people who are ineligible on the basis of occupation, office or profession should continue to be eligible for jury service. If there is a matter of hardship or inconvenience for the person, or concern about the person's lack of impartiality, this can be dealt with on a case-by-case basis by way of excusal or challenge.

Proposal

7-25 The spouses of people who are ineligible on the basis of occupation, office or profession should remain eligible for jury service.

964 Ibid 71–2, Proposal 19, 21. 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].

965 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [4.99]–[4.104], Rec 21.

COMMONWEALTH EXEMPTIONS

7.223 A number of occupations are also exempt from serving on juries in federal, state or territory courts under Commonwealth legislation. Many of these are similar to the categories of occupational ineligibility that apply in some of the states and territories of Australia, and have been noted elsewhere in this chapter.

7.224 The *Jury Exemption Act 1965* (Cth) exempts the following people:

> 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[966]

7.225 Under the *Jury Exemption Regulations 1987* (Cth), a wide number of other occupational exemptions also apply. These include occupations relating to the administration of justice and public administration. These exemptions are listed in regulations 5 and 7:

> **5 Exemptions relating to administration of justice**
>
> …
>
> (2) This regulation applies to the following persons:
>
> (a) an officer or employee of:
>
> (i) a Department; or
>
> (ii) the Office of Parliamentary Counsel; or
>
> (iii) the Office of the Director of Public Prosecutions;
>
> being an officer or employee whose duties involve the provision of legal professional services;
>
> (b) an officer or employee of:
>
> (i) the High Court of Australia; or
>
> (ii) the Federal Court of Australia; or

966 *Jury Exemption Act 1965* (Cth) s 4, sch.

(iii) the Family Court of Australia; or

(iv) the Federal Magistrates Court;

(c) a person employed as a chemist in the Australian Government Analytical Laboratories, being a person whose duties include appearing as an expert witness in court proceedings;

(g) a member within the meaning of the *Australian Federal Police Act 1979* and a person employed under section 24 of that Act;

(h) the Chief Executive Officer within the meaning of the *Australian Crime Commission Act 2002* and an examiner or a member of the staff of the Australian Crime Commission within the meaning of that Act;

(j) a person not otherwise referred to in this subregulation for the time being employed by:

(ii) the Australian Police Staff College; or

(iii) the National Police Research Unit;

(k) a member, or a member of the staff, of the Administrative Appeals Tribunal;

(l) a member, or a member of the staff, of the National Native Title Tribunal;

(m) a staff member, within the meaning of the *Australian Securities Commission Act 1989*, being a staff member whose duties involve:

(i) providing legal professional services; or

(ii) investigating matters.

…

7 Exemptions relating to public administration

…

(2) This regulation applies to:

(a) the Official Secretary to the Governor-General; and

(b) a person performing duties as Secretary to:

(i) a Royal Commission; or

(ii) a Committee of Inquiry established under an Act; and

(c) a person holding, or for the time being performing the duties of, one of the following positions in relation to a Minister of State:

(i) Principal Private Secretary;

(ii) Principal Adviser;

(iii) Senior Private Secretary;

(iv) Senior Adviser;

(v) Private Secretary;

(vi) Adviser;

(vii) Press Secretary; and

(e) the Industrial Registrar, and any Deputy Industrial Registrar, within the meaning of subsection 62 (2) of the *Workplace Relations Act 1996*; and

(f) a person holding, or for the time being performing the duties of, one of the following offices in the Department of the Senate:

(i) Clerk of the Senate;

(ii) Deputy Clerk of the Senate;

(iii) Clerk-Assistant (Table);

(iv) Clerk-Assistant (Procedure);

(v) Clerk-Assistant (Management);

(vi) Clerk-Assistant (Committees);

(vii) Usher of the Black Rod;

(viii) Principal Parliamentary Officer, Table Office;

(ix) Secretary to a committee established by the Senate, or jointly by the Senate and the House of Representatives, including a committee established by an Act; and

(g) a person holding, or for the time being performing the duties of, one of the following offices in the Department of the House of Representatives:

(i) Clerk of the House of Representatives;

(ii) Deputy Clerk of the House of Representatives;

(iii) First Clerk Assistant;

(iv) Clerk Assistant (Procedure);

(v) Assistant Secretary (Committees);

(vi) Clerk Assistant (Table);

(vii) Assistant Secretary (Corporate Services);

(viii) Serjeant-at-Arms;

(ix) Director (Programming), Table Office;

(x) Director (Legislation and Records), Table Office;

(xi) Secretary to a committee established by the House of Representatives, or jointly by the House of Representatives and the Senate, including a committee established by an Act; and

(j) a person holding, or for the time being performing the duties of, one of the following positions in the Department of Defence:

(i) Deputy Director, Defence Signals Directorate;

(ii) Director-General, Alliance Policy and Management;

(iii) Deputy Chief of Facility, Joint Defence Facility, Pine Gap;

(iv) Australian Chief of Security, Joint Defence Facility, Pine Gap;

(v) Engineer Class 3, Joint Defence Facility, Pine Gap; and

(k) a person holding, or for the time being performing the duties of, the position of Parliamentary Liaison Officer in the Department of the Prime Minister and Cabinet.

7.226 Regulation 4 also exempts *all* 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.

7.227 Some other Commonwealth exemptions also apply, namely:

- Veterinary officers or other persons employed in the Department of Primary Industries and Energy whose duties relate to the planning, co-ordination and monitoring of measures to limit the importation of exotic diseases into, or outbreak of exotic diseases in, Australia;[967]
- Masters and seamen of all ships;[968] and
- Persons regularly employed by an airline in the capacity of operating crew.[969]

967 *Jury Exemption Regulations 1987* (Cth) reg 6(2).

968 *Navigation Act 1912* (Cth) s 147.

969 *Air Navigation Regulations 1947* (Cth) reg 150. The masters and crews of ships actually trading, licensed sea pilots and aircraft pilots regularly employed as such on Australian aircraft also used to be exempt in Queensland under s 8(1)(n) and (u) of the former *Jury Act 1929* (Qld).

Senior public servants

7.228 As noted above, senior public servants are exempt under the Commonwealth legislation.[970] Chief executives in the public service are also exempt in the Australian Capital Territory,[971] but, other than those employed in the criminal justice system,[972] public servants are not generally exempt under the legislation in any other Australian jurisdictions.

7.229 The exemption of public servants under the Commonwealth legislation has been criticised as unnecessarily broad.[973] 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'.[974] It recommended that the exemption 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'.[975]

7.230 In Ireland, for example, a civil servant is excusable as of right:[976]

> 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.

7.231 Most recently, the Law Reform Commission of Western Australia noted that the exemptions that apply under the *Jury Exemption Act 1965* (Cth) and *Jury Exemption Regulations 1987* (Cth) extend to a range of occupations beyond those that are connected with the administration of justice. It observed that:

> These provisions, while beyond the scope of what may be recommended for reform by the Commission, nevertheless comprise a small component of the present regime against which any recommendations must be considered.[977]

QLRC's provisional views and proposals

7.232 It is not within the Commission's Terms of Reference to review the provisions of Commonwealth legislation dealing with juror eligibility or exemption. The Commission has, however, had regard to the occupational exemptions that apply under the Com-

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970 *Jury Exemption Regulations 1987* (Cth) reg 4. Regulation 4 currently exempts Commonwealth employees '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'. Also see *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II.

971 *Juries Act 1967* (ACT) s 11(1) sch 2 pt 2.1.

972 See [7.131]–[7.132] above.

973 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].

974 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.23].

975 Ibid 5, Rec 27.

976 *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II. Under that provision, Heads of Government Departments and Offices are also excusable as of right.

977 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 78.

monwealth legislation for comparative purposes as part of its examination of the categories of occupational ineligibility that apply under the Queensland Act. It also agrees with the view expressed by the NSW Law Reform Commission that the exemption of all senior Commonwealth public servants from jury service in Australia is undesirably broad and should be reviewed.

Proposal

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 keeping juries as representative as possible and that the burden of jury service be shared fairly.

Chapter 8

Ineligibility or Exemption: Age, Competence and Personal Beliefs

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:

> 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.[978]

978 See the Terms of Reference set out in Appendix A to this Paper.

8.2 At present, section 4(3)(j)–(l) of the *Jury Act 1995* (Qld) provides the following categories of ineligibility on the basis of age, competence and personal circumstances:

> (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;
>
> …

8.3 As noted earlier in this Paper, there has been a general trend in other jurisdictions, and to some extent in Queensland as well, to limit the categories of people who are exempted from jury service.

8.4 The focus of this chapter is whether there should be, or continue to be, automatic exemptions on the basis of age, lack of understanding of English, physical or mental disability, and personal or religious beliefs; chapter 9 considers the grounds for case-by-case excusal.

THE PRINCIPLE OF NON-DISCRIMINATION

8.5 In chapter 5 of this Paper, the Commission identified non-discrimination as one of the principles that should guide the review and reform of the rules of juror eligibility and selection. This is of particular importance in this chapter.

8.6 All people, regardless of disability, age or other distinction are entitled to participate in public and political life.[979] Jury service is a basic civil obligation, and has even been characterised as civil right. If the latter were accepted, it would follow 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 pubic service and the right to take part in government.[980] Freedom from discrimination on the basis of age, race, disability or religion is

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979 See, for example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, Art 25 (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).

980 *Universal Declaration of Human Rights*, Art 2, 6, 21, GA Res 217 (III) (10 December 1948). Also see n 979 above.

also upheld by a number of other specific United Nations declarations and conventions, which provide, among other things, that:[981]

- 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.
- 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.[982] The Act's purpose is to promote equality of opportunity.[983] Its focus is unfavourable and unreasonable treatment in certain areas of activity, such as work, accommodation and education, including the administration of State laws and programs.[984] 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;

981 See, for example, *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 1 June 2010.

982 *Anti-Discrimination Act 1991* (Qld) ss 6, 7(f)–(i). Also see, for example, *Disability Discrimination Act 1992* (Cth).

983 *Anti-Discrimination Act 1991* (Qld) s 6(1).

984 *Anti-Discrimination Act 1991* (Qld) ss 9–11, 101.

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,[985] as is discrimination on the basis of a legal incapacity that is relevant to the transaction at hand.[986] Sections 104, 105 and 112 of the Act provide:

104 Welfare measures

A person may do an act to benefit the members of a group of people with an attribute for whose welfare the act was designed if the purpose of the act is not inconsistent with this Act.

Example 1—

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.

Example 2—

It is not unlawful to restrict special accommodation to women who have been victims of domestic violence or to frail, older people.

Example 3—

It is not unlawful to establish a high security patrolled car park exclusively for women that would reduce the likelihood of physical attacks.

105 Equal opportunity measures

(1) A person may do an act to promote equal opportunity for a group of people with an attribute if the purpose of the act is not inconsistent with this Act.

(2) Subsection (1) applies only until the purpose of equal opportunity has been achieved.

…

112 Legal incapacity

A person may discriminate against another person because the other person is subject to a legal incapacity if the incapacity is relevant to the transaction in which they are involved.

Example—

It is not unlawful for a person to refuse to enter into a contract with a minor, or a person who has impaired capacity for the contract within the meaning of the *Guardianship and Administration Act 2000*, if the contract can not be legally enforced.

985 *Anti-Discrimination Act 1991* (Qld) ss 104, 105.

986 *Anti-Discrimination Act 1991* (Qld) s 112.

8.10 In considering the appropriateness of exemptions from jury service, the principle of non-discrimination must also be balanced, however, against the need for competence. The right to a fair trial encompasses the right to a competent tribunal.[987] Exclusions from jury service may thus be justified if a person is not capable of discharging the duties of a juror.

8.11 In general, exclusion arising from a personal attribute should be based not on the possession of the attribute alone, but on the person's inability, because of that attribute and having regard to the assistance that can reasonably be provided, to competently perform jury service. Exemption might also be justified if it is for the benefit or assistance of the people to whom it applies.

8.12 The principle of representativeness, and the need for a fair sharing of the task of jury service, will also be relevant.

PEOPLE 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.[988] People aged 70 years or more may opt in for jury 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.[989] They are the only group in Queensland whose liability for jury service is voluntary.

8.14 This is, uniquely, an 'opt-in' system.

8.15 Once a person reaches 70 years of age, the person is recorded on the courts database for jury administration as 'never available' for jury service; the system is then updated if the Sheriff receives notice of the person's election to remain eligible.[990] It is unclear how many people over this age elect to remain or become eligible.

8.16 The *Notice to Prospective Juror* also includes a place for the person to indicate (by ticking next to the relevant item) whether he or she is ineligible for service because the person is 70 years or older and does not wish to serve.[991]

8.17 The age of 70 years may have been chosen because it accords with the age of judicial retirement.[992]

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987 See, for example, *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).

988 *Jury Act 1995* (Qld) s 4(3)(j), (4).

989 *Jury Regulation 2007* (Qld) s 4.

990 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

991 See generally *Jury Act 1995* (Qld) s 18; Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 1 June 2010.

8.18 Previously in Queensland, section 8(3) of the *Jury Act 1929* (Qld) provided that any 'senior male person' and any woman could apply for exemption simply by writing to the Sheriff, informing him that he or she desired to be exempt from jury service. A 'senior male person' was defined by section 3 to be between the ages of 65 and 70; all people over 70 were disqualified from service under section 6(1).

Other jurisdictions

8.19 The position with respect to older people differs across the other Australian jurisdictions. Only two jurisdictions provide a fixed upper age limit on jury service: in South Australia and Western Australia, people above the age of 70 years are not qualified (or not eligible) to serve.[993]

8.20 The remaining Australian jurisdictions instead provide that people over a certain age — or, in Victoria, who are of 'advanced age' — may seek excusal or exemption from jury service, sometimes permanently:

- In the Australian Capital Territory, people over 60 years old may seek exemption from jury service.[994]
- In New South Wales, people aged 70 years or older are entitled as of right to be exempted from jury service.[995]
- In the Northern Territory, people over 65 years may exempt themselves on a permanent basis by giving written notice to the Sheriff.[996]
- In Tasmania, a person who is at least 70 years old may apply to the Sheriff to be excused for the whole or part of the jury service period or on a permanent basis.[997]
- In Victoria, a person may seek to be excused from the whole or part of the jury service period or permanently on the basis of the person's 'advanced age'.[998]

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992 See, for example, Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [2.9]. The NSW Law Reform Commission also compared the upper age limit of jury service with that of the judiciary, noting, however, that 'retired judges have regularly served as acting judges in NSW up to the age of 75 years': New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.40]. In Queensland, the compulsory retirement age for Supreme and District Court judges is 70 years; for magistrates, it is 65 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. The retirement age for magistrates is expected to be raised to 70 years: see Attorney-General and Minister for Industrial Relations Hon Cameron Dick, 'Retirement age for magistrates to rise' (Ministerial Media Statement, 25 May 2010).

993 *Juries Act 1927* (SA) s 11(b); *Juries Act 1957* (WA) s 5(a)(ii). The same age limit applies in England and Ireland: *Juries Act 1974* (Eng) s 1(1)(a); *Juries Act 1976* (Ireland) s 6. In Scotland and Hong Kong, people over 65 years of age are not qualified to serve: *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(1)(b); *Jury Ordinance, Cap 3* (HK) s 4(1).

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

995 *Jury Act 1977* (NSW) s 7.

996 *Juries Act* (NT) s 11(2).

997 *Juries Act 2003* (Tas) s 11(1).

998 *Juries Act 2000* (Vic) ss 8(3)(i), 9(4)(c). Prior to the enactment of the *Juries Act 2000* (Vic), Victorian legislation provided that people over 65 years of age could be excused as of right: *Juries Act 1967* (Vic), reprint 045, s 4(4), sch 4 cl 14.

- In Western Australia, people who are 65 years or older may be excused as of right.[999] Similar provision is made in Ireland.[1000]

- In New Zealand, people over 65 years may be excused for the jury service period.[1001]

8.21 All of the other jurisdictions thus differ significantly from Queensland where people over 70 years old are ineligible but may opt in for jury service.

Retaining a fixed upper age limit?

8.22 One of the difficulties in making older people ineligible for jury service is that there is no fixed time of life at which jury service becomes too difficult or inconvenient due to a person's ageing. Automatic disqualification of people over 70 may eliminate from the pool citizens who are otherwise capable and willing to serve while it may also keep people in the pool who ought to be excused permanently. The starting position, that people over 70 years should generally be excluded from jury service, might be seen as presumptuous and discriminatory.

8.23 The Law Commission of New Zealand recommended that there should be no fixed upper age limit on jury service, suggesting that people over 65 'should decide for themselves whether or not they want to serve on a jury'.[1002] Subsequently, the automatic disqualification of people over the age of 65 in New Zealand was removed in favour of an excusal provision.[1003]

8.24 A fixed upper age limit on jury service would, however, be consistent with compulsory retirement for judicial officers[1004] and may have administrative advantages in its simplicity and certainty. The Law Reform Commission of Western Australia has proposed, for example, that a fixed upper age limit be retained: see [8.26] below.

8.25 In England and Wales, Lord Justice Auld saw 'no compelling case for change' in this regard[1005] and the legislation presently retains an upper age limit of 70 years.[1006] However, the United Kingdom Ministry of Justice is currently considering whether the upper age limit should be raised or abolished and whether to provide, in either case, a 'right of self-excusal' for people over 70 years.[1007]

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999 *Juries Act 1957* (WA) s 5(c)(i).

1000 *Juries Act 1976* (Ireland) ss 6, 9(1)(a), sch 1 pt II.

1001 *Juries Act 1981* (NZ) s 15(2)(aa), 16(a).

1002 Law Commission of New Zealand, *Juries in Criminal Trials: Part One*, Discussion Paper 32 (1998) [337].

1003 *Juries Act 1981* (NZ) s 6(a), repealed by *Juries Amendment Act 2000* (NZ) s 5.

1004 See n 992 above.

1005 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [21]. Justice Auld's report is discussed in more detail in chapter 5 of this Paper.

1006 *Juries Act 1974* (Eng) s 1, sch 1 pt III, amended by *Criminal Justice Act 2003* (Eng) s 15.

1007 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) <http://www.cjsonline.gov.uk/current_consultations/> at 1 June 2010.

LRCWA's proposals

8.26 In its recent Discussion Paper, the Law Reform Commission of Western Australia proposed that an upper age limit for liability for jury service should be retained (but that it be raised from 70 to 75 years)[1008] and that there no longer be provision for excusal as of right for those aged between 65 and 70; indeed, it expressed the view that there should be no excusals as of right on any basis.[1009]

8.27 In the LRCWA's view, in contrast to an open-ended age limit and a system of excusal on the basis of age,

> 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.[1010]

8.28 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.[1011]

Opting in, or opting out?

8.29 At present, Queensland's upper age limit is modified by the provision allowing otherwise ineligible older persons to volunteer for service.

8.30 The Queensland provision was inserted in the Act in 1996. The explanatory notes to the amending legislation explained the reasoning in the following way:

> 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.[1012]

8.31 Allowing people over 70 years to volunteer for service goes some way to addressing concerns about unfair discrimination and unnecessary reductions of the jury pool. But, it also raises other difficulties. Unless it is merely tokenistic, it presumes that people who are capable of serving will volunteer. It also assumes a feasible mechanism for informing older people of their right to serve: see [8.15]–[8.16] above.

8.32 A better alternative may be to remove the upper age limit on jury service and simply allow older people to opt out of jury service if they want to. The Law Reform Commission of Hong Kong preferred this approach:

1008 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 53–5, Proposal 10.

1009 Ibid 111.

1010 Ibid 55.

1011 Ibid.

1012 Explanatory Notes, Jury Amendment Bill 1996 (Qld) 1.

> The advantage of the latter approach is that, by placing the onus on the individual to take himself out of the system, rather than to opt into it, the jury pool is less likely to be diminished.[1013]

8.33 On the other hand, it may clutter the jury lists with older people who can no longer reasonably carry out the functions of a juror.

8.34 The Ministry of Justice in the United Kingdom is also considering such an approach, recognising 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.[1014]

Excusal as of right, or only with good cause?

8.35 If opting out is to be preferred, an issue to consider is whether exemption should be based on age alone, or should require the demonstration of some further justification, such as a disability or illness that impacts on the person's ability to discharge the duties of a juror.

8.36 The former position applies in the majority of other Australian jurisdictions. In most cases, the entitlement to exemption is tied to a nominated age threshold.[1015] As is the case in Victoria, however, an exemption could be claimed on the basis of 'advanced age',[1016] without the need to specify a particular age threshold.

8.37 The Victorian Law Reform Committee recommended in its 1996 report on jury selection that 'an upper age limit should not apply' but that 'persons aged 70 years and over should be entitled to elect to have their names removed from the jury list' in order to 'reduce inconvenience and anxiety'.[1017] It considered this to be an appropriate measure to alleviate older persons' distress, and noted that people over 65 years constituted a relatively small portion of those summoned for jury service but accounted for half of all applications for excusal:

> 3.165 Several submissions regarded the existence of a special provision relating to age alone as being unnecessary because the legislation already excludes people who are unable to serve because of illness, mental or physical disability. The Council on the Ageing provided three additional reasons for opposing such a provision. First, people's abilities are related in only a minor way to their age. Secondly, juries should be reflective of the community and older people should be included in the same proportion as they occur in the population. Thirdly, the older age range is likely to cover a greater proportion of people retired from the work force who may have more time available, and who have retired from occupations which had earlier exempted them from jury service.
>
> 3.166 The committee accepts that there is much force in the submission from the Council on the Ageing. However, the committee also notes that the most common complaint received by the sheriff is from older people who receive questionnaires

1013 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.11].

1014 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] <http://www.cjsonline.gov.uk/current_consultations/> at 1 June 2010.

1015 See [8.20] above. Also, under s 8(3) of the former *Jury Act 1929* (Qld), people between the ages of 65 and 70 were entitled to apply for exemption.

1016 *Juries Act 2000* (Vic) ss 8(3)(i), 9(4)(c).

1017 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.167].

> too frequently. The Deputy Sheriff (Juries) has commented that: 'the receipt of jury notices by elderly people is often the cause of a great deal of distress to them or their family'. Moreover, as noted earlier, persons over the age of 65 years account for 50% of all persons claiming a right to be excused from jury service. A survey conducted by the committee of 17,345 persons summoned for jury service in 1994 shows that only 525 or 3% were aged over 65 years. Of these 241 or 1.4% were aged 70 years or over—151 were aged between 70 and 74, 63 between 75 and 79, 22 between 80 and 84 and 5 between 85 and 89. The oldest person who actually served on a jury was aged 83, while the oldest person who attended for jury service was aged 87.
>
> 3.167 Largely for the reasons advanced by the Council on the Ageing, the committee believes that an upper age limit should not apply to jury service. However, in order to reduce inconvenience and anxiety, persons aged 70 years and over should be entitled to elect to have their names removed from the jury list.[1018] (notes omitted)

8.38 In contrast, in England and Wales the entitlement of people between 65 and 70 years of age to claim excusal as of right has been removed,[1019] leaving such persons to apply for discretionary excusal on some other basis. This was the approach preferred by Lord Justice Auld in his 2001 Report:

> Excusal as of right of those over 65 is relatively new, having been introduced by a statutory amendment in 1988.[1020] But it seems to me that the increasing number and better health of persons over that age justify treating them as other potential jurors under the qualifying limit of 70, namely, fit to serve unless they can show that they are so physically or mentally unfit as not to be able to act effectively as jurors. No doubt, claims by persons over 65 on that account would be sympathetically considered.[1021] (note in original)

NSWLRC's recommendations

8.39 In its recent Report on jury selection, the NSW Law Reform Commission recommended that the automatic right of exemption for people over 70 years be removed and that such persons should instead be entitled to seek excusal for good cause, 'for example, on the grounds of illness or other incapacity'.[1022] It acknowledged, however, that it may be appropriate, in practice, for people over 75 years to be entitled to excusal if they do not wish to serve:

> 6.45 We do not believe that it is appropriate to select the age of 70 years as an arbitrary point for exemption. 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 would be more appropriate to allow elderly people to be excused for good cause, for example, on the grounds of illness or other incapacity, or the likely length of the trial, or personal discomfort, rather than relying on a presumptive right to exemption based on an arbitrary age alone. We see no reason why applications to be excused could not be dealt with sympathetically by the Sheriff or by a judge without any personal embarrassment to the potential juror.

1018 Ibid [3.165]–[3.167].

1019 *Juries Act 1974* (Eng) s 1, sch 1 pt III, amended by *Criminal Justice Act 2003* (Eng) s 15.

1020 *Criminal Justice Act 1988*, s 119(2).

1021 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [36]. Justice Auld's report is discussed in more detail in chapter 5 of this Paper.

1022 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.45].

> 6.46 Alternatively, if it is considered, on a pragmatic basis, that most people aged over 75 years would successfully apply to be excused from jury service, then as a fall back we recognise that this could be achieved by the adoption of a suitable guideline, which would facilitate excusal of those who do not wish to serve, while allowing those who are able to do so to exercise that right.[1023]

QLRC's provisional views and proposals

8.40 The Commission's provisional view is that 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 carrying out the duties of a juror.

8.41 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.

8.42 On balance, the Commission is of the provisional view that people who are 70 years or older should be entitled to claim exemption as of right from jury service for the whole or part of a jury service period or permanently. Such 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 is preferable to an amorphous designation such as 'advanced age'.

8.43 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 civic society for many years the opportunity to opt out of further service. It may thus also allow the burden of jury service to be shared more equitably among other members of the community.

8.44 This approach also has the advantage that once a person has claimed permanent exemption, his or her name can be removed from the relevant lists and the person will not be called for jury service again.

1023 Ibid [6.45]–[6.46].

Proposals

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.

PEOPLE WHO ARE UNABLE TO READ OR WRITE ENGLISH

8.45 In Queensland, people who are 'not able to read or write the English language' are ineligible to serve as jurors.[1024]

8.46 The *Notice to Prospective Juror* asks the notified person to indicate, by ticking the relevant item, whether they are ineligible for jury service. One of the items listed is that the person is 'unable to read or write English'.[1025] The form itself is written only in English and carries no reference to translation or interpreting facilities, even for the purpose of understanding the Notice, the requirement to be able to read and write English, or the process that prospective jurors with poor English should follow to have their claim for disqualification heard; neither does the *Juror's Handbook*. Telephone translation and interpretation services are, however, available to members of the public.[1026]

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 requirement for jurors to understand English.[1027] In Victoria, for example, the following statement is included on the 'notice of selection' in English and in seven other languages:

1024 *Jury Act 1995* (Qld) s 4(3)(k).

1025 See generally *Jury Act 1995* (Qld) s 18; Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 1 June 2010.

1026 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 1 June 2010.

1027 See Supreme Court of the Northern Territory, 'For Jurors: Ineligibility through English language difficulty' <http://www.supremecourt.nt.gov.au/jurors/index.htm#q3>; Supreme Court of the Northern Territory, 'For Jurors' 2–3 <http://www.supremecourt.nt.gov.au/documents/JuryService.pdf>; 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, 'Victoria's Jury System: Notice of Selection – Metropolitan' <http://www.courts.vic.gov.au/CA256902000FE154/Lookup/Jury_Service/$file/Notice%20of%20Selection%20(full).pdf> at 1 June 2010.

> ***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.[1028]

8.48 It may be possible to transcribe the notice and summons into community languages. However, it would remain important to ensure that jurors are able to understand the evidence and participate in deliberations.

8.49 In practice, claims of ineligibility or for excusal because of a poor command of English are assessed in interviews with the Deputy Sheriff or a court registrar on a case-by-case basis.[1029]

Other jurisdictions

8.50 While the wording differs, each of the Australian jurisdictions deals with English language difficulty as a matter of ineligibility or disqualification:[1030]

- In the ACT, people who are unable to read and speak the English language are disqualified from jury service.[1031]
- In New South Wales, people who are unable to read or understand English are ineligible for jury service.[1032]
- In the Northern Territory, people who are unable to read, write and speak the English language are disqualified from serving as jurors.[1033]
- In South Australia, people who have an insufficient command of the English language to enable them properly to carry out the duties of a juror are ineligible to serve as jurors.[1034]
- In Tasmania, people who are unable to communicate in or understand the English language adequately are ineligible as jurors.[1035]
- In Victoria, people who are unable to communicate in or understand the English language adequately are ineligible for jury service.[1036]

1028 See the sample Notice of Selection for Jury Service for metropolitan areas available at Courts and Tribunals Victoria, Jury Service, 'Victoria's Jury System' <http://www.courts.vic.gov.au/CA256902000FE154/Lookup/Jury_Service/$file/Notice%20of%20Selection%20(full).pdf> at 1 June 2010.

1029 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1030 Also see *Juries Act 1976* (Ireland) s 7, sch 1 pt I under which persons who are unfit to serve on a jury because of insufficient capacity to read, are ineligible for jury service.

1031 *Juries Act 1967* (ACT) s 10(c).

1032 *Jury Act 1977* (NSW) s 6(b), sch 2.

1033 *Juries Act* (NT) s 10(3)(c). See also s 27A(3)–(4).

1034 *Juries Act 1927* (SA) s 13(b).

1035 *Juries Act 2003* (Tas) s 6(3), sch 2.

1036 *Juries Act 2000* (Vic) s 5(3), sch 2.

- In Western Australia, people who do not understand the English language are disqualified from jury service.[1037]

8.51 In the ACT, the legislation also provides that the judge may discharge a person from jury service if satisfied that the person 'has not sufficient understanding of the English language or of the course of judicial proceedings':

> **16 Discharge because of comprehension difficulty or disability**
>
> If a judge is satisfied that a person summoned or appointed to attend to serve as a juror has not sufficient understanding of the English language or of the course of judicial proceedings, or is suffering such mental or physical disability as to be incapacitated for the proper discharge of the duties of a juror, the judge may discharge that person from further attendance on the Supreme Court under that summons or appointment.[1038]

8.52 Similar provisions apply in New Zealand, England and Wales, and Hong Kong.[1039] Section 16AA of the *Juries Act 1981* (NZ) provides, for example:

> **16AA Judge may discharge summons of person with disability or language difficulty**
>
> (1) On application in accordance with subsection (3), or on his or her own motion, a Judge may discharge the summons of a person if the Judge is satisfied that, because of disability or difficulties in understanding or communicating in the English language, the person is not capable of acting effectively as a juror.
>
> (2) A discharge may apply to the whole period for which the person is summoned, or to a particular proceeding.
>
> (3) An application under this section must be made—
>
> (a) before the jury is constituted; and
>
> (b) by the Registrar, or by a member of the court registry staff who is involved in, or responsible for, the administration of juries.
>
> (4) An application under this section must be heard in private, and the Judge may conduct the hearing and consider such evidence as he or she thinks fit.

Automatic exclusion

8.53 The ineligibility of people who cannot understand English is premised on the fact that court proceedings are conducted in English; in fairness to the defendant, it is of obvious importance that the jury be able to follow the evidence on which it will decide its verdict.

1037 *Juries Act 1957* (WA) s 5(b)(iii).

1038 *Juries Act 1967* (ACT) s 16. Also see *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'.

1039 *Juries Act 1981* (NZ) s 16AA (the application for discharge of the summons must be made by the registrar and is to be heard in private); *Juries Act 1974* (Eng) s 10; *Jury Ordinance, Cap 3* (HK) s 4(1)(c), (2).

8.54 One concern about an automatic exclusion of people with English language difficulties is that this may dilute the representativeness of juries by excluding people from non-English speaking backgrounds who are otherwise willing and able to perform jury service. It may also have an impact on many Indigenous Australians and could well be a factor in their being under-represented on Australian and Queensland juries. Automatic exclusion merely on the basis of belonging to a linguistic minority may also infringe the principle of non-discrimination.

8.55 Australian Census data from 2006 indicate that approximately 16% of Australia's population speaks a language other than English at home; 81% of those people speak English well or very well, with younger people and people born in Australia who speak a language other than English at home having higher English proficiency than older people and people born outside Australia.[1040] In Queensland, of those who speak languages other than English at home, 15% speak English not well or not at all.[1041] 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%).[1042] Census data also show that while most Indigenous Queenslanders (84.45%) speak only English at home, 1.9% speak English not well or not at all.[1043] There is also a significant gap in literacy skills between Indigenous and non-Indigenous Australians.[1044]

8.56 Some people whose command of English is poor are not recent arrivals in Australia but are not citizens, and therefore are ineligible for jury service in any event.

8.57 The diversity study conducted for the United Kingdom Ministry of Justice[1045] found that 21% of all 'black and minority ethnic'[1046] people summoned for jury service who did not serve were excused for language reasons.[1047] 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'.[1048] Comparable empirical data are not available for Queensland, although a study of jurors on Victorian civil trials in 2001 found that the proportion of jury-eligible citizens born outside Australia in the Victorian

1040 B Pink, *2008 Year Book Australia*, Australian Bureau of Statistics No 90, Cat No 1301.0, 455–7.

1041 Department of Immigration and Citizenship (Commonwealth of Australia), *The People of Queensland – Statistics from the 2006 Census*, Vol 2 (2008) 3, Table 1.16 (English language proficiency by age: Selected language groups, 2006 Census).

1042 Australian Bureau of Statistics, *2006 Census QuickStats: Queensland*, 'Person Characteristics: Language Spoken at Home'.

1043 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'.

1044 See, for example, Australian Council for Educational Research (L De Bortoli and S Thomson), *The Achievement of Australia's Indigenous Students in PISA 2000–2006* (2009).

1045 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 [4.55]–[4.56] above.

1046 The Commission uses the expression 'black and minority ethnic' because it is the expression used by the UK Ministry of Justice in its report: see 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) 1, note 1, 28, Table 2.1.

1047 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.

1048 Ibid 199–200.

population was generally reflected in the composition of civil juries.[1049] The reported statistics are extracted in the following table.

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 birthplace[1050]

8.58 These results, which suggest at least roughly proportionate ethnic representation on juries, were obtained even though people with inadequate English are ineligible to serve.

The level and type of proficiency in English required

8.59 If proficiency in English is to remain a matter of eligibility, consideration should be given to the type of proficiency that should be required. Different formulations apply across the jurisdictions: some require that jurors can 'understand' English,[1051] others that jurors can 'read', 'write', or 'speak' English,[1052] and some require that jurors are able to 'communicate' in English.[1053] In Queensland, people are excluded if they cannot 'read or write' in English.

8.60 The ineligibility of jurors who cannot *read* English is said to arise:

> from the fact that, in most trials, jurors will be provided with written directions, and given access to portions of the transcript of evidence and, in many cases, required to view and read written documents.[1054]

8.61 In trials that are heavily dependent on documentary evidence, an inability to read English may pose a significant impediment. This difficulty is unlikely to arise, however, in trials where there is limited documentary evidence or where translation can reasonably be provided. The ability to read, and write, in English may be less of an essential requirement, in many cases, than an ability to understand (and communicate in) spoken English.

1049 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.

1050 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).

1051 Eg *Juries Act 1957* (WA) s 5(b)(iii).

1052 Eg *Juries Act* (NT) s 10(3)(c).

1053 Eg *Juries Act 2003* (Tas) s 6(3), sch 2.

1054 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.9], Rec 23. Similarly, the Victorian Law Reform Committee considered this ground of ineligibility justified on the basis that evidence may be in documentary form and jurors may want to take notes of evidence: Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.141]–[3.142], Rec 34.

8.62 Although there is an increasing trend towards the use of written materials and aids, criminal trials are still largely conducted orally.[1055] Most evidence is given orally by witnesses in court, and some, such as police interviews or children's evidence, is given in the form of sound or video recordings. The addresses of the parties and of the judge are also made orally, although they may increasingly be supplemented by written aids. It is also reasonable to assume that most jury deliberations are predominantly conducted by oral discussion, although, again, this is likely to be supplemented by written aids, such as jurors' notes and, increasingly, by access to transcripts and written jury instructions.

8.63 Jurors with poor skills in spoken English may well find themselves at a disadvantage in the jury room in trying to get their point of view across to their fellow jurors during deliberations, and may well simply go along with the majority because of their inability to form or express an independent opinion based on the evidence and other information given to them in court. Jurors who are unable to read the written material that others in the jury room are using may also be disadvantaged.

8.64 It is unclear whether the requirement to 'read' requires reading 'on paper' as opposed to reading with electronic assistance.[1056] If the former is the case, this may unjustifiably disadvantage those persons who, because of blindness or low vision, rely on electronic adaptive technologies for reading.

8.65 While the Law Commission of New Zealand and the Victorian Law Reform Committee both considered that inadequate understanding of English was an appropriate basis for ineligibility, they rejected the imposition of a standard literacy test. The LCNZ considered that such testing would involve 'considerable practical problems' and noted that people who cannot read 'often develop other skills to compensate' for their illiteracy.[1057] The Victorian Law Reform Committee also noted that such a requirement could exclude people from non-English speaking backgrounds and people with literacy difficulties who are otherwise able to serve.[1058]

8.66 In contrast to Queensland, some other Australian jurisdictions limit ineligibility to those who cannot understand English 'adequately' or sufficiently to carry out the duties of a juror. Significantly, this attempts to link eligibility with a person's actual ability to perform the functions of a juror. This is important to ensure that people from non-English speaking backgrounds are not unfairly excluded.

8.67 In practice, this would probably need to be assessed on a case-by-case basis, having regard to the nature of the trial and the ability to provide or make any reasonable adjustments to facilitate a person's understanding of proceedings.[1059]

1055 See [2.78]–[2.79] above. Also see generally Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [10.10]–[10.26], [10.138]–[10.154] and the Commission's recommendation for legislative encouragement of the consideration and use of written aids to assist criminal trial juries.

1056 Vision Australia, Submission 19. Also see generally Vision Australia, Resources, 'Adaptive Technology Guide' <http://www.visionaustralia.org.au/info.aspx?page=1230> at 1 June 2010.

1057 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [208]. Also see Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.87] in which a similar position is taken.

1058 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.12].

1059 See, for example, *Juries Act* (NT) s 27A(3)–(4).

Interpreters and translation facilities

8.68 The capacity of potential jurors to understand proceedings and communicate effectively in the role of juror may improve if they are able to use an interpreter or translation facilities or technologies. Just as the provision of interpreters for non-English speaking witnesses and defendants is recognised as important,[1060] similar provision for jurors might also be justified so that English proficiency is not 'used to discriminate against potential jurors'.[1061] The NSW Law Reform Commission noted this as a possibility in its Report on jury selection, although it did not give it detailed consideration.[1062]

8.69 The provision of interpreters or translation services, however, would invariably add to the cost of trials and the complexity of trial management, and might be expected to add to the length of trials as well. The NSW Law Reform Commission noted these concerns in the context of its recommendation for interpreters and other assistance to facilitate deaf or blind jurors. It concluded, however, that 'budgetary reasons alone' ought not to preclude those persons from serving.[1063]

Excusal or discharge as an alternative

8.70 In England and Wales, English language difficulties are dealt with by way of discretionary excusal or discharge, rather than ineligibility. Jury summonses are accompanied by information in other languages:

> 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.[1064]

8.71 Applications for excusal 'on the grounds of insufficient understanding of English' are encouraged to be granted.[1065] 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 he or she should act as a juror and, if not, to discharge the summons.[1066] Lord Justice Auld considered this approach 'probably the best that can be achieved':

1060 See generally, for example, Supreme and District Courts of Queensland, *Equal Treatment Benchbook*, 'Interpreters in Criminal Cases' [6.3] <http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf> at 1 June 2010.

1061 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.

1062 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.6].

1063 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [2.63] quoting from a submission from the NSW Law Society.

1064 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 1 June 2010.

1065 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [6] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 1 June 2010.

1066 Similar provision is made in *Juries Act 1981* (NZ) s 16AA; *Juries Act 1967* (ACT) s 16.

Discharge of jury summons because of incapacity to understand English

> 49 As to command of and literacy in English, the Morris Committee considered and rejected a number of proposals variously calling for educational, intelligence or literacy tests as a requirement for inclusion on the list for jury service.[1067] However, it recommended that no-one should be qualified to serve on a jury who found it difficult to read, write, speak or understand English. The Roskill Committee doubted whether the formula in the 1974 Act of 'insufficient understanding of English' sufficiently met those recommendations as to literacy. Whilst the Committee noted a judicial readiness to excuse jurors who acknowledged a difficulty in reading and writing in cases involving documentary evidence, it regarded it as no guarantee of excluding them in such cases. It was of the view that, either by amendment of the statutory formula or by leaving it to those responsible for the administration of the courts, it should be ensured that only literate persons should serve as jurors in fraud cases.[1068]
>
> 50 To impose literacy as a qualification for jury service would exclude a significant section of the community who, despite that inability, have much to contribute to the broad range of experience and common-sense that is required in a jury. However, in my view, it is becoming increasingly necessary for jurors to have a reasonable command of written English. Even in the simplest case, there are usually exhibited documents that they must be capable of understanding. If, as I recommend, there is a move to more use of visual aids in court, to written summaries of the issues and of admitted facts and to more wide-spread use of written directions, the need will become greater. I have sympathy with the Roskill Committee's concern that there should be a means of ensuring that illiterate persons do not sit as jurors in fraud trials or any case that involves critical documentary evidence. It would be difficult to entrust the matter to the Central Summoning Bureau to sort out by way of discretionary excusal at the summoning stage. It would not be known then whether the illiterate person summoned would be required to sit as a juror in a case with critical documentary evidence. And to leave it to discreet enquiries by court staff when organising panels of jurors for particular cases is both chancy and offends the principle of randomness. The present system of leaving the judge as the final filter during the process of jury selection is probably the best that can be achieved. By then the nature of the case for trial and its likely demands on the literacy of potential jurors can be assessed. The judge should give the panel of potential jurors an ample and tactfully expressed warning of what they are in for, and offer them a formula that would enable them to seek excusal without embarrassment. As a very last resort, there is always the option for the prosecution to 'stand by' a potential juror who clearly has difficulty, when being sworn, in reading the oath.[1069] (notes as in original)

8.72 The Law Commission of New Zealand also considered that 'testing by court staff would be quite impractical' and preferred instead to ask jurors to bring such difficulties to the attention of the judge:

> It appears to us that a further screening process is required, but clearly further testing by court staff would be quite impracticable. We recommend that, when the jury retires to choose a foreman, the judge should direct them to talk among themselves and ensure that each of them is able to speak and understand English, and to advise the judge if any juror appears unable to do so. At that stage they have already

1067 The Morris Report, paras 76–80.

1068 The Fraud Trials Committee Report (HMSO, 1986), paras 7.9–7.11 155.

1069 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [49]–[50].

> been empanelled, but the case has not been opened. We have recommended … that there should be a broad single provision governing discharge of jurors. Inability to understand English sufficiently well will fit within this general power.[1070] (notes omitted)

NSWLRC's recommendations

8.73 On the basis that jurors will in many cases be 'required to view and read written documents', and to underline the importance of being able to communicate in English,[1071] the NSW Law Reform Commission recommended that people who are unable 'sufficiently to read and communicate in English to enable them properly to carry out the duties of a juror' should be disqualified from jury service.[1072] It preferred this test on the basis that it is less open-ended and targets communication rather than mere understanding.[1073]

8.74 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.[1074]

LRCWA's proposals

8.75 The Law Reform Commission of Western Australia also proposed that people who are 'unable to understand and communicate in English' should not be qualified to serve as jurors.[1075] This would add to the existing provision an express requirement of being able to communicate in English.

8.76 The LRCWA observed that the reason for the disqualification of such persons 'is clear':

> jurors must be able to understand the evidence presented in court and to communicate with other jurors during deliberation. In other words, as stipulated by the Commission's Guiding Principle 1,[1076] jurors must be competent to discharge their duties.[1077] (note added)

1070 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [197]–[200].

1071 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.9].

1072 Ibid [5.9], Rec 23.

1073 Ibid [5.9], [5.10]. At present, the *Jury Act 1977* (NSW) s 6(b), sch 2 cl 11 provides that persons who are 'unable to read or understand English' are ineligible for jury service.

1074 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.8], Rec 23. The Law Reform Commission of Ireland has also proposed that jurors should be required to read and be 'fluent' in English and noted that, in addition to self-identification, the judge has an opportunity, at the time just after the jury has been empanelled when the judge informs the jury about such matters as the expected length of the trial, to ensure that persons selected who have literacy or communication difficulties are excused: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.86]–[4.94].

1075 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 93–4, Proposal 37. At present, *Juries Act 1957* (WA) s 5(b)(iii) provides that a person who 'does not understand the English language' is not qualified as a juror.

1076 The LRCWA's Guiding Principle 1 is that 'The law should protect the status of the jury as a body that is, and is seen to be, an independent, impartial and competent lay tribunal': see Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 16.

1077 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 92.

8.77 The LRCWA noted, however, that because there is no way to identify such people on the jury list '[t]he system essentially relies on self-identification':

> A person summoned for jury service is required under the Fourth Schedule of the *Juries Act* to disclose a lack of understanding of the English language. Attached to the summons is a Juror Information Sheet which explains that if the person summoned does not understand English he or she should complete the statutory declaration and return it to the Sheriff's Office.[1078]

8.78 To be effective, and to avoid the unfair imposition of penalties for failure to respond to a summons, the LRCWA proposed that the jury summons and 'juror information sheet' should state, in the 10 most commonly spoken languages other than English in Western Australia, that translations are available.[1079] It also proposed that guidelines for assessing English language requirements should be developed so that summoning officers can more confidently deal with case-by-case claims that are made in person or on the phone.[1080]

8.79 The LRCWA did not consider that an ability to read English should be necessary except in trials that involve a significant amount of written evidence. In those cases, the LRCWA considered that the process just prior to empanelment when prospective jurors are able to apply to the judge to be excused from jury service 'can accommodate literacy requirements on a case-by-case basis':

> The trial judge can advise the panel that, if selected, they will be required to read large amounts of documentary evidence and if they do not believe that they are capable of this task they should seek to be excused and can confidentially write a note for the judge.[1081]

8.80 The LRCWA considered whether representation of people from linguistically and culturally diverse backgrounds could be improved. Because of the practical difficulties involved, it did not consider that the provision of interpretation and translation services for sitting jurors would be appropriate but sought submissions on other ways of improving the participation of people with poor English skills on juries.[1082]

8.81 The LRCWA also observed that, while Census data show that only 1.75% 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. It suggested that jury awareness strategies targeting people from culturally and linguistically diverse backgrounds should be conducted, noting that there may be a misconception, for example, that jurors need the ability to *read*, and not just understand, English.[1083] Of course, some people may exaggerate their English language difficulties to avoid jury service.

8.82 The LRCWA also noted that it is difficult to assess the extent to which people from culturally and linguistically diverse backgrounds are represented on juries and

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1078 Ibid 94.

1079 Ibid 94–5, Proposal 38.

1080 Ibid 95, Proposal 40.

1081 Ibid 93. This Commission notes that asking jurors to identify their poor English skills in a written note to the judge may not be the most tactful way of approaching this issue.

1082 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 96–7, Invitation to Submit H.

1083 Ibid 95, Proposal 39.

proposed that the juror feedback questionnaire given to people who have completed jury service should be revised to collect more complete statistics in this regard.[1084]

Preliminary submissions

8.83 Vision Australia expressed concern that the existing provision does not distinguish between a person who can understand and read and write the English language, and a person 'who is blind or deaf and understands English but cannot read or write on paper due solely to their lack of vision'. It suggested that the courts should provide necessary support, in the form of adaptive technology, interpreters or readers, for instance, to assist people to perform jury service in this regard.[1085]

8.84 In a preliminary consultation with the Commission, some members of the Criminal Law Section of the Queensland Law Society suggested, however, that the principle of non-discrimination should come second to the need for an effective, and competent, jury. If there is, or is to be (as the Commission has recently recommended),[1086] an increasing trend towards the use of written jury directions and aids, then it is necessary for all jurors to be able to comprehend those documents, as well as any exhibits or other evidence. In their view, it would be undesirable for jurors to rely on other members of the jury to interpret or explain those materials given the risk of miscommunication. It was also noted that the types of documents used in a trial may not be known until the trial is underway.[1087]

QLRC's provisional views and proposals

8.85 The Commission's provisional view is that, 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.

8.86 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 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.

8.87 The existing formulation — that jurors must be able to 'read or write' in English — should be changed. Literacy alone should not be determinative. It fails to take into account the importance of spoken English, and the emphasis on writing seems misplaced. Neither does the test 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

1084 Ibid 96, Proposal 41.

1085 Vision Australia, Submission 19.

1086 See Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) [10.138]–[10.154], Rec 10-1.

1087 Queensland Law Society, Criminal Law Section, Submissions 26, 26A.

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.

8.88 The Commission is thus attracted to 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 is based partly on the test proposed by the Law Reform Commission of Western Australia and partly on the test recommended by the NSW Law Reform Commission. 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.

8.89 In practice, this requires case-by-case assessment and will inevitably rely, to some extent, on self-identification. The Commission considers that the current practice in this regard is the best approach to this issue. To facilitate it, the Commission is inclined to the view that the Sheriff should be given express power to excuse a person who appears to be ineligible on this basis, and that specific guidelines for the assessment of prospective jurors' abilities to understand and communicate in English should be developed. 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.

8.90 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 provisional view is that, where reasonable accommodations can be provided, they probably should be. However, this needs to be assessed on a case-by-case basis taking into account all relevant considerations, including the cost of providing such facilities.

8.91 The judge's discretion to discharge a juror is discussed further in chapter 10 of this Paper.[1088]

8.92 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.

Proposals

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.

1088 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.

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*.

PEOPLE WITH PHYSICAL OR MENTAL DISABILITIES

8.93 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.[1089]

8.94 The *Questionnaire for Prospective Juror* includes a place for a notified person to indicate that he or she is ineligible to serve on the basis of being 'incapable of performing the duties of a juror because of a physical or mental disability'. If the person nominates this ground of ineligibility, the Questionnaire requires the person to attach a medical certificate specifying 'the exact nature of the condition or illness'.[1090]

8.95 In practice, such claims are assessed on a case-by-case basis by the Sheriff's Office, relying on potential jurors to self-identify, and if the Sheriff's Office cannot make a determination, the claim may be referred to the presiding judge.[1091]

8.96 The previous Queensland jury legislation excluded blind, deaf and mute people, and people 'of unsound mind' or who were otherwise 'incapacitated by disease or infirmity',[1092] but this no longer applies.

8.97 At present, there are limited provisions or resources to allow blind or deaf people to serve as jurors. The *Jury Act 1995* (Qld) makes no express provision for the

1089 *Jury Act 1995* (Qld) s 4(3)(l).

1090 See *Jury Act 1995* (Qld) s 18; Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 1 June 2010.

1091 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1092 See former *Jury Act 1929* (Qld) s 8(1)(s).

use of interpreters and most court buildings, other than those that have been modernised or built recently, have only limited facilities for mobility-impaired jurors.[1093]

Other jurisdictions

8.98 The position in relation to people with disabilities varies considerably across Australia, although all relevant legislation makes some mention of people with disabilities.

8.99 A number of jurisdictions provide that people with physical or mental disabilities[1094] are disqualified from jury service or are ineligible to serve as jurors:

- In the ACT, a person is not qualified for jury service if the person is, because of mental or physical disability, incapable of serving as a juror or is of unsound mind.[1095]
- In New South Wales, a person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror is ineligible for jury service.[1096]
- In the Northern Territory, a person is not qualified for jury service if he or she is of unsound mind, 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).[1097]
- In South Australia, a person who is mentally or physically unfit to carry out the duties of a juror is ineligible to serve as a juror.[1098]
- In Tasmania, a person who has a physical, intellectual or mental disability that renders the person incapable of effectively performing the duties of a juror is ineligible for jury service.[1099]
- In Victoria, ineligibility applies to a person who has a physical disability that renders the person incapable of performing the duties of jury service; 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

1093 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1094 In the Northern Territory and New Zealand, the ineligibility applies only in respect of particular mental disabilities, and not physical disabilities.

1095 *Juries Act 1967* (ACT) s 10(d), (e).

1096 *Jury Act 1977* (NSW) s 6(b), sch 2.

1097 *Juries Act* (NT) s 10(3)(d), (e). While the provision in the Northern Territory does not extend to people with physical disabilities generally, it does apply to people who are 'protected persons' within the meaning of the *Aged and Infirm Persons' Property Act* (NT). Under s 12(1) of that Act, a protection order in relation to a person's estate may be made if the person is 'by reason of age, disease, illness or mental or physical infirmity in a position which renders it necessary in the interests of that person or the interests of those dependent on him that his estate be protected'.

1098 *Juries Act 1927* (SA) s 13(a).

1099 *Juries Act 2003* (Tas) s 6(3), sch 2.

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).[1100]

- In Western Australia, a person is not qualified for jury service if the person is incapacitated by any disease or infirmity of the mind or body, including defective hearing, that affects the person in discharging the duty of a juror.[1101]

8.100 In New Zealand, people with an intellectual disability shall not serve on a jury.[1102] England and Wales have also retained the automatic ineligibility of 'mentally disordered' people from jury service, namely:[1103]

> **1**
> A person who suffers or has suffered from mental disorder within the meaning of the *Mental Health Act 1983* (UK) and on account of that condition either—
>
> (a) is resident in a hospital or similar institution; or
>
> (b) regularly attends for treatment by a medical practitioner.
>
> **2**
> A person for the time being under guardianship under section 7 of the *Mental Health Act 1983* (UK) or subject to a community treatment order under section 17A of that Act.
>
> **3**
> A person who lacks capacity, within the meaning of the *Mental Capacity Act 2005* (UK), to serve as a juror.

8.101 In most of those jurisdictions, including Queensland, the disability must be such as to render the person incapable of effectively performing the functions, or discharging the duties, of a juror.[1104] This is a crucial qualification because there will be many disabled people who are quite able to serve on juries and are, therefore, liable to do so. As the Law Commission of New Zealand noted, for example, a person's ability to act as a juror:

1100 *Juries Act 2000* (Vic) s 5(3), sch 2.

1101 *Juries Act 1957* (WA) s 5(b)(iv).

1102 *Juries Act 1981* (NZ) s 8(k).

1103 *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 I.

1104 Also see *Juries Act 1976* (Ireland) s 7, sch 1 pt I. In Hong Kong, a person is qualified for jury service only if he or she is of sound mind and not afflicted by blindness, deafness or other disability preventing the person from serving as a juror: *Jury Ordinance, Cap 3* (HK) s 4(1)(a). In the Northern Territory and New Zealand, however, the ineligibility attaches to the disability, as relevantly defined or worded, without any additional specification that the disability must be such as to make the person unfit for or incapable of performing jury service.

> will vary according to the individual's impairment and also according to the facilities available; modern courtrooms have, for example, wheelchair access and hearing loops, while older courtrooms may not.[1105]

8.102 Several jurisdictions also provide for people to claim an exemption, or seek excusal, from jury service:

- if the person is 'totally or partially' blind or deaf (in the ACT);[1106]
- if the person is 'blind, deaf or dumb' or 'otherwise incapacitated by disease or infirmity from discharging the duties of a juror' (in the Northern Territory);[1107]
- on the ground of 'incapacity' or 'disability' (in Tasmania and Victoria);[1108] or
- on the ground that the person's disability would cause undue hardship (in New Zealand).[1109]

8.103 In England and Wales, there is no provision for people to seek automatic exemption on the basis of physical disability; it is instead a question of discretionary excusal or discharge. Applications for discretionary excusal on this basis are to be 'considered sympathetically':

> 21. Applications for excusal on the grounds of a physical disability which would make jury service difficult to undertake should be considered sympathetically [and] such applications should normally be considered without the necessity for a medical certificate to be produced. However, a certificate should be requested if the summoning officer feels that that one is necessary to support an application for excusal on the grounds of illness or physical disability (for example, where there is uncertainty as to the illness/disability), or where one is required for an appeal against non-excusal.[1110]

8.104 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.

1105 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [193]. Also see, for example, Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report 1 (1996) Vol 1 [3.140]; Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.47]. 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 1 June 2010; and the Hon Justice Margaret Wilson, 'The Jury Environment' (Paper presented at the Jury Research and Practice Conference, Brisbane, 14 November 2008).

1106 *Juries Act 1967* (ACT) s 11(2), sch 2 pt 2.2.

1107 *Juries Act* (NT) s 11(1), sch 7.

1108 *Juries Act 2003* (Tas) ss 9(3)(b), 10(3)(b), 12; *Juries Act 2000* (Vic) ss 8(3)(b), 9(4)(b), 11.

1109 *Juries Act 1981* (NZ) s 15(1)(aa), 16.

1110 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [6]–[21] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 1 June 2010.

8.105 In the Australian Capital Territory and New Zealand, a judge may also discharge a juror if satisfied that the person is incapable of discharging the duties of a juror because of his or her disability.[1111]

Physical disability

8.106 As a matter of principle, it seems inappropriate that physical disability should operate to exclude someone from jury service automatically given that a person's ability to discharge the duties of a juror will not necessarily be affected by — or only by — the nature of the disability, but also by the available facilities and support[1112] and the nature of the particular trial.[1113] In many instances, a physical disability will have little impact on a person's ability to serve. Certainly, there will be occasions where the available facilities are an impediment, for example, in older court buildings with inadequate wheelchair access. Such impediments, however, do not derive from the person's capacity to serve as a juror — physical disability is no marker of intellectual or moral deficiency — but from environmental constraints. The issue is arguably, therefore, not one of a person's qualification as a juror but of the capacity of the system to enable the person to serve.

8.107 Identification of prospective jurors whose physical disability may affect their ability to serve is often likely to be easier than it is for people with mental disabilities. Nevertheless, it requires an assessment of the extent to which they could be assisted to serve and whether their disability is such that, as a practical matter, they would be unable to serve.

8.108 Given the variety of relevant circumstances and considerations inherent in an acceptance of these propositions, it may be more appropriate for disability to form a ground of possible excusal or exemption — to be determined on an individual basis — than a basis for automatic ineligibility. This was the conclusion of the NSW Law Reform Commission in its 2007 Report on jury selection.[1114]

8.109 These concerns have also been recognised in England and Wales, where physical disability is not a basis for automatic disqualification or exemption but is a matter for discretionary excusal or discharge by the judge.[1115] Lord Justice Auld had this to say in his report on the criminal courts of England and Wales:

> **Discharge of jury summons on account of disability or incapacity**
>
> 41 The court has power to discharge a jury summons if it considers that the person, on account of disability[1116] or 'insufficient understanding of English'[1117] will not be able to act effectively as a juror.[1118]

1111 *Juries Act 1967* (ACT) s 16; *Juries Act 1981* (NZ) s 16AA. See [8.51]–[8.52] above.

1112 See, for example, New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.11], [5.13]; Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [193]; Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [193]; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report 1 (1996) Vol 1 [3.134]; Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.47]–[5.48].

1113 See, for example, New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [3.8].

1114 See [8.133] below.

1115 See [8.103]–[8.104] above.

1116 1974 [Juries] Act s 9B.

42 In both cases this power of discharge is quite distinct from that of excusal for good reason. As to disability, amendment of the law in 1994[1119] effectively established a presumption that people with disabilities attending court in response to a summons can serve on juries. In a case of doubt the judge should only discharge the summons if he is 'of the opinion that the person will not, on account of his disability, be capable of acting effectively as a juror'. This is of a piece with the strong move in this country and civilised countries everywhere to accommodate and, as far as possible, positively to include people with disabilities in all society's activities. The European Convention on Human Rights speaks of the right of each individual to pursue a dignified and fulfilling life, and Article 14 of it, as interpreted by the Strasbourg Court, prohibits discrimination against people with disabilities. The Disability Discrimination Act 1995 is our opening legislative contribution to that movement.

43 As the Bar Council Disability Committee have observed, in a powerful submission in the Review, the concept of disabled persons sitting on juries is wholly consistent with the principle of random selection from all members of society. Enabling them to do so is not just a question of evaluating their disability and relating it to the task, but also of providing, where reasonably practicable, the facilities and/or assistance to them to undertake it. This includes fairly predictable needs, such as access for people with mobility difficulties to and, as necessary, throughout the court-building, space for jurors in wheelchairs in or near the jury box, special lavatories and suitable equipment for people with visual impairments. The Court Service has been alive to these basic needs for some years. All courts have been audited against the standards implied by the Disability Discrimination Act 1995 and a schedule of works has been compiled that should ensure compliance with those standards by October 2004. Priority will be given to works to the main court centres for each circuit.

44 There are, however, additional problems for the profoundly deaf since, if they are to contribute effectively to the verdict, they will require the assistance of an interpreter in the jury room before and during the jury's deliberations. Judges to date have ruled that if a person was so deaf that he could not participate in the jury's deliberations without an interpreter, he should be discharged as incapable of acting effectively as a juror, because the presence of a 13th party in the jury room would be an incurable irregularity.[1120]

45 In recent years a number of organisations concerned with disability generally and the deaf in particular have pressed for amendment of the law to permit a deaf person to act as a juror with the assistance of a sign language interpreter or lip speaker. The Bar Council Disability Committee suggest that anxieties about an interpreter intruding on the privacy of the jury room would be met if he were required to undertake to communicate with the disabled person and the other jurors only as an interpreter and not to divulge the jurors' deliberations to any third person.

46 There is understandable caution about the prospect of such a 13th person in the jury room. But accredited interpreters work to agreed professional standards that should preclude any attempt to intrude on or breach the confidence of juries' deliberations. In April 2000 the Lord Chancellor indicated that he could see no objection to deaf people serving as jurors. The Government has

1117 1974 [Juries] Act s 10.

1118 The Morris Committee had recommended that persons with physical difficulties, such as blindness or deafness, rendering them incapable of jury service should be ineligible; paras 123–127.

1119 *Criminal Justice and Public Order Act 1994*, s 41, introducing s 9B of the 1974 [Juries] Act.

1120 See *Goby v Wetherill* [1915] 2 KB 674; *R v McNeil* [1967] Crim LR 540, CACD; *Re Osman* [1996] 1 Cr App R 126 (Sir Lawrence Verney, the Recorder of London).

> committed itself to a general review of support in court and in the jury room to jurors with disabilities and to those who cannot speak English. The Home Office was to issue a consultation paper on the matter towards the end of 2000, but has yet to do so. In the circumstances, it would be premature to attempt any specific recommendation. But, in principle, I consider that all reasonable arrangements, coupled with suitable safeguards, should be provided to enable people with disabilities to sit as jurors with third party assistance. I say this, not because there is a general right, as distinct from duty, to undertake jury service or under any anti-discrimination legislation,[1121] but because such inclusiveness is a mark of a modern, civilised, society.
>
> 47 In the United States a policy of automatic exclusion of blind or deaf persons from jury service would violate the Federal Anti-Discrimination legislation.[1122] The experience of the American Courts where deaf people have sat on juries is that they have not been a hindrance. On the contrary, the need for juries to work at their pace, although lengthening the deliberations somewhat, has tended to make them more structured, with the advantage, if nothing else, of only one person talking at a time.
>
> 48 Regardless of the outcome on that particular issue, I consider that more needs to be done than at present to inform all people with disabilities summoned for jury service that they will be considered for it, if they wish. I know that the Central Summoning Bureau is alert to identify and, in liaison with the courts, to meet these needs. But I think it could do more by way of positive encouragement. Given the Home Office's current review of the whole subject, I consider that, apart from a general exhortation to make proper provision at all Crown Court centres for people with disabilities to serve as jurors, it would be wrong for me to attempt any specific recommendation in advance of the Home Office's completion of its review.[1123] (notes as in original)

8.110 As discussed 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.

8.111 The Law Reform Commission of Ireland has also recently proposed that physical disability be removed as a ground of ineligibility:

> The Commission provisionally recommends that the *Juries Act 1976* be amended to ensure that no person is prohibited from jury service on the basis of physical disability alone and that capacity be recognised as the only appropriate requirement for jury service. The Commission also provisionally recommends that 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.[1124]

1121 Although the courts are 'providers of services' under section 19 of the *Disability Discrimination Act 1995*, selection as a juror is not a service provided by them, as distinct from the service they should provide to jurors once selected.

1122 See eg *People v Caldwell* 603 N.Y.S. 2d. 713 (NY Crim. Ct, 1993) and *Galloway v Superior Court of District of Columbia* 816 F Supp 12 D.D C 1993; see also 57 Albany L Rev 289, 296–305.

1123 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [41]–[48].

1124 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.58].

Reasonable accommodation

8.112 The automatic disqualification of people with disability has been described as a violation of civil rights,[1125] particularly when jury service is characterised not just as an obligation but as a right of citizenship.[1126] As noted above, the principles of non-discrimination and equality of opportunity for people with disabilities are enshrined in legislation and international human rights instruments.[1127]

8.113 An assessment of a disabled person's ability (or inability) to serve as a juror should not only take into account any difficulties the person may have, but should also consider the extent to which those difficulties 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.[1128]

8.114 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.[1129] 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.

1125 Eg H Meekosha, 'Disability and Human Rights' (Paper presented at the Attorney General's NGO Forum on Domestic Human Rights, Canberra, 11 March 1999) <http://www.wwda.org.au/humright.htm> at 1 June 2010; New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004) [1.8] citing Submission of People With Disabilities (NSW) Inc. See also Jacqueline Horan and David 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) [4.1]. The exclusion of deaf persons from jury service under *Jury Act 1976* (Ireland) has also been subject to a High Court challenge. The judgment was still pending at the end of March 2010: see generally Free Legal Advice Centres (Ireland), 'Deaf jurors plan welcomed by legal rights body' (Press Release, 31 March 2010) <http://www.flac.ie/news/2010/03/31/deaf-jurors-plan-welcomed-by-legal-rights-body/> at 25 June 2010; Posting of Charles O'Mahony to Human Rights in Ireland (31 March 2010) <http://www.humanrights.ie/index.php/2010/03/31/capacity-to-undertake-jury-service/> at 25 June 2010.

1126 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004) [1.4].

1127 See [8.5]–[8.9] above. Also see *Disability Discrimination Act 1992* (Cth); *Disability Services Act 2006* (Qld) s 19; *Mental Health Act 2000* (Qld) s 8; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 2; *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 2.

1128 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).

1129 *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). Also see, generally, this Commission's discussion of the Convention in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper WP64 (2008) 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.

8.115 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

8.116 In 2009, the *Disability Discrimination Act* (Cth) was amended to reflect the obligation to make reasonable adjustments.[1130] That Act applies, among other things, to Commonwealth government service providers and the administration of Commonwealth government laws and programs.[1131]

8.117 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.

8.118 In England and Wales, public service providers are required to make reasonable accommodations under the *Disability Discrimination Act 1995* (Eng).[1132] It is the courts' 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. The following information for jurors with disabilities appears on the courts' website:

> If you are a juror with a disability or a special need, you will be asked by HMCS [Her Majesty's Courts Service] to provide further information on the 'Reply to Your Summons for Jury Service'. This information is then passed from the Jury Central Summoning Bureau to the court where you have been called for jury service so that arrangements to assist you whilst at court can be made in advance of jury service. It is important you provide all necessary information about your disability or special need in advance and any arrangements you need so the court can make reasonable adjustments. If it is not possible to make the necessary adjustments e.g the layout of a listed building then your jury service may be transferred to a court nearby where adjustments can be made to suit your needs.
>
> If you have a disability or special need and would like to view the facilities available at the Crown Court you have been asked to attend before the start of your jury service, please contact the JCSB [Jury Central Summoning Bureau] in the first 8 weeks of receiving your summons to arrange a pre court visit and to discuss any arrangements.
>
> **Jurors with Visual Impairment**
> At the pre court visit the Jury Manager will give you the opportunity to go through the jury routes in the building such as between the jury waiting areas to the court rooms. The Jury Manager will also discuss any arrangements that need to be in place such as a designated member of staff, comfort breaks for guide dogs etc.

1130 *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).

1131 *Disability Discrimination Act* (Cth) ss 24, 29.

1132 *Disability Discrimination Act 1995* (Eng) ss 19, 21B–21E; *Disability Discrimination Act 2005* (Eng) s 2. In Australia, see *Disability Discrimination Act* (Cth) ss 5(2), 6(2), 24, 29, 45.

> **Jurors with Hearing Impairment**
> At the pre court visit the Jury Manager will give you the opportunity to discuss arrangements and the available options include the following:
>
> **Induction Loop System:** this wiring system benefits some hearing aid users by reducing undesirable and distracting background noise. It is advisable to test the system at your pre court visit.
>
> **Computer Aided Transcription (CAT):** this allows a person with hearing difficulties to have proceedings relayed simultaneously to them in written form whilst in the court room. The court will organise this service with the appropriate contractor. However, once the jury are asked to retire to consider their verdict, you must be able to lip read as only 12 jurors randomly selected are allowed into the deliberation room.[1133]

8.119 Similarly, in the United States, conformity with the *Americans with Disabilities Act*[1134] means that deaf or blind people can no longer be automatically excluded from jury service by statute.[1135]

8.120 The English approach of asking prospective jurors to provide information about any disabilities and special needs they have facilitates an assessment and provision of reasonable adjustments. In Queensland, seeking information on which unlawful discrimination might be based would ordinarily infringe the *Anti-Discrimination Act 1991* (Qld). However, it is a defence if the information was reasonably required for a purpose that did not involve discrimination and, as noted above, welfare and equal opportunity measures are specifically exempted from what is unlawful discrimination.[1136] The Commission also understands that, at present, prospective jurors who have a disability often contact the court to discuss the available facilities.[1137]

Blind or deaf jurors

8.121 The ineligibility of people with physical disabilities that render them incapable of effectively performing the duties of a juror means that in most Australian jurisdictions, people who are blind or deaf are likely to be excluded from jury service.[1138] This contrasts with the position in England and Wales.

8.122 Discussion of this question has tended to focus on the extent to which people with significant hearing or sight impairment are able to participate as jurors and whether they can be assisted to perform jury service by technological and other accommodations.

8.123 Some commentators have emphasised the practical difficulties in accommodating blind or deaf jurors.

1133 Her Majesty's Courts Service (United Kingdom), Jury Service, 'Jurors with disabilities or special needs' <http://www.hmcourts-service.gov.uk/docs/infoabout/juryservice/special_needs_disabled_jurors.doc> at 1 June 2010.

1134 *Americans with Disabilities Act* 42 USC ch 126 §12132 (1990).

1135 See generally HH Perritt, *Americans with Disabilities Act Handbook* (4th ed, 2003) Vol 1 §5.07[D].

1136 *Anti-Discrimination Act 1991* (Qld) ss 104, 105, 124. See [8.9] above.

1137 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1138 See [8.99] above.

8.124 In Hong Kong, the legislation provides that people who are blind or deaf are not qualified to serve as jurors.[1139] The Law Reform Commission of Hong Kong has provisionally recommended the retention of this disqualification on the basis of the need to ensure a fair trial:[1140]

> It can be argued that the underlying principle that a jury should be representative of the community which it serves would suggest that those suffering from disabilities should be included in the jury pool if that is viable from a practical point of view. There is force in this argument, but at the same time it would not be right to include in the jury pool persons who, by reason of their disability, were unable to participate fully in the jury's work. Among other tasks, jurors must assess the credibility of the witnesses who testify before them and in doing so they will need to consider the demeanour of each witness. Moreover, the jury will have to examine and consider all exhibits produced at the trial, including maps, diagrams, sketches and physical objects, etc, apart from documents. At the close of the defence case, the jury retires to consider its verdict and it is essential that all jurors are capable of taking full part in the deliberations on the evidence, which may include visual or audio elements.[1141]

8.125 Lord Justice Auld's report also referred to difficulties in accommodating 'profoundly deaf' jurors noting, in particular, that English case law prevents the presence of interpreters in the jury room.[1142]

8.126 Others have been more optimistic. For example, in its review of jury service in Victoria, the Victorian Law Reform Committee noted the following comments from its respondents:

> There is a need to recognise that the ability of persons with certain disabilities to carry out the functions of a juror may be affected by the availability of facilities and support. For example, in relation to deaf persons it has been suggested that they could serve on juries if they were provided with the appropriate support, such as a sign language interpreter, or through the use of recent technological advances. The Victorian Deaf Society and the Human Rights and Equal Opportunity Commission have suggested that ineligibility for deaf persons should cease.
>
> Similar comments have been made in relation to people with a sight impairment. Several submissions suggested that it may not be necessary to exclude persons with a sight impairment (other than where there is a very low level of sight), because there are methods available to improve vision and the ability to view exhibits.[1143] (notes omitted)

8.127 The Law Commission of New Zealand also considered that some people can be assisted to serve as jurors, although it expressed doubts about the ability of blind or deaf people to serve as jurors in all cases:

> There are occasions when a disability, such as impaired vision or deafness, will not be a barrier to jury service. For example, a deaf juror may be able to lip read.

1139 *Jury Ordinance, Cap 3* (HK) s 4(1)(a).

1140 Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.46], Rec 5.

1141 Ibid [5.45].

1142 See [8.109] above.

1143 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.134]–[3.135]. That Committee recommended a general provision rendering persons ineligible if their disability makes them incapable of effectively performing the functions of a juror: [3.134]–[3.140], Rec 33. Also see Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.57].

> However, even with modern technology and advances in overcoming disabilities, there will still be people whose disability means that they are not capable of serving as jurors, and situations where a person's disability cannot be compensated for by technology.[1144] There may also be people whose disability can only be compensated for at great cost, and where the methods of compensation may be overly disruptive to the trial process.[1145] (note in original)

NSWLRC's recommendations

8.128 In 2006, the NSW Law Reform Commission completed a dedicated reference on jurors who are blind or deaf.[1146] It appears to be unique in Australia in being solely concerned with this issue.

8.129 In its Report, the NSWLRC challenged the assumed inability of blind persons to serve as jurors:

> the mere fact that there is evidence in the form of documents, diagrams, photographs and so on need not result in automatic exclusion of a blind juror, as in many cases there will be no issue as to its interpretation, and the content can be conveyed successfully through description or using technology.[1147]

8.130 The NSWLRC also challenged the assumed value of observable demeanour in assessing witnesses' credibility.[1148] It cited research showing that 'there is no such thing as a typical deceptive response' and that people 'are generally poor lie detectors'.[1149] It noted as well that a jury is usually instructed 'that while demeanour can be taken into account', it 'must be kept in balance with other considerations'.[1150] Moreover:

> the deaf or blind juror 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.[1151]

8.131 These comments serve to highlight the variety of circumstances and considerations that need to be taken into account in addressing this issue.

1144 For example, a blind person in a trial where photographic evidence is central to the case, or a person who is severely physically or intellectually disabled.

1145 Law Commission of New Zealand, *Juries in Criminal Trials: Part One*, Discussion Paper 32 (1998) [347].

1146 New South Wales Law Reform Commission, *Blind or Deaf Juror*s, Discussion Paper 46 (2004); New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006). See generally NSW Law Reform Commission, Digest of Law Reform Commission References, '103. Jurors' <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/digest.103> at 1 June 2010.

1147 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [3.8].

1148 Ibid [3.15].

1149 Ibid [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: see, for example, A Vrij et al, 'Detecting deceit via analysis of verbal and nonverbal behavior' (2000) 24(4) *Journal of Nonverbal Behavior* 239, 240. Research in a number of Western countries has also shown that 'lie experts' such as police officers, prison guards, and customs officers are no more accurate at detecting lies from non-verbal behaviours than lay people: see, for example, A Vrij and GR Semin, 'Lie experts' beliefs about nonverbal indicators of deception' (1996) 20(1) *Journal of Nonverbal Behavior* 65.

1150 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [3.15]. In Queensland, see the model direction on testimony accuracy indicators in Queensland Courts, *Supreme and District Court Benchbook*, 'General Summing Up Directions' [24.6] <http://www.courts.qld.gov.au/2265.htm> at 1 June 2010 which reads, in part:

> You have seen how the witnesses presented in the witness box when answering questions. Bear in mind that many witnesses are not used to giving evidence and may find the different environment distracting.

1151 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [3.16].

8.132 In the NSWLRC's view, the exclusion of blind or deaf people from jury service should not be automatic. Instead, it should be considered on case-by-case basis, having regard to the circumstances of the particular trial and the availability of 'reasonable adjustments'.[1152] 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.[1153] Blind or deaf potential jurors 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':[1154]

> A blanket prohibition …, as currently exists, is excessive and unnecessary. It mandates the exclusion of a class of citizens from participating in one of the rights and responsibilities of citizenship purely on the basis of a disability, and precludes any enquiry as to the actual ability of a member of that class to effectively perform in that role.[1155]

8.133 The NSWLRC therefore recommended:

> (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.[1156]

8.134 An empirical study on the use of Australian Sign Language interpreting in court, conducted as part of the NSWLRC's review, also 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 deaf jurors, who are able to understand the judge's summing up to the same extent as hearing jurors.[1157]

8.135 As noted above, objections have been made against allowing interpreters in the jury room on the basis that it would involve the presence of a '13th person', who is not a juror, and would breach the secrecy of jury deliberations. The NSWLRC considered, however, that as long as interpreters are subject to the same secrecy requirements that apply to jurors and others, there is no obstacle to their being permitted in the jury room.[1158] The NSWLRC therefore also made recommendations to that effect.[1159]

1152 Ibid [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].

1153 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) [2.11]–[2.15], [3.3]–[3.6].

1154 Ibid [4.10].

1155 Ibid [4.1].

1156 Ibid 59, Rec 1 (a)–(c).

1157 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].

1158 The confidentiality of jury deliberations is discussed in chapter 2 of this Paper, and the penalties for breach of those confidentiality provisions are discussed in chapter 13 below.

8.136 It also recommended the development of guidelines for the provision of sign language interpreters and other aids for blind or deaf jurors, and for professional awareness activities in relation to the inclusion of blind or deaf persons as jurors to be made available to judicial officers and court staff.[1160]

8.137 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:[1161]

> The preferable course is to treat it, on a case by case basis, as a potential ground for excuse for good cause, reserving to the authority that administers the Act the capacity to grant either a permanent excusal, or an excusal for a particular trial.[1162]

8.138 It recommended that the Sheriff be able to excuse a person for good cause on the basis that:

> some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror.[1163]

LRCWA's proposals

8.139 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 disqualification.[1164] 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:

> 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.[1165] (note omitted)

8.140 In those circumstances, either the summoning officer or the judge should be able to excuse the person from serving.[1166]

1159 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 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].

1160 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 60, 61, Rec 2, 4.

1161 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [5.16].

1162 Ibid.

1163 Ibid [7.12], Rec 29, [7.14] (b), Rec 31.

1164 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 98.

1165 Ibid 103.

1166 Ibid 98, 100–3, Proposal 43.

> the Commission … agrees with the NSWLRC that deaf or blind (and, by extension, other physically disabled) jurors who wish to answer a jury summons should not be automatically denied the possibility of performing this civic duty. Although there is no 'right' (as distinct from duty) attached to jury service, enabling, where practicable, physically disabled jurors to serve on juries can only enhance a jury's representative nature. Any decision to exclude a physically disabled juror must therefore lie in an assessment of facilities required and available to accommodate the person's disability and whether, considering the provision of facilities, the person can effectively discharge their duties as a juror.[1167] (notes omitted)

8.141 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:

> 2. That a person who has a physical disability that may impact upon his or her ability to discharge the duties of a juror—including mobility difficulties and severe hearing or visual impairment—must notify the summoning officer upon receiving the summons so that, where practicable, reasonable adjustments may be considered to accommodate the disability.
>
> …
>
> 4. That, where a physically disabled juror for whom relevant facilities to accommodate the disability have been provided is included in the jury pool, the court should be made aware of, in advance of empanelment, the nature of the disability and the facilities provided to accommodate or assist in overcoming the disability.[1168]

8.142 It also proposed that guidelines on the provision of reasonable adjustments be developed by the Sheriff.[1169]

8.143 In addition, the LRCWA noted that mental, intellectual or physical disability may support an excuse on the basis of undue hardship or extreme inconvenience, even if it does not render the person unable to discharge the duties of a juror.[1170]

Preliminary submissions

8.144 Vision Australia expressed the view that people who are blind or who have vision impairment should have the same rights and obligations as others and should therefore not be excluded 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:

> 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.

1167 Ibid 102–3.

1168 Ibid 103, Proposal 43(2), (4).

1169 Ibid 103, Proposal 43(3).

1170 Ibid 98, 100, 103.

> 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.
>
> Nevertheless, it is feasible that courts could 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 is not practical for jurors to bring their own 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 a Braille or synthetic speech user, the cost may be negligible. There may be 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.[1171]

8.145 Some members of the Criminal Law Section of the Queensland Law Society again suggested, in a preliminary consultation with the Commission, that the principle of non-discrimination should take second place to the need for an effective jury. They commented that the provision of reasonable adjustments to accommodate people with physical disabilities would need to be assessed on a case-by-case basis and would depend on the nature of the trial. In their view, there is a risk, however, that making such adjustments will add to the length, and therefore to the cost, of trials. One of the members noted that reliance on self-identification can also be problematic; in some cases, it may come to light only during the course of the trial that a juror has been unable to see or hear the evidence, the juror having been too embarrassed to disclose the difficulty earlier. It was suggested that prospective jurors should have an obligation to bring possible difficulties like this to the attention of the Sheriff's Office.[1172]

QLRC's provisional views and proposals

8.146 The Commission's provisional view is that 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. This will not enable *all* people with disabilities to serve as jurors, but will ensure that the legislation does not unfairly exclude people on the basis of disability alone.

8.147 The Commission understands that many of the facilities that could be offered to assist people to serve are not presently available in all court houses. The ability of many disabled people to perform jury service will improve, however, as more accommodations become available, for example, as court house infrastructure is upgraded for wheelchair accessibility.

1171 Vision Australia, Submission 19.

1172 Queensland Law Society, Criminal Law Section, Submissions 26, 26A.

8.148 The Commission also notes that some accommodations may simply be unfeasible. Some will be available only at very great expense and some may involve too great a disruption to the running of trials to operate successfully. The resource and administrative demands of sign-language interpretation for deaf jurors, for example, are likely to be considerable. Interpreters would need to be professionally accredited and appropriately trained. They would need to be available on call and at relatively short notice for extended periods of time. They would need to have sufficient breaks during each sitting day of the trial, possibly necessitating the use of two or more interpreters for each trial. Consideration would also need to be given to the appropriateness or feasibility of having interpreters present during jury deliberations. While not, perhaps, insurmountable, the practical hurdles involved with such measures are considerable, and the impact on the length and cost of trials should not be overlooked. The Commission's concern is simply that there should be no *legislative* impediment if, and when, such practicalities can be overcome.

8.149 To facilitate this approach, the Commission proposes that provision be made for:

- prospective jurors to inform the Sheriff of any disabilities and special needs they may have as part of the *Questionnaire* issued with the *Notice to Prospective Juror*;[1173] and

- the judge to excuse a prospective juror or 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 the person's disability, that the person is unable to discharge the duties of a juror effectively.

8.150 The judge's discretion to discharge a juror is discussed further in chapter 10 of this Paper.[1174]

8.151 The Commission also proposes that the Sheriff's Office 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.

8.152 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 section 21 of the Act. The grounds for excusal are discussed in chapter 9 of this Paper.

Proposals

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.

1173 See [8.120] above.

1174 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.

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 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.

Mental disability

8.153 The ineligibility of people who are incapable of acting as jurors because of a mental disability is common across jurisdictions,[1175] and is based on the principle of competence.

8.154 Mental capacity is a threshold criterion of juror qualification in that people 'of unsound mind' are excluded from the electoral roll.[1176] 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. People who have had significantly impaired capacity from birth or early childhood, for example, will never have been included on the electoral roll, and others will have been removed from the roll.

8.155 There will remain some people, however, whose capacity to act as a juror is impaired but whose names nevertheless remain on the electoral roll. For example, while a person might be found to have impaired capacity under the *Guardianship and Administration Act 2000* (Qld) for matters such as voting,[1177] they will remain theoretically capable of being called for jury service until steps are taken to remove their name from the electoral roll. Removal from the electoral roll is not an automatic process, but requires an application and accompanying medical certificate:

> **A relative has dementia. How do I have his/her name removed from the electoral roll?**
>
> An elector may be removed from the Commonwealth roll where a registered medical practitioner has certified in writing that the person is incapable of understanding the nature and significance of enrolment and voting because of unsound mind. (Section 93(8) of the [Commonwealth Electoral Act] 1918).

1175 Even in England and Wales, for example, the ineligibility of 'mentally disordered' persons has been retained: *Juries Act 1974* (Eng) s 1(1)(c), sch 1 pt 1.

1176 *Electoral Act 1992* (Qld) s 64(1)(a)(i); *Commonwealth Electoral Act 1918* (Cth) s 93(8)(a).

1177 See *Guardianship and Administration Act 2000* (Qld) ss 10, 81, sch 2 pt 2 cl 2 (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.

> If a person believes a relative or friend should be removed from the roll for this reason, they need to include with the certified document, a completed 'claim that an elector should not be on the electoral roll' form. This form is not available on our internet site, however we can post or email them out.
>
> …
>
> **Do disabled electors have to be on the electoral roll?**
>
> All Australian citizens over the age of 18 are required to enrol and vote under the Commonwealth Electoral Act 1918, however anyone who is incapable of understanding the nature and significance of enrolment and voting by reason of being of unsound mind can request to be removed from the roll. (Your request must be certified by a medical practitioner and be accompanied with a completed 'claim that an elector should not be on the electoral roll' form. This form is not available on our internet site, however we can post or email one out to you.)[1178]

8.156 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.

8.157 In practical terms, the ineligibility of persons with mental disabilities that render them incapable of performing jury service will involve case-by-case assessment and will depend to a large extent on self-identification. In some jurisdictions, such as the Northern Territory, Victoria and England and Wales, this is aided in part by linking ineligibility to defined classes of people under mental health legislation.[1179] In Queensland, this could include, for example, people in respect of whom a guardianship order is in force under the *Guardianship and Administration Act 2000* (Qld) and people who are involuntary patients under the *Mental Health Act 2000* (Qld).

8.158 This has the advantage of making identification easier.[1180] It has the disadvantage, however, of operating without any inquiry about the person's actual ability to perform jury service. This would exclude people who, despite a finding of incapacity or mental disability in another context, are capable of performing jury service.[1181] 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.

1178 Australian Electoral Commission, 'Electoral Roll — Frequently Asked Questions' <http://www.aec.gov.au/FAQs/Electoral_Roll.htm> at 1 June 2010.

1179 See [8.99]–[8.100] above.

1180 The Commission notes, however, that there is presently no mechanism in place for the Sheriff's Office to determine whether the Adult Guardian has been appointed as a substitute decision-maker for a potential juror: Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1181 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.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/publications_1997_to_2006/mh.pdf> at 1 June 2010; 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_uturn_on.html> at 1 June 2010. Similar criticism has been made of the Irish provision: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.73]; *Juries Act 1976* (Ireland) s 7, sch 1 pt I.

8.159 Most problematic is the identification of people whose psychiatric or psychological difficulties are hidden and those who deny the existence or extent of their difficulties. Some of these difficulties are unlikely to be wholly resolvable by the legislation dealing with jury selection and form part of a wider and more complex matrix of issues.[1182]

8.160 Some jurisdictions make provision for the matter to be dealt with by a judge.[1183]

8.161 Importantly, all adults are presumed to have capacity.[1184]

8.162 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.[1185]

LRCWA's proposals

8.163 The Law Reform Commission of Western Australia considered that mental and physical incapacity should be distinguished.

8.164 The LRCWA expressed the view that mental incapacity — 'which may render a person incompetent to discharge the duties of a juror' — should be a matter of disqualification.[1186] It noted that case-by-case assessment of incapacity by the summoning officer is a practical necessity since it is impossible to identify prospective jurors who would be disqualified on this basis from the jury lists, and is an appropriate approach.[1187] 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:[1188]

> 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 family member has telephoned to alert the summoning officer of the relative's mental impairment or where a mental impairment is apparent.[1189] (note in original)

8.165 To improve this, the LRCWA proposed 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

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1182 See, for example, the discussion of the issues involved with self-represented civil litigants who have impaired capacity in Queensland Public Interest Law Clearing House, *Incapable of Justice: Capacity and Self-Represented Civil Litigants*, Submission to the Public Trustee of Queensland (November 2009) <http://www.qpilch.org.au/01_cms/details.asp?ID=21> at 1 June 2010.

1183 See [8.105] above.

1184 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).

1185 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [4.73]–[4.75].

1186 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 98, 99–100, Proposal 42.

1187 Ibid 98.

1188 Ibid 99–100.

1189 Cases where a mental impairment is clearly apparent in the person's behaviour may, however, invoke a challenge from counsel.

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 jurors'.[1190] The LRCWA therefore proposed that a person should not be qualified to serve as a juror if he or she:[1191]

> (iv) is an involuntary patient within the meaning of the *Mental Health Act 1996* (WA);[1192]
>
> (v) is a mentally impaired accused within the meaning of Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA);[1193] or
>
> (vi) is the subject of a Guardianship Order under s 43 of the *Guardianship and Administration Act 1990* (WA).[1194] (notes in original)

Preliminary submission

8.166 In a preliminary consultation with the Commission, some members of the Queensland Law Society's Criminal Law Section commented that mental disabilities that make the person incapable of effectively performing the functions of a juror should always be a basis for automatic disqualification. However, in the view of these members, physical disability alone would not usually render someone incapable of acting as a juror.[1195]

QLRC's provisional views and proposals

8.167 In the Commission's provisional view, mental disability that makes the person incapable of effectively performing the functions of a juror should continue to be a ground of ineligibility. It is a necessary condition of jury service that jurors have the mental capacity to discharge the duties of a juror.

8.168 Of practical necessity, this ground of ineligibility will need to be assessed on a case-by-case basis and will ordinarily depend on self-identification. It must be recognised, however, that there will also be situations in which doubt about a person's capacity arises 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 such cases, the person's difficulty may remain hidden unless and until it manifests in a disturbance during the trial or the jury's deliberations.[1196] Depending on the nature of the difficulty and the way in which it comes to light, this may require the discharge of

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1190 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 100.

1191 Ibid 100, Proposal 42.

1192 *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.

1193 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.

1194 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'.

1195 Queensland Law Society, Criminal Law Section, Submissions 26, 26A.

1196 See, for example, *R v Metius* [2009] QCA 3.

the jury before a verdict is given.[1197] The difficulty of identification in such circumstances is not one that can easily be overcome, and is not one that is confined to the selection of jurors; such issues may also arise, for instance, with self-represented litigants in civil actions.[1198]

8.169 The main issue to consider for the purpose of this review is how this ground of ineligibility should be expressed, having regard to the need for clarity on the one hand, and flexibility on the other.

8.170 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 alone.

8.171 The Commission is also considering, however, whether the terminology of 'mental disability' is appropriate. One issue to consider is whether this ground of ineligibility could be further clarified by linking it to definitions that apply under other legislation so that it applies, for example, 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).

8.172 While this may assist prospective jurors (and their families) and the Sheriff's Office in determining whether the person is ineligible, it may be too blunt an approach. The risk is that it substitutes a status approach for what is presently, and ought continue to be, a more functional standard.[1199] 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.

8.173 An alternative approach may be to reword the current ground of ineligibility to the effect that a person who has impaired capacity, within the meaning of the *Guardianship and Administration Act 2000* (Qld),[1200] to serve as a juror is ineligible for

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1197 The jury in a part-heard murder trial in the Supreme Court of Queensland was recently discharged, and the trial adjourned, after the trial judge received a note from one of the jurors which revealed information about the jury's deliberations and which also tended to show that the juror may have been incapable, because of a mental disability, of effectively performing the functions of a juror: Transcript of Proceedings, *R v Ney* (Supreme Court of Queensland, Atkinson J, 3 June 2010). Disclosure of information about jury deliberations or identifying a juror in a particular proceeding is prohibited under s 70 of the *Jury Act 1995* (Qld). Jurors are also bound by their oath (or affirmation) to keep the jury's deliberations confidential: see chapter 2 above. There are, of course, significant financial and emotional costs to those involved in the trial, including the jurors, whenever a trial is aborted in this way.

1198 See [8.159] above.

1199 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, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper 64 (2008) [6.8].

1200 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:

jury service. This would confirm the functional nature of the criterion, but would be a difficult standard to apply in practice in the absence of a formal order or ruling. It is also unclear whether 'impaired capacity' would have the same meaning or scope as the 'mental disability' ground of ineligibility as it is presently expressed.

8.174 Whatever the formulation should be, the Commission's provisional view is that a judge should be empowered to excuse or discharge a prospective juror or juror from further attendance if it appears that the person falls within this category of ineligibility. Consideration should be given, however, to the way in which this can be done discretely to avoid unnecessary embarrassment. The judge's discretion to discharge a juror is discussed in chapter 10 of this Paper.[1201]

Proposal

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).

Questions

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?

(a) understanding the nature and effect of decisions about the matter; and

(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. Also see generally Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP64 (2008) ch 6.

1201 The judge already has power to discharge a juror *after the trial has started* if there is a reason that the juror should not continue to serve. The judge's power to excuse a person during the empanelment and selection process is, however, limited to discharge on the basis of an inability to be impartial. See *Jury Act 1995* (Qld) ss 46, 56.

CONSCIENTIOUS OBJECTORS

8.175 In some jurisdictions, ministers of religion or clergymen are exempt, or may claim exemption or excusal, from jury service.[1202] In New South Wales and the Northern Territory, vowed members of religious orders are also exempt.[1203]

8.176 Some jurisdictions also confer a right to claim exemption or seek excusal on practising members of religious groups, the beliefs or principles of which are 'incompatible' with jury service.[1204]

8.177 Under section 8(1)(d) of the former *Jury Act 1929* (Qld), the following people used to be exempt in Queensland on the basis of their religious adherence:

> minsters 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.

8.178 All of these provisions, especially the older ones, are based on conventional Christian religious identification, and invite some debate as to which religions, and which form of religious ordination, would be accepted as the basis for exemption.

8.179 No such provision currently applies under the *Jury Act 1995* (Qld).

8.180 However, religious-based objection is recognised as a valid excuse for failure to vote at elections. Section 164(2) of the *Electoral Act 1992* (Qld)[1205] provides that:

> if an elector believes it to be part of the elector's religious duty not to vote at an election, that is a valid and sufficient excuse for failing to vote at the election.

8.181 Arguably, the *Jury Act 1995* (Qld) should accord the same respect for religious or other beliefs, possibly based on a sense that these civic duties and rights should, wherever appropriate, run in parallel. It has also been said that there is a risk that, if conscientious objectors are required to serve despite their objections, they will refuse to participate in jury deliberations and hung juries may result.[1206] That risk may now be diminished in cases where juries in Queensland are permitted to give non-unanimous

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1202 *Juries Act 1967* (ACT) s 11(2), sch 2 pt 2.2 (ministers of religion); *Jury Act 1977* (NSW) s 7, sch 3 (clergy); *Juries Act* (NT) s 11(1), sch 7 (clergymen in holy orders, priests of the Roman Catholic faith, and ministers of religion having an established congregation); *Juries Act 2000* (Vic) s 5(c)(i), sch 2 pt 2.2 (persons in holy orders, or who preach or teach in any religious congregation, but only if they follow no secular occupation except that of a schoolteacher). Also see *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)(h), (ha), (hb).

1203 *Jury Act 1977* (NSW) s 7, sch 3 (vowed member of any religious order); *Juries Act* (NT) s 11(1), sch 7 (monk, nun or other vowed member of any religious community). Also see *Jury Ordinance, Cap 3* (HK) s 5(1)(n).

1204 *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.

1205 Similar provisions are made in other jurisdictions: see *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).

1206 Eg New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.30], [7.34].

verdicts.[1207] However, it still raises the prospect of deliberately unco-operative or obstructive jurors.

8.182 The Commission understands 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.[1208] Those excusals are made on the basis of section 21(1)(c) of the Act — which provides for excusal if jury service would result in substantial inconvenience to the public or a section of the public — but could also be dealt with on the basis that service would cause substantial hardship to the person, under section 21(1)(a).

8.183 Exemptions for conscientious objectors, however, implicitly pass the burden of jury service to others. As the NSW Law Reform Commission noted, there may be a sense of inequity in allowing some to avoid a civic duty because of their beliefs, and yet, presumably, continue to receive the benefits and privileges which that duty upholds:

> [One] submission suggested that people who seek to be excused on the ground of their conscientious beliefs should be prepared to pay a fine or perform some other form of community service, in recognition of the fact that otherwise they expect to receive the benefits and entitlements of community membership. Although no submission expressly made the point, those who claim to be excused for this reason are effectively passing to others the burden of ensuring that the criminal justice system requiring trial by jury continues to operate, and would presumably expect it to continue to do so if they were themselves the victims of crime or charged with some criminal offence.[1209] (note omitted)

8.184 It has also been said that religious officials would be inclined to compassion, making it difficult for them 'to consider the claims of justice alone'.[1210] The community, however, expects all jurors to put aside their personal predilections to deliver a verdict according to law. Why should the position be any different for those with a religious vocation or affiliation? Indeed, the special experience of religious officials is arguably 'very useful inside a jury room'.[1211]

8.185 Absence during jury service might also cause hardship where religious officials have ongoing community obligations.[1212]

8.186 On balance, those jurisdictions that have explicitly recognised conscientious objection as a basis for not serving on juries have tended to prefer discretionary excusal rather than automatic exemption.[1213]

8.187 In his 2001 report, Lord Justice Auld expressed the view that 'there is no justification' for exclusion of clergy 'unless they find it incompatible with their tenets or

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1207 See *Jury Act 1995* (Qld) s 59A.

1208 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1209 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.33].

1210 *Report of the Departmental Committee on Jury Service*, Cmnd 2672, HMSO (1965) (the 'Morris Report') [120].

1211 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.96].

1212 Ibid [3.95].

1213 See [8.175] above. Also see, for example, Law Reform Commission of Hong Kong, *Criteria for Service as Jurors*, Consultation Paper (2008) 107, Rec 8(iv), [5.59](h), (ha), (hb), (n).

beliefs' and that this would be 'more appropriately dealt with by way of discretionary excusal'.[1214] Following that report, changes to the *Juries Act 1974* (Eng) removed the automatic exclusion of the clergy, leaving them to seek excusal.[1215] The guidelines for granting excusals and deferrals in that jurisdiction provide that:

> 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.[1216]

8.188 Significantly, those guidelines point to the need for evidence in support of such an application. Without a requirement to demonstrate a genuinely-held belief, there may be a risk of people using such a ground of excusal or exemption illegitimately as a pretext for avoiding jury service.[1217] This was one reason informing the Victorian Law Reform Committee's view.[1218] It recommended that:

> a specific category of exemption on the grounds of conscientious objection should not be provided for in the *Juries Act.* However … there should be a guideline for the exercise of the discretion to excuse for good reason which covers the situation of a conscientious objector.[1219]

8.189 The NSW Law Reform Commission has recommended a similar approach.[1220]

> We recognise that there are circumstances where clergy may need to be excused because of some direct knowledge or contact with those who become involved in the justice system, and where, particularly in small communities, it may not be possible for them to be replaced when performing jury duty. We also recognise that there may be groups such as closed orders or those whose religious faith may be inconsistent with them sitting in judgment on others. They can, however, be catered for, on a case by case basis, by applying to be excused for good cause, by reason of one or other of these factors. We are not persuaded by an argument that clergy or religious as a class cannot bring themselves to participate impartially and fairly in the role of juror, or that they risk being unduly judgmental, and we do not consider it appropriate for this category of exemption to continue as of right. 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 trial, can be adequately dealt with by an application to be excused for cause.[1221]

1214 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [33]. A similar recommendation had earlier been made by the Runciman Royal Commission: The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO (1993) 132 [57].

1215 See *Juries Act 1974* (Eng) s 9(2).

1216 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [8] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 1 June 2010.

1217 Eg New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.31], [7.34].

1218 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.198].

1219 Ibid [3.199], Rec 49. The recommended wording was:

> Persons able to establish to the satisfaction of the sheriff or a judge by proof on oath, by affidavit, statutory declaration or otherwise that they hold such moral, ethical or religious convictions or beliefs as to render them unfit or unsuitable for jury service should be excused from such service.

1220 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.34].

1221 Ibid [6.22].

8.190 It considered that the Sheriff's guidelines for granting excusals for good cause should take into account the 'holding of objectively demonstrated religious or conscientious beliefs that would be incompatible with jury service'.[1222]

8.191 This approach recognises the possibility of conscientious objection to jury service. Equally, it recognises an argument that people should not be automatically relieved of the burden of jury service solely on the basis of their particular vocation or religious beliefs. In a society as culturally and religiously diverse as ours, it may be hard to justify the automatic exclusion of some people on the basis of personal beliefs. The approach recommended by the NSW Law Reform Commission attempts to balance these considerations by allowing potential jurors to seek excusal in cases of particular hardship and by alerting the Sheriff to the fact that such hardship may derive from a conscientious objection.

8.192 In any event, the number of people currently seeking exemption on the basis of conscientious objection is low, amounting to only 1% of people who had sought exemption or excusal.[1223]

Preliminary submission

8.193 One respondent who has made a preliminary submission in relation to this reference considered that it has been 'a serious error of judgement' to remove the automatic exemption for members of the clergy.[1224] This respondent, a Catholic priest in regional south-east Queensland, argued that priests should be automatically exempted from jury service.[1225]

8.194 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'.

8.195 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.

8.196 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.

1222 Ibid 7, Rec 33.

1223 See [9.44] below.

1224 Section 8(1)(d) of the former *Jury Act 1929* (Qld) used to exempt 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. That exemption was removed when the *Jury Act 1995* (Qld) was enacted.

1225 Submission 18.

QLRC's provisional views and proposals

8.197 The Commission's provisional view is that 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 exemptions that apply only to people of religious vocation or belief.

8.198 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 Paper.

8.199 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, if that is made available as is proposed in chapter 9 of this Paper.[1226] Such claims are no different from similar claims made by others, for instance, by a student who has exams scheduled during the jury service period or a business person whose travel commitments take him or her out of the State for the relevant period.

8.200 Finally, conscientious objections to jury service can be dealt with, where they are warranted, by applications for discretionary excusal under section 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 grounds for discretionary excusal, and the question of guidelines for excusal applications, are discussed in chapter 9 below.

Proposal

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.

1226 Additionally in chapter 9 of this Paper, the Commission has sought submissions on whether the criteria for discretionary excusal in s 21 of the Act should be amended to include substantial hardship to a third party or to the public because of the prospective juror's employment or personal circumstances. This may provide an appropriate basis for excusal of a priest who has significant pastoral care responsibilities. See [9.67] and Question 9-4 below.

Chapter 9

Excusal and Deferral

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.[1227]

9.2 In many jurisdictions, there are two types of excusal: excusal as of right, which entitles a person to exemption, 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.

1227 The Terms of Reference are set out in Appendix A to this Paper.

EXCUSAL AS OF RIGHT

9.3 People who are entitled to excusal as of right are eligible for jury service but may opt out if they choose. In some jurisdictions, excusal as of right is available to people such as doctors, teachers, emergency service workers, ministers of religion, pregnant women and carers.[1228] As discussed in chapters 5 and 7 above, however, a number of jurisdictions have reduced their categories of excusal as of right. Following the recommendations of Lord Justice Auld, changes to the legislation in England and Wales have removed virtually all entitlements to exemption as of right.[1229]

9.4 Similarly, the NSW Law Reform Commission and the Law Reform Commission of Western Australia have advocated the removal of all categories of exemption or excusal as of right, preferring instead that claims for excusal be dealt with on a case-by-case basis and granted only when good cause is shown.[1230] The NSWLRC explained:

> 6.3 The Commission considers that, save in the case of those who have previously served as jurors, there should no longer be an entitlement to claim exemption as of right. The difficulty with its preservation lies in the fact that many will regard it as an invitation to be excused from jury service, which they will readily accept, without giving any consideration to the wider public interest involved in that form of service. Moreover, some studies reveal it to be a cause for resentment and diminution in confidence on the part of those who do serve as jurors and then question why other members of the community seem able to avoid that commitment.[1231]
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> 6.4 The continuation of the wide categories of potential exemption in fact 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. There was substantial support in the submissions and consultations for this conclusion.[1232] It is also to be noted that exemption as of right no longer exists in Victoria, Tasmania, Queensland, SA, or in England and Wales.
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> …
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> 6.6 Lord Justice Auld, who supported eliminating the categories for exemption, observed that any applications to be excused would have to be tested carefully according to 'the individual circumstances' of each case 'otherwise there could be a reversion to the present widespread excusal of such persons by reason only of their positions or occupations'.[1233] We agree with this conclusion.[1234] (notes in original)

1228 See *Juries Act 1967* (ACT) s 11(1), sch 2 pt 2.1; *Jury Act 1977* (NSW) s 7, sch 3; *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.

1229 *Criminal Justice Act 2003* (Eng) s 321, sch 33 cl 15.

1230 A similar position has recently been put forward by the Law Reform Commission of Ireland: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.107]–[3.116].

1231 J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, (Draft) Report to the Criminology Research Council (2007) *not yet published* [as at September 2007], 34 and 72.

1232 NSW Young Lawyers, *Submission*, 12; J Kane, *Submission*; Redfern Legal Centre, *Submission*, 9; GJ Samuels, *Submission*, 2; MJ Stocker, *Submission*, 7; NSW Bar Association, *Submission*, [23]; NSW Public Defender's Office, *Submission*, 6; NSW Jury Taskforce, *Submission*, 2; NSW Office of the Director of Public Prosecutions (NSW), *Submission*; J Goldring, *Submission*, 3; A Abadee, *Consultation*. [Submissions made to, and consultations held with, the NSWLRC.]

1233 RE Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001), 151.

1234 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.3]–[6.6], and see Rec 27–28.

9.5 The LRCWA agreed with the NSWLRC's conclusions:

> Providing an automatic right for certain groups to be excluded from jury service potentially undermines the representative nature of juries. The goal of representation is to obtain a jury of diverse composition; that is, people with different backgrounds, knowledge, perspectives and personal experiences. According to media reports, the current Western Australian Attorney General plans to remove the categories of excuse as of right in order to ensure that juries are more representative of the community. Likewise, the NSWLRC noted that automatic categories jeopardise the representative nature of the jury and 'can have the effect of limiting the collective skill and experience of the jury'.
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> …
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> Consistent with the Commission's Guiding Principle 3 — that wide participation in jury service should be encouraged — it is important that members of the community share the responsibility of jury service. The NSWLRC explained in its 2007 report that the continuation of automatic categories of excuse may cause resentment among other members of the community. Providing certain members of the community with an absolute right to be excused, irrespective of their individual circumstances, means that the burden of jury service is not being shared equitably.
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> As the VPLRC [Victorian Parliament Law Reform Committee] observed, those who are entitled to be excused as of right invariably exercise that right. Similarly, the NSWLRC noted that the problem with exemptions as of right is that people 'may regard it as an invitation to be excused from jury service, which they will readily accept, without giving any consideration to the wider public interest involved in that form of service'. The Commission acknowledges that the administrative burden on the Sheriff's Office may increase to some extent because the processing of applications may take longer (as a result of the need to assess whether the person has demonstrated good cause). However, the Commission notes that the Jury Manager in Western Australia supports the removal of the categories under Part II of the Second Schedule. In addition, during initial consultations for this reference a number of judges stated that they did not support the continuation of excuses as of right.
>
> In its 2007 report, the NSWLRC recommended that no person should be entitled to be excused from jury service as of right solely because of their occupation, profession or calling or because of personal characteristics or situations. Instead, they should be able to apply, on a case-by-case basis, to be excused for good cause. The Commission agrees and therefore proposes that Part II of the Second Schedule of the *Juries Act* should be repealed.[1235] (notes omitted)

9.6 The LRCWA observed that in Perth, time-specific excuses, such as study or holidays, and excusals as of right comprise 46% of all excusals. The LRCWA expressed the view that its proposals to remove excusal as of right, tighten the grounds for excuse for cause and introduce a system of deferral would be sufficient to 'dramatically decrease' the number of excusals and increase the representativeness of juries.[1236]

1235 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 112–13, Proposal 45.

1236 Ibid 63.

Preliminary submission

9.7 In some jurisdictions, people who are blind or deaf can claim automatic exemption.[1237] Vision Australia has submitted, however, that blindness or vision impairment should not provide a basis for excusal as of right. It argued that people who are blind 'will ably carry out the functions and responsibilities of a juror' and that any assistance needed to enable them to do so will be 'minimal or absent' in most cases.[1238]

QLRC's provisional views and proposals

9.8 With one exception, there is presently no provision in Queensland allowing any person to claim automatic exemption or excusal 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 served at some time in the previous 12 months to be excused for the jury service period.[1239] In addition, the Commission has proposed in chapter 8 of this Paper that people who are 70 years or older should be entitled to exempt themselves from jury service.[1240]

9.9 Having regard to the trend in other jurisdictions away from excusals as of right, the Commission's provisional view is that the position in Queensland should remain as it is. Other than in relation to previous jury service and the exemption of people 70 years of age or older, there should be no entitlement conferred on any person to claim automatic exemption from jury service solely on the basis of belonging to a particular class or because of particular personal circumstances. Claims for excusal that are grounded on inconvenience or hardship should be dealt with as a matter of discretionary excusal in the individual circumstances.

9.10 To introduce a system of excusals as of right would tend to undermine the representativeness of juries and would certainly support a perception that jury service is not shared equitably among all members of the community. It is reasonable to expect that if people were able to claim excusal as of right, many of them would do so.

9.11 The Commission has made a similar proposal in chapter 7 in relation to exemption on the basis of occupation or profession.

Proposal

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.

1237 Eg *Juries Act 1967* (ACT) s 11(2), sch 2 pt 2.2; *Juries Act* (NT) s 11(1), sch 7; *Juries Act 2003* (Tas) ss 9(3)(b), 10(3)(b), 12; *Juries Act 2000* (Vic) ss 8(3)(b), 9(4)(b), 11.

1238 Vision Australia, Submission 19.

1239 *Jury Act 1995* (Qld) s 22. See [9.112]–[9.130] below.

1240 See Proposals 8-1 to 8-3 in chapter 8 of this Paper.

EXCUSAL FOR CAUSE: HARDSHIP OR PERSONAL CIRCUMSTANCES

9.12 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[1241] or permanently.[1242] A judge may also excuse a person from jury service on that person's application or on the judge's own initiative.[1243]

9.13 Section 21 of the *Jury Act 1995* (Qld) sets out the criteria for determining whether a 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.

9.14 In 1997, the Senior Judge Administrator of the Supreme Court of Queensland issued a Practice Direction under section 13 of Act, which provides that:

> The sheriff of a jury district is empowered to grant permanent excusal from jury service under section 21(2) of the Jury Act to any person on production of a medical certificate issued by a duly qualified medical practitioner which indicates permanent excusal is appropriate in the circumstances.[1244]

1241 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).

1242 *Jury Act 1995* (Qld) s 19.

1243 *Jury Act 1995* (Qld) s 20.

1244 Supreme Court of Queensland, Practice Direction No 4 of 1997, 'Jury Act 1995 section 13' (Senior Judge Administrator, Martin Moynihan, 7 February 1997) [1]. Section 13(d) of the *Jury Act 1995* (Qld) provides that, after consulting with the chief judge of the District Court and the President of the Childrens Court, the senior judge administrator may issue directions under the *Supreme Court of Queensland Act 1991* (Qld) about the criteria for excusing from jury service and the circumstances in which a person may be excused permanently from jury service. The sheriff must comply with procedural requirements imposed under such practice directions when exercising power to excuse a person from jury service: s 19(2).

9.15 Under that Practice Direction, the Sheriff may also 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.

9.16 Section 21 of the *Jury Act 1995* (Qld) does not appear to have been judicially considered in any reported decision. This is perhaps not surprising as questions of excusal are either handled by the Sheriff or by a judge before a jury is empanelled; in neither case is it likely to give rise to a reported decision.

9.17 When recommending the inclusion of a provision along the lines of section 21 of the Queensland Act, the Litigation Reform Commission commented that people such as medical professionals, teachers, carers of children, and infirm persons should be excused 'not because they are members of a particular class, but because in their individual cases jury service would create undue hardship or inconvenience'.[1245]

9.18 Prospective jurors can seek to be excused when they receive the *Notice to Prospective Juror*,[1246] or at a later stage.[1247] The *Notice to Prospective Juror* sets out the following bases on which people may seek to be excused from jury service:

- your work or study commitments make it impossible
- significant medical, personal or financial obstacles exist
- you have served as a juror in the past 12 months[1248]

9.19 The *Notice to Prospective Juror* advises that an application for excusal due to work commitments must be supported by a written statement from the person's employer and, similarly, that an application for excusal on medical grounds must be supported by a medical certificate specifying the exact nature of the condition or illness.[1249] The Notice also advises prospective jurors to make alternative arrangements for child care and other responsibilities and to speak with their employers to make arrangements to be available if summoned for jury service. Elsewhere, prospective jurors are advised that 'Work commitments are not generally a sufficient reason to be excused,' at least if the application to be excused is made after receipt of a summons.[1250]

9.20 People who are excused are not required 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

1245 Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [2.14].

1246 *Jury Act 1995* (Qld) s 18(4); Queensland Courts, 'Excusal' <http://www.courts.qld.gov.au/161.htm> at 10 May 2010; Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 10 May 2010. See [10.11]–[10.14] below.

1247 *Jury Act 1995* (Qld) s 23.

1248 Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 10 May 2010. See also Queensland Courts, 'Selection' <http://www.courts.qld.gov.au/159.htm> at 10 May 2010; Queensland Courts, 'Excusal' <http://www.courts.qld.gov.au/161.htm> at 10 May 2010.

1249 The Commission understands that the Sheriff's Office also asks for a medical certificate to support claims for excusal on the basis of disability: Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1250 Queensland Courts, 'Summons' <http://www.courts.qld.gov.au/163.htm> at 10 May 2010.

may receive a Notice in the future[1251] unless, presumably, they are permanently excused.[1252]

9.21 As well as the Sheriff, the judge has power to excuse a person from jury service for a particular jury service period (or part of it) or permanently. Before empanelment begins, the judge may hear and determine applications for excusal and renewed applications for excusals that were refused by the Sheriff.[1253]

9.22 The Australian Institute of Criminology recently noted that financial hardship is a commonly cited reason for requests for excusal:

> Discussions with jury administrators revealed that employment-related concerns, particularly financial hardship, are a common excuse for not performing jury service. Some specialised professions, such as specialist medical practitioners, may be difficult if not impossible to replace, and their absence may also cause public inconvenience.[1254]

9.23 In Queensland, planned trips and other similar prior personal commitments are a common basis for applications for excusal,[1255] but the most common ground for excusal is employment. The Sheriff has noted that people may not want to be excused but nevertheless feel that their employment may be jeopardised if they serve.[1256]

9.24 An issue to consider is whether the current criteria for excusal in Queensland are appropriate. If the categories of ineligibility are restricted and there are to be no categories of excusal as of right, the grounds on which discretionary excusal can be granted need to be generous enough to cover all those situations in which excusal may be appropriate. On the other hand, the grounds ought not to be so wide as to allow excusal for unjustifiable reasons.

Other jurisdictions

9.25 Provisions setting out the grounds for excusal are found in each of the other Australian jurisdictions and in New Zealand. Although they are differently expressed, all have broad criteria to cover hardship, urgency or unforeseen circumstances. In some jurisdictions, a request for excusal may have to be verified by affidavit or statutory

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1251 Queensland Courts, 'Excusal' <http://www.courts.qld.gov.au/161.htm> at 10 May 2010.

1252 See *Jury Act 1995* (Qld) s 19(1)(b).

1253 *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 10 May 2010.

1254 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) 25.

1255 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1256 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010. 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 13 of this Paper.

declaration[1257] or such evidence in support as the Sheriff, or equivalent officer, considers appropriate.[1258]

9.26 In addition, some matters that in other jurisdictions would be covered by discretionary excusal are separately covered in some jurisdictions by provisions for excusal or exemption as of right.

New South Wales, Northern Territory

9.27 In some jurisdictions, the grounds for discretionary excusal are wide, leaving considerable discretion to the Sheriff or judge, as the case may be. This has the benefit of flexibility and responsiveness to change, but, particularly given that excusal provisions are unlikely to arise for judicial consideration, vests considerable discretion in those who write and administer any relevant guidelines.

9.28 In New South Wales, a person may be excused either before being summoned, if he or she 'shows good cause' because of 'any matter of special importance or any matter of special urgency',[1259] or after having been summoned, for 'good cause'.[1260] The legislation does not define 'good cause',[1261] although guidelines have been used in assessing applications for excusal. These guidelines were described by the NSW Law Reform Commission in its report on jury selection:

> The Sheriff's internal guidelines for the exercise by his or her officers of the discretion to excuse recognise that there are many potential grounds for such an application. They include, for example, the fact that the potential juror has booked and paid for a holiday during the period of the trial, or is suffering a temporary illness, or has university or TAFE commitments or examinations, or cannot be replaced in his or her employment because of staff shortages or other exigencies of business.[1262]

9.29 In addition, the New South Wales legislation currently provides for the following categories of people who are entitled to claim exemption as of right:

9 Pregnant women.

10 A person who has the care, custody and control of children under the age of 18 years (other than children who have ceased attending school), and who, if

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1257 *Jury Act 1977* (NSW) ss 18A(4), 38(4); *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).

1258 *Juries Act 1957* (WA) s 27(1); *Juries Act 1981* (NZ) s 15(3). In Queensland, a person is to state the reasons for the request on the application form and must not state something the person knows is false: *Jury Act 1995* (Qld) s 18(5), (6).

1259 *Jury Act 1977* (NSW) s 18A(1).

1260 *Jury Act 1977* (NSW) s 38(1). In addition, people may claim exemption on the basis of certain personal or other circumstances, including: having the care, custody and control of children under 18 years; having full-time care of a person who is sick, infirm or disabled; being pregnant; residing more than 56 km from the place at which the person is required to serve: s 7, sch 3.

1261 See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.3]–[7.4]. That Commission recommended (at [7.14]) that the legislation should define 'good cause' to include situations where:

(a) service would cause undue hardship or serious inconvenience to an individual, to his or her family, or to the public;

(b) some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror; or

(c) 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.

1262 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.7].

exempted, would be the only person exempt under this item in respect of those children.

11 A person who resides with, and has full-time care of, a person who is sick, infirm or disabled.

12 A person who resides more than 56 kilometres from the place at which the person is required to serve.[1263]

9.30 In the Northern Territory, a person may be excused from attendance for such period as the judge or master specifies 'for sufficient cause'.[1264] Again, this term is not defined in the legislation.[1265]

9.31 The position is similar in England and Wales, Ireland, and Scotland, where a person may be excused for 'good reason'.[1266]

9.32 In England and Wales, the Courts Service has issued guidelines for summoning officers when considering excusals and deferrals of jury service.[1267] The guidelines cover such grounds as insufficient understanding of English, care responsibilities, religious beliefs, difficulty in reaching the court location, holidays, business or work commitments, shift work and night work, hardship for teachers and students, conflict with public duties, parliamentary duties, illness and physical disability.[1268] In general, and with some exceptions,[1269] the guidelines encourage summoning officers to grant deferrals rather than excusals.[1270]

Australian Capital Territory, South Australia, Western Australia

9.33 Other jurisdictions specify the grounds for excusal in more detail in the legislation.

1263 *Jury Act 1977* (NSW) s 7, sch 3.

1264 *Juries Act* (NT) s 15. One of the categories of people who are exempt from jury service is people who are 'incapacitated by disease or infirmity from discharging the duties of a juror': s 11(1), sch 7.

1265 Information for jurors in the Northern Territory states, with respect to requests for excusal for sufficient cause, 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 10 May 2010.

1266 *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). Also see *Jury Ordinance, Cap 3* (HK) s 28(2). In England, the former list of categories of persons who were entitled to claim excusal as of right has been removed (this is discussed in chapter 5 above). At present, the legislation in Ireland maintains a number of categories of excusal as of right including persons in holy orders and vowed members of religious orders: *Juries Act 1976* (Ireland) s 9(1)(a), sch 1 pt II. The Law Reform Commission of Ireland has, however, recently proposed that these be abolished: Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.107]–[3.116].

1267 See Her Majesty's Courts Service (United Kingdom), 'Deciding on deferrals and excusals' <http://www.hmcourts-service.gov.uk/infoabout/jury_service/deferrals_excusals.htm> at 10 May 2010.

1268 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [6]–[21] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010.

1269 For example, the guidelines provide that applications for excusal on the grounds of insufficient understanding of English or because the person is a member of a religious or secular order whose ideology or beliefs are incompatible with jury service should ordinarily be granted: Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [6], [8] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010.

1270 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [2], [4] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010.

9.34 In the Australian Capital Territory, the four express circumstances of excusal for the jury service period are illness, pregnancy, the care of children or ill or aged people, and 'circumstances of sufficient importance or urgency'.[1271] In addition, if two or more partners of the same partnership, or two or more people employed in the same establishment, have been summoned or appointed to attend as jurors on the same day, one or more of those partners or people may be excused from attendance on that day.[1272]

9.35 In South Australia, a person may be excused from attendance or further attendance on the following grounds: the person is one of two or more partners from the same partnership, or employees of the same establishment, summoned on the same day; ill-health, conscientious objection, or a matter of special urgency or importance; or 'for any reasonable cause'.[1273]

9.36 In Western Australia, a person may be excused from attendance on the grounds of illness; undue hardship to himself or herself or another; 'circumstances of sufficient weight, importance or urgency'; or recent jury service.[1274] In addition in Western Australia, the legislation provides that pregnant women and persons residing with, and having full-time care of, children under the age of 14 years or persons who are aged, in ill-health or physically or mentally infirm are entitled to be excused as of right.[1275]

Tasmania, Victoria

9.37 Legislation in Tasmania and Victoria sets out the most extensive list of grounds for excusal. In Tasmania, a person may be excused for 'good reason' for the whole or part of a jury service period, such reason being:[1276]

> (a) the illness or poor health of the person;
>
> (b) the incapacity of the person;
>
> (c) the excessive time or excessive inconvenience to the person to travel to the place at which the person is required to attend for jury service;
>
> (d) the substantial hardship to the person resulting from attendance for jury service;
>
> (e) the substantial financial hardship resulting from the person's attendance for jury service;
>
> (f) the substantial inconvenience to the public resulting from the person's attendance for jury service;
>
> (g) if the person has the care of any dependant, alternative care during the person's attendance for jury service is not reasonably available for that dependant;

1271 *Juries Act 1967* (ACT) s 14.

1272 *Juries Act 1967* (ACT) s 15. Also see *Juries Act 1927* (SA) s 16(2)(b); *Juries Act 1981* (NZ) ss 15(1), 16.

1273 *Juries Act 1927* (SA) s 16(2)(b)–(d).

1274 *Juries Act 1957* (WA) ss 5(c)(2), 27(1), 32, sch 3.

1275 *Juries Act 1957* (WA) s 5(c)(i), sch 2 pt II cl 4.

1276 *Juries Act 2003* (Tas) ss 9, 12.

(h) the beliefs or principles of the religious society or body of which the person is a practising member are incompatible with jury service;

(i) any other matter of special urgency or importance.[1277]

9.38 A person may also seek permanent excusal from jury service for good reason, namely:

(a) the continuing poor health of the person;

(b) the disability of the person;

(c) the beliefs or principles of the religious society or body of which the person is a practising member are incompatible with jury service.[1278]

9.39 The list of grounds for excusal from the whole or part of the jury service period for 'good reason' in Victoria is virtually identical to that in Tasmania, but includes the following two bases for excusal:

(c) the distance to travel to the place at which the person would be required to attend for jury service is—

(i) if the place is in Melbourne, over 50 kilometres; or

(ii) if the place is outside Melbourne, over 60 kilometres;

…

(i) the advanced age of the person;[1279]

9.40 In Victoria, the grounds for permanent excusal 'for good reason' include, but are not limited to, continuing poor health, disability, or advanced age.[1280] As noted above, in Queensland, a person may be permanently excused on production of a medical certificate indicating that such excusal is appropriate.[1281]

New Zealand

9.41 In New Zealand, a person may be excused from attendance if it would cause 'undue hardship or serious inconvenience' to that person, another person or the general public because of the nature of the person's occupation or business or any special or pressing commitment arising in the course of the person's occupation or business; the person's disability; or the person's state of health, family commitments or other personal circumstances.[1282] In addition to those grounds, a judge may excuse a person from attendance if satisfied that the person objects to jury service on the grounds of conscience, whether religious or not.[1283]

1277 *Juries Act 2003* (Tas) s 9(3).

1278 *Juries Act 2003* (Tas) s 10(3).

1279 *Juries Act 2000* (Vic) s 8(3).

1280 *Juries Act 2000* (Vic) s 9.

1281 See [9.14] above.

1282 *Juries Act 1981* (NZ) s 15(1). Practising members of a religious sect or order that holds service to be incompatible with its tenets are additionally entitled to excusal as of right under s 15(2)(a).

1283 *Juries Act 1981* (NZ) s 16.

Community attitudes to exemption and excusal

9.42 As part of a recent study of juror satisfaction conducted for the Australian Institute of Criminology, 4765 jury-eligible citizens, 1048 non-empanelled jurors and 628 jurors from New South Wales, South Australia and Victoria were surveyed in relation to a number of aspects of jury service that contributed to juror satisfaction.[1284] Among other things, the surveys canvassed citizens' and jurors' attitudes to performing and avoiding jury service.

9.43 The community survey sampled citizens eligible for jury service but who had never served as jurors. Two out of three said that they would like to serve on a jury; those with previous experience of the courts expressed the highest levels of interest in doing jury service.[1285] However, 19% said they would seek to avoid jury service for personal reasons and 14% said they would do so for financial reasons.[1286]

9.44 The sample also included some people who had at some time been summoned for jury service but had not actually served. The researchers noted that the deliberate exclusion of people who had served as jurors may have led to an over-representation of participants who had avoided jury service. The results nevertheless shed some light on common reasons for avoiding jury service:

- 1% had ignored the summons;
- 13% had not served because they were ineligible or disqualified;
- 40% had claimed an exemption or were deferred;
- the main reasons cited for exemption 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%); 26% cited unspecified 'other' reasons.[1287]

9.45 The study also compared the attitudes of jury-eligible citizens on the grounds for exemption with those of both non-empanelled and empanelled jurors:

1284 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. See [4.64]–[4.65] above.

1285 A similar trend has been noted 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) 29.

1286 Research in the United Kingdom has also shown that where prospective jurors' were reluctant to undertake jury service, it was often because of 'domestic or employment constraints': 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) 25. Similarly, in a New Zealand survey of jurors who had completed jury service, jurors identified employment and family and social disruption as the major sources of inconvenience that arose from their service: Law Commission of New Zealand, *Juries in Criminal Trials: Part Two*, Preliminary Paper 37 (1999) Vol 2 [10.41].

1287 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.

> 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%).[1288]

9.46 As noted above, few community members and jurors supported exemptions for people with 'important jobs'.[1289] A study conducted in the United Kingdom in 2004 also reported concerns by some jurors about 'the more affluent and powerful groups' being able to escape jury service:[1290]

> Some jurors complained that the more affluent and powerful groups were less likely to serve on longer trials. As one juror put it:
>
> > I feel the middle class and educated people opt out and you fill up with working class people who really suffer financially and have a hard time with their employers (Interview 183, Southwark).
>
> Jurors were also concerned about those who were summonsed, but did not participate in jury service and found some way to exempt themselves. There was a feeling among some jurors that not only was the jury selected disproportionately from certain sections of the community, but that a second process of selection occurred for longer trials, with the better-off jurors excusing themselves. Thus as one juror who was involved in a longer trial suggested:
>
> > It's the poor workers who were selected for the long case and the more professional workers wriggled out of it (Interview 280, Old Bailey).[1291]

9.47 Contrary to popular belief, however, more recent research conducted for the United Kingdom Ministry of Justice found that professionals are fully represented on English juries:

> The reality is that the highest rates of jury service for summoned jurors are among middle to high-income earners, and that those in higher status professions are fully represented among serving jurors. The retired and unemployed are, in fact, underrepresented among serving jurors, and in reality it is the employed that are over-

1288 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.

1289 Ibid.

1290 According to that study, 'jurors of professional status were … the most reluctant of the different occupational groups' to engage in jury service on receiving a summons, and jurors of professional status were less likely to serve on longer trials than unskilled workers and skilled manual workers: 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) 26, 28.

1291 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.

> represented among serving jurors in relation to their representation in the population.[1292]

9.48 Participants in the study by the Australian Institute of Criminology were also surveyed about their perceptions of the representativeness of juries:

- 36% disagreed or strongly disagreed with the statement that 'juries in my state are not representative of the community';
- 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%).[1293]

9.49 This is consistent with another of the study's findings that members of the jury pool 'generally expressed significantly more confidence in juries and the criminal justice system than did jury-eligible members of the community who did not report for jury duty'.[1294]

> In general, the results revealed that persons with more direct contact and experience with court, even if as a defendant, were more eager to serve as jurors and expressed more support for the jury system and more confidence in the criminal justice system. Citizens most likely to avoid jury duty were those with the least experience and past contact with the courts, and with less accurate information and knowledge of the jury system.[1295]

NSWLRC's recommendations

9.50 In its Report on jury selection, the NSW Law Reform Commission recommended the removal of the existing categories of exemption as of right for clergy and members of religious orders; health professionals; emergency services personnel; pregnant women; people with the care, custody and control of school children; people with the care of a person who is sick, infirm or disabled; and people who live more than 56 km from the court. Instead, the NSWLRC considered that claims for excusal by people in these groups should be considered on a case-by-case basis and granted only if good cause is shown.[1296]

9.51 It noted that many of the categories of exemption as of right are very broad and fail to take account of the person's individual circumstances and capacity to serve. For example, the NSWLRC commented in relation to pregnant women that:

1292 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) 197–8. A 1995 New Zealand study also found that while a number of occupational groups, including professionals, were somewhat under-represented in jury pools (in comparison with the population of the jury districts from which they were drawn), the under-representation was most stark for the 'elementary' rather than professional occupations: Law Commission of New Zealand, *Juries in Criminal Trials: Part One*, Preliminary Paper 32 (1998) [280] citing New Zealand Department of Justice, *Trial by Peers? The Composition of New Zealand Juries* (1995).

1293 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.

1294 Ibid 148.

1295 Ibid 170.

1296 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.

> 6.49 It would appear that this category of exemption is too broad if applied on a class basis, since there are many people in the early or mid term stages of pregnancy who could sit as jurors without difficulty or discomfort. One submission suggested that pregnant women should continue to be entitled to exemption, on the basis that complications associated with the condition could interrupt trials and cause delays. However, those who have medical or other reasons to be excused could apply to be excused for cause, as could those in the later stages of pregnancy. This approach was supported by a number of submissions, and it reflects the view which we adopt in relation to this current ground of exemption.[1297] (notes omitted)

9.52 The NSWLRC also 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.[1298] It considered, however, that 'good cause' should be defined:[1299]

> 7.14 We consider it desirable for the Act to establish a general definition of 'good cause' that would encompass situations where:
>
> (a) service would cause undue hardship or serious inconvenience to an individual, to his or her family, or to the public;
>
> (b) some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror;[1300]
>
> (c) 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.[1301]
>
> 7.15 This draws on a number of models, including the New York Jury Project, which proposed two grounds alone on which a potential juror could be excused for good cause, namely:
>
> (a) the individual has a mental or physical condition that causes him or her to be incapable of performing the duties of a juror; or
>
> (b) the individual asks to be excused because his/her service would be a continuing hardship to the individual, his/her family, or the public.[1302] (notes in original)

9.53 It also recommended that a set of guidelines be developed, and made publicly available, for the assessment of applications for excusal (and deferral) that would elucidate the sorts of matters that would be considered sufficient for an excusal to be granted:

1297 Ibid [6.49].

1298 Ibid [7.12], [7.40], Rec 29, 34.

1299 Ibid [7.14], and see also Rec 31.

1300 See also para 5.11–5.16 [of the NSWLRC's Report]. [The NSWLRC considered that 'sickness, infirmity or disability which renders a person unable to discharge the duties of a juror' should no longer be a ground of ineligibility and that, instead, people with a disability should be entitled to seek excusal for good cause if the disability would prevent them from being able to serve effectively as a juror. In its view, this would allow the matter to be dealt with on a case-by-case basis and would mean that persons with disabilities who could be assisted to serve, by the provision of reasonable accommodations, could do so if they wanted.]

1301 Based on NSW Bar Association, *Submission*, [29] [made to NSWLRC].

1302 *The Jury Project*, Report to the Chief Judge of the State of New York (1994) 34.

RECOMMENDATION 33

Guidelines should be prepared and published to assist the Sheriff's exercise of discretion in excusing jurors for good cause or in deferring the time at which those who seek to be excused might still be required to serve.

The guidelines, which should also be made available to all judges, should take into account the following matters:

(a) the demonstration of illness, poor health or disability, which would make jury duty unreasonably uncomfortable or incompatible with the good health of the juror, although only on production of a medical certificate;

(b) the pregnancy of the juror where, in the particular circumstance, service has been shown on production of a medical certificate to be unreasonably uncomfortable, or incompatible with the good health of the juror;

(c) the existence of substantial or undue personal hardship (including financial) or undue inconvenience to an ongoing business or professional practice resulting from attendance for jury service;

(d) the fact that excessive time or excessive inconvenience would be involved in travelling to and from court;

(e) the occasioning of substantial inconvenience to the public (or a section of the public) or the functioning of government resulting from the person's attendance for jury service;

(f) the existence of caregiving obligations for young children or people with a disability where:

    (i) suitable alternative care is required and is shown not to be reasonably available; or

    (ii) special circumstances exist in relation to the person in care that justify the carer being excused.

(g) the fact that the person is one of two or more partners from the same business partnership, or one of two or more employees in the same business establishment (being one with fewer than 25 staff members), who have been summoned to attend as jurors during the same period;

(h) the holding of objectively demonstrated religious or conscientious beliefs that would be incompatible with jury service;

(i) the existence of a particular pastoral or ongoing counselling relationship between a member of the clergy or health professional and the accused or a victim or their families, such that the juror might be unable to bring (or appear to be unable to bring) an unbiased mind to the case;

(j) the existence of a previous or current professional contact between the accused, a victim or a witness in a particular case, such that the juror might be unable to bring (or appear to be unable to bring) an unbiased mind to the case;

(k) the age of the person in circumstances where, on that account, jury service would be unduly onerous;

(l) the fact that the juror has a high public profile to the extent that his or her anonymity might be lost if required to serve, resulting in a possible risk to his or her personal safety;

(m) pre-existing conflicting commitments such as pre-booked travel or holidays, special events, such as weddings, funerals or graduations, or examinations, compulsory study courses, or practical exercises required of students;

(n) the fact that the person is a teacher or lecturer who is scheduled to supervise or assess students approaching examinations, or to supervise or process an assessment task, or if the service is to take place in the first two weeks of a term or semester;

(o) the fact that the person is a member of the staff of the NSW Ombudsman attached to the Corrections team or the Police and child protection team; and

(p) any other matter or circumstance of special or sufficient weight, importance or urgency.[1303]

9.54 In addition, the NSWLRC recommended that provision be made for a person to seek a re-determination from the duty judge of a Sheriff's refusal to grant an excusal.[1304]

LRCWA's proposals

9.55 The Law Reform Commission of Western Australia reported that most excusals in Western Australia are made on the basis of work matters (18%),[1305] followed by health issues (5%), 'circumstances of sufficient weight, importance or urgency' (4.4%),[1306] pre-booked holidays (2.9%), and recent jury service (0.38%).[1307]

9.56 The LRCWA considered that the grounds for excusal should be limited 'in order to ensure wide participation':[1308]

> The Commission has approached this topic with a view to ensuring that people who are summoned for jury service are not excused from further attendance too readily — it is vital that jury service is shared among the community as equitably as possible and that juries represent a broad range of people with different skills, backgrounds and life experiences.[1309]

9.57 In its view, 'all of the potential reasons a person would seek to be excused' are encompassed by the two concepts of hardship and inconvenience.[1310] It considered that 'the degree of hardship or inconvenience' would need to be 'sufficiently high so

1303 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [7.25], Rec 31.

1304 Ibid [7.44]–[7.45], Rec 35.

1305 It noted, however, that applications for excusal that are tied to loss of income are 'promptly rejected' because of the provision for jurors to continue to be paid their usual salary or to be reimbursed during jury service: Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 114. Remuneration for jury service is discussed in chapter 11 of this Paper.

1306 See *Juries Act 1957* (WA) ss 27, 32, sch 3 (Grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the court).

1307 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 114.

1308 Ibid.

1309 Ibid.

1310 Ibid 116.

that people are not excused from jury service too readily' and that inconvenience should encompass both inconvenience to the public and inconvenience to the person; for persons in some occupational groups, such as the emergency services, an absence from work may impact on a significant number of people.[1311] In this regard, the LRCWA was attracted to the recommendation of the Law Reform Commission of Hong Kong:[1312]

> that a person should only be exempted, excluded or deferred from jury service 'where substantial inconvenience to the public may result' or 'where undue hardship or extreme inconvenience may be caused to the person'.[1313] (note in original)

9.58 In addition, the LRCWA considered that the summoning officer or the judge must be able to excuse a person from attendance 'if the particular circumstances indicate that they are unable to discharge their duties as a juror', for example, if it appears that the person is 'unable to sufficiently understand English' or the person advises that they know the accused in the trial.[1314]

9.59 The LRCWA therefore made the following proposal, based partly on the concepts used by the Law Reform Commission of Hong Kong and on the recommendation of the NSW Law Reform Commission[1315] to clarify the grounds for excusal:

> **PROPOSAL 46**
>
> **Third Schedule: grounds on which a person may be excused from jury service**
>
> That the Third Schedule of the *Juries Act 1957* (WA) be amended to provide that the grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the court are:
>
> - Where service would cause substantial inconvenience to the public or undue hardship or extreme inconvenience to a person.
> - Where a person who, because of an inability to understand and communicate in English or because of sickness, infirmity or disability (whether physical, mental or intellectual), is unable to discharge the duties of a juror.
> - Where a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror.[1316]

9.60 The LRCWA also recommended that the existing entitlement to claim automatic excusal from jury service on the basis of particular family circumstances should be removed and that such matters should be considered on a case-by-case basis. This would mean, for example, that claims for excusal on the basis of pregnancy would not

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1311 Ibid.

1312 Ibid.

1313 Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008) 107, Rec 8.

1314 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 116.

1315 See [9.52] above.

1316 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 116, Proposal 46.

be granted without an inquiry as to the stage of the person's pregnancy or the person's actual fitness to serve as a juror.[1317]

9.61 The LRCWA noted that many primary carers also work part-time or full-time and thus engage paid or unpaid carers to assist them while at work. In its view, family carers should therefore undertake jury service if reasonable and suitable alternative care is available.[1318] The LRCWA nonetheless considered that family carers should be reimbursed for any reasonable carer expenses incurred solely for the purpose of jury service.[1319]

9.62 To promote the 'consistent and rigorous' assessment of applications for discretionary excusal, the LRCWA also proposed the development of guidelines, although it did not consider it necessary for the guidelines to be made publicly available:[1320]

> **PROPOSAL 47**
>
> **Guidelines**
>
> That the Sheriff's Office in consultation with Supreme Court and District Court judges should prepare guidelines for determining whether a person summoned for jury service should be excused from further attendance and that these guidelines should include:
>
> 1. guidance for determining applications to be excused by persons summoned for jury service on the basis of substantial inconvenience to the public or undue hardship or extreme inconvenience to a person including specific examples of applications that should ordinarily be granted and examples of applications that should ordinarily be rejected;
>
> 2. that applications for excuse should be assessed with reference to two guiding principles — that juries should be broadly representative and that jury service is an important civil duty to be shared by the community;
>
> 3. guidance for determining if a person summoned for jury service should be excused from further attendance because he or she is unable to understand and communicate in English, including guidelines for dealing with literacy requirements in trials involving significant amounts of documentary evidence;[1321]
>
> 4. guidance for determining whether a person summoned is unable to discharge the duties of a juror because of sickness, infirmity or disability (whether physical, mental or intellectual) bearing in mind the nature of the particular trial or the facilities available at the court;
>
> 5. guidance for determining whether a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror;

1317 Ibid 109–10.

1318 Ibid 110.

1319 Ibid 110–11, Proposal 44. This is discussed in chapter 11 below.

1320 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 117–18.

1321 See Proposal 40 [in the LRCWA's Discussion Paper].

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

7. relevant procedures such as enabling prospective jurors to record their reasons for seeking to be excused where those reasons are of a private nature.[1322] (notes in original)

9.63 The LRCWA also sought submissions on whether provision should be made for a person whose application for excusal has been refused to apply to the judge (or a magistrate) before the date on which the person is required to attend court in response to the summons.[1323] This would remove the need for the person to wait until the jury summons date to seek excusal from the judge.

Preliminary submission

9.64 Vision Australia submitted that 'blindness should not, in itself, be grounds to be excused' but that individual circumstances should be considered and accommodated. For instance, a person whose onset of blindness is very recent may not yet have adapted to his or her loss of vision, and some people may feel vulnerable and unsafe because of their blindness.[1324]

QLRC's provisional views and proposals

9.65 The Commission's provisional view is that the existing provisions dealing with the circumstances in which the Sheriff, or a judge, may excuse a person from jury service are generally appropriate and should be retained.

9.66 The Commission considers that the current excusal criteria strike an appropriate balance, and avoid being overly prescriptive on the one hand and unambiguously wide on the other. In general, the criteria appear to cover all of those circumstances, identified with more particularity in some other jurisdictions, in which excusal is likely to be warranted while also ensuring that excusal in the case of hardship or inconvenience is granted only if the hardship or inconvenience is 'substantial'. The Commission considers this balance is important in helping to ensure that the jury pool is not diminished because of unjustified excusals.

9.67 The Commission considers, however, that there may be scope for some further clarification in relation to some of the criteria. Section 21(1)(a) provides a basis for excusal if jury service would result in substantial hardship to the person because of the person's employment or personal circumstances. It may be appropriate, however, to expand this to include substantial hardship to a third party. For instance, a specialist surgeon who is scheduled to perform surgery during the jury service period, which is particularly urgent or for which the patient has been waiting a long time, would seem to have a good case for being excused. The hardship, however, is not really to the sur-

1322 The practice occurs now in Western Australia. The NSWLRC noted that it may be embarrassing for prospective jurors to air their reasons in open court so it was recommended that the practice of enabling jurors to write down on a document their grounds for seeking to be excused should be encouraged: NSWLRC, *Jury Selection*, Report No. 117 (2007) 131.

1323 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 118–19.

1324 Vision Australia, Submission 19.

geon but to the patient. The Commission notes, in this regard, that section 21(1)(c) recognises the impact of jury service on third parties as a valid basis for excusal; it is framed in terms of 'substantial inconvenience to the public or a section of the public'.

9.68 Additionally, in chapter 8 of this Paper, the Commission has proposed that the Act should be amended to provide that the Sheriff or the judge may excuse a person from jury service if it appears that the person:

- 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 disability, is unable to discharge the duties of a juror effectively.[1325]

9.69 The Commission has also asked in that chapter whether the judge should have a similar power to excuse a prospective juror if it appears that the person is ineligible because of a mental disability that makes the person incapable of effectively performing the functions of a juror.

9.70 In the Commission's provisional view, those matters do not fall neatly under any of the existing criteria for excusal in section 21 of the Act and should be added to that provision.

9.71 The Commission is also interested in submissions on whether there should be detailed excusal guidelines, along the lines of those proposed by the NSW Law Reform Commission and the Law Reform Commission of Western Australia. This Commission is not presently aware of the extent to which the Sheriff's Office has or uses any such guidelines in assessing applications for excusal, although there appears to be a practice of requiring a statement from the person's employer where a claim for excusal is based on work difficulties, and a medical certificate for claims on medical grounds or disability.[1326] A formal set of guidelines might have the advantage of indicating the circumstances in which different sorts of claims might meet the threshold of 'substantial' hardship or inconvenience.

9.72 One matter that could be dealt with in such guidelines is excusal on the basis of conscientious objection. In chapter 8 of this Paper, the Commission has suggested that it may be appropriate for a claim of hardship in those circumstances to be supported by evidence of a genuinely held belief or conviction that is incompatible with jury service.[1327]

9.73 The Commission also considers that the provisions dealing with how and when an application for excusal may be made, and the period for which a person may be excused, are generally appropriate. The Commission is interested, however, in submissions on whether the provision allowing permanent excusal is appropriate. At present, a person may be permanently excused only on production of a medical certificate indicating that permanent excusal is appropriate. The Commission is interested in learning

1325 See Proposals 8-5, 8-6 and 8-10 in chapter 8 of this Paper.

1326 See [9.19] above.

1327 See Proposal 8-15 in chapter 8 of this Paper.

whether there might be any other circumstances in which permanent excusal would be justified and should be permitted.

Proposals

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.

9-3 Guidelines should be prepared and published for determining whether a person summoned for jury service should be excused from attendance or further attendance.

Question

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?

DEFERRAL OF JURY SERVICE

9.74 Each of the Australian jurisdictions includes provisions for discretionary excusal from jury service which, typically, allow for a person to be excused from attendance or further attendance for part or all of the period covered by the summons.[1328] It is possible, therefore, for a person to be excused for a part of the summons period but required to attend for the remainder. It is also possible for a person to be excused for the whole of the summons period. It is not generally possible under the excusal provisions, however, for a person to be excused for the current summons period but required to attend for some other future jury service period.

9.75 Specific provision for deferral of jury service to a later period is, however, made in some Australian jurisdictions: Tasmania and Victoria include specific deferral provisions; the Northern Territory and South Australia allow excusals from jury service to be made conditional on future jury service. Additionally, the NSW Law Reform Commission, the Law Reform Commission of Western Australia, the Law Commission of New Zealand and the Law Reform Commission of Ireland have each advocated the introduction of a system of deferral in their respective jurisdictions.

9.76 Deferring jury service allows people who have been summoned 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.

9.77 Deferral of jury service is not currently available in Queensland.

1328 See [9.25]–[9.40] above. Also see *Juries Act 1981* (NZ) ss 15, 16; *Juries Act 1974* (Eng) s 9; *Juries Act 1976* (Ireland) s 9(2); *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(5); *Jury Ordinance, Cap 3* (HK) s 28.

9.78 In relation to the then proposed *Jury Act 1995* (Qld), the Litigation Reform Commission recommended that provision be made for deferral of jury service.[1329] This proposal suggested deferral only within the sittings to which the request related rather than for any longer period of time. It was in effect taken up in the Act in section 19, which allows a person to be excused from service for the whole or part of any jury service period. A person may also be excused permanently under section 21(2) but there is no other provision for delaying a person's jury service beyond the jury service period for which he or she has been summoned.

Tasmania and Victoria

9.79 The deferral provisions in Tasmania and Victoria are in very similar terms. In those jurisdictions, a person summoned for jury service may apply to the Sheriff or Juries Commissioner, respectively, to defer that service to another time within the following 12 months.[1330]

9.80 For example, section 8 of the *Juries Act 2003* (Tas) provides:

> **8. Deferral of jury service**
>
> (1) A person, or another person on his or her behalf, may apply to the Sheriff for deferral of jury service to another jury service period within the next 12 months.
>
> (2) The application is to be made before the person by or for whom it is made is selected to be empanelled for a jury under section 29.
>
> (3) On receipt of the application, the Sheriff may —
>
> (a) grant the application to defer the jury service for a further period within the next 12 months; or
>
> (b) refuse to grant the application.
>
> (4) If the Sheriff refuses to grant the application to defer a person's jury service, the Sheriff, by notice in writing, is to notify the person accordingly.

9.81 The Sheriff may grant the deferral in his or her discretion: the legislation does not specify any grounds of which the Sheriff must be satisfied, nor are there any factors or considerations which are required to be taken into account. Information provided to prospective jurors in those States suggests, however, that deferrals may be granted on such grounds as substantial personal or financial hardship for a self-employed person (in Victoria), or illness, family responsibilities or prior arrangements that cannot be changed (in Tasmania).[1331]

1329 Litigation Reform Commission (Criminal Procedure Division), *Reform of the Jury System in Queensland*, Report (1993) [2.17].

1330 *Juries Act 2003* (Tas) s 8; *Juries Act 2000* (Vic) s 7.

1331 See Courts and Tribunals Victoria, Jury Service, 'Juror FAQs' <http://www.courts.vic.gov.au/CA256EBD007FC352/page/Jury+Service-Jurors+FAQs?OpenDocument&1=50-Jury+Service~&2=10-Jurors+FAQs~&3=~> at 10 May 2010; and Supreme Court of Tasmania, Going to Court, 'The Jury Summons' <http://www.supremecourt.tas.gov.au/going_to_court/jurors/jury_summons> at 10 May 2010.

Northern Territory and South Australia

9.82 In the Northern Territory and South Australia, the ability to defer jury service is incorporated into the excusal process. As a condition of excusing a person from attendance or further attendance in accordance with the summons, the Sheriff may order the person's name to be included amongst the names of jurors to be summoned for jury service at some specified later time.[1332]

9.83 The provisions in those jurisdictions are very similar. For example, section 17A of the *Juries Act* (NT) provides:[1333]

> **17A Power to exempt from jury service on condition of subsequent service**
>
> (1) Where a person is excused under section 15 from attendance or further attendance on the Court, the Judge or the Master may, as a condition of excusing that person, order that the name of the person be included amongst the names of jurors to be summoned for jury service at some subsequent time specified in the order.
>
> (2) Where a Judge or the Master makes an order under subsection (1), he shall notify the Sheriff of the making of the order and the Sheriff shall cause the person the subject of that order to be summoned, in accordance with that order, as a juror.

9.84 The option to defer arises only if the person is excused; this means that the grounds for excusal from service must have been satisfied for deferral to be considered.[1334] In the Northern Territory, a person may be excused 'for sufficient cause';[1335] in South Australia, a person may be excused:

> (a) on the ground that the person has served as a juror within the previous three years;
>
> (b) on the ground that the person is one of two or more partners from the same partnership, or of two or more persons employed in the same establishment, who have been summoned to attend as jurors on the same days;
>
> (c) because of ill-health, conscientious objection or a matter of special urgency or importance;
>
> (d) for any reasonable cause.[1336]

1332 *Juries Act* (NT) s 17A; *Juries Act 1927* (SA) s 16(4). Also see *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* s 1(5A).

1333 While the South Australian provision is generally similar, s 16(4)(b) of the *Juries Act 1927* (SA) also provides that the judge or Sheriff may, in the alternative, order that the person attend in compliance with the summons at a specified subsequent time and place or at a time and place to be directed by the Sheriff.

1334 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) 32–3.

1335 *Juries Act* (NT) s 15. Also see Supreme Court of Northern Territory, For Jurors, 'Persons excused from service' <http://www.supremecourt.nt.gov.au/jurors/index.htm#q6> at 10 May 2010, which states 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'.

1336 *Juries Act 1927* (SA) s 16(2).

New South Wales

9.85 Section 18A of the *Jury Act 1977* (NSW) allows a person to be excused from the whole or part of the period for which he or she has been summoned if there is 'good cause' because of any matter of 'special importance' or 'special urgency'. That Act does not currently provide for deferrals to a different jury service period.

9.86 However, in its recent report on jury selection, the NSW Law Reform Commission recommended that potential jurors, 'if otherwise eligible to be excused, should be allowed an opportunity to defer and to nominate dates within the coming 12 months when they will be available' for jury service.[1337] It considered that multiple deferrals should be discouraged.[1338] It also expressed the view that depending on 'the nature of the reason for being excused and for receiving a deferral, it may be possible to allocate a juror to a panel for short trials'.[1339]

Western Australia

9.87 The Law Reform Commission of Western Australia proposed the introduction of deferral of jury service as an alternative to excusal. In its view, the ability for people who would otherwise be excused from jury service to have their jury service deferred to a later, more convenient time would 'facilitate greater participation' and 'ease the burden on other members of the community':[1340]

> The Commission believes that a system of deferral should be introduced in Western Australia because it will result in a more equitable sharing of the responsibility of jury service and it will increase the representative nature of Western Australian juries. Furthermore, the ability to postpone jury service will ensure that any inconvenience caused by jury service is minimised because those people who defer jury service will have additional time to organise their affairs and reduce any inconvenience to themselves, to their families or to the public.[1341]

9.88 The LRCWA noted that a system of deferral would have practical benefits:

> The ability to defer jury service would reduce the number of people required to be summoned for each court sitting because the Sheriff's Office would have a number of people flagged in the system who had postponed their jury service to that time. This would be particularly beneficial for regional Western Australia. The Commission notes that seasonal work such as tourism or farming is conducive to deferral. Deferral of jury service would assist in alleviating some of the pressures in those regional areas where the number of available jurors is limited.[1342] Instead of being excused, seasonal workers could be available for jury service during the off–peak season and this will relieve the burden on other members of the local community.[1343] (note in original)

1337 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) 134, Rec 32.

1338 Ibid [7.22], 134, Rec 32.

1339 Ibid [7.22].

1340 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 120.

1341 Ibid 120–1.

1342 See above Chapter Two, 'Regional issues' [of the LRCWA's Discussion Paper].

1343 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 120.

9.89 The LRCWA stated that, because the option to defer would arise only after the initial random selection and summoning of prospective jurors, it 'is not the same as volunteering for jury service'.[1344]

9.90 Under the LRCWA's proposal, the grounds for deferral would be the same as for excusal:

> In order for jury service to be deferred the person should first have demonstrated a valid reason to be excused from attending on the jury summons date. If it were otherwise, people may seek deferral simply to avoid minor inconvenience. If the majority of people summoned sought to postpone their jury service on this basis (ie, as of right) a deferral system would not assist in reducing the number of people required to be summoned; instead it would mean that more people would have to be summoned to accommodate deferrals. Thus, deferral of jury service should operate as a sub-category of excuse so that some people who would otherwise have been excused can be deferred instead.[1345]

9.91 The LRCWA's proposal also provides for one deferral only, unless the sitting dates of the court require otherwise, for a period of up to 12 months.[1346]

PROPOSAL 48

Deferral of jury service

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

   (a) The summoning officer may, instead of excusing a person from further attendance on the grounds specified in the Third Schedule defer a person's jury service to a specified time within the next 12 months.

   (b) When the person whose jury service has been deferred is summoned to attend on the specified date, the summoning officer is not permitted to again defer that person's jury service unless the date on which the person is due to attend is not a date on which the relevant court is sitting.

   (c) When the person whose jury service has been deferred is summoned to attend on the specified date, the court or the summoning officer may excuse that person from further attendance on the grounds specified in the Third Schedule.

2. The Sheriff's Office in consultation with Supreme Court and District Court judges prepare guidelines for determining whether a person summoned for jury service should be permitted to defer jury service and that these guidelines should include guidance about the circumstances in which it would be appropriate to excuse a person from further attendance on the subsequent deferral date.[1347]

1344 Ibid.

1345 Ibid 121.

1346 Ibid 122.

1347 Ibid 122, Proposal 48.

New Zealand

9.92 In its report on juries in criminal trials, the Law Commission of New Zealand noted information that 56% of summoned jurors are excused from jury service, that over half those excusals related to employment and that more than 16% related to family commitments.[1348] It considered that deferral 'would be more effective than stricter guidelines for excusing jurors' in dealing with the high rate of excusals.[1349]

9.93 That Commission recommended that jurors should be entitled to defer their jury service once, to a date not more than 12 months in the future. It recommended, however, that this should be an 'absolute right, so that jurors do not have to explain why they are seeking it'.[1350] This would allow jurors 'to keep their domestic and personal affairs to themselves' and avoid the need for registrars to consider the merits of each request.[1351]

9.94 A system of deferral was subsequently introduced by amendments made in 2008, but which have not yet commenced.[1352] The amendments provide for a once-only deferral to a date within twelve months, but only if the registrar is satisfied that attendance on the present occasion 'would cause or result in undue hardship or serious inconvenience to that person, any other person, or the general public', because of one or more of the following matters:

> (a) the nature of that person's occupation or business, or of any special and pressing commitment arising in the course of that person's occupation or business;
>
> (b) that person's disability;
>
> (c) that person's state of health, or family commitments, or other personal circumstances[1353]

9.95 These are the same as the grounds for excusal under section 15(1) of the *Juries Act 1981* (NZ).

England and Wales

9.96 In England and Wales, section 9A of the *Juries Act 1974* (Eng) empowers summoning officers to grant a deferral of jury service for 'good reason'. If a deferral is granted, the days on which the person is summoned to attend will be varied to another date,[1354] normally within one year of the date of the original summons.[1355] The summon-

1348 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [155].

1349 Ibid.

1350 Ibid [494].

1351 Ibid [493] citing a submission from The Privacy Commissioner to the LCNZ.

1352 *Juries Amendment Act 2008* (NZ) s 11, which inserts new ss 14B and 14C into the *Juries Act 1981* (NZ). The amendments will commence on a date to be appointed: *Juries Amendment Act 2008* (NZ) s 2(2).

1353 *Juries Act 1981* (NZ) s 14B(2), to be inserted by *Juries Amendment Act 2008* (NZ) s 11.

1354 *Juries Act 1974* (Eng) s 9A(1).

1355 See Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [3] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010.

ing officer may grant a deferral once only in relation to a particular summons.[1356] The court is also given power to defer a person's attendance.[1357]

9.97 With some exceptions,[1358] the guidelines issued by the United Kingdom Courts Service encourage summoning officers to grant deferrals rather than excusals:

> If good reason is shown why the person should not sit on the date they have been summoned, deferral should always be considered in the first instance. Excusal from jury service should be reserved only for those cases where the jury summoning officer is satisfied that it would be unreasonable to require the person to serve at any time within the following twelve months.[1359]

9.98 For example, in the first instance deferral, rather than excusal, should ordinarily be granted for holidays, to teachers and students during term time and exam periods, where service would conflict with important public duties or with work commitments, to members of parliament, and to members of the judiciary.[1360]

Ireland

9.99 There is presently no provision for deferral of jury service in the Irish jury legislation. Whilst recognising that it might involve additional administrative costs, the Law Reform Commission of Ireland has recently proposed that such a system be introduced:

> The Commission provisionally recommends that a deferral date of up to 12 months should be introduced in circumstances where a person is not available to undertake jury service. The Commission also provisionally recommends that a person who defers jury service should be entitled to seek an excusal. The Commission also provisionally recommends that a further deferral should be available to a juror, provided that the application is for good cause. The Commission provisionally recommends that guidelines on excusal should contain a section on the administration of the deferral system.[1361]

Advantages of a system of deferral

9.100 There can be no denying that jury service is an imposition on and an inconvenience to many people.

1356 *Juries Act 1974* (Eng) s 9A(2A).

1357 *Juries Act 1974* (Eng) s 9A(4).

1358 For example, the guidelines provide that applications for excusal on the grounds of insufficient understanding of English or because the person is a member of a religious or secular order whose ideology or beliefs are incompatible with jury service should ordinarily be granted: Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [6], [8] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010.

1359 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications' [2] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010. This accords with the recommendation of Lord Justice Auld: The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [40], 152.

1360 Her Majesty's Courts Service (United Kingdom), 'Guidance for summoning officers when considering deferral and excusal applications', [10], [14]–[16], [18], [20] <http://www.hmcourts-service.gov.uk/courtfinder/forms/js_guidance_0709.pdf> at 10 May 2010.

1361 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [3.125].

9.101 A system of deferral acknowledges the plain fact that jury service creates a significant inconvenience for many people but, by allowing people, within limits, to time their service to meet their own convenience, that inconvenience can be reduced, even if not eliminated entirely. It also means that while people need not be required to attend at the time for which they were originally summoned, the pool of prospective jurors and its representativeness need not be diminished. Giving prospective jurors some input into the timing of their own service may also contribute to more positive perceptions of jury service.[1362]

9.102 Cases of particular hardship can be dealt with by excusing a person from jury service either permanently or for a specified period. However, that reduces the pool from which jurors can be drawn and increases the burden on those who are willing or compelled to attend.

9.103 Where it operates, deferral is seen as a very useful aspect of jury administration:

> 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.[1363]

9.104 Deferral is recommended by people involved in the administration of the criminal justice system in various Australian States as a means of meeting the needs of potential jurors and reducing applications for excusal.[1364]

Resource implications

9.105 While the Australian Institute of Criminology research cited above suggests that the management of deferral processes need not be particularly onerous,[1365] there are nevertheless likely to be financial costs in establishing such a system.[1366] For instance, it may necessitate changes to computerised systems and staff training. Its potential to reduce the available numbers for a given jury service period might also require an increased number of notices initially to be sent. On the other hand, it may simply have the effect of converting what would ordinarily be excusals into deferrals, with little additional reduction in the pool of summoned jurors.

1362 The opportunity of affected parties to participate in decisions is a key factor that informs people's assessment of the fairness of third-party decisions and, in turn, the legitimacy of third-party decision-makers: see generally, for example, TR Tyler, *Why People Obey the Law* (1990).

1363 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.

1364 Ibid 102.

1365 See [9.103] 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].

1366 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

QLRC's provisional views and proposals

9.106 The Commission's provisional view is that 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. The former Sheriff of Queensland commented to the Commission, for instance, that deferral would 'reduce one of the main reasons for excusal, i.e. planned trips or something planned for the period of intended jury service'.[1367]

9.107 In the Commission's provisional view, the Sheriff and judges should be empowered to defer a person's jury service instead of excusing the person from attendance altogether, if the Sheriff or the judge considers it appropriate. Thus, deferral should be available if a person is otherwise eligible to be excused.

9.108 The Commission is interested in submissions on the features a deferral scheme should have. For instance, is it appropriate that service be deferred to a time within 12 months of the original summons, as is provided in a number of jurisdictions, or should a shorter or longer period be provided? The Commission's provisional view is that 12 months would probably allow sufficient flexibility without imposing the administrative difficulties that might accompany a longer period of deferral.

9.109 The Commission also notes the concern that a person's residential or employment status may change after deferral is granted. This may mean that the person is no longer eligible to serve, or is entitled to be excused. Consideration may need to be given to an obligation to serve at the deferred time and the way in which it could be enforced.

9.110 The Commission is also interested to hear whether deferral should be permitted once only on the particular summons, as is provided in England and Wales and has been recommended by the NSW Law Reform Commission and the Law Commission of New Zealand. Being able to defer a person's service a second time would help to keep the person within the jury pool. On the other hand, it may be inconvenient for the person summoned and more difficult for the administration of the system to allow more than one deferral.

9.111 The Commission is also interested in seeking submissions on whether guidelines should be adopted to assist in determining whether a person's service should be deferred. Guidelines, dealing with both excusal and deferral, may be useful.

Proposals

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:

1367 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

(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.

9-6 Guidelines should be prepared for determining whether deferral of a person's jury service should be granted.

EXEMPTION FOR PREVIOUS JURY SERVICE

9.112 At present, the Queensland Act allows people to be excused on the basis that they served as a juror some time in the last 12 months.[1368]

9.113 Section 22 of the Act provides that prospective jurors are entitled to be excused for the jury service period[1369] 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.

9.114 The *Notice to Prospective Juror* explains that a person who has served as a juror in the past 12 months is not obliged to do jury service. To claim this exemption, the Notice requires the person to apply for excusal, giving particulars of the person's previous service.[1370]

1368 *Jury Act 1995* (Qld) s 22.

1369 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).

1370 See generally *Jury Act 1995* (Qld) s 18; Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 10 May 2010.

9.115 As in Queensland, the legislation in the ACT, New South Wales, the Northern Territory and South Australia provides for a prospective juror to be excused, or exempted, if he or she was summoned to attend, or served as a juror, during a specified interval of time preceding the person's current summons. In summary, a person may be excused, or exempted if he or she was summoned in the preceding:

- 12 months, in Queensland (whether or not the person actually served as a juror) and New South Wales (if the person attended and was prepared to serve but did not actually serve);[1371]
- two years, in the ACT[1372] and New Zealand;[1373] or
- three years, in New South Wales (if the person actually served),[1374] the Northern Territory[1375] and South Australia.[1376]

9.116 In Tasmania and Victoria, a different approach is taken. In those jurisdictions, an exemption from jury service may be granted for any period up to three years that the Sheriff or Juries Commissioner, respectively, considers appropriate.[1377] In Tasmania, this applies to a person who performs jury service, and in Victoria to a person who attends for service or serves on a jury. The legislation does not specify that such exemption is to be given only on the basis that the person has previously served or been summoned for jury service, but it seems reasonable to expect that these provisions may be applied in those circumstances.

9.117 The position in Western Australia differs again: a person summoned to attend as a juror may be excused on the ground of 'recent jury service'.[1378] Further legislative guidance on what qualifies as 'recent' jury service is not provided.

9.118 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'.[1379]

1371 A person who attended court in accordance with a summons and who was prepared to, but did not, serve as a juror in the preceding 12 months is entitled as of right to be exempted from jury service: *Jury Act 1977* (NSW) s 7, sch 3 cl 13.

1372 A person is excused from serving as a juror if he or she has been summoned to attend from a given jury list until the next jury list is prepared (which occurs at two year intervals): *Juries Act 1967* (ACT) ss 18A(1), 19.

1373 A person summoned to attend as a juror shall be excused, on application to the Registrar, from attending on that occasion if he or she has served, or attended for service, as a juror at any time within the preceding period of two years: *Juries Act 1981* (NZ) ss 15(2)(b), 16(a). Similar provision, where the relevant preceding interval is also two years, applies in England and Wales: see *Juries Act 1974* (Eng) s 8(1), (2).

1374 A person who attended court and served as a juror within the preceding three years is entitled as of right to be exempted from jury service: *Jury Act 1977* (NSW) s 7, sch 3 cl 13. Similar provision, where the relevant preceding interval is also three years, applies in Ireland: see *Juries Act 1976* (Ireland) s 9(1)(b).

1375 The Sheriff may excuse a person from attendance in compliance with a jury summons if satisfied the person has been summoned not later than three years after the date on which he or she previously served as a juror: *Juries Act* (NT) s 18AB.

1376 A judge or the Sheriff may excuse a person from attendance if the person has served as a juror within the previous three years: *Juries Act 1927* (SA) s 16(2)(a).

1377 *Juries Act 2003* (Tas) s 14(1); *Juries Act 2000* (Vic) s 13(1).

1378 *Juries Act 1957* (WA) ss 27(1), 32, sch 3.

1379 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [3.181].

9.119 Provision is also made in some jurisdictions for excusal of jurors who have served on particularly long or arduous trials. That is discussed in chapter 11 of this Paper.

NSWLRC's recommendations

9.120 In its Report on jury selection, the NSW Law Reform Commission recommended that the entitlement to claim exemption for previous jury service should be retained:

> 6.67 We consider that it would be appropriate to maintain the current exemption as of right for those who fall within this category. It would then be the only remaining category of exemption and it would be the one that does not require any exercise of judgment or discretion beyond that of the juror, who would have the choice of relying on it or making himself or herself available for further service.
>
> …
>
> 6.69 Most submissions supported retaining this head of exemption, which also serves the purpose of sharing the burden of jury service on an equitable basis. This has some relevance for rural areas where, as a result of the smaller size of the potential jury pools, there is a risk of people being summoned more frequently than in metropolitan areas.[1380] (note omitted)

9.121 It also considered that this basis of exemption 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'.[1381]

LRCWA's proposals

9.122 The Law Reform Commission of Western Australia did not propose automatic excusal on the basis of recent jury service in its recent Discussion Paper.

9.123 In Western Australia, 'recent jury service' is one of the grounds on which a person may seek discretionary excusal.[1382] The LRCWA noted that, in practice, jurors are usually excused if they have served in the previous 12 to 18 months, although this is not necessarily the case in regional areas because of a lack of available jurors.[1383]

9.124 The LRCWA preferred that recent jury service should continue to be dealt with by way of discretionary excusal; an automatic entitlement to be so excused would be impractical in smaller jury districts:

> While the Commission acknowledges that people who have undertaken recent or lengthy jury service may have a very strong basis for being excused, the Commission favours a case-by-case approach because it enables the individual circumstances to be considered. Specifically, in Western Australia there are a number of jury districts in regional Western Australia whose required juror quota is higher than the number of eligible persons on the electoral roll in that jury district. Bearing in

1380 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.67]–[6.69], and see Rec 28.

1381 Ibid [6.70], and see Rec 28.

1382 *Juries Act 1957* (WA) ss 5(c)(2), 27(1), 32, sch 3.

1383 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 115, note 11.

> mind the Commission's Guiding Principle 6 — that reforms should take into account local conditions — it would not be feasible to provide an automatic right to be excused on the basis of jury service because in these jury districts members of the community are sometimes required to serve on a jury more than once a year.[1384]

Preliminary submission

9.125 Vision Australia supported the existing provision for exemption on the basis of previous jury service in the preceding 12 months.[1385]

QLRC's provisional views and proposals

9.126 Increased rates of excusal or exemption are likely to reduce the already potentially limited pool of prospective jurors in regional areas.

9.127 Nevertheless, in the Commission's provisional view, the exemption 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.

9.128 An issue to consider, however, is whether excusal for 12 months (which is the current position in Queensland) is long enough. A number of jurisdictions provide for periods of excusal of two or three years. Alternatively, a shortened period may be appropriate.

9.129 There might be scope, for instance, for different periods of exemption depending on the circumstances.[1386] For example, in New South Wales a person is exempt for one year if he or she attended and was prepared to serve but did not actually serve; and for three years if the person actually served.[1387]

9.130 The Commission invites submissions on these issues.

Proposal

9-7 Section 22 of the *Jury Act 1995* (Qld), which provides an exemption for previous jury service, is appropriate and should be retained.

Questions

9-8 Is the period for which exemption is granted (currently 12 months) appropriate, or should it be changed in some way?

1384 Ibid 115.

1385 Vision Australia, Submission 19.

1386 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1387 *Jury Act 1977* (NSW) s 7, sch 3 cl 13.

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?

Chapter 10

Jury Selection and Empanelment Processes

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.[1388]

1388 See the Terms of Reference set out in Appendix A to this Paper.

10.2 The *Jury Act 1995* (Qld)[1389] and the *Jury Regulation 2007* (Qld) set out the overall way in which juries are selected from the community in Queensland, though in some respects the details are left to the Sheriff of Queensland.[1390] The work involved in putting together jury panels and 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 panels of around 30 people to each criminal trial; and
- 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 from the Department of Justice and Attorney-General, reported in the *Brisbane Times*, show the number of notices and summonses sent, and the number of people empanelled as jurors, for the years 2006–07 to 2008–09:

1389 All references in this Paper 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.

1390 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 Paper refers only to the Sheriff in relation to these powers and duties, the power to delegate being understood.

	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

Table 10.1: Number of people identified for jury service in Queensland[1391]

10.5 Given that the number of voters in Queensland at the election in March 2009 was 2,660,940 and that the population of Queensland aged 20 years and over in June 2008 was 3,117,058,[1392] the following can be drawn from the figures for 2008–09 (ignoring the slight disparity in dates):

- The pool from which jurors can be drawn (that is, those enrolled to vote) represents 85% 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 (9%) on the electoral roll are sent a jury service notice.[1393]
- Of those who receive a notice, only a few over one in ten (11%) are sent a summons, or just 1% of those enrolled to vote.
- Of those who are summoned, a little over one in four (26%) actually sit on a jury. This is under 3% of those who are sent jury service notices and a tiny fraction (0.25%) of the total jury pool.
- These figures give no indication of the numbers of notices and summonses that are actually received, nor of the numbers of people who are excused for any reason. They are State-wide figures and therefore do not reveal any regional variation.

Compilation of jury rolls

10.6 The Sheriff prepares and maintains a jury roll for each of the 32 jury districts in Queensland.[1394] 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.[1395] The

1391 These figures, sourced from the Queensland Department of Justice and Attorney-General, were reported in the *Brisbane Times*: Daniel Hurst, 'Queensland jury figures', *Brisbane Times*, 29 April 2010 <http://www.brisbanetimes.com.au/queensland/queensland-jury-figures-20100428-ts8x.html> at 29 April 2010. See also Daniel Hurst, 'Juries no duty for most', *Brisbane Times*, 29 April 2010 <http://www.brisbanetimes.com.au/queensland/juries-no-duty-for-most-20100428-ts8u.html#comments> at 29 April 2010.

1392 See [4.12]–[4.17] above.

1393 Contrary to the leading paragraph in the *Brisbane Times*, this does not mean that 90% of Queenslanders 'avoid' jury duty: they are simply not asked to serve: see Daniel Hurst, 'Juries no duty for most', *Brisbane Times*, 29 April 2010 <http://www.brisbanetimes.com.au/queensland/juries-no-duty-for-most-20100428-ts8u.html#comments> at 29 April 2010.

1394 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 below.

1395 *Jury Act 1995* (Qld) s 10(1), (2).

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.[1396] Information from the electoral roll is received electronically every month; there is no real-time access to the electoral roll by the Sheriff.[1397]

10.7 The jury rolls or lists in the other jurisdictions are also prepared from the relevant electoral roll.[1398]

10.8 Jury districts are generally areas of about 20 km in radius, based on a particular courthouse, though this is varied in larger cities.[1399]

10.9 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.[1400] The Sheriff is authorised to determine how often these lists of prospective jurors need to be prepared, and how large they need to be.[1401] For criminal court sittings, jury lists are compiled on a weekly basis.[1402]

10.10 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.[1403] 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.[1404] 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.[1405]

Notices to prospective jurors

10.11 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*.[1406] 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 (in Brisbane, typically two weeks). Information about the recipients is based on information held by the Electoral Commission of Queensland, and provision is made on the Questionnaire for recipients

1396 *Jury Act 1995* (Qld) ss 10(3), 11, 12.

1397 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1398 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. Also see *Juries Act* (NT) s 21.

1399 Queensland Courts, 'Selection' <http://www.courts.qld.gov.au/159.htm> at 10 May 2010. See chapter 11 below for a discussion of the jury districts in Queensland.

1400 *Jury Act 1995* (Qld) ss 15(1), 16. See also Queensland Courts, 'Selection' <http://www.courts.qld.gov.au/159.htm> at 10 May 2010.

1401 *Jury Act 1995* (Qld) s 15(2).

1402 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1403 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1404 Ibid; Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010. But see chapter 11 below in relation to long trials.

1405 Queensland Courts, 'Summons' <http://www.courts.qld.gov.au/163.htm> at 10 May 2010.

1406 *Jury Act 1995* (Qld) s 18.

to inform the Sheriff if their details have changed.[1407] 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's Office to conduct necessary checks and assess excusal applications.[1408] As noted at [10.4] above, 241,480 Notices were sent out in the financial year 2008–09.

10.12 Prospective jurors can seek to be excused at this point, using the application form included with the Questionnaire.[1409]

10.13 The Questionnaire is intended to solicit 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;[1410] failure to do so is an offence under the Act punishable by a fine of 10 penalty units ($1000) or two months' imprisonment.[1411] In any event, a person failing to respond may be put in a second ballot.[1412]

10.14 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.[1413]

10.15 A second ballot based on the revised lists of prospective jurors determines randomly who amongst the potential jurors who have not been excluded will be sent a summons.[1414]

10.16 Before summonses are issued, criminal history checks are done by the Sheriff's Office in relation to all people who are available for a jury service period, based on information provided by the Queensland Police Service.[1415]

10.17 The issue of a notice and questionnaire prior to the issue of summonses 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 people on the

1407 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 10 May 2010.

1408 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1409 *Jury Act 1995* (Qld) s 18(2); Queensland Courts, 'Excusal' <http://www.courts.qld.gov.au/161.htm> at 10 May 2010; Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 10 May 2010.

1410 Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 10 May 2010.

1411 *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 13 of this Paper.

1412 Queensland Courts, 'Notification' <http://www.courts.qld.gov.au/160.htm> at 10 May 2010; Queensland Courts, 'Excusal' <http://www.courts.qld.gov.au/161.htm> at 10 May 2010.

1413 *Jury Act 1995* (Qld) s 24.

1414 *Jury Act 1995* (Qld) ss 25(1), 26(1), (2).

1415 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

jury list a questionnaire or make whatever inquiries are necessary to determine the qualification and eligibility of people on the jury list.[1416]

Summons

10.18 A summons to a juror will set out where and when a prospective juror 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 summons[1417] or may extend beyond the end of that period.

10.19 The Sheriff has authority to determine how frequently summonses need to be issued.[1418]

10.20 Failure to attend in answer to a summons without reasonable excuse is an offence punishable by a fine of 10 penalty units ($1000) or two months' imprisonment.[1419]

10.21 Summonses are typically issued at least two weeks before the court sittings to which they relate.[1420] In the financial year 2008–09, 26,954 summonses were issued.[1421]

10.22 As noted 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.[1422]

1416 See *Jury Act 1977* (NSW) s 13; *Juries Act 1927* (SA) s 25; *Juries Act 2003* (Tas) s 19(4)–(4B) *Juries Act 2000* (Vic) s 20. Also see 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>; Courts and Tribunals Victoria, Being Summoned for Jury Service, 'Initial Selection of Potential Jurors' <http://www.courts.vic.gov.au/CA256EBD007FC352/page/Jury+Service-Being+Summoned?OpenDocument&1=50-Jury+Service~&2=30-Being+Summoned~&3=~> at 22 June 2010.

1417 Queensland Courts, 'Summons' <http://www.courts.qld.gov.au/163.htm> at 10 May 2010.

1418 *Jury Act 1995* (Qld) s 26(1).

1419 *Jury Act 1995* (Qld) s 28. Breaches and penalties under the Act are discussed in chapter 13 of this Paper.

1420 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1421 See [10.4] above.

1422 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. And see 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.dotag.wa.gov.au/E/excuse_from_jury_duty.aspx?uid=9995-2446-9129-6857> at 22 June 2010.

NSWLRC's recommendations

10.23 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.[1423] This would necessitate, however, provision for the withdrawal of summonses for people who are found to be ineligible or who have been excused.[1424]

10.24 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.[1425]

LRCWA's proposals

10.25 In Western Australia, jury lists are to be delivered to the Sheriff in printed form.[1426] The Law Reform Commission of Western Australia has proposed that the legislation should instead provide for the lists to be delivered electronically, as is the current practice.[1427]

Issues for consideration

10.26 An issue to consider is whether the 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.

10.27 The advantage of the current procedure is that people who are disqualified, ineligible or entitled to be excused can be removed from the pool of potential jurors sooner rather than later. Their names can be removed 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. It may also assist in identifying changes of address. It also has the advantage of giving advance notice of the possibility of being called for jury service to those who receive notification.

10.28 On the other hand, the two-stage procedure may involve additional administration and resources that could be saved by issuing summonses directly from the jury roll. As the NSW Law Reform Commission noted, claims of ineligibility or for excusal would need to be considered at one, rather than two, stages.

1423 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [8.39]–[8.50], Rec 39.

1424 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.

1425 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [9.6]–[9.9], Rec 41.

1426 *Juries Act 1957* (WA) s 14(3), (4).

1427 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 22, Proposal 1.

Question

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?

JUROR ORIENTATION

10.29 In Queensland, before being empanelled, all potential 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.[1428] These sessions are conducted by bailiffs and officers from the Sheriff's Office. 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 courtroom, 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.

10.30 After this introduction, potential jurors are shown a video that outlines the empanelling and trial process.[1429] The 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 accused 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 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;

1428 Similar orientation sessions are conducted in all other Australian jurisdictions: see Elizabeth Najdovski-Terziovski, James RP Ogloff, Jonathan Clough and Rudy Monteleone, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70.

1429 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/103.htm> at 10 May 2010.

- an explanation of the jury's role and trial processes once the jury has been empanelled;[1430] and

- an outline of jurors' responsibilities concerning jury deliberations.[1431]

10.31 The Commission understands that the video is some 15 years old.[1432] It may need to be revised and updated, for example, to include court diagrams and photos and to make it available on the courts' website.

10.32 Potential jurors each also receive a booklet, the *Juror's Handbook*, which covers similar topics.[1433]

10.33 In particular, jurors are given notebooks which they are told must stay at court during the trial and will be destroyed at the end of the trial. They are told to take their own notes as they will not be given a copy of the transcript, even if they ask.[1434]

10.34 Empanelled jurors are also supplied with a booklet entitled *Guide to Jury Deliberations*[1435] when they retire to consider their verdict. This outlines some suggested approaches that might be taken during a jury's deliberations, reviews some aspects of a juror's duties, and emphasises the need for confidentiality in relation to the jury's discussions.[1436]

1430 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.

1431 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*.

1432 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1433 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 10 May 2010.

1434 This is not strictly true, but transcript, or portions of transcript, is rarely given to jurors in Queensland (although it is common in some other jurisdictions, such as New Zealand). See Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009) Vol 1 [10.73]–[10.114], [10.154] in which the Commission recommended an amendment to the Criminal Code (Qld) to give trial judges express power to order that the jury be given access to transcripts.

1435 Queensland Courts, *Guide to Jury Deliberations* (2008).

1436 Both booklets are available on the Queensland Courts' website: <http://www.courts.qld.gov.au/103.htm>, or <http://www.courts.qld.gov.au/Factsheets/SD-Publication-JurorsHandbook.pdf> and <http://www.courts.qld.gov.au/Factsheets/SD-Brochure-JurorsGuideDeliberations20081215.pdf> at 10 May 2010. Similar information is also available on the Queensland Courts' website at <http://www.courts.qld.gov.au/162.htm> at 10 May 2010.

Review of orientation material

10.35 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':[1437]

> 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.
>
> 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.
>
> The main suggested improvements to information provided to jurors included the following:
>
> - Small percentages of people wanted better explanations of the processes outlined in the Notice to Prospective Jurors and information in the Summons to Jurors. Only small percentages of people experienced problems with information (i.e. not knowing the hours of attendance, locations, etc.).
> - A small proportion (6.3%) of jurors did not receive a Juror's Handbook. This related to some jurors in Rockhampton, Longreach and Ipswich who reported that they did not receive a Juror's Handbook.
> - Only a small proportion of jurors reported that they had not seen the jurors' video (Kingaroy and Longreach). A few jurors reported that their view of the video was somewhat obstructed.
> - Only small percentages of jurors suggested improvements to the Bailiff's talk and these suggestions placing greater emphasis on the detail of the procedure, providing an interesting presentation and putting people at ease.

10.36 The preliminary notice and orientation material in New South Wales, Victoria and South Australia were also considered in the review of juror satisfaction conducted

1437 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].

by the Australian Institute of Criminology in 2007.[1438] It was suggested that juror satisfaction is greater when there is more information and explanation about the system and the jury deliberation process.[1439]

10.37 The orientation procedures and materials in seven Australian jurisdictions were also reviewed in an article published in 2008.[1440] That study looked at the material provided to jurors upon arrival at court rather than in advance,[1441] and the published results covered the materials provided and procedures followed in courts across Australia.[1442]

10.38 All jurisdictions used videos, and five of the seven (including Queensland) also provided handbooks.[1443] The written material was generally found to be acceptably readable and within the capabilities of jurors and consumers generally.[1444] Two jurisdictions used personal presentations by a jury administrator, and one provided a judge to answer jurors' questions before empanelment[1445] (apparently Victoria).[1446]

10.39 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.

> 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.[1447] (notes omitted)

10.40 Some of the matters covered in the introductory material are also covered by judges in their opening remarks to the jury, and again in the summing up. These relate to the jurors' duties and role in court rather than the more practical aspects of their involvement in the trial. Although it is clearly primarily the judge's role to instruct the jury, the fact that these matters may be repeated in the orientation process should lead to greater familiarity with, and adherence to, these principles.[1448]

1438 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.

1439 Ibid 9.

1440 Elizabeth Najdovski-Terziovski, James RP Ogloff, Jonathan Clough and Rudy Monteleone, '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 15 April 2010. 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 15 April 2010.

1441 Elizabeth Najdovski-Terziovski, James RP Ogloff, Jonathan Clough and Rudy Monteleone, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70, 71.

1442 However, the authors indicate that a jurisdiction-by-jurisdiction breakdown is available from them: ibid 70.

1443 Elizabeth Najdovski-Terziovski, James RP Ogloff, Jonathan Clough and Rudy Monteleone, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70, 71.

1444 Ibid 76.

1445 Ibid 72.

1446 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) 74.

1447 Elizabeth Najdovski-Terziovski, James RP Ogloff, Jonathan Clough and Rudy Monteleone, 'What are we doing here? An analysis of juror orientation programs' (2008) 92(2) *Judicature* 70, 75.

1448 Ibid 77.

10.41 The authors stress that the orientation procedures should not be seen as a stand-alone exercise but be regarded as part of a 'continuum of communication aimed at assisting jurors to perform their task':

> 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.[1449]

Issues for consideration

10.42 Orientation materials and procedures are important tools in helping prospective jurors to understand what to expect in terms of procedures and protocol, and to grasp 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.

10.43 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. Those materials and presentations should be kept up to date and should be internally consistent in order to smooth prospective jurors' transition into jury service. The Commission also considers that as much of that information as possible, including the video presentation given to prospective jurors, should also be made available on the Courts' website.

10.44 The Commission is interested in submissions on how these materials and processes can continue to be improved.

Question

10-2 In what ways can the orientation materials and processes that are used by the courts for prospective jurors be improved?

EMPANELLING A JURY

10.45 Groups or 'panels' of 30 or more prospective jurors[1450] are taken to each court where trials are scheduled to begin for the final selection process, from which a jury of 12[1451] (and possibly up to three reserve jurors[1452]) will be empanelled.

10.46 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

1449 Ibid.

1450 *Jury Act 1995* (Qld) s 36(1). These groups are, somewhat confusingly, also called 'panels': see, for example, Queensland Courts, 'Summons' <http://www.courts.qld.gov.au/163.htm> at 10 May 2010. 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'.

1451 *Jury Act 1995* (Qld) s 33.

1452 *Jury Act 1995* (Qld) s 34.

refused by the Sheriff. These applications are generally heard without formality; the prospective juror approaches the bench to discuss the matter.[1453]

10.47 The judge's associate will have a bundle of cards, each of which bears a prospective juror's name, town or suburb and occupation, which are mixed to ensure a random selection.[1454] The 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.[1455] The person called then walks to the bailiff to take the juror's oath or affirmation.[1456]

10.48 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 courtroom.[1457] If not, the juror is sworn in. The procedure is repeated until a complete jury (including any reserve jurors) has been sworn in.[1458]

10.49 After all jurors have 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.

10.50 Almost 7000 people (6972) were empanelled as jurors for trials in Queensland in the financial year 2008–09.[1459]

10.51 The selection procedure is generally very similar in the other jurisdictions, except in relation to the way in which prospective jurors are identified when called.[1460] In some jurisdictions, prospective jurors are called by number only, and not by name.[1461]

Reserve jurors

10.52 Juries for criminal trials are to consist of 12 people.[1462]

1453 *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 10 May 2010.

1454 *Jury Act 1995* (Qld) s 37.

1455 *Jury Act 1995* (Qld) s 41.

1456 *Jury Act 1995* (Qld) s 44. And see Queensland Courts, 'Serving on a jury' <http://www.courts.qld.gov.au/162.htm> at 10 May 2010. The form of the jurors' oath in a criminal trial is set out at [2.63] above.

1457 Queensland Courts, 'Serving on a jury' <http://www.courts.qld.gov.au/162.htm> at 10 May 2010.

1458 See generally Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.2]–[5B.3] <http://www.courts.qld.gov.au/2265.htm> at 10 May 2010.

1459 See [10.4] above.

1460 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.

1461 See Table 10.2 below.

1462 *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).

10.53 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 ordinary jurors, take the same oath or affirmation as ordinary jurors, and are subject to the same arrangements as other jurors during the trial,[1463] but do not retire with the jury to deliberate on a verdict unless they have replaced a juror who has died or been discharged.

10.54 Reserve jurors might be selected if the trial is expected to be a relatively long or complex one,[1464] or during flu season.

10.55 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'.[1465]

10.56 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.[1466]

10.57 Provision for the empanelment of reserve, or additional, jurors is also made in the other Australian jurisdictions,[1467] 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.

10.58 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 off the excess jurors, a ballot is taken to select the 12 jurors who will retire to deliberate on the verdict.

Supplementing the jury panel

10.59 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. Section 38 of the Act provides:

1463 *Jury Act 1995* (Qld) s 34(1), (2). And see generally Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.6] <http://www.courts.qld.gov.au/2265.htm> at 10 May 2010.

1464 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010. See generally Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.6] <http://www.courts.qld.gov.au/2265.htm> at 10 May 2010.

1465 *Jury Act 1995* (Qld) s 34(3), (4).

1466 *Jury Act 1995* (Qld) s 34(5). And see generally Queensland Courts, *Supreme and District Courts Benchbook*, 'General Summing Up Directions' [24.8] <http://www.courts.qld.gov.au/2265.htm> at 10 May 2010.

1467 *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. Also see New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.43]–[10.54], Rec 45, 46.

38 Supplementary jurors

(1) If a trial is likely to be delayed because there are no persons or not enough persons, who have been summoned for jury service, available for the selection of a jury, the judge may, on application by a party to the proceeding, direct the sheriff to make up or supplement a jury panel by selecting from among persons who are qualified for jury service and instructing them to attend for jury service.

(2) The number of persons to be selected, and the way the selection is to be made, must be as directed by the judge.

(3) The persons instructed to attend for jury service under this section become (subject to being excused or discharged under this Act) members of the jury panel from which the jury for the trial is to be selected.

(4) Unless the person has a reasonable excuse, a person must not fail to comply with—

(a) an instruction to attend for jury service under this section; or

(b) a further instruction about jury service given by the sheriff or the judge.

Maximum penalty—10 penalty units or 2 months imprisonment.

(5) A contravention of subsection (4) may be dealt with either as an offence or a contempt of the court.

10.60 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.[1468]

CHALLENGING JURORS

10.61 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
- peremptory challenges, for which no cause need be shown.[1469]

10.62 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 called[1470] although there is provision for a challenge for cause to be made during the trial itself.[1471]

1468 *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. Also see *Jury Rules 1990* (NZ) r 20.

1469 Such challenges by the prosecution are often done by the prosecutor asking the prospective juror to 'stand by': see [10.86]–[10.97] below.

1470 *Jury Act 1995* (Qld) s 44.

1471 *Jury Act 1995* (Qld) ss 44(3), 47. See [10.101]–[10.103] below.

10.63 Before the selection process begins, the defendant is to be informed of the right to challenge.[1472] 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.[1473]

Information about jurors

10.64 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.[1474] 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.[1475]

10.65 This is the only information about potential jurors that is made available to the parties by the court and, apart from the appearance of the jurors themselves in the courtroom and (especially in small communities) any personal knowledge that the parties may have of the potential jurors, is all that the parties have to go 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.[1476] Failure to return the lists is an offence under the Act punishable by a fine of 10 penalty units ($1000) or two months' imprisonment.[1477] It is also an offence to copy, distribute or disclose the list or its contents without authorisation from the Sheriff.[1478]

10.66 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 penalty for doing so is two years' imprisonment.[1479]

10.67 However, if one party obtains information about a prospective juror that may show that that 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.[1480]

10.68 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

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1472 *Jury Act 1995* (Qld) s 39; *Criminal Practice Rules 1999* (Qld) r 47. And see Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.2] <http://www.courts.qld.gov.au/2265.htm> at 10 May 2010.

1473 *Jury Act 1995* (Qld) s 49.

1474 *Jury Act 1995* (Qld) s 29.

1475 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1476 *Jury Act 1995* (Qld) s 29(5)–(7).

1477 *Jury Act 1995* (Qld) s 29(5).

1478 *Jury Act 1995* (Qld) s 30. The breaches and penalties under the Act are discussed in chapter 13 of this Paper.

1479 *Jury Act 1995* (Qld) s 31.

1480 *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: Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

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.[1481]

10.69 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.

10.70 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.

10.71 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 name, occupation and address 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 number and name, *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 name and occupation of persons summoned, may be obtained by the parties' legal practitioners on the day fixed for the trial.[1482]	Prospective jurors are called by name and occupation.
NSW	There is no right to inspect the jury panel, containing the name and occupation of persons summoned.	Prospective jurors are called by number only.
NT	There is no right to inspect the jury list containing the name, occupation and address of persons summoned.	Prospective jurors are called by name and description (that is, occupation and address).
SA	A copy of the jury panel and list giving the number, name, occupation and suburb 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'.[1483]	Prospective jurors are called by number only.

1481 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.

1482 *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.

1483 Supreme Court of South Australia, *Criminal Practice Directions 2007*, Practice Direction No 7 (Selection of Jurors) [7.2] also provides that while unrepresented accused 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'.

	Prior to empanelment	During empanelment
Tas	A list of the names 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 name,[1484] *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 name and occupation,[1485] *unless the court directs that they be identified by number only, in which case they are called by number and occupation.*
WA	A copy of the jury panel or pool, showing the number, name and address 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, *subject to an order of the court prohibiting, restricting or imposing conditions on the inspection*.[1486]	Prospective jurors are called by number only.

Table 10.2: Information about jurors prior to and during empanelment[1487]

10.72 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.[1488] 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'.[1489] A similar, though somewhat less restrictive, position arises in Victoria, where judges may order that jurors be called by number and occupation only.[1490] 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.

1484 *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.

1485 *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.

1486 *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.

1487 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), (3), 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.

1488 See, for example, the commentary in New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.25]–[10.27].

1489 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.

1490 *Juries Act 2000* (Vic) ss 31(3), 36(1).

LRCWA's proposals

10.73 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.[1491] The Law Reform Commission of Western Australia proposed that the prosecution should no longer be authorised to check the criminal backgrounds of prospective jurors':[1492]

> The Commission is of the view that when considering what information should be available to the parties in a criminal proceeding, fairness dictates that the prosecution and the accused should have a 'level playing field'. Of course, one party may have information about a prospective juror based on personal knowledge (eg, recognising a juror in the back of the court) but one party should not be entitled to access information that is not equally available to the other. For this reason, the Commission has concluded that the Criminal Procedure Rules 2005 should be amended to ensure that the DPP is not entitled to check the criminal histories of prospective jurors. This conclusion has been strongly influenced by the view that the legislative criteria for disqualifying people from jury service on the basis of their criminal history should be determinative — it is up to Parliament to decide the degree of past criminality that renders a person incapable of jury service.[1493]

10.74 The LRCWA also proposed 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.[1494]

10.75 In addition, the LRCWA sought submissions on 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 proposals 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.[1495]

10.76 The LRCWA also proposed that the jury list should be available to the parties only on the morning of the trial,[1496] rather than four days before the trial as is currently required.[1497] 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.[1498]

1491 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 29, 36; *Criminal Procedure Rules 2005* (WA) r 57.

1492 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 38, Proposal 4(1).

1493 Ibid 38.

1494 Ibid 38, Proposal 4(2).

1495 Ibid 40.

1496 Ibid 40, Proposal 5.

1497 Ibid 28, 37; *Juries Act 1957* (WA) s 30.

1498 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 38.

Challenges to the jury panel as a whole

10.77 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.[1499] These are also known as 'challenges to the array'. The judge must rule on the challenge before proceeding with the selection of jurors.[1500]

10.78 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.[1501] 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.

10.79 Challenges to the array by a party are rare in Queensland.[1502] In *R v Chapman*,[1503] 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 Acts[1504] 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)

10.80 The challenge was upheld, and the panel quashed.

10.81 Express provision is made for a party to challenge the whole jury panel before empanelment commences in Tasmania[1505] and the common law right of challenge to the array is preserved in New South Wales, the Northern Territory and South Australia.[1506] Challenge to the array is not, however, available to an accused in Western Australia.[1507]

1499 *Jury Act 1995* (Qld) s 40(1).

1500 *Jury Act 1995* (Qld) s 40(2).

1501 Sir Patrick Devlin, *Trial by Jury* (1956) 26.

1502 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.

1503 [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, described in chapter 2 above.

1504 See former *Jury Act 1929* (Qld) s 24 (Prospective jurors' list).

1505 *Juries Act 2003* (Tas) s 32.

1506 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).

1507 See *Juries Act 1957* (WA) s 40; *Criminal Procedure Act 2004* (WA) s 104(1).

Challenges for cause

10.82 In Queensland, each party may make an unlimited number 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.[1508]

10.83 The number of challenges for cause is not limited in any Australian jurisdiction, although this is not always stated expressly but may be presumed from the lack of express restriction in the legislation.[1509]

10.84 A party who challenges a juror for cause must inform the judge of the basis of 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.[1510] The judge must then rule on the challenge.[1511] That ruling is not subject to interlocutory appeal but may be considered in any eventual appeal against the final judgment of the court.[1512]

10.85 Challenges for cause are now 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.

Peremptory challenges

10.86 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).[1513] Up to two additional peremptory challenges are available if reserve jurors are also to be selected.[1514] If there are multiple defendants, each defendant may make eight peremptory challenges, and the prosecution may make as many as the defendants combined.[1515]

1508 *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).

1509 *Jury Act 1995* (Qld) s 43; *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. And see *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].

1510 *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).

1511 *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).

1512 *Jury Act 1995* (Qld) s 43(7).

1513 *Jury Act 1995* (Qld) s 42(3). This Commission recommended that this be reduced to six in the case of joint trials of more than one defendant in 1985, but that has never been implemented: 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) 114.

1514 *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.

1515 *Jury Act 1995* (Qld) s 42(5). See also *Juries Act 1981* (NZ) s 24(2).

10.87 Defendants had previously been entitled to 12 peremptory challenges. When it was introduced, section 35 of the *Jury Act 1929* (Qld) provided for 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 other crime or for misdemeanour';[1516] and section 32 had provided an unlimited right for the prosecution to apply for any juror to be 'stood by'.[1517] With the exception of cases of treason, the numbers were reduced when the Act was amended in 1958; it then provided for 23 peremptory challenges in the case of treason, 14 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.[1518] 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.[1519]

10.88 Generally speaking, there is very little information available to a party on which to base any challenge.[1520] Whereas a challenge for cause can be used to eliminate a potential juror in relation to whom there is some basis to allege bias, a peremptory challenge can be used to eliminate any potential juror merely because of a suspicion of bias,[1521] or for any other reason, rational or otherwise.

10.89 The number of, and procedure relating to, challenges available to the parties varies amongst the Australian States and Territories:

- Eight peremptory challenges are available in Queensland and the Australian Capital Territory, though more are available if reserve jurors or an expanded jury are used.[1522]
- Six peremptory challenges are available in the Northern Territory[1523] and Tasmania (with one extra available for reserve jurors).[1524]
- Five peremptory challenges are available in Western Australia.[1525]
- Four peremptory challenges are available in New Zealand.[1526]
- Only three peremptory challenges are available in South Australia,[1527] Victoria[1528] and New South Wales (unless the prosecution and all defen-

1516 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 misdemeanor'.

1517 See [10.95]–[10.100] below.

1518 *Jury Acts Amendment Act 1958* (Qld) ss 5, 6.

1519 *Jury Act 1995* (Qld) s 42(3), as passed.

1520 See [10.64]–[10.72] above.

1521 Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 18.

1522 *Jury Act 1995* (Qld) ss 42, 43; *Juries Act 1967* (ACT) ss 31A, 34.

1523 *Juries Act* (NT) s 44.

1524 *Juries Act 2003* (Tas) s 35.

1525 *Criminal Procedure Act 2004* (WA) s 104.

1526 *Juries Act 1981* (NZ) s 24; reduced in December 2008 from six.

1527 *Juries Act 1927* (SA) ss 61, 63.

1528 *Juries Act 2000* (Vic) s 35.

> dants 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.[1529]

10.90 The number of peremptory challenges available to a party is not reduced by any challenges for cause made by that party.[1530]

10.91 Although potential jurors may be told that challenges are 'no reflection on [their] character or ability',[1531] a peremptory challenge is in effect a personal comment on a challenged juror, but not necessarily one with any real rational or informed backing.

10.92 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.[1532] 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 trial[1533] (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.[1534] The researchers also noted the potential frustration and embarrassment that jurors may feel when they are challenged. The researchers concluded:

> 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. One recommendation to improve the utility of peremptory challenges is to provide the parties with more information about prospective jurors — such as name, suburb of residence and occupation — rather than number alone.[1535] 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.[1536] (note added)

1529 *Jury Act 1977* (NSW) s 42.

1530 *Jury Act 1995* (Qld) s 43(8). And see generally *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; *Juries Act 1957* (WA) s 104(3), (4); *Juries Act 1981* (NZ) ss 24, 25(1).

1531 Queensland Courts, 'Serving on Jury' <http://www.courts.qld.gov.au/162.htm> at 10 May 2010.

1532 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.

1533 Ibid 83, 86, 96.

1534 Ibid 79, 86.

1535 It was suggested by Victorian stakeholders that the juror's name can 'give an indication of cultural background which may be perceived to conflict with the defendant's own background', that the juror's occupation 'allows the defendant to challenge those on the jury panel that may be influenced by their field of employment', and that identification by number only is appropriate 'only in particular cases where safety of the jury was a concern': ibid 83.

1536 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) 186. And see ibid 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.

10.93 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.[1537] The Law Reform Commission of Ireland provisionally concluded that the right of peremptory challenge should be retained, noting that:

- it allows the defendant to remove prospective jurors 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 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.[1538]

10.94 It did suggest, however, that the number of peremptory challenges permitted could be reduced from seven to five:

> 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.[1539]

Standing by

10.95 Historically, the right to challenge a potential juror was, strictly speaking, that of the defendant alone.[1540] However, the prosecution had a right to require jurors to stand by, though this has now been absorbed in most jurisdictions into the prosecution's rights to challenge.

10.96 Requiring a prospective juror to stand by is like a provisional challenge. Prospective jurors who are required to stand by after their names have been called out to be empanelled are asked to wait at the back of the courtroom until all remaining names are called. If a jury can be constituted without them, they are not empanelled without being challenged further. If the pool is exhausted without a jury being constituted, they are called again and may be formally challenged in the normal way.

10.97 In Queensland, there is no statutory provision for requiring a potential juror to stand by.

10.98 In the Australian Capital Territory, the legislation specifically gives the court power, at the prosecutor's request, to order a prospective juror whose name has been called to stand by until all names have been called. If, when all names have been called, fewer than 12 people have entered the jury box, the cards bearing the names of the people who have been stood by are then returned to the ballot box and called

1537 *Juries Act 1967* (Ireland) s 20(2).

1538 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [6.50], [6.52].

1539 Ibid [6.51], [6.53].

1540 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.

again.[1541] In the Northern Territory, the court's power to stand aside jurors on the prosecution's request is limited to six potential jurors.[1542]

10.99 Provision is also made in the Tasmanian and Victorian legislation for the prosecution to require a juror to stand aside. In Tasmania, the number of jurors that may be stood aside is unlimited; in Victoria, it is limited to six if there is one defendant, 10 if there are two defendants, and four per defendant if there are three or more defendants.

10.100 The New South Wales legislation specifically excludes the right to require a prospective juror to stand by.[1543]

Special challenges for cause

10.101 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.[1544]

10.102 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.

10.103 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.[1545]

Rationale

10.104 The goal of peremptory challenges may be clear — to produce a jury that is more likely to be sympathetic to the challenging party or one that, at least, does not include prospective jurors perceived to be biased against the challenging party — but it is unclear if they achieve their objective, and their benefits to a defendant may be more psychological and superficial, or even illusory, than real.[1546] There may even be some doubt as to whether those objectives should be achievable. Peremptory challenges do nonetheless have the support of history and are a standard feature of criminal trials in

1541 *Juries Act 1967* (ACT) s 33.

1542 *Juries Act* (NT) s 43.

1543 *Jury Act 1977* (NSW) s 43.

1544 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.

1545 *Jury Act 1977* (NSW) s 55D.

1546 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) 108.

common law jurisdictions.[1547] They also permit the defendant a degree of formal participation[1548] in the trial and thus represent an aspect of procedural fairness.

10.105 It may be thought that defendants would seek to have jurors who are like themselves and unlike their victims. Prosecutors have a different role and function from defence counsel in this respect. In Queensland 'the duty of a prosecutor is to act fairly and impartially, to assist the court to arrive at the truth.'[1549] Guideline 30 of the *Director's Guidelines* issued by the Director of Public Prosecutions reads:

> **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.[1550]

10.106 Under the present Queensland legislation, challenges are based on little more than the name, occupation and appearance of the person. Their practical utility may be hard to justify.

10.107 Every person has 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. It is impossible to assess many important biases a prospective juror may harbour, especially in the fleeting opportunity afforded to the parties in a criminal trial during the few moments that elapse between the calling of a potential juror's name and that person being sworn in. Nothing in the jury selection process could alert a party in a bank robbery trial, for example, that a potential juror had once been caught up in a bank hold-up, unless the juror volunteered that information, perhaps to support an application to be excused on the basis of bias. Potential jurors may have strong views about, for example, the legal status of the possession and use of marijuana or other illicit narcotics. Jurors may try to double-guess the thoughts of the parties and dress sloppily in an attempt to be challenged or asked to stand by, or dress 'normally' or less casually than usual in order to improve their chances of being sworn in.[1551]

10.108 In practice, absolute objective impartiality and freedom from bias in potential jurors may simply not be a realistic goal; it probably does not exist. Indeed, the community wisdom that jurors are valued for may simply be another way of looking at the accumulated biases and cultural training that each of us carries. Perhaps what we should be seeking in jurors, therefore, is not an absolute impartiality in this sense but a

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1547 See ibid 105, 108.

1548 Eg P Byrne, 'Jury reform and the future' in Mark Findlay and Peter Duff (eds), *The Jury Under Attack* (1988) 190, 194.

1549 Office of the Director of Public Prosecutions, *Director's Guidelines*, as at 30 June 2008 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 2007–2008* (2008) 44.

1550 Office of the Director of Public Prosecutions, *Director's Guidelines*, as at 30 June 2008 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 2007–2008* (2008) 77. 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.

1551 See Margaret Cuneen, 'Getting it right: Juries in criminal trials' (2007) 90 *Reform* 43.

willingness and capacity to obey the juror's oath to objectively and rationally apply the law (as instructed by the judge) to the evidence presented in court.

10.109 If no-one is completely bias-free, not even judges and lawyers, perhaps all that a rational challenge can seek to do is to eliminate jurors whose apparent biases are extreme, or to limit the play of jurors' biases to acceptable limits (however they might be defined) within the context of a jury's functions.

10.110 One of the often-stated virtues of a randomly chosen jury is that the biases of any one juror will be 'diluted and balanced' by the other jurors and their biases.[1552] It seems to be accepted that one of the great advantages of having a jury of twelve is that the idiosyncrasies of each individual will be outweighed, diluted or cancelled out by the presence of the others in the group, and that group dynamics will lead to a consensus that will counteract many individual biases. Empirical studies have indicated, for example, that individual juror traits have little reliable bearing on verdict outcomes but, when shared by all members of the jury, particular characteristics and attitudes can produce bias effects.[1553] Majority verdicts, available in some trials, may also 'moderate concerns' about 'potentially disruptive' jurors.[1554]

10.111 The use of challenges has been criticised. It had been said that they can be used tactically in a way that undermines the intended representativeness of a jury by seeking to eliminate jurors who might be unsympathetic to the challenging party.[1555] This is said especially of peremptory challenges.[1556] This Commission has previously warned that 'the attempt to control the ultimate composition of the jury by eliminating

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1552 See ibid 44. See also Allan Blank, 'Juries in the US: Not "Law and Order"' (2007) 90 *Reform* 45–6: as an attorney in the United States, Blank had the advantage of being able to talk directly to jurors and panel members who were challenged.

1553 The homogeneity of the jury is apparently a key factor in the operation of such biases:

> Bias associated with trial participants may be substantial in some instances, particularly bias stemming from jury-defendant demographic similarity, jury personality composition with regard to authoritarianism/dogmatism and jury attitudes toward accused individuals and verdict options. However, several factors may serve to limit the influence of composition bias in actual trials. First, it may be necessary for some critical threshold to be met with regard to the number of similar jurors before composition bias becomes operative. Bias related to jury composition has tended to occur in studies where composition was manipulated to create juries that were homogeneous with regard to some focal variable. This suggests composition bias may be limited to situations in which most members of a jury are similar in some regard, for example, female, death-qualified, authoritarian, or highly cynical toward accused persons. Second, random variation and voir dire (which may have a quasi-random effect for unobservable characteristics) probably serve to prevent most juries from achieving a level of homogeneity sufficient to activate composition biases. Third, in keeping with the overwhelming influence of the evidence, composition bias should have little impact when the evidence clearly favours one side or the other. (references omitted): DJ Devine et al, 'Jury decision making: 45 years of empirical research on deliberating groups' (2001) 7(3) *Psychology, Public Policy, and Law* 622, 700, and see also 673–6.

Research has also shown, however, that some individual jurors can play a more influential role in deliberations than others: see, for example, [7.72] above.

1554 J Horan and J Goodman-Delahunty, 'Challenging the peremptory challenge system in Australia' (2010) 34 *Criminal Law Journal* 167, 185. See chapter 2 above for the circumstances in which a non-unanimous verdict may be taken.

1555 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].

1556 Jacqueline Horan and David Tait, 'Do juries adequately represent the community? A case study of civil juries in Victoria' (2007) 16 *Journal of Judicial Administration* 179, 188.

people believed to be unfavourable to one, or the other side, derogates' from the ideal of a representative jury.[1557]

10.112 Judges and others involved in the administration of the criminal justice system in New South Wales have commented that the use of peremptory challenges undermines the representativeness of juries:

> Stakeholders commented that the three peremptory challenges afforded to each party in New South Wales encourage largely superficial judgments based on a juror's demeanour, and are unlikely to have a significant influence on the composition of the jury. However, in some trials (e.g. sexual assault) some defence counsel may exercise these challenges to try to shift the gender balance in a manner perceived to be more favourable for their client.[1558]

10.113 The use of 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:

> 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 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. But, as we have said, the Crown cannot be expected to exercise its right to achieve that object without knowledge which informs the exercise of the right. …[1559]

1557 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) 106–7.

1558 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. Also see generally J Horan and J Goodman-Delahunty, 'Challenging the peremptory challenge system in Australia' (2010) 34 *Criminal Law Journal* 167.

1559 *R v Su* [1997] 1 VR 1, 18 (Winneke, Hayne JJA, Southwell AJA). See [10.105] above in relation to the role of the Office of the Director of Public Prosecutions in the striking of juries.

10.114 It has also been suggested that Indigenous people may be challenged off juries as a matter of some routine,[1560] contributing to their under-representation on juries. Given the *Director's Guidelines*, noted at [10.105] above, this may be more a matter of unfortunate historical observation than an accurate reflection of present practices. Removal of peremptory challenges would, nevertheless, ensure that jury selection is an entirely random process.

10.115 On the other hand, challenges can be used to guard against the appearance of unfairly unrepresentative juries. For example, 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.[1561]

10.116 Some of the bases for challenges, particularly special challenges for cause under section 47 of the Act, may be weakened since trials by judge alone were introduced in Queensland in September 2008[1562] as these provide a mechanism for dealing with cases when the notoriety of the defendant or overwhelming publicity might make it difficult to be confident of having an impartial jury.

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.[1563] The NSW Law Reform Commission did not make any recommendation about the retention of the right of peremptory challenge in its Report on jury selection, but recommended that its use be kept under review 'with a view to its eventual abolition if it is assessed as not serving any legitimate purpose'.[1564]

10.118 The NSWLRC identified the following advantages of the right of peremptory challenge:[1565]

- By giving the defendant the opportunity to object to people who might be perceived to be prejudiced or unlikely to be impartial, it confers a means of involvement by the defendant and thus allows the defendant to be com-

1560 See, for example, *Binge v Bennett* (1989) 42 A Crim R 93, 105 (Smart J); M Israel, 'Ethnic bias in jury selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 43–4, and the material cited there.

1561 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': Chris 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.

1562 By the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

1563 *Jury Act 1977* (NSW) s 42.

1564 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.20], Rec 44.

1565 Also see Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [6.36]–[6.43], where the same arguments for the retention of peremptory challenges are identified. The Law Reform Commission of Ireland additionally notes that peremptory challenges are arguably a more efficient and less embarrassing challenge procedure than challenge for cause.

fortable with and confident in the way in which the jury that is to determine his or her guilt is constituted.[1566]

- It provides an opportunity for the prosecution to 'redress any apparent skewing of the representative balance of the jury'.[1567]

- It also provides a means by which the prosecution may exclude 'unsuitable' people from juries without having to show cause for challenge.[1568]

- Where a potential juror has been unsuccessfully challenged for cause, it allows for the removal of that juror 'who may harbour resentment' at having been challenged.[1569]

10.119 The NSWLRC also identified the following arguments against peremptory challenges:[1570]

- 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.[1571]

- Challenges are exercised 'on appearance alone' in 'an arbitrary exercise dependent upon guesswork and dubious mythology'. In New South Wales, the parties are not provided with the jurors' names, localities or occupations and have only the potential jurors' outward appearance and demeanour to judge from.[1572]

- It requires 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.[1573]

- In the absence of guidelines to the contrary, such as those of the NSW Director of Public Prosecutions, peremptory challenges allow 'an unfettered discretion' to exclude people from a jury on what may be, or may appear to be, discriminatory grounds and in such a way as to undermine, or be seen to undermine, the impartiality of the jury.[1574]

1566 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).

1567 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.39].

1568 Ibid [10.36] citing the submission made to that Commission by the NSW Office of the Director of Public Prosecutions.

1569 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.17], [10.40] citing *Katsuno v The Queen* (1999) 199 CLR 40, [51] (Gaudron, Gummow and Callinan JJ), [83] (Kirby J).

1570 Also see Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [6.44]–[6.48], in which the same arguments for abolition of peremptory challenges are identified.

1571 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.21]–[10.24].

1572 Ibid [10.25]–[10.28].

1573 Ibid [10.29].

1574 Ibid [10.30]–[10.33].

- There is potential for people to dress or behave in a manner that they hope will provoke a challenge in order to escape from jury service.[1575]

- Other means of challenge that are available in New South Wales, namely, challenge for cause, standing aside by consent, challenge to the array, and discharge by the judge, are sufficient without the need for peremptory challenges as well.[1576]

10.120 As an alternative to complete abolition, the NSWLRC noted that the number of challenges could be further reduced.[1577] It concluded that the ability of the prosecution and defence to agree to enlarge the number of challenges[1578] should be removed:

> 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.[1579]

LRCWA's proposals

10.121 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. It concluded 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.[1580]

10.122 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.[1581] 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.[1582] If peremptory challenges were abolished, the LRCWA considered that the right to challenge for cause would

1575 Ibid [10.34].

1576 Ibid [10.12], [10.35].

1577 Ibid [10.41]. The Law Reform Commission of Ireland made a similar proposal: see [10.94] above.

1578 See *Jury Act 1977* (NSW) s 42(2), (3).

1579 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [10.42], and see Rec 43.

1580 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 34, Proposal 3.

1581 Ibid 26–7, 28–9.

1582 Ibid 26, 31.

have to be expanded; it considered the retention of peremptory challenges preferable in those circumstances.[1583]

10.123 The LRCWA acknowledged that peremptory challenges are more controversial:

> In general terms, it is suggested that peremptory challenges are made by the parties to 'stack' the jury in their favour and that they are exercised on the basis of inaccurate and stereotypical views about different groups in the community.[1584]

10.124 It also noted, however, that:[1585]

> just as peremptory challenges can potentially be exercised in order to achieve a partial and unrepresentative jury, they can equally be exercised in order to ensure impartiality and representativeness…
>
> …
>
> For example, if the first 10 jurors who have been sworn are all female, and the 11th juror (who is about to be sworn) is also female, one of the parties can peremptorily challenge that juror in order to try to achieve a jury with some male representation. The Commission notes that the DPP Guidelines support this approach by providing that it is 'reasonable to challenge in order to ensure that the jury is properly representative of the community'.[1586] (note in original)

10.125 The LRCWA also noted that while peremptory challenges involve direct input by the parties, the final jury will always be comprised from a pool of randomly selected people given the out-of-court selection procedures and the fact that the parties' influence is limited to objecting to, and not choosing, particular jurors.[1587]

10.126 Perhaps most importantly, the LRCWA pointed out that the right of peremptory challenge can play an important role in ensuring a fair trial:

> 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.[1588]
>
> 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.[1589] It has been argued that peremptory challenges enable an accused to challenge a juror whom they

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1583 Ibid 34. The Law Reform Commission of Ireland expressed a similar view: see [10.93] above.

1584 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 27, and see 29–31, 32–3.

1585 Ibid 30–1.

1586 See DPP, *Statement of Prosecution Policy and Guidelines* (Perth, 2005) 19. It is also provided that it is reasonable to challenge to if there are grounds to believe that the prospective juror may not be impartial and, further, that 'no attempt should be made to select a jury that is unrepresentative as to race, age or sex'.

1587 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 30.

1588 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).

1589 NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986) [4.59]; *Katsuno v R* [1999] HCA 50 [83].

> 'simply dislike' and this promotes acceptance of the verdict by the accused.[1590] 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 made[1591] or if a juror unsuccessfully seeks to be excused. A juror who has been unsuccessfully challenged for cause may 'harbour resentment or bias'[1592] 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'.[1593] 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.[1594] (notes in original)

10.127 Further, the LRCWA considered that, while the less information about prospective jurors that is available, the more likely it is that peremptory challenges will be based on inaccurate stereotypical assumptions, it is generally 'risky to rely on assumptions about why peremptory challenges are made':

> When making peremptory challenges the parties do not rely solely on the age, gender and appearance of prospective jurors; other relevant information may include the juror's name, address and occupation as well as physical observations of his or her behaviour and mannerisms in court. For example, defence counsel might challenge a juror of conservative appearance, but this juror may in fact have been challenged because the accused recognises the juror's name and thinks that he might be related to someone who dislikes the accused. Likewise, the prosecutor may challenge a young shabbily dressed juror but the reason may be because the prosecutor observed this juror yawning and appearing disinterested when the judge was addressing the jury panel.[1595]

QLRC's provisional views and proposals

10.128 The Commission's provisional view is that the current system of challenges is generally appropriate.

10.129 Challenges to the array are rarely exercised but are nonetheless an important safeguard against juries whose composition has been unfairly skewed. The Commission is not, at this stage of its review, aware of any problems in the operation of section 40 of the Act and considers it should be retained.

10.130 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.[1596] It follows from the purpose of challenges for cause that the num-

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1590 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].

1591 See *Katsuno* [1999] HCA 50 [83]; NSWLRC *Jury Selection*, Report No 117 (2007) 180.

1592 McCrimmon L, 'Challenging a Potential Juror for Cause: Resuscitation or requiem?' (2000) 23 *University of New South Wales Law Journal* 127, 132.

1593 Lord Justice Phillips, 'Challenge for Cause' (1996) 29 *Victoria University Wellington Law Review* 479, 480.

1594 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 33.

1595 Ibid.

1596 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).

ber 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 currently aware of any particular difficulties with section 43 of the Act and thus considers it should be retained.

10.131 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.

10.132 The Commission notes, however, that the right of peremptory challenge is more controversial. There is a tension between the principle of random selection, the need to ensure a representative jury, and the desirability of defendants' having confidence in the impartiality, independence and competence of the jury and in the fairness of the trial. Each of the Australian jurisdictions has a slightly different approach. Queensland, with the ACT, has the highest number of peremptory challenges (at eight). New South Wales, South Australia and Victoria have the lowest (at three). In Queensland, however, the parties have access to more information, albeit for a short period of time, about the jurors on which to base a peremptory challenge. Prosecutors in Queensland are also instructed to avoid selection of juries that are unrepresentative.[1597]

10.133 The Commission's provisional view is that the current provisions generally strike the right balance. If the view is taken that peremptory challenges have more of a symbolic than an actual impact on the composition of the jury, they nevertheless represent an important guarantee of the defendant's participation in the process. They also provide a means of seeking to guard against the appearance of an unfairly unrepresentative jury. There are also other measures to ensure that the composition of the jury is not unfairly skewed by the use of peremptory challenges.[1598] The Commission is not presently aware of any major difficulties in practice arising from the existence of the right of peremptory challenge in Queensland.

10.134 Peremptory challenges would, however, become virtually meaninglessness if the parties did not have access to information about the prospective jurors such as is provided for in Queensland. That access should nevertheless be restricted in time, to curtail unnecessary and unwarranted incursions into jurors' privacy. It must be long enough, on the other hand, to enable the parties to give it consideration. 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, seems appropriate to meet these ends. 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.

10.135 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 anti–jury-vetting reforms made when the *Jury Act 1995* (Qld) was first introduced. Those provisions,

1597 Office of the Director of Public Prosecutions, *Director's Guidelines* [30] as at 30 June 2008.

1598 Namely, the *Director's Guidelines* and the judge's discretion in s 48 of the Act to discharge the jury: see [10.105] above, [10.142] below.

which include the prohibition on pre-trial questioning of prospective jurors, were arrived at after detailed consideration in several inquiries and reviews.[1599] It is unnecessary and undesirable to disturb those provisions.

10.136 The Commission is interested in receiving submissions, however, on whether the number of peremptory challenges is appropriate or should be changed. Only one other Australian jurisdiction provides such a high number of peremptory challenges (the ACT); the others allow three, five or six, and New Zealand allows four. This raises the question whether the number of challenges should be reduced in line with the position in the other jurisdictions.

10.137 In addition, the Commission is interested in receiving submissions on whether prospective jurors' names should be read aloud in court during the empanelment procedure. As noted above, the judge may direct, for security or other reasons, that the jurors be identified by number only. However, if the parties have access to the names of prospective jurors prior to empanelment, there may be little reason for the names ever to be called in open court. The preservation of privacy might suggest that prospective jurors should be called by number only and that this should not require an order from the judge but should be a standing rule.

Questions

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?

EXCUSING AND DISCHARGING JURORS

10.138 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.[1600] The grounds for excusal are discussed in chapter 9 of this Paper.

10.139 The Act also gives the judge express power to discharge a juror, or jury, after the jury has been sworn.

1599 See *Jury Act 1995* (Qld) ss 29, 30, 31, 35. See also [1.15]–[1.26], [3.23], [10.64]–[10.68] above.

1600 *Jury Act 1995* (Qld) ss 20, 22, 23.

Discharge at the final stage of selection

10.140 After a jury has been sworn but before the remainder of the jury panel has been discharged, 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 chosen from the jury panel to replace the discharged juror.[1601] 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:

> 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.[1602] 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 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.[1603] (notes and formatting as in original)

10.141 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

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1601 *Jury Act 1995* (Qld) s 46.

1602 Section 46(1) *Jury Act*.

1603 Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.3] <http://www.courts.qld.gov.au/2265.htm> at 10 May 2010.

excuse a jury 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'.[1604]

10.142 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'.[1605] 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.[1606] This is rarely exercised but occurred in New South Wales 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 challenged off by the prosecutor.[1607]

Discharge during the trial

10.143 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.

10.144 Without discharging the whole jury, the judge may discharge an individual juror, who has been sworn, if:

> (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
>
> (c) the juror becomes unavailable, for reasons the judge considers adequate, to continue as a juror;[1608]

10.145 The judge's discretion to discharge is thus very wide.

10.146 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.

10.147 If a juror is discharged (or dies) *before* the trial begins, the judge may direct that another juror be selected and sworn.

10.148 If a juror is discharged (or dies) *after* the trial has begun (but before the jury has retired to consider its verdict), a reserve juror will take the juror's place[1609] or, if there is no reserve juror, the judge may direct that the trial continue with the remaining jurors

1604 *Juries Act 2003* (Tas) s 39(1)–(4); *Juries Act 2000* (Vic) s 32.

1605 *Jury Act 1995* (Qld) s 48.

1606 *Jury Act 1977* (NSW) s 47A.

1607 This case is discussed in greater detail at [4.69] above.

1608 *Jury Act 1995* (Qld) s 56(1).

1609 *Jury Act 1995* (Qld) s 34(3).

(provided they number not less than 10).[1610] In the latter case, the verdict of the remaining jurors has the same effect 'as if all the jurors had continued present'.[1611]

10.149 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:

> 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 unmistakeable 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. 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.[1612]

10.150 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.[1613]
- 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.[1614]

1610 *Jury Act 1995* (Qld) s 57(1), (2). Under s 33, a jury ordinarily comprises twelve jurors.

1611 *Jury Act 1995* (Qld) s 57(3).

1612 Queensland Courts, *Supreme and District Courts Benchbook*, 'Trial Procedure' [5B.10] <http://www.courts.qld.gov.au/2265.htm> at 10 May 2010. See also *R v Metius* [2009] QCA 003.

1613 *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'.

1614 *Juries Act 2003* (Tas) s 40; *Juries Act 2000* (Vic) s 43.

- 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.[1615]

10.151 Provision is also made in New South Wales, as described at [10.156] below.

10.152 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;[1616]
- if the judge considers there are 'other proper reasons' for discharging the jury without giving a verdict;[1617]
- if proceedings are to be discontinued because the trial is adjourned;[1618] or
- if the judge dies, or becomes 'incapable of proceeding with the trial'.[1619]

10.153 If the jury is discharged, the judge may either adjourn the trial or proceed immediately with the selection of a new jury.[1620]

10.154 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.[1621]

NSWLRC's recommendations

10.155 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.[1622]

10.156 Following the NSWLRC's recommendations, changes to the legislation were made by the *Jury Amendment Act 2008* (NSW).[1623] Sections 53A and 53B of the *Jury Act 1977* (NSW) now provide for mandatory and discretionary discharge of jurors:

1615 *Criminal Procedure Act 2004* (WA) s 115.

1616 *Jury Act 1995* (Qld) s 60(1).

1617 *Jury Act 1995* (Qld) s 60(1).

1618 *Jury Act 1995* (Qld) s 60(2).

1619 *Jury Act 1995* (Qld) s 61. In this circumstance, an 'appropriate officer of the court' must discharge the jury.

1620 *Jury Act 1995* (Qld) s 62(1).

1621 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.

1622 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) ch 11, Rec 52–56.

1623 See the second reading speech of the Jury Amendment Bill 2008 (NSW): New South Wales, *Parliamentary Debates*, Legislative Council, 15 May 2008, 7681 (Hon J Hatzistergos, Attorney General and Minister for Justice).

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 disqualified or ineligible to serve as a juror or was otherwise not returned and selected in accordance with this Act, or

(b) the juror becomes disqualified from serving, or ineligible to serve, as a juror, 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 ineligible 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 proposals

10.157 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 expressed the provisional view that such a provision is unnecessary in Western Australia.[1624] It did note, however, that such a provision might assist if peremptory challenges have been used to exclude Aboriginal jurors.

QLRC's provisional views and proposals

10.158 The Commission considers that the judge's powers to discharge individual jurors are generally appropriate and should be retained.

10.159 In the Commission's provisional 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.

10.160 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.

10.161 In chapter 8 of this Paper, the Commission has proposed 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:

- is unable to understand, and communicate in, English well enough to discharge the duties of a juror effectively;

1624 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 35.

- 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.[1625]

10.162 The Commission has also asked in that chapter whether the judge should have a similar power to discharge a juror if it appears that the juror is ineligible because of a mental disability that makes the person incapable of effectively performing the functions of a juror.

10.163 It is intended that this would apply at any time after the juror has been sworn, including at the final stage of the jury selection process, and would therefore need to apply to the situations covered by both sections 46 and 56 of the Act. (It is also proposed in chapter 8 that judges, and the Sheriff, be given express power to excuse a *prospective* juror in those circumstances.[1626])

10.164 In the Commission's provisional view, the provisions for the judge to discharge the whole jury are also generally appropriate and should be retained.

10.165 The Commission seeks submissions on whether the provisions for discharge are appropriate or should be changed in any way.

Proposals

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.

IRREGULARITIES IN SUMMONING OR EMPANELMENT

10.166 As noted in chapter 2 of this Paper, section 6 of the Act 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'. Provisions dealing with this issue also apply in other jurisdictions.[1627]

10.167 Some of those jurisdictions also provide that the verdict is not impeached because of an irregularity in the selection and summoning or empanelment of a juror.

10.168 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

1625 See Proposals 8-6, 8-10 in chapter 8 of this Paper.

1626 See Proposals 8-5, 8-6, 8-10 in chapter 8 of this Paper.

1627 *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.

to 'the jury list, a jury precept or a panel of jurors' does not invalidate or affect the jury's verdict.[1628]

10.169 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.[1629] Similar provision is made in New Zealand.[1630]

10.170 The provision in New South Wales is the most comprehensive:[1631]

> **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 disqualified from serving, or was ineligible to serve, as a juror 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 disqualified from serving or ineligible to serve as a juror in the course of the trial or coronial inquest, or
>
> (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.

10.171 No similar provision is made in Queensland.

1628 *Juries Act 1967* (ACT) s 30; *Juries Act* (NT) s 35.

1629 *Juries Act 2003* (Tas) s 7(2).

1630 *Juries Act 1981* (NZ) s 33.

1631 Subsections (1)(a), (a1), (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.

QLRC's provisional views and proposals

10.172 The saving of jury verdicts that would otherwise be vulnerable to being overturned because of an informality or irregularity appears to the Commission to be a sensible position. Even when acting entirely properly, there is a possibility of innocent oversight or error, particularly when dealing with large numbers of people and orally conducted empanelment proceedings. The Commission's provisional view is that the Act should expressly provide for the saving of verdicts when there has been an irregularity in the selection, summoning or empanelment of a jury. The Commission seeks submissions on this issue and on the way in which such a provision should be expressed.

Proposal

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.

Chapter 11

Other Options for Reform

INTRODUCTION

11.1 The preceding chapters considered some options for reform that might result in a larger pool from which to select jurors in Queensland and in juries that are, or will continue to be, representative of the Queensland community generally.

11.2 This chapter considers some other issues that impact on the fairness and representativeness of juries and the equity of jury selection and participation, including the length of jury service, the impact of jury district boundaries, the representation of Indigenous people on juries, and remuneration for jury service.

11.3 The Commission notes in this regard that the Terms of Reference require it to consider, among other things:

> 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;[1632]

IMPLICATIONS OF WIDER JURY SERVICE

11.4 Laudable as a much wider spread of the burdens of jury service might be, a number of consequential matters arise, many of which are beyond the immediate scope of this review:

- Professional bodies representing groups who are currently ineligible or entitled to exemption — and who might lose that status and become liable for jury service — would need to consider developing guidelines for their members. These guidelines could outline a proper basis on which professional people could, and could not, seek excusal or deferral. The British Medical Association, for example, has published guidelines for the benefit of medical practitioners summoned for jury service following the 2004 amendments in England and Wales in which medical practitioners lost their automatic exemption from jury service.[1633]

- Businesses and professional practices, especially small to medium-sized enterprises, may also need to take any increased liability for jury service into account in their terms of employment, partnership agreements and in similar arrangements and contracts. Large corporations would also need to consider the implications of the fact that their directors and senior management would become increasingly liable to attend for jury service, and would need to factor that into their service agreements.

- The introduction of a broadly-based system of deferral could have implications on the resources available to the Sheriff and his delegates for the timetabling of jury panels. In England and Wales, the Central Jury Summoning Bureau was established as part of the 2004 reforms to implement and manage the new regime.[1634]

- There is a possible risk that compelling people who really are not prepared or motivated to act as a juror to do so will force onto juries hostile, antagonistic or uninterested jurors whose presence may be disruptive.[1635]

1632 See the Terms of Reference set out in Appendix A to this Paper.

1633 See British Medical Association, *Jury Service: Guidance for Medical Practitioners Summoned for Jury Service* (November 2005) <http://www.bma.org.uk/employmentandcontracts/independent_contractors/managing_your_practice/juryservice05.jsp> at 1 June 2010. These guidelines suggest that a request for excusal might be based on such circumstances as working in a small or single-handed practice or a practice with a high patient load where jury service could have serious implications for service delivery, or where locum cover is hard to obtain. And see Paul Head, 'It could be you … jury service', *British Journal of General Practice* (March 2007) 248.

1634 See R Gwynedd Parry, 'Jury Service for All? Analysing Lawyers as Jurors' (2006) 70 *Journal of Criminal Law* 163, 166.

1635 See 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.

MINIMISING OR RESTRICTING THE LENGTH OF SERVICE

11.5 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, one difficulty that might remain incapable of easy resolution is that of long trials, and the length of trials generally.

11.6 The personal difficulties that jury service presents for prospective jurors are compounded when the trial is long. The interruptions on jurors' personal and work lives are immense and are not mirrored in any way in any similar civic obligations, nor in the position of all other major participants in the trial, who (with the exception of the defendant) are there in a professional capacity. Witnesses do not attend for the whole of the trial, and victims, although often present for the whole, or large portions, of the trial, will sometimes be supported.

11.7 The unpredictable nature and length of trials is one factor that makes jury service difficult to manage, both for jurors and for the Sheriff.

11.8 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.[1636] 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,[1637] 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.

11.9 Whilst some uncertainty is unavoidable, there may be measures to improve prospective jurors' expectations about the length of 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.[1638]

1636 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1637 See generally Queensland Courts, 'Serving on jury' <http://www.courts.qld.gov.au/162.htm> at 1 June 2010 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 court 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 June 2010.

1638 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. 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].

Serving on long trials

11.10 Jury legislation makes no express provision for long trials.[1639] In Queensland, a number of practices apply to deal with long trials.[1640]

11.11 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 period, prospective jurors are asked to volunteer.[1641] Those who agree to serve, if selected, 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.[1642] People with work, family or other commitments, for instance, are perhaps less likely to volunteer for longer trials.

11.12 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.

11.13 An issue to consider is whether the current practices for longer trials are appropriate.

Excusal after serving on lengthy trials

11.14 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, or exempt, a juror from further jury service:

- if the length of the trial justifies doing so (in the ACT);[1643]
- if attendance for the trial was for a lengthy period (in New South Wales, Tasmania and Victoria);[1644]

1639 The daily remuneration payable to jurors generally rises, however, with the length of the trial. Remuneration is discussed later in this chapter.

1640 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009; and Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1641 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: Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1642 Information about jury demographics in Queensland is provided in chapter 4 of this Paper.

1643 *Juries Act 1967* (ACT) s 18A(2).

1644 *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 exemption as of right: s 7, sch 3 cl 14.

- if the trial was of an exceptionally exacting nature (in Ireland);[1645] or
- for any other good reason (in Tasmania and Victoria).[1646]

11.15 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.[1647]

11.16 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 a jury service period. This section is commonly used to excuse jurors who have sat on a harrowing trial from future jury service. Nevertheless, in recognition of the additional service rendered by jurors on long trials, it may be appropriate for express provision to be made in Queensland for excusal in such circumstances.

11.17 The NSW Law Reform Commission has recently recommended the retention in that State of the entitlement to claim exemption for previous lengthy jury service:

> 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.[1648]

One day, one trial attendance

11.18 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.[1649] Uncertainty about the length of time they will be required may be an understandable cause of frustration for prospective jurors.

11.19 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.[1650] 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.[1651]

11.20 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

1645 *Juries Act 1976* (Ireland) s 9(8).

1646 *Juries Act 2003* (Tas) s 14(2); *Juries Act 2000* (Vic) s 13(2), (3).

1647 *Juries (General) Regulations 1998* (SA) reg 6.

1648 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [6.66].

1649 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1650 See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [5.5].

1651 See ibid, for example.

day (or, in Country Courts, the third or fourth day), he or she is excused from further attendance.[1652] The Victorian Law Reform Committee commended this approach in its 1996 report on jury service:

> 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 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.[1653] (note omitted)

11.21 The number of days' attendance that is necessary would likely 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.

11.22 The Commission understands that such a system does not presently operate in Queensland. The former Sheriff of Queensland 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.[1654] Even in Brisbane, such a system is likely to be resource intensive and may be difficult to administer.

11.23 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.[1655] 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.[1656] It concluded:

> 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.[1657]

1652 See, for example, Victoria Law Foundation and Juries Commissioner's Office Victoria, *Juror's Handbook* (2005) 4 <http://www.courts.vic.gov.au/CA256EBD007FC352/page/Jury+Service?OpenDocument&1=50-Jury+Service~&2=~&3=~> at 1 June 2010.

1653 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996) Vol 1 [5.10].

1654 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1655 See New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [9.12]–[9.16].

1656 Ibid [9.17]–[9.18].

1657 Ibid [9.19].

Issues for consideration

11.24 The Commission considers that it is appropriate for the commitment required of jurors to be recognised and accommodated but has not reached a provisional view on whether there is a need for any specific changes to deal with the length of jury service.

11.25 At present, jurors who have served on a particularly long trial may be excused from further attendance by the judge. There is no express provision to this effect in the legislation, however, and an issue to consider is whether there should be.

11.26 Another issue to consider is whether a one day, one trial system, or something similar to it, should 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 system and of the courts, and the convenience of prospective jurors. Many of the concerns about waiting times and the somewhat indeterminate length of service can be addressed, in part, by continued improvements to community and juror education and court facilities.[1658]

Questions

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?

REGIONAL ISSUES AND INDIGENOUS REPRESENTATION

11.27 Consideration of the imperatives of improved jury representativeness and an equitable sharing of the burden of jury service requires an account of the practical concerns that arise in regional jury areas and in relation to the representation of Indigenous Queenslanders.[1659]

Jury district boundaries

11.28 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.[1660]

1658 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) 167.

1659 See, for example, Claudia 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.

1660 *Jury Act 1995* (Qld) ss 4(1), 5. The Commission understands that, on occasion, people have travelled from outside the jury district to attend for jury service but that those people have been excused from further attendance upon discovery of the discrepancy: Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009. And see, 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.

11.29 In some jurisdictions, people may also seek excusal or exemption if they live beyond a certain distance from the court or travel to the court would take an excessive time or cause excessive inconvenience.[1661]

11.30 In its report on juror satisfaction in Australia, the Australian Institute of Criminology noted that the use of an arbitrary, fixed distance for such exemptions may involve some inequity:

> 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.[1662] (references omitted)

11.31 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.[1663] Previously in Queensland, section 8(1)(r) of the *Jury Act 1929* (Qld) exempted commercial travellers and others who were frequently required to travel outside their jury district by reason of their employment.

11.32 In small jurisdictions, it may be possible for all parts of the jurisdiction to fall within a jury district.[1664] In most jurisdictions, including Queensland, however, jury district boundaries encompass localities within only a limited radius of each 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. In some instances, this may be thought anomalous given that many people may travel up to an hour or more to work each day.

11.33 The jury districts for Queensland, and their boundaries, are defined under the *Jury Regulation 2007* (Qld).[1665] The main jury districts are:

1661 *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); *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).

1662 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.

1663 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: Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1664 In the ACT, for example, 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). And see [11.46] below.

1665 See *Jury Act 1995* (Qld) s 7; *Jury Regulation 2007* (Qld) s 5, sch 1.

District Name	District Area and Boundaries
Brisbane	The City of Brisbane, Pine Rivers Shire, Redcliffe City, and Redland Shire,[1666] to the extent those areas fall within the Brisbane District Court district.
Beenleigh	Logan City,[1667] 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 *Electoral Act 1992* (Qld).
Kingaroy	The area within a 20 km radius of the Kingaroy courthouse, and Cherbourg Shire.[1668]
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[1669] 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 districts[1670]

11.34 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.[1671] 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.[1672]

11.35 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 jury eligible population. The Sheriff 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.[1673] The Commission also understands that the jury district boundaries have not been updated since 2008.[1674] They may need to be revised to take account of changes in population density and to ensure that sufficient numbers of people are available to meet the courts' workload requirements.

1666 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.

1667 As it is shown on area map LGB78 edition 9: *Jury Regulation 2007* (Qld) s 5(1), sch 1 cl 1(a).

1668 As it is shown on area map LGB151 edition 1: *Jury Regulation 2007* (Qld) s 5(1), sch 1 cl 6(b).

1669 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).

1670 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.

1671 *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.

1672 See *District Court of Queensland Act 1967* (Qld) s 6(3); *District Court Regulation 2005* (Qld) s 2(1), sch 1 column 1.

1673 Correspondence from Nick Dower (Sheriff of Queensland) to Queensland Law Reform Commission, 18 May 2010.

1674 Ibid.

11.36 In many instances, however, it will be impractical for jury district boundaries to be expanded because of the distance people would need to travel to reach the court. The Commission understands, for instance, that while Cherbourg Shire was included in the jury district for Kingaroy in 2008,[1675] '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'.[1676]

11.37 Transport and other attendance difficulties might also arise on a seasonal or cyclical basis in some regional areas, suggesting a need to ensure that circuit courts are timed appropriately. The jury pool may be reduced, for instance, during fruit-picking season when many local people depend on that work, or during the wet season, when roads are flooded and travel becomes impossible.[1677]

11.38 There are also likely to be some anomalies arising from the fact that jury districts in Queensland are based on the places at which the District Court sits. The Commission understands that the Supreme Court, for instance, does not usually sit at the Gold Coast or the Sunshine Coast. Trials involving defendants from those areas are instead heard in Brisbane, with juries drawn from the Brisbane jury district. This has the consequence that defendants from the Gold or Sunshine Coast who are tried in the Supreme Court will never have residents from their own region on their juries. The Commission understands that similar difficulties apply to defendants from the Cape and Gulf regions of Queensland, whose trials are heard in Cairns and Mount Isa, respectively. The costs of travel in those cases may also have significant detrimental consequences for defendants.[1678]

11.39 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. The difficulty of ensuring sufficient numbers for jury service in small regions may also be compounded by the difficulties of enforcing compliance with jury summonses.

NSWLRC's recommendations

11.40 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. Thus a person who is listed in one jury district is not to be listed, at the same time, in another jury district. There is also an exemption for people who live more than 56 km from the relevant courthouse. The jury district boundaries have not, however, been defined by reference to that 56 km radius and have not been revised in several years.[1679]

11.41 The NSW Law Reform Commission noted a number of concerns with the current system:

1675 See *Jury Regulation 2007* (Qld) s 5, sch 1 cl 6(b), inserted by *Justice and Other Legislation Amendment Regulation (No 1) 2008* (Qld) s 27(3).

1676 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1677 A comment to this effect was made during a preliminary consultation with Legal Aid Queensland: Submission 20.

1678 This was noted in a preliminary consultation with the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd: Submissions 21, 21A.

1679 See generally New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [8.3]–[8.5].

- 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.[1680]

11.42 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 would be maintained in real time and could be enhanced by attaching a 'geopositioning code' to individual residential properties for which particular attributes could be noted.[1681] Further:

> 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.[1682]

LRCWA's proposals

11.43 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.[1683]

11.44 In those districts 'the required quota of jurors is never reached because there are not enough qualified electors in the relevant district'.[1684] As a consequence, people can be required to perform jury service up to two or three times a year. Jury fatigue is one unwelcome consequence of this.[1685]

11.45 The LRCWA invited submissions on whether those jury districts — or indeed jury districts in Western Australia generally — should be expanded:

> The Commission acknowledges that jury service may be extremely difficult for people who reside long distances from the courthouse.[1686] 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

1680 Ibid [8.18]–[8.21].

1681 Ibid [8.24]–[8.28], Rec 36.

1682 Ibid [8.28].

1683 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 44.

1684 Ibid 21.

1685 Ibid 41.

1686 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.

> 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 cutoff 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.[1687] (note in original)

11.46 The LRCWA noted, for example, that in South Australia the whole of the State falls within one of the 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.[1688]

Indigenous participation

11.47 Although the Commission has no information about the number of Indigenous people who are called for jury service or who are empanelled on juries,[1689] it is apparent that many Indigenous communities in Queensland fall outside the jury districts and that, as a consequence, Indigenous Queenslanders are not represented well on juries.[1690]

11.48 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.[1691]

11.49 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.

11.50 In 2006, Indigenous people made up 3.5% of the Queensland population.[1692] Some parts of Queensland, however, have higher Indigenous populations than others. Most 'local government areas'[1693] in Queensland have Indigenous populations of less than 10%, many less than 5%. There are several local government areas, however,

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1687 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 44.

1688 Ibid.

1689 See chapter 4 above for information about Queensland's jury demographics.

1690 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1691 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.35], and see the research cited there. Also see 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.

1692 Australian Bureau of Statistics, *National Regional Profile: Queensland*, 'Population/People' (2008).

1693 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.

with Indigenous populations of 90% or more. These are mostly small communities in remote areas of far northern and western Queensland.[1694]

11.51 It is also clear that the areas with the highest Indigenous populations almost universally fall outside Queensland's jury district boundaries.

11.52 An idea of the proportion of Indigenous people residing within each of Queensland's jury districts can be gleaned by matching each jury district to the corresponding local government area. 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[1695]
Beenleigh — Logan City and the area within 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[1696] 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.

1694 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/nrpmaps.nsf/NEW+GmapPages/national+regional+profile?opendocument> 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, Mabuiag, Mapoon, Mer, Mornington, Mapranum, New Mapoon, Palm Island, Pormpuraaw, Poruma, Saibai, St Pauls, Umagico, Warraber, Woorabinda, Wujal Wujal, Yarrabah, and Yorke.

1695 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].

1696 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[1695]
	Redcliffe (City)	52,518	2.1	Major city. Major urban.
	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.
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.
Hervey Bay — 15 km radius of the Hervey Bay courthouse	Hervey Bay (City)	55,113	2.7	Inner regional. Predominantly other urban.
Hughenden — 20 km radius of District Court courthouse	Flinders (Shire)	1907	8.5	Very remote. Combined other urban and rural.

Jury District	Local Government Area ('LGA')	Total LGA population	%age of LGA population that is Indigenous	LGA geographic classification[1695]
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)	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.
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.

Jury District	Local Government Area ('LGA')	Total LGA population	%age of LGA population that is Indigenous	LGA geographic classification[1695]
Warwick — 20 km radius of District Court courthouse	Warwick (Shire)	22,878	3.0	Predominantly inner regional. Combined other urban and rural.

Table 11.2: Indigenous population of jury districts by reference to local government areas[1697]

11.53 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 Shire. As noted earlier, however, the lack of available transport to the courthouse in Kingaroy means that people in that Shire nonetheless do not serve on juries.

11.54 Other jury districts located in areas that appear to have a higher than average percentage of Indigenous residents (though 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 presently aware of the extent to which Indigenous people are actually represented, or prevented from being represented, on juries in those districts. The Commission understands that jury trials are held in those locations as caseloads require.[1698]

11.55 A number of different factors appear to contribute to the apparent under-representation of Indigenous people on juries. The major reason would seem to 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, Indigenous people may:[1699]

- be less likely to enrol to vote, although no data on this is available (see [6.12] above);
- be 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 concluded that 'there does not appear to be any practical alternative to serving jury summonses by post';

1697 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/nrpmaps.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 [11.33]–[11.34] above.

1698 See District Court of Queensland, *Annual Report 2008–2009* (2009) 37.

1699 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).

- be more likely to be disqualified on the basis of criminal convictions due to the disproportionate representation of Aboriginal people in the criminal justice system (see [6.53] above);

- be disqualified from serving because of poor command of standard English (see [8.55] above);

- be 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; and

- be subject to a disproportionately high rate of peremptory challenge, although, again, there is no current data on this and any such practice would be incongruous with the *Director's Guidelines* on jury selection (see [10.114] above).

NSWLRC's recommendations

11.56 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.[1700]

11.57 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.[1701]

11.58 The NSWLRC also noted the possibility of under-enrolment of Indigenous people 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 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.[1702]

LRCWA's proposals

11.59 The Law Reform Commission of Western Australia noted that while 'law reform bodies, researchers and others involved in the criminal justice system' have pointed to the under-representation of Aboriginal people on juries, empirical information on this is generally not available; electoral information does not include Aboriginality and statis-

1700 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [3.19], [3.23], Rec 4. This is discussed in chapter 6 of this Paper.

1701 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 above.

1702 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 [11.42] above.

tics on the Aboriginality of jurors are not collected on a state-wide basis.[1703] The LRCWA did refer to one exit survey in which only 1% of the jurors self-identified as Aboriginal. Since Aboriginal people comprise 3% of the Western Australian population, this result suggests that Indigenous people are under-represented on juries in Western Australia. The LRCWA also noted, however, that the proportion of Aboriginal people in regional areas is much higher and that anecdotal information suggests that they are relatively well represented on juries:

> The proportion of Aboriginal people residing in regional Western Australia is much higher than 3% (eg, Aboriginal people comprise approximately 45% of the population in Derby; over 26% in Kununurra; approximately 20% in Broome and in Carnarvon; between 13% and 15% in Port Hedland and South Hedland; and 8% in Geraldton). Although no statistics are kept, the Commission has been told anecdotally that approximately 20% of the people who attend for jury service in response to a summons in Kununurra are Aboriginal. In Derby, where almost half of the population is Aboriginal, the Commission has been told that approximately half of all people who turn up in response to a juror summons are Aboriginal and usually about 4 to 5 (but sometimes less and sometimes more) Aboriginal people are selected to serve on a jury. Hence, in these locations it appears that Aboriginal people are relatively well represented.[1704] (notes omitted)

11.60 The LRCWA concluded that some of these barriers may be 'difficult, if not impossible, to overcome' and expressed the view that its proposals in relation to increasing participation in regional areas generally should assist in improving participation rates by Aboriginal people:[1705]

> The Commission is also not convinced that the level of Aboriginal participation in juries in Western Australia is necessarily as low as perhaps it once was. However, it is impossible to know the number of Aboriginal jurors who are being selected in the absence of reliable data. To the extent that under-representation exists, the Commission is of the view that its proposals above to address problems in regional areas will assist in increasing the number of Aboriginal people who are enrolled to vote and will help ensure enrolment details are accurately recorded so that juror summonses are sent to the correct address. Further, if jury district boundaries are extended, the number of Aboriginal people living in remote parts of Western Australia who are liable for jury service would increase.[1706]

Issues for consideration

11.61 Except in relation to a judicial power to direct the composition of the jury (which is discussed below), the Commission has not reached a provisional view on these matters and seeks submissions on the way in which they may be addressed.

11.62 If the legitimacy of the jury system is to be ensured, it is essential that all members of the community have confidence in it. Whilst the idea of trial by a jury of 'one's peers' is not strictly part of the law in Queensland, it holds much popular appeal and it is understandable that an Indigenous defendant may feel uncomfortable being tried by a jury that does not contain any Aboriginal jurors, particularly if Indigenous people are routinely excluded from the possibility of jury service, whether intentionally

1703 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 45.

1704 Ibid.

1705 Ibid 47.

1706 Ibid.

or otherwise.[1707] It is similarly incongruous for non-Indigenous defendants routinely to be tried by juries that never have Indigenous jurors when Indigenous people make up a sizeable proportion of the wider community.

11.63 One of the first impediments to Indigenous representation on juries is the suggestion that many Indigenous people may not be on the electoral roll or may not have a fixed residential address for the purpose of the electoral roll. This makes summoning those persons impossible or difficult, particularly in remote areas. As noted in chapter 6 above, strategies to encourage and facilitate electoral enrolment by Indigenous Australians are ongoing.

11.64 Another major hurdle is the formation of jury districts. An issue thus arises as to whether any of the existing jury districts should be expanded in an effort to include people from Indigenous communities. This has related practical concerns, however. For instance, how can the system assist people in outlying areas to make the required journey to the courthouse? Should a transport service be provided? A related issue is whether the range of locations at which the Supreme and District Courts may sit for jury trials should be extended in some way.

11.65 Even if jury districts are expanded to include more Indigenous communities, there may be other obstacles to overcome. The present requirement that jurors must be able to 'read and write' English may disproportionately affect Indigenous people; in chapter 8 of this Paper, the Commission has proposed that this be reformulated. The criminal record disqualifications would also seem to affect Indigenous people disproportionately. Again, in chapter 6, the Commission has considered how this might be reworked.

11.66 There may also be concerns that summoned jurors may be more likely to know the defendant or a witness if those persons are from the same, small community, and may thus be excused or discharged in any event. There have also been suggestions that Indigenous people have often been challenged by the prosecution, although it is doubtful, particularly in light of the *Director's Guidelines*, whether such a practice continues.[1708]

11.67 One of the major difficulties in formulating a response to concerns about Indigenous under-representation on juries is the lack of available research. Another major difficulty is that jury service is but one of many systemic problems facing Indigenous people, and cannot be addressed in isolation. The difficulties that lead to under-representation on the electoral roll and over-representation in the criminal justice and penal systems are just two of the more obvious, complex issues that intersect with the question of Indigenous representation on juries. The under-representation of Indigenous people on juries is, however, of no less concern than these wider issues given domestic and international anti-discrimination obligations.[1709]

1707 A member of the Queensland Law Society's Criminal Law Section commented in a preliminary consultation with the Commission that it is important that Indigenous defendants are able to see Indigenous faces on a jury: Queensland Law Society, Criminal Law Section, Submissions 26, 26A.

1708 See [10.114] above.

1709 See, for example, *Anti-Discrimination Act 1991* (Qld) s 101; *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); and the discussion at [8.5]–[8.9] above.

11.68 The Commission thus puts forward the following questions on which it seeks submissions on these matters.

Questions

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 or court circuits 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?

JUDICIAL POWER TO DIRECT THE COMPOSITION OF THE JURY

11.69 As discussed in chapter 2 of this Paper, juries *de medietate linguæ*, whose composition was 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.

11.70 Nevertheless, there have been some cases, although rare, in which Indigenous defendants have argued, unsuccessfully, that the right to fair trial required that there be at least some Indigenous people on their juries.[1710] 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.[1711] 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.

11.71 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

1710 Eg *R v Walker* [1989] 2 Qd R 79; *Binge v Bennett* (1989) 42 A Crim R 93. These cases are discussed in chapter 2 above. And see 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.

1711 *R v A Judge of the District Courts & Shelley* [1991] 1 Qd R 170.

Institute of Judicial Administration in the 1990s, then Associate Professor Mark Findlay commented that:[1712]

> 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 ethic/racial representatives if the concept of the 'communion of peers' is to have any reality.

11.72 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:

> 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*[1713] 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.[1714] (note in original)

11.73 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

1712 Australian Institute of Judicial Administration (M Findlay et al), *Jury Management in New South Wales* (1994) 177. And see Jacqueline Horan and David 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.

1713 3 A.E.R. 445 [[1989] QB 868].

1714 The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO (1993) 133–4 [62]–[63].

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'.[1715] However, Lord Justice Auld proposed something similar in his review:

> 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 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.[1716] (note omitted)

11.74 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.[1717]

11.75 The NSW Law Reform Commission also rejected the notion of introducing special panels to hear charges against Indigenous defendants.[1718] 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:

> 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.[1719]

1715 Australian Institute of Judicial Administration (M Findlay et al), *Jury Management in New South Wales* (1994) 177.

1716 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) ch 5 [60]–[61].

1717 Law Commission of New Zealand, *Juries in Criminal Trials*, Report 69 (2001) [160]. Also see Law Commission of New Zealand, *Juries in Criminal Trials: Part One*, Preliminary Paper 32 (1998) [293]–[295].

1718 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.51]–[1.53].

1719 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 46–7.

11.76 As was discussed in chapter 10, 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'.[1720] A similarly worded power applies in New South Wales.[1721]

QLRC's provisional views and proposals

11.77 The Commission's provisional view is that it would be inappropriate 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.

11.78 This would be at odds with the principle of random selection, which is the key mechanism for ensuring a broadly representative jury.[1722] This is facilitated by selection from the electoral roll given that all adult citizens, regardless of ethnic or racial background, gender or other distinction, are required to enrol.

11.79 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.[1723] 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.[1724]

Proposal

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.

REMUNERATION

11.80 The low level of juror remuneration is frequently cited as one of the major obstacles to willing participation on juries.[1725]

1720 *Jury Act 1995* (Qld) s 48.

1721 *Jury Act 1977* (NSW) s 47A.

1722 See, for example, the comments made by Connolly J in *R v Buzzacott* (2004) 154 ACTR 37 [27]–[28].

1723 *Jury Act 1995* (Qld) s 48.

1724 Criminal Code (Qld) ss 559, 614, 615; *District Court of Queensland Act 1967* (Qld) s 63.

1725 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; and, more recently, Terry Sweetman, 'Majority pass on jury duty', *The Sunday Mail* (Brisbane) 2 May 2010, 55. It has also been noted by former jurors in submissions to this Commission: Submissions 22, 23, 24. The same cry was heard during the debate of the Jury Bill 1929 (Qld):

11.81 Jurors receive allowances for their attendance in court, the rates for which are set by the *Jury Regulation 2007* (Qld). They may also be paid by their employer while on jury service, though this will depend on the attitude of the employer and, in relevant cases, on the award under which the juror is employed.[1726] Jurors who are paid their normal salary or other remuneration during jury service may be required to reimburse their employers for the jury allowances that they receive.[1727]

Jurors' allowances in Queensland

11.82 Any person who attends when summoned for jury service is entitled to the following remuneration specified by the *Jury Regulation 2007*:[1728]

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[1729]	$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 11.3: Remuneration for jurors in Queensland

11.83 Jurors are also entitled to be reimbursed for public transport costs associated with travel to and from court or, if public transport is not reasonably available, mileage allowances for using their motorbikes (15¢ per km) or other vehicles (37½¢ per km).[1730]

11.84 In addition, certain special payments are authorised by the Act 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).[1731]

> There is a distinct objection to working people, who have very few shillings to spare, having to serve for weeks on a jury, and perhaps losing 3s. per day while the sittings last. … No one seeks to exercise the duty which trial by jury calls upon him to perform and make a profit; but the performance of that duty to the public should not cause him any loss: Queensland, *Parliamentary Debates*, Legislative Assembly, 15 November 1929, 1675 (Mr EM Hanlon).

1726 See Queensland Courts, 'Excusal' <http://www.courts.qld.gov.au/161.htm> at 11 May 2010; Queensland Courts, 'Remuneration' <http://www.courts.qld.gov.au/157.htm> at 11 May 2010.

1727 Queensland Courts, 'Remuneration' <http://www.courts.qld.gov.au/157.htm> at 11 May 2010.

1728 *Jury Act 1995* (Qld) s 63; *Jury Regulation 2007* (Qld) ss 8, 9, sch 2

1729 This means that a juror receives a total of $142.50 per day after the 20th weekday of a trial.

1730 *Jury Regulation 2007* (Qld) s 10.

1731 *Jury Act 1995* (Qld) s 64(1), (2).

11.85 The taxable status of jurors' allowances depends on their other income and financial circumstances, and whether, for example, jurors reimbursed their employers with these allowances if they were otherwise paid their usual salaries.[1732] 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.[1733]

11.86 The only other comfort given to jurors by the legislation is that it is an offence under section 69 of the *Jury Act 1995* (Qld) if their employer terminates their employment, or prejudices them in their employment, because of their absence on jury service. The penalty under section 69 of the Act is one year's imprisonment.

Position in other Australian jurisdictions

11.87 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.[1734]

11.88 Each of the jurisdictions provides daily attendance allowances; some have flat rates which increase in accordance with the number of days' attendance, and 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.

11.89 In general terms, the allowances paid to Queensland jurors are comparable to the highest rates paid interstate. The provision allowing claims for special compensation under section 64 of the *Jury Act 1995* (Qld)[1735] has counterparts elsewhere, though not in all other Australian jurisdictions.

Australian Capital Territory

11.90 In the Australian Capital Territory, jurors' remuneration is governed by the *Juries Fees Regulation 1968* (ACT). Schedule 1 provides for the following rates of payment:

Attendance at court for up to 4 hours	$44.10
Attendance at court for more than 4 hours—	
Each day for the first 5 days	$88.60
Each day for the next 5 days	$102.90
Each day after day 10	$120.00

1732 See Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1733 Queensland Courts, 'Remuneration' <http://www.courts.qld.gov.au/157.htm> at 11 May 2010.

1734 Unless otherwise specified, the allowances set out in this chapter are those in force as at June 2010.

1735 See [11.84] above.

Travel allowance for each day of attendance at court	$15.00

Table 11.4: Remuneration for jurors in the Australian Capital Territory

New South Wales

11.91 In New South Wales, the following rates of payment are set out in Schedule 1 of the *Jury Regulation 2004* (NSW):

Attendance at court for up to 4 hours but not selected for jury service	Nil
Attendance at court for up to 4 hours and selected for jury service	$44.90
Attendance at court for 4 hours or more (whether or not selected for jury service)	$90.30
Attendance at court—	
2nd to 5th day of attendance	$90.30
6th to 10th day of attendance	$104.80
11th and subsequent days of attendance	$122.20
Travel allowance for each day of attendance at court	30.70¢ per km up to $30.70 each way
Refreshment allowance for lunch (if jury is released)	$6.60

Table 11.5: Remuneration for jurors in New South Wales

Northern Territory

11.92 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.[1736]

11.93 If that is not the case, jurors are entitled to receive the following base allowances:[1737]

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 11.6: Remuneration for jurors in the Northern Territory

1736 *Juries Regulations* (NT) reg 8(1).

1737 *Juries Regulations* (NT) reg 8(2).

11.94 If 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).[1738]

11.95 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.[1739]

South Australia

11.96 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.[1740]

11.97 The amounts in the Schedule to the Regulations (and set out below) 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.[1741] In any event, the amounts to be paid to a juror are to reflect actual monetary loss or expenditure: the amounts set out in the Schedule are maximum amounts and are not paid automatically. The maximum amounts in the Schedule are:

For trials other than 'long trials'—	
If no loss or expenditure in excess of $20 was incurred	$20
Otherwise, up to a maximum of	$125
For 'long trials'—	
Before empanelment:	
If no loss or expenditure in excess of $20 was incurred	$20
Otherwise, up to a maximum of	$125
After empanelment:	
If no loss or expenditure in excess of $20 was incurred	$20
Otherwise, up to a maximum of	$225

1738 *Juries Regulations* (NT) reg 8(3).

1739 *Juries Regulations* (NT) reg 9.

1740 See *Juries (Remuneration for Jury Service) Regulations 2002* (SA) reg 2. 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: s 5(2). The Commission is aware of only one trial having been declared a long trial in this way: see South Australian Government Gazette, 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: Andrew Dowdell, 'Tears flow in court after son, farmhand found guilty of murder', *The Advertiser* (Adelaide) 1 April 2010, 4.

1741 *Juries (Remuneration for Jury Service) Regulations 2002* (SA) regs 4, 5.

Travel allowance for each day of attendance at court	60¢ per km for a minimum of 12 km

Table 11.7: Remuneration for jurors in South Australia

Tasmania

11.98 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.

11.99 Unemployed people are entitled to the following allowances:[1742]

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[1743]
For each subsequent day	$50[1744]
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 11.8: Remuneration for jurors in Tasmania

11.100 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.[1745] 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).[1746]

11.101 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 is $176. For

1742 *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 23 June 2010.

1743 Or a proportionate part of $25, whichever is the greater: *Juries Regulations 2005* (Tas) reg 4.

1744 Or a proportionate part of $25, whichever is the greater: *Juries Regulations 2005* (Tas) reg 4.

1745 *Juries Regulations 2005* (Tas) reg 5(2), (5).

1746 *Juries Regulations 2005* (Tas) reg 5(1), (4).

each later financial year, the amount is indexed to reflect inflation in average weekly earnings. The present amount is $184.83.[1747]

11.102 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.[1748]

11.103 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 for jury service are not entitled to any juror remuneration (other than meal and travel allowances).[1749]

Victoria

11.104 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 11.9: Remuneration for jurors in Victoria

11.105 Jurors are entitled to double these amounts for the last day of any trial if they are required to serve longer than eight hours.

11.106 Jurors outside Melbourne are entitled to a travel allowance for one journey per day at the rate of 38¢ per km in excess of 8 km.

Western Australia

11.107 In Western Australia, the position is governed by the *Juries Regulations 2008* (WA), which came into force on 1 October 2008. The Regulations operate in conjunction with section 58B of the *Juries Act 1957* (WA) in a way that is different from other Australian jurisdictions.

11.108 An employer must pay a person performing jury service the amount that the person would reasonably expect to be paid during the period of jury service: section 58B(3).[1750] The employer is entitled to be paid by the State the amount prescribed by the Regulations.[1751] A person who is not paid under, or who is not covered by, section 58B(3) — such as a self-employed or unemployed person — is entitled to be paid the

1747 Supreme Court of Tasmania, Jurors, 'Expenses' <http://www.supremecourt.tas.gov.au/going_to_court/jurors/expenses> at 23 June 2010.

1748 *Juries Regulations 2005* (Tas) reg 6.

1749 *Juries Regulations 2005* (Tas) reg 7.

1750 The employer is liable to a fine of $2000 for failing to do so: *Juries Act 1957* (WA) s 58B(3).

1751 *Juries Act 1957* (WA) s 58B(4).

amounts prescribed by the Regulations.[1752] The Regulations may exclude classes of people or employers from this regime, disentitling them from receiving any allowances under the Regulations.[1753]

11.109 Most significantly, under regulation 4(2) of the Regulations, if the summoning officer is satisfied that a person doing jury service who is not covered by section 58B(3) has, by reason of that service, lost income greater than the amounts set out in regulation 4(1),[1754] 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). Curiously, regulation 4(2) appears to make that payment discretionary as it provides that the summoning officer ***may*** (not 'must') reimburse that loss.

Comparison with minimum and average salaries

11.110 For the year 2009–10, the Federal Minimum Wage is $543.78 per week, equivalent to $28,276.56 per year or $108.76 per day.[1755] The Federal Minimum Wage is 56.2% of the seasonally adjusted average weekly earnings recorded for February 2010 of $968.10[1756] (equivalent to $50,341.20 per year or $193.62 per day).

11.111 By comparison, the standard daily allowance for empanelled jurors in Queensland of $107 is equivalent to $535 per week and $27,820 per year. This is about 98.4% of the Federal Minimum Wage and 55.3% of average weekly earnings. 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 $37,050 per year. This is 131% of the Federal Minimum Wage and 73.6% of average weekly earnings.

Jurors' attitudes to remuneration

11.112 Recent research conducted by the Australian Institute of Criminology in New South Wales, Victoria and South Australia has confirmed that the financial burden of jury duty is of particular concern to jurors.[1757]

> There was near unanimity amongst stakeholders that the amounts should be increased. Furthermore, a small percentage of jury-eligible citizens identified financial, work and child care responsibilities as barriers to jury participation, and a substantial percentage reported avoiding jury service due to financial hardship.

1752 *Juries Act 1957* (WA) s 58B(5), (6).

1753 *Juries Act 1957* (WA) s 58B(4), (5), (6). *Juries Regulations 2008* (WA) reg 6 excludes the following employers from this scheme: State Government departments, State instrumentalities, and State trading concerns.

1754 Which vary up to a maximum of only $20 per day.

1755 On 7 July 2009, the Australian Fair Pay Commission announced its decision to freeze the Federal Minimum Wage at its then current level: <http://www.fairpay.gov.au/> at 8 July 2009. Also see Fair Work Online, Finding the right pay, 'National minimum wage' <http://www.fairwork.gov.au/Pay-leave-and-conditions/Finding-the-right-pay/> at 2 June 2010.

1756 See Australian Bureau of Statistics, *Average Weekly Earnings Australia, February 2010* (2010) Cat No 6302.0, 5.

1757 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) xiv, 164.

> Dissatisfaction with remuneration may be a significant barrier to participation in jury service, and thus the representativeness of juries.[1758]

11.113 It should be noted that, although this dissatisfaction with remuneration and travel allowances was associated with dissatisfaction in the experience of jury duty, it did not correlate strongly with overall confidence (or lack of confidence) in the criminal justice system.[1759]

The cost of juries

11.114 The Commission does not presently have access to recent information about the total amount that is spent on juries and juror remuneration in Queensland.

11.115 However, a report from the early 1990s showed that, in 1991–92, the cost to the Department of Justice and Attorney-General of providing juries was $3,812,619. This was over $1 million more than was budgeted for that year.[1760]

11.116 By far the largest component of this figure was the amount of $2,989,332 (78.4%) for jurors' fees, with $561,840 (14.7%) being spent on jurors' meals.[1761] The remainder was made up of transport costs (3.9%), accommodation (1.2%), postage (1.0%) travel allowances (0.5%) and advertising (0.2%).[1762]

11.117 Records showed that the percentage of the overall expenditure that related to jurors' fees had remained fairly constant in the range of 75% to 78% from 1986–87 to 1991–92, with one exception in 1987–8, when it dropped to 69%.[1763]

11.118 In civil jury trials, some of the costs of jury trial are borne by the parties.[1764]

11.119 The Commission's task in this review is not to examine State expenditure on juries in any detail. However, it is worth noting that any suggested increase or other adjustment to juror remuneration is likely to impact on overall expenditure, both in absolute and relative terms.

Alternatives to increased remuneration

11.120 In its recent report on jury service, the Law Reform Commission of Ireland noted that 'there are other ways to acknowledge the important role that jurors play in the legal system in addition to payment':[1765]

1758 Ibid xiv.

1759 Ibid xv.

1760 Policy and Research Branch, Courts Division, Department of Justice and Attorney-General (Constance Johnston), *Report on Queensland Jury Expenditure* (1992) 1. From 1986–87 to 1991–92, the only year in which the budget was not exceeded was 1990–91: ibid App 8.

1761 Policy and Research Branch, Courts Division, Department of Justice and Attorney-General (Constance Johnston), *Report on Queensland Jury Expenditure* (1992) 16.

1762 Ibid.

1763 Ibid 17.

1764 *Jury Act 1995* (Qld) s 65; *Jury Regulation 2007* (Qld) s 11. See chapter 12 below.

1765 Law Reform Commission of Ireland, *Jury Service*, Consultation Paper 61 (2010) [7.32]–[7.33].

> For example, at the end of a trial it is normal practice for the presiding judge in an Irish court to thank the members of the jury for performing jury service and perhaps excuse them from jury service for a number of years. Usually there is also an acknowledgement of the importance of their role within the legal system. In some courts in the United States the role of jurors is acknowledged in more visible ways. For example, jurors are presented with certificates of jury service, souvenirs or letters of thanks from the trial judge.[1766] Some courts even organise thank you parties for jurors.
>
> The Auld Review recommended that a standard letter of thanks signed by the trial judge may be — a suitable and pleasing way of recording in more permanent form what may be a memorable and unique experience for many.[1767] (notes as in original)

NSWLRC's recommendations

11.121 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'.[1768] It recommended that the daily allowances be increased, and that there should also be provision for a capped amount to be paid to reimburse jurors for actual loss of income or earnings:

> 12.24 In our view, the submissions in favour of increasing the daily allowance have merit. Unless jurors are guaranteed a reasonable attendance allowance, there will be little incentive for them to serve, and jurors whose earnings exceed the allowance, particularly where they have significant ongoing commitments such as home mortgages or other personal or business borrowings, are likely to be excused from service. For those who are dependent on shift allowances or overtime to meet these commitments, the problems arising from jury service can be even more acute. Unless addressed, this could have the consequences of depriving the system of the services of some who might be best qualified to serve, and of jeopardising the objective of ensuring the availability of representative juries. The barrier to service is likely to be strongest for long and complex trials.
>
> 12.25 However, 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.
>
> 12.26 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.[1769]

1766 The Michigan Supreme Court demonstrated the importance of jury service through staging a juror appreciation month across Michigan Courts in July 2007.
See <http://courts.michigan.gov/supremecourt/press/JAM2.pdf>. Juror Appreciation Week is celebrated annually state-wide in Californian courts: see <http://www.courtinfo.ca.gov/jury/jaw.htm>.

1767 See Auld *Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at 224–225.

1768 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [12.2].

1769 Ibid [12.24]–[12.26], and see Rec 57.

11.122 It also recommended that payment for loss of earnings should depend on the production of a certificate of loss of earning or income.[1770]

LRCWA's proposals

11.123 Western Australia has 'the most generous system of juror allowances in Australia … covering actual loss of earnings for all jurors'.[1771] Accordingly, the Law Reform Commission of Western Australia noted that the perception that jurors are inadequately compensated is:

> perhaps the most widespread misconception about jury service in Western Australia and it may be a significant barrier to participation in jury service.[1772]

11.124 It proposed that regular community awareness strategies should be resourced and undertaken to inform the community about juror remuneration.[1773]

11.125 The LRCWA also noted that, as a matter of practice, child care expenses are reimbursed by the Sheriff's Office and proposed that this be expressly provided for the in legislation.[1774]

> PROPOSAL 44
>
> Child care or other carer expenses
>
> 1. That the *Juries Regulations 2008* (WA) be amended to insert a new regulation 5B to cover reimbursement of child care and other carer expenses.
>
> 2. That this regulation provide that, for the purpose of s 58B of the *Juries Act 1957* (WA), the reasonable out-of-pocket expenses incurred for the care of children who are aged under 14 years, or for the care of persons who are aged, in ill health, or physically or mentally infirm are prescribed as an expense provided that those expenses were incurred solely for the purpose of jury service.[1775]

11.126 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.[1776]

1770 Ibid [12.30], Rec 58.

1771 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 125; *Juries Act 1957* (WA) s 58B; *Juries Regulations 2008* (WA) regs 4, 5.

1772 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 125.

1773 Ibid 127, Proposal 49.

1774 Ibid 125, 111, Proposal 44. 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: ibid 125.

1775 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 111, Proposal 44.

1776 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.

Issues for consideration

11.127 Like most other Australian jurisdictions, the legislation in Queensland provides a scale of daily allowances for jury service, supplemented by allowances for travel expenditure and meals. This model of juror remuneration contrasts with the model that operates in Western Australia which provides for jurors to be reimbursed for actual loss of income or earnings. The Law Reform Commission of Western Australia has recently proposed that, in addition, reasonable out-of-pocket expenses for child care or family care incurred as a consequence of jury service should also be reimbursed.

11.128 An issue to consider, therefore, is whether the existing model of allowances is appropriate and should continue, or whether Queensland should adopt a lost earnings model.[1777] The NSW Law Reform Commission has recently recommended, for instance, that provision be made for jurors to be reimbursed, up to a capped amount, for demonstrated loss of income or earnings.

11.129 It is arguable that savings made in other areas of jury administration should find their way into increased juror remuneration.[1778]

11.130 The Commission has not reached a provisional view on this issue but raises the following questions on which it seeks submissions.

Questions

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 paid an amount to reimburse them for reasonable, out-of-pocket child care or other care expenses incurred as a result of jury service?

1777 At present, there are only limited provisions to make special compensation payments in Queensland: see [11.84] above.

1778 Recent reforms to remove the requirement for juries to be kept together overnight during deliberations, for instance, should have resulted in considerable savings. See *Jury Act 1995* (Qld) s 53(7), as substituted by *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld) s 26.

Chapter 12

Civil Jury Trials

INTRODUCTION

12.1 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'.[1779] Those provisions apply equally to juries in both criminal and civil trials.

12.2 Jury trials are mainly used for the determination of serious criminal charges, and the focus of this Paper has, accordingly, been on criminal juries. Civil jury trials are much rarer.

AVAILABILITY OF TRIAL BY JURY

12.3 There is no common law right to trial by jury for civil cases.[1780] Whether or not a jury may be used is determined by statute. Rules 472 and 475 of the *Uniform Civil Procedure Rules 1999* (Qld) set out the circumstances in which proceedings started by claim[1781] may proceed by jury trial.[1782] They provide that, unless jury trial is excluded by statute, a plaintiff or defendant in a civil case is entitled to elect for a jury and the court may order trial by jury in certain circumstances:

1779 The Terms of Reference are set out in Appendix A to this Paper.

1780 See *Matthews v General Accident Fire & Life Insurance Co Ltd* [1970] QWN 37 (Kneipp J); *Lohe v Gargan* [2000] QSC 140, [45] (Holmes J). 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. Also see *Rules of the Supreme Court 1971* (WA) order 32, rr 2, 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. This applies with respect to defamation proceedings in most jurisdictions under the uniform defamation legislation adopted in 2005: see [12.4] below.

1781 *Uniform Civil Procedure Rules 1999* (Qld) r 471.

1782 And see *Kelly v Kelly* [1990] 2 Qd R 147 (Derrington J) in relation to O 39, r 4 of the former *Rules of the Supreme Court* (Qld). 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. Also see *Supreme Court Act 1995* (Qld) ss 51, 259, 283(2)(g); *District Court of Queensland Act 1967* (Qld) s 75.

> **472 Jury**
>
> Unless trial by jury is excluded by an Act, a plaintiff in the statement of claim or a defendant in the defence may elect a trial by jury.
>
> …
>
> **475 Changing mode of trial**[1783]
>
> (1) The court may order a trial by jury on an application made before the trial date is set by a party who was entitled to elect for a trial by jury but who did not so elect.
>
> (2) If it appears to the court that an issue of fact could more appropriately be tried by a jury, the court may order a trial by jury. (note added)

12.4 Section 21 of the *Defamation Act 2005* (Qld) also specifically preserves the right to trial by jury:[1784]

> **21 Election for defamation proceedings to be tried by jury**
>
> (1) Unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.
>
> (2) An election must be made at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried.
>
> …
>
> (4) In this section—
>
> ***court*** means the Supreme Court or the District Court.

12.5 The right to jury trial may, however, 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:[1785]

> (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.

1783 Some special reason must ordinarily be shown why trial by jury should be ordered: see *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [1999] QSC 384, [3]–[4] (Douglas J).

1784 The same provision applies in the other jurisdictions that have adopted the uniform defamation legislation: see s 21 of the *Defamation Act 2005* as it applies in New South Wales, Tasmania, Victoria and Western Australia.

1785 See, for example, *Smit v Chan* [2001] QSC 493 (Mullins J), in which it was ordered, under r 474, that trial of the medical negligence claim proceed without a jury. In coming to this conclusion, the court had regard to the number of difficult medical issues on which determination would be required, the divergence in medical opinion as to the nature of the plaintiff's condition, the complexity of the question of causation, and the inability to examine the jury's verdict on appeal. The court did not consider, in that case, that the 'extended length and expense of a trial by jury' was relevant to the determination under r 474 'when that is a mode of trial expressly provided for in the *UCPR*': [42]. Also see LexisNexis, Civil Procedure Qld, Uniform Civil Procedure Rules 1999, 'Trial without jury' [r474.1] (at May 2010):

> In exercising its discretion under this rule the court will take into account the number of documents in the action, the physical difficulty to jurors of handling numerous documents in the jury box, the delay caused by this, … and the risk that the jury might not sufficiently understand all of the issues involved.

12.6 An identically worded provision applies in relation to defamation proceedings, under section 21(3) of the *Defamation Act 2005* (Qld).

12.7 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'.[1786]

12.8 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:[1787]

> **73 Exclusion of jury trial**
>
> A proceeding in a court based on a claim for personal injury damages must be decided by the court sitting without a jury.

12.9 Jury trial is also excluded for proceedings for damages under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) and the *Whistleblowers Protection Act 1994* (Qld).[1788]

FREQUENCY OF CIVIL JURY TRIALS

12.10 The availability of jury trial for civil proceedings is, therefore, limited. Indeed, there has been a general trend towards the limitation of the right of trial by jury in civil cases.[1789] Civil jury trials have been abolished altogether in some jurisdictions,[1790] and restricted in others.[1791] As a consequence, juries are now rarely used; civil trials in Queensland are almost universally determined by a judge without a jury,[1792] and civil juries tend to be common only in defamation proceedings.[1793]

1786 See, for example, *Shannon v Australia and New Zealand Banking Group Ltd (No 3)* [1996] 1 Qd R 340, 346, in relation to the similarly worded discretion in s 4(4), (5)(g) of the former *Commercial Causes Act 1910* (Qld). Also see *Uniform Civil Procedure Rules 1999* (Qld) r 468(2)(b)(ii).

1787 Also see *Commonwealth Motor Vehicles (Liability) Act 1959* (Cth) s 6.

1788 *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 301; *Whistleblowers Protection Act 1994* (Qld) s 43.

1789 See generally J Horan, 'Perceptions of the civil jury system' (2005) 31 *Monash University Law Review* 120, 120–1.

1790 Eg *Supreme Court Act 1933* (ACT) s 22; *Juries Act 1927* (SA) s 5.

1791 It has been noted, for instance, that the use of civil juries has 'all but stopped' in New South Wales, except for defamation proceedings; that civil jury trials accounted for only 8% of all jury trials held in the Victorian Supreme and County Courts in 2008–09; and that, since 1994, there have been no civil jury trials held in Western Australia: see, respectively, Department of Justice (Victoria), *Jury Service Eligibility*, Discussion Paper (2009) [3.1]; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 11; New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.20]. See n 1780 above.

1792 See Queensland Courts, 'The Supreme Court of Queensland' fact sheet (March 2009) <http://www.courts.qld.gov.au/Factsheets/SC-FactSheet.pdf> at 28 May 2010; 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 28 May 2010.

1793 See generally Rares J, 'The jury in defamation trials' (Paper presented at the Defamation and Media Law Conference, Sydney, 25 March 2010); B Beaumont, 'Written and oral procedures—The common law experience' (2001) 21 *Australian Bar Review* 275, 276.

12.11 The Commission understands that there are generally no more than one or two civil jury trials held in Queensland each year, most of those being held in Brisbane.[1794]

FEE FOR CIVIL JURIES

12.12 A significant difference between criminal and civil jury trials is that the parties in a civil trial must pay a fee for the use of a jury.

12.13 If a party 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.[1795]

12.14 If the court requires the jury, those fees are to be paid by the plaintiff.[1796]

12.15 The fee-paying party is entitled to the return of such fees if the trial does not proceed and no person attends the court for jury service.[1797]

HOW CIVIL JURY TRIALS OPERATE

12.16 Almost all of the provisions in the *Jury Act 1995* (Qld) apply equally to juries in criminal and civil trials.[1798] The summoning, selection and empanelling of a civil jury will generally be the same as for a criminal jury. Those procedures and provisions are outlined in chapters 2 and 10 of this Paper. Similarly, 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.

12.17 Nevertheless, there are some differences.

12.18 Empanelment of the jury will proceed in the same way as for a criminal trial, except that the number of jurors required is four[1799] (rather than 12), and the parties are entitled to two peremptory challenges[1800] (rather than eight). Up to three reserve jurors may be selected.[1801] If one or two reserve jurors are to be selected, the parties are entitled to one additional peremptory challenge. If three reserve jurors are to be selected, an additional two challenges are permitted.[1802]

1794 Correspondence from Michael Webb (Supreme and District Courts) to Queensland Law Reform Commission, 28 May 2010.

1795 *Jury Act 1995* (Qld) s 65(1); *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 11 above.

1796 *Jury Act 1995* (Qld) s 65(2); *Jury Regulation 2007* (Qld) s 11.

1797 *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.

1798 There are a small number of provisions 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).

1799 *Jury Act 1995* (Qld) s 32.

1800 *Jury Act 1995* (Qld) s 42(1). See chapter 10 above in relation to the number of jurors required in a criminal trial, and for a discussion of peremptory challenges.

1801 *Jury Act 1995* (Qld) s 34. Reserve jurors are discussed in chapter 10 above.

1802 *Jury Act 1995* (Qld) s 42(2).

12.19 If a juror dies or is discharged, and there is no reserve juror to take the juror's place, the judge may direct that the trial continue with the remaining jurors, provided that there are not less than three jurors remaining.[1803]

12.20 When the jurors are empanelled, they must take an oath or make an affirmation.[1804] The form of words is slightly different for civil jurors:[1805]

> You will conscientiously try the issues on which your decision is required and decide them according to the evidence. You will also not disclose anything about the jury's deliberations other than as allowed or required by law.

12.21 When the trial begins, the party who bears the onus of proof (usually the plaintiff) makes the opening address.[1806] It will include a statement of the following matters, agreed to by the parties prior to trial:[1807]

- the essential facts necessary to establish the plaintiff's claim;
- the essential facts necessary to establish any defence relied on by the defendant;
- details of all admitted facts; and
- the issues in question for resolution by the jury.

12.22 The plaintiff's witnesses will then be examined and cross-examined. Evidence may also sometimes be given by affidavit.[1808]

12.23 At the close of the plaintiff's case, the defendant may submit to the court that there is no case to answer. The judge will decide the application on the basis of the plaintiff's evidence.[1809]

12.24 If the defendant does not make a no-case submission, or if such an application fails, the defendant may lead its own evidence. After the evidence, final addresses will be made by the defendant and then by the plaintiff.[1810]

12.25 If the defendant does not lead evidence, closing addresses will be made by the plaintiff first, followed by the defendant.[1811]

1803 *Jury Act 1995* (Qld) s 57(1)–(2).

1804 *Jury Act 1995* (Qld) s 50.

1805 *Oaths Act 1867* (Qld) s 21. See chapter 2 above for the form of the oath in criminal jury trials.

1806 B Cairns, *Australian Civil Procedure* (6th ed, 2005) 480, 481.

1807 Supreme Court of Queensland, Practice Direction No 1 of 2002, 'Civil jury trials' (Chief Justice, Paul de Jersey, 25 March 2002) [2](a), (c). The pleadings may be read to the jury instead of an agreed statement of this kind if the pleadings 'are clear, simple and non contentious': [2](d).

1808 B Cairns, *Australian Civil Procedure* (6th ed, 2005) 480. And see *Uniform Civil Procedure Rules 1999* (Qld) rr 367(3)(d), 390.

1809 B Cairns, *Australian Civil Procedure* (6th ed, 2005) 481.

1810 Ibid.

1811 Ibid 480–1.

12.26 Whilst evidence is given through oral testimony, civil trials may also involve considerable documentary evidence. To assist the jurors in following the evidence, counsel are encouraged to give the jury a folder of exhibits at the beginning of the trial.[1812] Technical aids for the presentation of evidence, such as visualisers, are also encouraged.[1813] The judge may also direct that the jury may view or inspect a particular place or object.[1814]

12.27 Once all of the evidence has been given, the questions for the jury to determine will be formulated.[1815]

12.28 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 established', but is not to determine the amount of damages, if any, that should be awarded.[1816]

12.29 The verdict in a civil trial must ordinarily be unanimous. Provided the parties agree, the court may, however, take a 3-1 verdict if, after six hours of deliberation, the jury has failed to produce a unanimous verdict.[1817]

ISSUES FOR CONSIDERATION

12.30 In chapter 5 of this Paper, 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, and the need for jurors to be competent, independent and impartial;
- The principle of random selection of jurors;
- The need for juries to be broadly representative of the wider community; and
- The importance of non-discrimination in the selection of prospective jurors and jurors.

1812 Supreme Court of Queensland, Practice Direction No 1 of 2002, 'Civil jury trials' (Chief Justice, Paul de Jersey, 25 March 2002) [3]. The judge may give a warning to the jury that the jurors should not look at the documents contained in the folder until evidence about them is led: [3](b). Also see r 393 of the *Uniform Civil Procedure Rules 1999* (Qld) which provides for the parties to agree to the admission without proof of a plan, photograph, video or audio recording, or model.

1813 Supreme Court of Queensland, Practice Direction No 1 of 2002, 'Civil jury trials' (Chief Justice, Paul de Jersey, 25 March 2002) [3](a).

1814 *Jury Act 1995* (Qld) s 52; *Uniform Civil Procedure Rules 1999* (Qld) r 478.

1815 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].

1816 *Defamation Act 2005* (Qld) s 22.

1817 *Jury Act 1995* (Qld) s 58. See chapter 2 above for a discussion of the circumstances in which a non-unanimous verdict may be taken in a criminal jury trial.

12.31 Those principles apply equally to criminal and civil jury trials.[1818]

12.32 For the most part, the discussion in the foregoing chapters, in light of those principles, would therefore also seem to apply just as well to civil juries as to criminal juries. Civil juries may, however, involve slightly different considerations on some issues, such as the categories of occupational ineligibility that should apply.

12.33 A key proposal made in chapter 7 of the Paper, for instance, is 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 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.[1819]

12.34 That proposal, and the others in that chapter that flow from it, attempt to open up and allow for a more representative jury pool by limiting occupational exclusions to those that are truly necessary having regard, in particular, to the independence of the jury from others who are involved in the criminal justice system. This approach assumes that jury trials are almost exclusively reserved for criminal matters.

12.35 An issue to consider, however, is whether this approach is appropriate given that juries are also used, albeit very infrequently, in civil proceedings. It may be thought desirable, for example, for non-criminal lawyers to continue to be excluded from jury service for civil trials.[1820] Consideration would need to be given, however, to the desirability or otherwise of introducing different eligibility rules for civil and criminal juries. At present, the eligibility provisions of the Act make no distinction between criminal and civil juries. The introduction of such a distinction may have significant administrative consequences.

12.36 The Commission is interested to learn whether civil jury trials give rise to any special considerations in the context of juror eligibility and selection, and the Commission seeks submissions on the following questions:

1818 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'.

1819 Proposal 7-1. See [7.16]–[7.17] above. This proposal has informed a number of others made in that chapter. For example, the Commission has proposed to limit the ineligibility of lawyers to those who are involved in criminal cases, and has proposed that officers of the Supreme, District and Magistrates Courts who are associated with the administration of the criminal courts should be made ineligible for jury service. See [7.147]–[7.150], [7.219] above.

1820 At present, lawyers who are 'actually engaged in legal work' are ineligible to serve as jurors in Queensland: *Jury Act 1995* (Qld) s 4(3)(f).

Questions

12-1 In addition to Proposal 7-14 in chapter 7 of this Paper,[1821] 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?

1821 What is put forward in Proposal 7-14 is 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 [7.147]–[7.150] above.

Chapter 13

Breaches and Penalties

INTRODUCTION

13.1 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.[1822]

13.2 In reviewing the penalty regime under the *Jury Act 1995* (Qld),[1823] this chapter covers a number of matters:

- What are the breaches stipulated and the penalties imposed for them?

1822 The Terms of Reference are set out in Appendix A to this Paper.

1823 All references in this Paper 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.

- Is this regime of breaches internally consistent within the Act? Internal consistency is one of the fundamental legislative principles that governs the drafting of Queensland legislation.[1824]

- Is this regime of breaches and penalties in the Act consistent with similar legislation in other jurisdictions?

- Is this regime consistent with other legislation applicable in Queensland that deals with similar types of breaches?

- Are the penalties appropriate and proportionate to the offence?

- Are the penalties effective and sufficient to deter non-compliance?

13.3 The Terms of Reference also direct the Commission to consider 'possible improvements to proceedings for offences', including whether the Sheriff should be authorised to commence proceedings for an offence. These matters are also addressed in this chapter.

13.4 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. The Commission does not have current statistics in relation to the proportion of notices sent and summonses issued that are not complied with. However, the Commission understands that in about 2007, the rate of non-response to Questionnaires and Notices ranged between 10% and 20%; and the rate of non-attendance in response to summonses was between 5% and 7%.[1825]

13.5 It cannot be assumed that all such non-responses are deliberate avoidances; in at least some cases it is reasonable to expect that the person did not receive the Notice or the summons because, for instance, of a change of address.

PENALTIES UNDER THE *JURY ACT 1995* (QLD)

13.6 All fines applicable under the Act are either 10 or 20 penalty units, or $1000 and $2000 respectively.[1826] Section 5 of the *Penalties and Sentences Act 1992* (Qld) presently provides that one penalty unit is equivalent to $100.[1827]

13.7 Imprisonment for two months is an alternative penalty to a fine of 10 penalty units ($1000), and four months' imprisonment is an alternative penalty to a fine of 20 penalty units ($2000), wherever those fines are stipulated in the Act.

1824 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Handbook* (2008) 120.

1825 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1826 The penalties stipulated are maximum penalties; the court may impose a penalty lower, but not higher, than the penalty stipulated for the offence: see *Acts Interpretation Act 1954* (Qld) s 41; *Penalties and Sentences Act 1992* (Qld) s 47. All references to penalties, fines and terms of imprisonment in this chapter are references to maximum penalties. Unless otherwise specified, the penalties set out in this chapter are those in force as at June 2010.

1827 The relevant sections of this Act are set out in Appendix D to this Paper.

13.8 However, there are several offences mentioned in the Act for which no fine is expressly stated as an alternative penalty to imprisonment. However, other legislation provides that a court may impose a fine in addition to, or instead of, imprisonment: the Magistrates Court may impose a fine of up to 165 penalty units ($16,500) for an individual and 835 penalty units ($83,500) for a corporation.[1828]

13.9 Penalties of 10 penalty units ($1000) or two months' imprisonment are found in the following provisions of the Act:

- section 18(3): failure to return the completed prospective juror questionnaire to the Sheriff within the time allowed without a reasonable excuse;
- section 18(6): making a false statement in the prospective juror questionnaire;
- section 28(1): failure to comply with a jury summons without reasonable excuse;
- section 29(5): failure to return a copy of the list of persons summoned for jury service to the Sheriff as soon as practicable after the jury has been selected;
- section 30(1): reproducing or disclosing the contents of the list of persons summoned for jury service other than to a party, or a lawyer or person representing a party, to the trial to which the list relates;
- section 38(4): failure to attend for jury service as a supplementary juror or to comply with an instruction about jury service given by the Sheriff or a judge; and
- section 53(8): failure to comply with any conditions imposed by the judge when allowing the jury or juror to separate.

13.10 Penalties of 20 penalty units ($2000) or four months' imprisonment are found in the following provisions of the Act:

- section 68(2): failing to answer a reasonable question from the Sheriff to find out whether a person is qualified for jury service;
- section 68(3): untruthfully answering a reasonable question from the Sheriff to find out whether a person is qualified for jury service; and
- section 68(5): failure to comply with a request by the Sheriff to produce a document to find out whether a person is qualified for jury service.

13.11 A penalty of one year's imprisonment (without any express alternative monetary penalty) is found in the following provision of the Act:

1828 *Penalties and Sentences Act 1992* (Qld) ss 45, 46 and 153. The maximum that may be imposed by the District Court is 4175 penalty units ($417,500); there is no limit on the fine that may be imposed by the Supreme Court.

- section 69: terminating or prejudicing the employment of anyone because of their absence due to jury service.

13.12 Penalties of two years' imprisonment (without any express alternative monetary penalty) are found in the following provisions of the Act:

- section 31(1): 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 impermissible purposes;

- section 31(2): 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 impermissible purposes;

- section 31(5): contravening a condition imposed on the questioning of a person who has been summoned for jury service;

- section 66: impersonating a member of a jury panel, a juror or a reserve juror;

- section 67(1): falsifying a record that must be made or kept under the Act;

- section 67(2): obstructing or interfering with the proper formation of a jury under the Act;

- section 69A: the making of any inquiries by a juror about the defendant until the jury of which that juror is a member has given its verdict or been discharged by the judge;

- section 70(2): publishing jury information to the public;

- section 70(3): seeking the disclosure of jury information from a juror or former juror;

- section 70(4): 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; and

- section 70(14): disclosure by a health professional of jury information unless necessary for the health or welfare of a former juror.[1829]

Regulations

13.13 Under section 74(2) of the Act, the Governor is empowered to make regulations which create offences and prescribe penalties of no more than 10 penalty units ($1000). None has yet been made.

1829 In 1985, the Commission recommended that disclosure of protected information constitute a misdemeanour punishable by three years' imprisonment with hard labour: 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) x, App E.

Contempt of court

13.14 Several breaches of the Act may also be treated as contempt of court:

- section 28(2): failure to attend before the court as instructed by the Sheriff or the court without reasonable excuse;[1830]
- section 38(5): failure to attend for jury service as a supplementary juror or to comply with an instruction about jury service given by the Sheriff or a judge;[1831]
- section 53(9): separating from the rest of the jury when not permitted to do so; and
- section 54(3): communicating with a juror without the judge's leave.

13.15 Contempt in the face of the court is a criminal offence, but is dealt with summarily and in civil proceedings.[1832] The court may deal with the contempt immediately and on its own motion[1833] or on application by another person;[1834] it may also order the registrar to bring proceedings to punish a person for contempt.[1835]

13.16 The court's sentencing powers for contempt are very wide.[1836] The court 'may punish the individual by making an order that may be made under the *Penalties and Sentences Act 1992* (Qld)',[1837] 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'.[1838] Alternatively or in addition, the court may, at common law, reprimand the offender, require an apology or order payment of costs.[1839]

13.17 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.[1840] Section 153A 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

1830 This is an alternative to the offence created by s 28(1) of the Act: see [13.9] above.

1831 This is an alternative to the offence created by s 38(4) of the Act: see [13.9] above.

1832 *Criminal Code Act 1899* (Qld) s 8; *Uniform Civil Procedure Rules 1999* (Qld) ch 20 pt 7. Also see CJ Miller, *Contempt of Court* (2000) [1.10]–[1.11], [4.41].

1833 *Uniform Civil Procedure Rules 1999* (Qld) ch 20 pt 7 div 2 (Contempt in face or hearing of court). Also see *District Court of Queensland Act 1967* (Qld) s 129(4).

1834 *Uniform Civil Procedure Rules 1999* (Qld) ch 20 pt 7 div 3 (Application for punishment for contempt).

1835 *Uniform Civil Procedure Rules 1999* (Qld) r 928.

1836 See generally *Uniform Civil Procedure Rules 1999* (Qld) ch 20 pt 7 div 4 (General). Also, the Supreme Court's inherent power, as a superior court of record, to punish for contempt is preserved: see *Supreme Court of Queensland Act 1991* (Qld) s 9.

1837 *Uniform Civil Procedure Rules 1999* (Qld) r 930(2).

1838 *Uniform Civil Procedure Rules 1999* (Qld) r 930(4).

1839 Thomson Reuters, *The Laws of Australia* (at 2 June 2010) Criminal Offences, 'Contempt' [10.11.1440]. Also *Uniform Civil Procedure Rules 1999* (Qld) r 932 (Costs).

1840 *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* (2000) [3.92], [3.93].

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.[1841]

Proceedings for offences and enforcement of fines

13.18 Offences under the Act are simple offences (as opposed to indictable offences) and are to be dealt with summarily under the *Justices Act 1886* (Qld).[1842]

13.19 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.[1843] If convicted, the Court may impose a fine up to the amount specified in the *Jury Act 1995* (Qld) for the offence.

13.20 If a person defaults on payment of a fine, enforcement procedures may be taken under the *State Penalties Enforcement Act 1999* (Qld).[1844] 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.[1845]

13.21 Fines for breaches of the Act have been imposed on occasion, but the low level of the fines makes enforcement unviable, and many such fines are remitted.[1846]

13.22 The Commission is not aware of any prosecution under the Act for any breaches relating to an employer prejudicing an employee due to the employee's jury service.[1847] Neither is the Commission aware of any prosecution for a breach of confidentiality in relation to jury deliberations or other jury information under section 70 of the Act.[1848]

13.23 No 'infringement notice' or similar procedure is available for offences under the *Jury Act 1995* (Qld). An overview of those procedures is provided later in the chapter.

1841 See CJ Miller, *Contempt of Court* (2000) [3.94], [4.42].

1842 Criminal Code (Qld) s 3; *Acts Interpretation Act 1954* (Qld) s 44. As noted at [13.14] above, some offences under the Act may also be dealt with as contempt of court.

1843 *Justices Act 1886* (Qld) ss 42, 53, 54, 59, 72, 144–146, 148. Provision is also made in the *Justices Act 1886* (Qld) for the Court to adjourn the hearing of the complaint and to determine the matter in the absence of the defendant in certain circumstances: pt 6 div 2 (Default by complainant or defendant).

1844 *Justices Act 1886* (Qld) s 161A(3)(b); *State Penalties Enforcement Act 1999* (Qld) s 34. But also see *Justices Act 1886* (Qld) s 161A(3)(a) in relation to execution warrants issued by a justice.

1845 *State Penalties Enforcement Act 1999* (Qld) ss 38, 41, 52, 63, 75, 119.

1846 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1847 Although it seems that there have been instances of conduct that might have warranted such a prosecution: Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

1848 Although there have been some investigations in relation to possible breaches: Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

COMPARISON WITH THE JURY LEGISLATION IN OTHER JURISDICTIONS

13.24 As would be expected, a range of penalty provisions applies in the jury legislation in all other Australian jurisdictions. It is desirable that the regime of breaches and penalties under the *Jury Act 1995* (Qld) be generally consistent with the regimes in place elsewhere in Australia.

13.25 In most Australian jurisdictions, fines are expressed in legislation in terms of 'penalty units'.[1849] One penalty unit is equivalent to:

- $100 in Queensland;[1850]
- $110 in the Australian Capital Territory,[1851] New South Wales[1852] and under the *Crimes Act 1914* (Cth), section 4AA;
- a gazetted amount in Victoria, currently $116.82, with the actual penalty rounded to the nearest dollar;[1853] and
- an indexed amount in Tasmania, which is currently $120.[1854]

13.26 There are no penalty provisions in the *Jury Exemption Act 1965* (Cth) or the regulations made under that Act.

13.27 The jury legislation in the other Australian jurisdictions provides a similar range of offences to those in Queensland. The penalties imposed vary and, although there are differences, the Queensland penalties do not seem radically inconsistent with the other States and Territories overall. Tasmania and Victoria generally provide for substantially higher penalties than the other jurisdictions. South Australia, too, provides a significantly higher penalty for some offences, such as impersonating a juror (seven years' imprisonment).

13.28 Some interesting differences with the position in Queensland can be noted:

- As well as imposing generally higher penalty levels, the Tasmanian and Victorian legislation also provides that, once empanelled as a juror, the penalty for failing to attend is doubled. A similar grading of penalties is not provided in the Queensland Act.

1849 Penalty units are not used in South Australia except in legislation that relates to federal legislation (for example, in relation to corporations). In the Northern Territory and Western Australia, the penalties for offences against the jury legislation are specified in monetary terms directly. However, amendments to the penalties that apply under the *Juries Act* (NT), made by the *Justice Legislation Amendment (Penalties) Act 2010* (NT), will commence on 1 July 2010.

1850 *Penalties and Sentences Act 1992* (Qld) s 5.

1851 *Legislation Act 2001* (ACT) s 133, unless the offender is a corporation, in which case it is equivalent to $550.

1852 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

1853 *Monetary Units Act 2004* (Vic) ss 5, 7; Victoria Government Gazette No S 132, 15 May 2009. The current value will apply until 30 June 2010. It will increase to $119.45 for the financial year beginning 1 July 2010: Victoria Government Gazette No G 10, 11 March 2010, 449. 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 22 June 2010.

1854 *Penalty Units and Other Penalties Act 1987* (Tas) s 4A. This amount will apply until at least 30 June 2009: 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 22 June 2010.

- A number of jurisdictions also set separate and higher penalties for corporate offenders for offences such as dismissing an employee because of jury service and publishing confidential jury information. Similar provision is not made in Queensland.

13.29 Offences under the Queensland Act, and in the other jurisdictions, may be grouped into several broad areas, as outlined below.

Failure to attend or answer questions

13.30 All of the jurisdictions include offences for failing to attend for jury service in answer to a summons or similar notice. Several, including Queensland, also include offences for failing to answer honestly questions from the Sheriff in relation to a person's eligibility to serve.

13.31 The Queensland penalty for failure to attend for jury service in accordance with the summons fits with the lower, but dominant, end of the range when compared with the other jurisdictions, including New Zealand and the United Kingdom. The penalties in Queensland for failing to respond to the Sheriff's notice and failing to answer the Sheriff's questions (or providing false information) also appear to fall within about the middle of the range:

	Failure to respond to Sheriff's notice	Failure to answer Sheriff's questions	Failure to attend in answer to summons
Qld	$1000 or 2 months' imprisonment	$2000 or 4 months' imprisonment	$1000 or 2 months' imprisonment
ACT	$550	n/a	$550
NSW	$1100	$1100	$2200 (or less if paid immediately or dealt with by penalty notice)[1855]
NT	n/a	n/a	$500
SA	$1250	n/a	$1250
Tas	$3600 or 3 months' imprisonment	$3600 or 3 months' imprisonment	$3600 or 3 months' imprisonment $7200 or 6 months' imprisonment if failure to attend after empanelled
Vic	$3504.60 or 3 months' imprisonment	$3504.60 or 3 months' imprisonment	$3504.60 or 3 months' imprisonment $7009.20 or 6 months' imprisonment if failure to attend after empanelled
WA	n/a	n/a	Such fine as the court thinks fit
NZ	n/a	n/a	NZ$1000
UK	n/a	£1000	£100

Table 13.1: Penalties for failure to respond to a summons or to the Sheriff's questions[1856]

1855 The system of fines that applies in New South Wales is discussed in more detail at [13.90] below.

1856 See *Juries Act 1967* (ACT) s 41; *Jury Act 1977* (NSW) ss 61–63; *Juries Act* (NT) s 50; *Jury Act 1995* (Qld) ss 18(3)(6), 28, 68; *Juries Act 1927* (SA) ss 25, 78(1); *Juries Act 2003* (Tas) ss 20(4B), 27(4), 29(12), 37(4), 54, 55; *Juries Act 2000* (Vic) ss 68–72; *Juries Act 1957* (WA) s 55; *Juries Act 1981* (NZ) s 32; *Juries Act 1974* (Eng) s 20(1), (5); *Interpretation Act 1978* (Eng) s 5, sch 1; *Criminal Justice Act 1982* (Eng) s 37.

Breaches of confidentiality

13.32 Various offences in relation to disclosing, soliciting or publishing protected information about jurors and jury deliberations are also provided for in all of the Australian jurisdictions. Again, the Queensland penalties are generally consistent with those provided in the other States and Territories:

	Disclosing juror's identity	Disclosing jury deliberations
Qld	2 years' imprisonment	2 years' imprisonment
ACT	$5500 or 6 months' imprisonment or both	$5500 or 6 months' imprisonment or both
NSW	$5500 or 2 years' imprisonment ($250,000 for corporate offenders)	$2200 ($5500 if done for reward)
NT	$10,000 or 2 years' imprisonment ($50,000 for corporate offenders)	$10,000 or 2 years' imprisonment ($50,000 for corporate offenders)
NZ	NZ$10,000 or 3 months' imprisonment or both	n/a
SA	$10,000 or 2 years' imprisonment ($25,000 for corporate offenders)	$10,000 or 2 years' imprisonment ($25,000 for corporate offenders)
Tas	$72,000 or 2 years' imprisonment ($360,00 for corporate offenders)	$72,000 or 2 years' imprisonment ($360,00 for corporate offenders)
Vic	$70,092 or 5 years' imprisonment ($350,460 for corporate offenders)	$70,092 or 5 years' imprisonment ($350,460 for corporate offenders)
WA	$5000	$5000

Table 13.2: Penalties for breaches of jury confidentiality[1857]

13.33 There are also provisions in some jurisdictions dealing with improper communication with jurors to obtain information or to influence a juror or jury. The nature of offences varies greatly, making direct comparisons difficult. By way of example, however, threatening a juror is an offence in both South Australia (seven years' imprisonment) and Tasmania ($60,000 or five years' imprisonment); Queensland prohibits unauthorised questioning of a person summoned for jury service (two years' imprisonment), the obstruction or interference with the proper formation of a jury (two years' imprisonment) and communication with a juror without the judge's leave (contempt).

Impersonating a juror

13.34 All of the Australian jurisdictions also make it an offence to impersonate a juror. The Queensland penalty, for which no alternative monetary penalty is expressly provided, would appear to sit at the middle to higher end of the range of penalties for this offence:

1857 See *Juries Act 1967* (ACT) s 42C; *Jury Act 1977* (NSW) ss 68, 68B; *Juries Act* (NT) ss 49A, 49B; *Jury Act 1995* (Qld) s 70; *Criminal Law Consolidation Act 1935* (SA) s 246; *Juries Act 2003* (Tas) ss 57, 58; *Juries Act 2000* (Vic) ss 77, 78; *Juries Act 1957* (WA) pt IXA.

Qld	2 years' imprisonment
ACT	$5500 or 6 months' imprisonment or both
NSW	$5500
NT	$2000
SA	7 years' imprisonment
Tas	$14,400 or 12 months' imprisonment
Vic	$14,018.40 or 12 months' imprisonment
WA	Such fine as the court thinks fit

Table 13.3: Penalties for impersonating a juror[1858]

Wrongful termination of employment

13.35 It is also an offence, in most Australian jurisdictions, for an employer to dismiss a person because of his or her jury service. The Queensland penalty is generally consistent with those in the other States and Territories:

Qld	12 months' imprisonment
ACT	$5500 or 6 months' imprisonment or both
NSW	$2200
NT	$5000 or 12 months' imprisonment
SA	n/a[1859]
Tas	$14,400 or 12 months' imprisonment ($72,000 for corporate offenders)
Vic	$14,018.40 or 12 months' imprisonment ($70,092 for corporate offenders)
WA	n/a

Table 13.4: Penalties for terminating a juror's employment[1860]

Receiving excess juror fees

13.36 Some jurisdictions also make it an offence for jurors to take a payment in excess of the amount to which they are entitled under the pretence of receiving remuneration for attendance at a trial. The Queensland Act does not include an express provision dealing with this.

1858 See *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; *Juries Act 1957* (WA) s 55(1)(c).

1859 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 7 years' imprisonment.

1860 See *Juries Act 1967* (ACT) s 44AA; *Jury Act 1977* (NSW) s 69; *Juries Act* (NT) s 52; *Jury Act 1995* (Qld) s 69; *Juries Act 2003* (Tas) s 56; *Juries Act 2000* (Vic) ss 76, 83.

Qld	n/a
ACT	n/a
NSW	n/a
NT	$500
SA	$1250
Tas	$14,400 or 12 months' imprisonment
Vic	$14,018.40 or 12 months' imprisonment
WA	Such fine as the court thinks fit

Table 13.5: Penalties for receiving excess juror fees[1861]

Breaches by officials

13.37 The legislation in Queensland and in some of the other Australian jurisdictions also includes various offences for breaches by officials, and other people, in relation to jury lists. The offences vary in nature, making direct comparisons difficult. However, for wrongful alteration of information about jurors, Queensland provides a penalty of two years' imprisonment, Victoria provides a penalty of $70,092 or five years' imprisonment, and Western Australia provides for a fine in the amount deemed fit by the court.[1862]

Overview of each jurisdiction

13.38 A more detailed summary of penalty provisions, jurisdiction by jurisdiction, follows.

Australian Capital Territory

13.39 In the Australian Capital Territory:

- A fine of five penalty units ($550) applies for a failure to comply with a summons to attend for jury service and similar breaches of the *Juries Act 1967* (ACT) (sections 41 to 42B); and
- Fines of 50 penalty units ($5500) or six months' imprisonment, or both apply to breaches of jury confidentiality (section 42C), 'personation' of jurors (section 43) and unlawful dismissal of employees for jury service (section 44AA).

New South Wales

13.40 In New South Wales, offences under the *Jury Act 1977* (NSW) are collected in Part 9 (sections 60 to 71) of that Act. It sets a range of modest monetary penalties for certain offences:

1861 See *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; *Juries Act 1957* (WA) s 55(1)(e).

1862 *Jury Act 1995* (Qld) s 67(1); *Juries Act 2000* (Vic) s 66; *Juries Act 1957* (WA) s 54.

- Fines of 10 penalty units ($1100) apply for offences for failing to respond (or respond honestly) to a Sheriff's notice (sections 61 to 62A);

- A fine of 20 penalty units ($2200) applies for failure to attend for jury service (section 63), although this offence can be dealt with by way of penalty notice, in which case lower fines apply (sections 64 and 66);

- A fine of 50 penalty units ($5500) applies to an offence of personating a juror (section 67);

- A fine of 10 penalty units ($1110) applies for wrongful inspection of a Sheriff's jury information (section 67A); and

- A fine of 20 penalty units ($2200) applies for unlawful dismissal of an employee summoned for jury service (section 69).

13.41 Significantly higher penalties apply in New South Wales for some other offences relating to breach of jury confidentiality and other breaches by jurors:

- Disclosure of the identity or address of a juror or former jury is punishable by a fine of 50 penalty units ($5500) or two years' imprisonment, or a fine of $250,000 for a corporate offender (section 68);

- Soliciting from a juror, or harassing a juror to obtain, information about a jury's deliberations or how a juror came to a decision is punishable on indictment by seven years' imprisonment (section 68A);

- Disclosure by a juror of jury information attracts a fine of 20 penalty units ($2200), unless done for reward, in which case the fine is 50 penalty units ($5000) (section 68B);

- A juror who makes enquiries about the accused or any matters relevant to the trial is punishable by a fine of 50 penalty units ($5500) or two years' imprisonment, or both (section 68C); and

- Directors of corporate offenders attract personal liability under section 70.

Northern Territory

13.42 In the Northern Territory, offences are covered in Part X (sections 49A to 56) of the *Juries Act* (NT).[1863]

13.43 The penalty for breaches of jury information confidentiality and publishing protected information is a fine of $10,000 or imprisonment for two years (sections 49A and 49B). The fine for corporate offenders is five times that of the fine specified for individuals under sections 49A and 49B (that is, $50,000).

1863 The penalties under the *Juries Act* (NT) are to be amended by the *Justice Legislation Amendment (Penalties) Act 2010* (NT), which will commence on 1 July 2010.

13.44 Lower fines apply for other offences:

- $500 for non-attendance in answer to a summons (section 50);
- $5000 or 12 months' imprisonment for wrongful dismissal of an employee (section 52);
- $2000 for 'personation' of a juror (section 55); and
- $500 for wrongfully receiving excessive juror fees (section 56).

South Australia

13.45 In South Australia, the *Juries Act 1927* (SA) provides a fine of $1250 for failure to respond (or respond honestly) to the Sheriff's questionnaire, failure to attend in answer to a summons, or receiving excess juror fees (sections 25(2), 78)).

13.46 Other relevant offences are created by sections 245 to 248 of the *Criminal Law Consolidation Act 1935* (SA):

- A penalty of seven years' imprisonment applies for offences relating to jurors, such as inducing a juror not to attend or to influence the outcome of proceedings, impersonating a juror, accepting an inducement not to attend as a juror or to act in a way that might influence the outcome of proceedings (section 245);
- Fines of $10,000 ($25,000 for corporations) or two years' imprisonment are the penalties for offences in relation to the disclosure, soliciting or publication of protected information (section 246);
- Similar fines of $10,000 ($25,000 for corporations) or two years' imprisonment are imposed in relation to harassing a juror in order to obtain information about a jury's deliberations (section 247); and
- Stalking or threatening a juror or any other person involved in criminal investigations or judicial proceedings is punishable by imprisonment for seven years (section 248).

Tasmania

13.47 In Tasmania, the *Juries Act 2003* (Tas) provides for a fine of 30 penalty units ($3600) or three months' imprisonment for the following offences:

- Failure to answer questions made by, or to provide information to, the Sheriff (sections 20, 54 and 55);
- Failure to comply with a summons (section 27);
- A supplementary juror's failure to attend (section 37); and
- Failure to take the required oath or affirmation (section 38).

13.48 A fine of 60 penalty units ($7200) or six months' imprisonment applies if a juror fails to attend after being empanelled (section 29).

13.49 A juror who improperly communicates to another person during an adjournment of the trial in breach of section 47 commits contempt of court and may be punished accordingly (section 51).

13.50 An employer who wrongfully terminates, threatens to terminate or prejudices a person's employment because of that person's jury service is liable to a fine of 120 penalty units ($14,400) or 12 months' imprisonment, or a fine of 600 penalty units ($72,000) in the case of a corporate offender (section 56).

13.51 Similar penalties apply for impersonating a juror (section 62) and receiving excessive juror fees (section 64).

13.52 Publishing information that identifies a juror or potential juror, or publishing other protected jury information, attracts a much larger fine of 600 penalty units ($72,000) or two years' imprisonment, or a fine of 3000 penalty units ($360,000) in the case of a corporate offender (section 57).

13.53 Influencing or threatening a juror attracts a fine of 500 penalty units ($60,000) or five years' imprisonment (section 63).

Victoria

13.54 In Victoria, offences are covered by Part 10, Division 1 (sections 65 to 79) of the *Juries Act 2000* (Vic).

13.55 Part 10 establishes a number of offences by officials:

- An official who fails to keep the secrecy in relation to information about jurors required by the Act is liable to a fine of 120 penalty units ($14,018.40) or 12 months' imprisonment (section 65); and

- An official who wrongfully alters information about jurors, or wrongfully excuses a person from jury service is liable to a fine of 600 penalty units ($70,092) or five years' imprisonment (section 66).

13.56 Breaches by potential jurors attract much lower fines:

- Failure to answer questions or to provide information or documents, and providing misleading information, attract fines of 30 penalty units ($3504.60) or, in some cases, three months' imprisonment (sections 68 to 70);

- Failure to attend for jury service attracts a fine of 30 penalty units ($3504.60) or three months' imprisonment but penalties are doubled (60 penalty units ($7009.20) or six months' imprisonment) for a juror who fails to attend once empanelled (sections 71 to 73);

- Impersonating a juror attracts a fine of 120 penalty units ($14,018.40) or 12 months' imprisonment (sections 74 and 82); and

- Receiving excess juror fees also attracts a fine of 120 penalty units ($14,018.40) or 12 months' imprisonment (sections 75 and 82).

13.57 Wrongfully terminating or prejudicing a person's employment because of jury duty attracts a fine of 120 penalty units ($14,018.40) or 12 months' imprisonment, or a fine of 600 penalty units ($70,092) for a corporate offender (sections 76 and 83).

13.58 Significantly higher penalties apply in other circumstances. Fines of 600 penalty units ($70,092) or five years' imprisonment (or fines of 3000 penalty units ($350,460) for corporate offenders) apply for:

- publishing the names of jurors (section 77); and
- breaching the confidentiality of a jury's deliberations (section 78).

13.59 A juror who makes enquiries about matters relevant to the trial is liable to a fine of 120 penalty units ($14,018.40) (section 78A).

Western Australia

13.60 In Western Australia, offences are covered by Parts X (sections 53 to 56) and XI (sections 56A to 57) of the *Juries Act 1957* (WA). Under Part X:

- a failure by the Sheriff or other officials to properly execute their duties under the Act attracts a fine of $100 (section 53);
- the Sheriff or other official who without excuse or justification alters information about jurors, or who accepts money to excuse a person from jury service, may be fined by the Supreme Court such amount as it deems fit (section 54);
- jurors who fail to attend or who accept excessive fees are liable to be fined such amount as the Supreme Court deems fit (section 55); and
- impersonation of a juror also attracts a fine of such amount as the Supreme Court deems fit (section 55).

13.61 Part XI relates to jury confidentiality. Under that Part, the disclosure, publication or soliciting of protected jury information attracts fines of $5000 (sections 56B to 56D). Photographing or publishing a photo of a juror is contempt of court, and punishable as such, under section 57.

13.62 In its recent Discussion Paper on jury selection, the Law Reform Commission of Western Australia also proposed the introduction of a provision, modelled on section 76 of the *Juries Act 2000* (Vic), making it an offence for:

> an employer or anyone acting on behalf of an employer to terminate, threaten to terminate or otherwise prejudice the position of an employee because the employee is, was or will be absent from employment on jury service.[1864]

1864 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 129, Proposal 50. It also considered that this protection should be extended to independent contractors.

New Zealand

13.63 A fine of NZ$1000 applies for failure to attend in answer to a summons in New Zealand. Fines of NZ$10,000 apply if an employer dismisses or otherwise prejudices the employment of an employee while on jury service, or if a person publishes any material that identifies or may lead to the identification of any serving or former juror.[1865]

England and Wales

13.64 The fine for failure to answer a jury summons in England and Wales is £100. A fine of £1000 applies if a person makes a false representation to the appropriate officer in order to evade jury service or refuses, without reasonable excuse, to answer or gives a false answer. If the person serves while disqualified, the fine may be increased to £5000.[1866]

COMPARISON WITH OTHER LEGISLATION IN QUEENSLAND

13.65 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.

13.66 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.

13.67 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

13.68 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 enrol or a failure to vote.[1867] Similarly, under the Commonwealth electoral legislation, failure to enrol attracts a one penalty unit ($110) fine and failure to vote a fine of $50.[1868] 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.

1865 *Juries Act 1981* (NZ) ss 32, 32A, 32B.

1866 *Juries Act 1974* (Eng) s 20(1), (5); *Interpretation Act 1978* (Eng) s 5, sch 1; *Criminal Justice Act 1982* (Eng) s 37.

1867 *Electoral Act 1992* (Qld) ss 150, 164.

1868 *Commonwealth Electoral Act 1918* (Cth) ss 101, 245. One penalty unit is $110: *Crimes Act 1914* (Cth) s 4AA.

13.69 This may simply reflect, however, the different nature of voting 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

13.70 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[1869] 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,[1870] but only two penalty units ($200) under the *Justices Act 1886* (Qld).[1871] 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)[1872] but others are as high as 1000 penalty units ($100,000) or one year's imprisonment[1873] and still others are set at 40, 20 or 10 penalty units ($4000, $2000 and $1000 respectively).[1874]

Penalties for offences against the administration of law and justice

13.71 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).[1875] Section 205 of the 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.[1876]

13.72 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

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1869 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.

1870 *Commissions of Inquiry Act 1950* (Qld) s 5.

1871 *Justices Act 1886* (Qld) s 79(1).

1872 Eg *Criminal Proceeds Confiscation Act 2002* (Qld) s 41; *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.

1873 Eg *Queensland Competition Authority Act 1997* (Qld) s 183.

1874 Eg *Coroners Act 2003* (Qld) s 37(6) (40 penalty units); *Mental Health Act 2000* (Qld) s 468 (40 penalty units); *Biological Control Act 1987* (Qld) s 41 (20 penalty units); *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).

1875 Criminal Code (Qld) pt 3 (Offences against the administration of law and justice, against office and against public authority).

1876 Although some of the indictable offences in pt 3 of the Code may be dealt with summarily: see Criminal Code (Qld) ss 141–144, 148, 552A.

that it was the officer's duty to keep secret is also punishable by two years' imprisonment.[1877] 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.[1878]

ARE THE PRESENT PENALTIES APPROPRIATE?

13.73 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:

> 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.[1879]

13.74 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:

> 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.[1880]

13.75 The overriding principles of enforcement provisions are set out in the *Queensland Legislation Handbook*:

> 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.

1877 *Jury Act 1995* (Qld) s 70(4); Criminal Code (Qld) s 85.

1878 *Jury Act 1995* (Qld) s 66; Criminal Code (Qld) ss 96, 97.

1879 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook* (2008) 120.

1880 Ibid 122.

> 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 7–8, 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.[1881]

13.76 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.

13.77 In its recent Discussion Paper on jury selection, the Law Reform Commission of Western Australia expressed the preliminary view that, while imprisonment should not be available as a penalty for non-compliance with a jury summons, the monetary penalty 'should be set at a sufficiently high level to act as a deterrent', somewhere in the range of $600 to $800.[1882] It sought submissions on this issue.

ARE THE PRESENT PENALTIES EFFECTIVE?

13.78 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?

1881 Queensland Government, *Queensland Legislation Handbook* (2nd ed, 2004) [2.12.4].

1882 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 133–4.

- 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?

13.79 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 burden of doing so is shared more equitably and amongst as large a number of community members as possible.

13.80 One assumption underlying some of these issues is that non-compliance can be remedied by the imposition of penalties such as fines, or even imprisonment. If the real cause of non-compliance is an issue that is outside the administrative scope of the Act, then the solution may not lie in a regime of increased penalties but in a re-thinking of other aspects of jury service. For example, there is no doubt that jury service is a considerable inconvenience for many people, especially where they are involved in a lengthy trial. Given the modest level of allowances paid to jurors and the major disruption to their lives on many levels that jury service entails (especially on long trials), fines of the scale that are currently imposed (or that might be considered in any ramped-up regime) may well be seen as a small price to pay to avoid jury service.

13.81 Stakeholders interviewed as part of a juror satisfaction research project for the Australian Institute of Criminology noted that there may be more benefit in finding out why people fail to respond to summonses rather than imposing penalties for non-attendance:

> 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)[1883]

13.82 One approach might be to consider different strategies for short jury service and for service on long trials that might conceivably involve different jury lists or pools from which jurors are drawn.

A POSSIBLE INFRINGEMENT NOTICE SCHEME

13.83 As noted earlier, penalties for breaches of the Act, even if imposed, are infrequently enforced. 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. It might be considered more effective if fines, even of relatively modest amounts, were issued as a matter of some routine, in similar fashion to 'on-the-spot' fines for traffic offences, for example.

13.84 Such a scheme is provided for under Part 3 of the *State Penalties Enforcement Act 1999* (Qld). A relevant authorised official who 'reasonably believes' that a person has committed an infringement notice offence may serve an infringement notice on the person. The person is required to pay the fine specified in the notice in full within 28 days, elect to have the matter dealt with by the Magistrates Court, or apply to pay the fine by instalments.

13.85 If the fine is paid, no further action is to be taken and no conviction is recorded. Unpaid infringement notices may be registered and further action to enforce the fine will be taken. Again, if the fine is paid in the time required, no other action will be taken and no conviction will be recorded.[1884]

13.86 However, if the person fails to comply (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).

13.87 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.[1885] Failure to vote is also an infringement notice offence for which the electoral commissioner is authorised to issue infringement notices.[1886]

13.88 Allowing 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, may similarly be desirable.[1887] It would allow fines to be issued administratively,

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1883 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.

1884 See *State Penalties Enforcement Regulation 2000* (Qld) ss 22, 33, 35, 38, 115(3), (4).

1885 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, sch 5.

1886 See *State Penalties Enforcement Regulation 2000* (Qld) ss 4, 5, sch 5; *Electoral Act 1992* (Qld) s 164.

1887 Correspondence from Neil Hansen (former Sheriff of Queensland) to Queensland Law Reform Commission, 25 May 2009.

facilitating enforcement without court action and thus at potentially less expense. By facilitating more frequent enforcement action, it might also ensure appropriate recognition for the seriousness of jury service obligations.

13.89 On the other hand, such a system would impose an additional administrative burden on the Sheriff's Office. It may also have the effect that potential jurors may 'opt' to pay a fine rather than attend for jury service.

NSWLRC's recommendations

13.90 The NSW Law Reform Commission outlined the existing 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:

> 9.21 The *Jury Act* allows a court to impose a penalty not exceeding 20 penalty units ($2,200) on anyone who fails to attend for jury service without reasonable excuse.[1888] 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 ($1,100)[1889] which, if paid, will apply in full satisfaction of the potentially higher court-imposed penalty.
>
> 9.22 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 ($1,100), 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.[1890] A penalty notice for failure to attend attracts a fine of 15 penalty units ($1,650).[1891]
>
> …
>
> 9.24 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.[1892] (notes in original)

13.91 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'.[1893] It also remarked on the need for education about the importance of compliance:

> 9.30 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 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

1888 *Jury Act 1977* (NSW) s 63(1).

1889 *Jury Act 1977* (NSW) s 64(2)(a).

1890 *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.

1891 *Jury Act 1977* (NSW) s 66(2).

1892 New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [9.21]–[9.24].

1893 Ibid [9.29], and see [9.25].

> 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.[1894]

13.92 It recommended that the penalties for failure to respond to a summons for jury service should be the subject of ongoing review.[1895]

LRCWA's proposals

13.93 The Law Reform Commission of Western Australia considered that the current procedure for imposing and enforcing fines for non-attendance in compliance with a jury summons is 'cumbersome and inadequate' and 'creates an unnecessary burden on judicial resources':

> The process involves multiple stages: a DNA ['did not attend'] investigation[1896] by the Sheriff's Office; referral of matters to the District Court; imposition of a fine by a judge; issuing of summons and notices to the person fined; consideration by a judge of any affidavits in relation to why the fine should not be enforced; and finally a decision to remit or reduce the previous fine imposed. And, after all of this takes place, outstanding fines are enforced under the *Fines, Penalties and Infringement Notices Enforcement Act* (which contains a series of options and stages for enforcing fines including possible licence suspension, seizure of goods and, ultimately, imprisonment).[1897] (note added)

13.94 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 require the 'did not attend' investigation by the Sheriff's Office:[1898]

> The Commission agrees that a fine by way of infringement notice is appropriate, though it questions whether such a fine should apply 'automatically'. In this regard, the Commission notes the following:
>
> - There are a significant number of people summoned who do not receive the juror summons at all or in time (eg, in 2008 approximately 7.6% of people summoned for jury service in Perth).

1894 Ibid [9.30].

1895 Ibid 167, Rec 42.

1896 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*, Discussion Paper (2009) 131:

> In the metropolitan area, the Sheriff's Office compiles a list of people who did not attend ('DNA') for jury service. After waiting for approximately two weeks (in order to see if anyone contacts the Sheriff's Office because they received the summons late) the names on the list are checked against current addresses on police records. If the address on this database is different to the address to which the summons was originally sent (ie, the address on the electoral roll) the person is given the benefit of the doubt — it is assumed that the summons was not received. For those remaining, the Sheriff's Office endeavours to make contact by phone or letter in order to determine if there was a valid reason for nonattendance. Following this process, those people who have not responded or who have not demonstrated a valid excuse are referred to the District Court to be dealt with in accordance with the provisions of the *Juries Act*.

1897 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) 132.

1898 Ibid 132, Proposal 51.

- That in certain regional locations there is no postal delivery service and therefore, unless mail is regularly collected from the post office, the person is unlikely to receive the juror summons[1899] in time and may not receive the relevant notices from the Fines Enforcement Registry.

- That if an infringement is registered with the Fines Enforcement Registry and a licence suspension order has been made in default of payment, an application has to be made to a magistrate to cancel the licence suspension order.

Therefore, in order to minimise any potential unfairness to members of the community who were genuinely unaware of the requirement to attend for jury service, the Commission supports a continuation of the existing practice of a DNA ['did not attend'] investigation by the Sheriff's Office.[1900] This investigation process will identify some jurors who should not be penalised and will avoid the negative consequences of an automatic infringement for these people. Following the DNA ['did not attend'] investigation, the Commission proposes that the Sheriff's Office (or the summoning officer) issue an infringement notice in those cases where it appears that the person has failed to comply without a reasonable excuse.[1901]

PROPOSAL 51

Penalties for non-compliance with a juror summons

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

1. It is an offence to fail to comply with a juror summons without reasonable excuse.

2. If the summoning officer has reason to believe that a person has, without reasonable excuse, failed to comply with a juror summons, the summoning officer may issue an infringement notice in the prescribed form.[1902] (notes in original)

ISSUES FOR CONSIDERATION

13.95 The Commission has not reached a provisional view about the appropriateness of the level of penalties for offences under the Act and seeks submissions on this issue.

1899 See above Chapter Two, 'Problems with the jury selection process' [of the LRCWA's Discussion Paper].

1900 The Jury Manager has indicated his support for a system where a preliminary investigation is undertaken before an infringement is issued: Carl Campagnoli, Jury Manager (WA), consultation [with the LRCWA] (20 August 2009).

1901 The offences of failing to comply with a juror summons in Victoria, Queensland, New South Wales and the Australian Capital Territory each adopt a similar phrase (eg, 'without reasonable excuse' or 'without valid and sufficient excuse': *Juries Act 2000* (Vic) s 71; *Jury Act 1995* (Qld) s 28; *Juries Act 1977* (NSW) s 63(3); *Juries Act 1967* (ACT) s 41.

1902 Under the *Juries Act 1957* (WA) a fine may be imposed on a person who fails to attend a court or fails to attend the jury assembly room. Likewise, a talesman may be fined for failing to attend court or wilfully withdrawing him or herself from the court (s 55(1)(b)). Section 55 also provides that a person may be summarily fined by the court if he or she 'personates or attempts to personate a juror whose name is on a jury panel for the purpose of sitting as that juror' or if he or she knowingly receives any sum over and above the amount allowed as fees or remuneration for attending a trial. The Commission [LRCWA] notes that these other offences may need to be reconsidered in light of the Commission's proposal; it may not be appropriate to issue an infringement notice for all of these offences and instead separate offences could be created with a specified maximum penalty.

13.96 The Commission is concerned to learn whether there are any aspects of the penalty regime under the *Jury Act 1995* (Qld) that warrant review due to a lack of internal consistency.

13.97 The Commission is also interested to learn if there is any view that the penalty provisions within the Act are in any way inconsistent with the overall penalties and sentencing strategy found in Queensland legislation.

13.98 Additionally, the Commission is interested in submissions on any amendments that might usefully be made to the procedures for enforcing penalties for breaches of the Act and, in particular, whether any offences under the Act should be dealt with by infringement notices issued by the Sheriff.

13.99 The Commission considers 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 is concerned, however, that it may not be sufficiently flexible to avoid the imposition of fines in circumstances where the person has a reasonable excuse for the failure.[1903] In this regard, the Commission notes 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.[1904] Another issue to consider is whether an infringement notice system should apply to any other breaches under the Act.

13.100 The Commission puts forward the following questions on which it seeks submissions:

Questions

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?

1903 It is not an offence under ss 18(3) or 28 of the *Jury Act 1995* (Qld) if the person has a reasonable excuse.

1904 See [13.94] above.

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?

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;[1905]
- 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.

1905 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

Appendix B

Preliminary Respondents

Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

Mr Graham Kearney

Legal Aid Queensland

Mr Brian Pike

The Queensland Law Society

The Queensland Retired Police Association Inc

Fr Peter F Schultz

Vision Australia

Mr Cedric Wright

In addition, the Commission received written or oral submissions from 8 members of the public who identified themselves as having served on juries in Queensland. The Commission has taken the view that their names should not be published to ensure that there is no improper publication or other disclosure of jury information.

Appendix C

Extracts from the *Jury Act 1995* (Qld)

Notes:

1. Footnotes appear as in the *Jury Act 1995* (Qld).

2. Part 6 (sections 50 to 62) of the *Jury Act 1995* (Qld), which has been omitted from these extracts, relates primarily to various procedural matters such as inspections and views, segregation of juries, accommodation for juries, reduced juries, majority verdicts and discharge.

3. Sections 72 to 79 of the *Jury Act 1995* (Qld), which have also been omitted from these extracts, relate to the delegation of powers, approval of forms and regulations made under the Act, and include transitional provisions.

PART 2 CITIZEN'S OBLIGATION TO PERFORM JURY SERVICE

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);

(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.

5 Obligation to perform jury service

A person who is qualified for jury service is liable to perform jury service unless the person is excused from jury service by a judge or the sheriff.[1906]

6 Verdict not to be questioned on ground of qualification of juror

The fact that a person who is not qualified for jury service serves on a jury is not a ground for questioning the verdict.

PART 3 JURY DISTRICTS AND JURY ROLLS

DIVISION 1 JURY DISTRICTS

7 Jury districts—establishment and boundaries

(1) A jury district may be established or abolished under a regulation.

(2) The boundaries of a jury district are as defined under a regulation.

8 Assignment of responsibility for jury districts to other sheriffs and persons

(1) Responsibility for carrying out the sheriff of Queensland's functions under this Act for a particular jury district may be assigned under a regulation to—

(a) the central sheriff; or

(b) the northern sheriff; or

(c) a deputy sheriff; or

(d) another officer or person specified under a regulation.[1907]

(2) However, despite an assignment of responsibility under this section, the sheriff of Queensland—

(a) remains responsible for keeping jury rolls and preparing lists of prospective jurors for all jury districts; and

(b) may, by agreement with the sheriff to whom responsibility for a particular jury district has been assigned, issue notices[1908] and summonses[1909] to prospective jurors for the jury district.

DIVISION 2 JURY ROLLS

9 Keeping of jury rolls

(1) The sheriff of Queensland must keep a jury roll for each jury district.

(2) A jury roll may be kept in any way, including, for example, by computer.

1906 For power to excuse from jury service, see sections 19 to 23.

1907 The northern sheriff and the central sheriff are appointed under the *Supreme Court Act* 1995, section 273. The deputy sheriffs are appointed under the *Supreme Court Act* 1995.

1908 See section 18 (Notice to prospective jurors).

1909 See section 27 (Summons for jury service).

10 Jury roll for a jury district

(1) The jury roll for a particular jury district must consist of a list of the names, addresses and occupations of electors whose addresses, as recorded in an electoral roll, are within the jury district.

(2) However, the sheriff of Queensland must exclude from the jury roll the names of persons who are, to the sheriff's knowledge, not qualified for jury service.

(3) The sheriff of Queensland may make reasonable inquiries to find out which persons enrolled as electors for addresses in a particular jury district should be excluded from the jury roll.

11 Electoral commission to give information

If asked by the sheriff of Queensland, the electoral commission must—

(a) give the sheriff information reasonably required for keeping a jury roll; and

(b) allow the sheriff access to any information the commission has relevant to the keeping of jury rolls.

12 Arrangements with commissioner of the police service

(1) For keeping a jury roll, the sheriff or the electoral commission may arrange with the commissioner of the police service for the police service to—

(a) make inquiries reasonably required for keeping a jury roll; or

(b) give other reasonable help relevant to keeping a jury roll.

(2) The sheriff or the electoral commission must give a police officer helping under the arrangement any information the sheriff or commission has that may help the officer conduct the inquiries.

(3) Subsection (1) does not limit the help the sheriff or the electoral commission may require.

(4) The *Criminal Law (Rehabilitation of Offenders) Act 1986* does not apply to the disclosure of information for inquiries, or to the sheriff or the electoral commission, under this section.

PART 4 ASSEMBLY OF JURORS

DIVISION 1 GENERAL POWERS OF SENIOR JUDGE ADMINISTRATOR

13 Practice directions

After consulting with the chief judge of the District Court and the President of the Childrens Court, the senior judge administrator may issue directions under the *Supreme Court of Queensland Act 1991*[1910] about—

1910 The *Supreme Court of Queensland Act 1991*, section 60, deals with the responsibility of the senior judge administrator for the administration of the Supreme Court in the trial division. The section empowers the senior judge administrator, among other things, to issue directions about the practices and procedures of the Supreme Court in the trial division (s 60(2)).

(a) the preparation of lists of prospective jurors for each jury district and, in particular, how often a fresh list is to be prepared for each jury district; and

(b) summoning and assembling prospective jurors for jury service; and

(c) forming panels of prospective jurors from the available persons who have been summoned for jury service in a jury district so juries may be selected for civil and criminal trials that are to begin in the jury district; and

(d) the criteria for excusing from jury service and the circumstances in which a person may be excused permanently from jury service; and

(e) jury members being informed of the names of the parties and any witnesses to be called.

14 Administrative directions

After consulting with the chief judge of the District Court, the senior judge administrator may give administrative directions for the proper and efficient administration of this Act to sheriffs and other persons engaged in the administration of this Act.

DIVISION 2 PREPARATION OF LISTS OF PROSPECTIVE JURORS

15 Lists of prospective jurors

(1) The sheriff of Queensland must prepare lists of prospective jurors for each jury district.

(2) The sheriff of Queensland may decide how often a list of prospective jurors is to be prepared for each jury district and the number of persons to be included in each list according to the sheriff's estimate of the likely need for jurors in the jury district.

(3) However—

(a) the sheriff of Queensland must comply with requirements under the practice directions about how often fresh lists of prospective jurors are to be prepared for each jury district; and

(b) subject to the practice directions, the sheriff of Queensland must comply with the request of another sheriff—

(i) for the preparation of lists of prospective jurors for the jury district for which the other sheriff is responsible; and

(ii) about the number of prospective jurors to be included in each list.

16 Selection of persons to be included in list of prospective jurors

(1) The names of persons to be included in the list of prospective jurors are to be drawn from the jury roll for the relevant jury district.

(2) The selection must be made—

(a) by a computer programmed to make a random selection of names from the jury roll; or

(b) by random selection of cards bearing the names of, or numbers representing, the persons whose names are on the jury roll.

17 Copies of list must be given to other sheriffs

When the sheriff of Queensland prepares a list of prospective jurors for a jury district for which another sheriff is responsible, the sheriff of Queensland must give a copy of the list to the other sheriff.

DIVISION 3 NOTICE TO PROSPECTIVE JURORS

18 Notice to prospective jurors

(1) The sheriff must give each prospective juror a written notice (a notice to prospective jurors) stating—

(a) the person may be summoned for jury service; and

(b) the jury service period for which the person may be summoned.

(2) The notice must include or be accompanied by—

(a) a questionnaire (a prospective juror questionnaire) to find out whether the person is qualified to serve as a juror and, if the person claims not to be qualified to serve as a juror, the ground of the claim; and

(b) a form (an application form) to enable the person to apply to be excused from jury service.

(3) A person to whom the notice is 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.

Maximum penalty—10 penalty units or 2 months imprisonment.

(4) If the person wants to be excused from jury service, the person must return the completed application form to the sheriff.

(5) Unless permitted by the practice directions, the sheriff may excuse a person from jury service only on an application form that states the reasons for asking to be excused from jury service.

(6) A person must not state something the person knows is false in response to a prospective juror questionnaire, or in an application to be excused from jury service.

Maximum penalty for subsection (6)—10 penalty units or 2 months imprisonment.

DIVISION 4 POWER TO EXCUSE FROM JURY SERVICE

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.

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.

DIVISION 5 REVISION OF LIST OF PROSPECTIVE JURORS

24 Revision of list

(1) After the end of the time allowed in the notices to prospective jurors for the return of prospective juror questionnaires, the sheriff must revise the list of prospective jurors.

(2) The revision is made by noting on the list the exclusion from the list of the name of each person—

(a) who, in the sheriff's opinion—

(i) cannot be located within a reasonable time; or

(ii) is not qualified for jury service; or

(b) who has been excused from jury service.

(3) The sheriff may make reasonable inquiries to find out whether the name of a person on the list of prospective jurors should be excluded from the list because the person is not qualified for jury service.

25 Effect of revised list

(1) On revision of the list of prospective jurors, the list (***the revised list of prospective jurors***) becomes the basis for issuing summonses for jury service in the relevant jury district for the jury service period concerned.

(2) However, an unrevised list of prospective jurors may be used as the basis for issuing summonses for jury service, if the sheriff considers there is not enough time to allow the list to be revised before the summonses are issued.

(3) A prospective juror selected from an unrevised list of prospective jurors may be summoned for jury service only if the notice to prospective jurors[1911] has been given to the prospective juror, or is given to the prospective juror together with the summons.

DIVISION 6 SUMMONING FOR JURY SERVICE

26 Selection of persons for summons

(1) The sheriff must from time to time (as the sheriff considers necessary) select for summons enough prospective jurors to enable the selection of juries for trials starting in the relevant jury district in the jury service period concerned.

(2) The persons to be summoned must be selected—

(a) by a computer programmed to make a random selection of names from the revised list of prospective jurors; or

(b) by random selection of cards bearing the names of, or numbers representing, the persons whose names are on the revised list of prospective jurors.

(3) However, the selection may be made from the unrevised list of prospective jurors, if the sheriff considers there is not enough time to allow for the list to be revised before the summonses are issued.[1912]

27 Summons for jury service

(1) The sheriff must give to each person selected for summoning a summons requiring the person—

(a) to attend for jury service as instructed by the sheriff at places and times to be stated in the instructions; and

(b) if selected as a member of a jury, to attend as instructed by the court until discharged by the court.

(2) A person summoned for jury service may only be instructed by the sheriff to attend for jury service at a time that falls within a period stated in the summons as the jury service period.

(3) The sheriff must instruct a sufficient number of persons to attend for jury service on each day on which a trial or trials are to start in the jury district to enable the selection of juries for the trial or trials.

(4) An instruction to attend for jury service may be given—

(a) personally, whether directly or indirectly; or

(b) by notice in a newspaper circulating generally in the jury district; or

(c) by telephone, radio, television or other form of distance communication; or

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1911 See section 18(1) (Notice to prospective jurors).

1912 See section 25(2) (Effect of revised list).

(d) in a way—

(i) authorised under a regulation; or

(ii) agreed between the sheriff and the person to whom the instruction is given.

(5) The persons required to attend on the sheriff's instructions may be identified in the instructions in a way stated in the summons.

Example—

The summons might allocate an identifying number to the person to whom the summons is given.

28 Obligation to comply with summons

(1) A person must not fail to comply with a summons under this division, unless the person has a reasonable excuse.

Maximum penalty—10 penalty units or 2 months imprisonment.

(2) If a person fails, without reasonable excuse, to attend before a court as instructed by the sheriff or the court under this division, the failure may be dealt with either as an offence against subsection (1) or as a contempt of the court.

29 List of persons summoned for jury service

(1) For each jury service period, the sheriff must prepare and keep up-to-date a list of the persons summoned for jury service in a jury district and not later excused from jury service (the list of persons summoned for jury service).

(2) The list of persons must state the name, address and occupation, as mentioned in section 37, of each person on the list.

(3) If asked by a party to a civil or criminal trial that is to take place in the jury district in the jury service period, or a lawyer or other person representing a party, the sheriff must—

(a) give the party, lawyer or other person a copy of the list of persons summoned for jury service; and

(b) identify or provide a means of identifying each person who has been instructed by the sheriff to attend on the day the jury for the relevant trial is to be selected.

(4) The request may be made no earlier than 4.00pm on the business day immediately before the day on which the jury for the trial is to be selected.

(5) A person who has received a copy of the list must return the copy to the sheriff as soon as practicable after the jury for the trial is selected, unless the person has disposed of it in the way directed by a judge under subsection (6).

Maximum penalty—10 penalty units or 2 months imprisonment.

(6) A judge may direct a person who has received a copy of the list to dispose of it as the judge directs.

(7) The sheriff must destroy copies of the list returned to the sheriff.

30 Reproduction of list of persons summoned for jury service

(1) A person who receives a copy of the list of the persons summoned for jury service must not—

(a) reproduce the list or permit its reproduction; or

(b) give the list, or disclose any information in the list, to a person other than a party, or a lawyer or other person representing a party, to the civil or criminal trial to which the list relates.

Maximum penalty—10 penalty units or 2 months imprisonment.

(2) However, the sheriff or a person acting under the sheriff's authority may—

(a) reproduce the list or permit its reproduction; or

(b) give a copy of the list, or disclose information in the list, to a person who is not a party or the representative of a party;

if it is reasonably necessary for the proper administration of this Act.

Example—

The sheriff or a person acting under the sheriff's authority might have a copy of the list made and give it to the judge who is to preside at the trial or the judge's associate or clerk.

31 Questions relating to jury service

(1) A person must not ask questions of a person who has been 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 selection or possible selection of the person as a juror in a trial unless—

(a) the questioning is authorised or required under another provision of this Act; or

(b) a judge authorises the questioning under this section.

Maximum penalty—2 years imprisonment.

(2) A person must not ask questions of anyone about a person (the ***other person***) who has been summoned for jury service to find out how the other person is likely to react to issues arising in a trial or for other purposes related to the selection or possible selection of the other person as a juror in a trial unless the questioning is authorised or required under another provision of this Act.

Maximum penalty—2 years imprisonment.

(3) Subsection (2) does not apply to discussions between a party and the party's lawyer.

(4) A judge may, on conditions the judge considers appropriate, authorise a person to ask questions of a person who has been summoned for jury service.

(5) A person must not contravene a condition under subsection (4).

Maximum penalty for subsection (5)—2 years imprisonment.

PART 5 FORMATION OF JURIES

DIVISION 1 NUMBER OF JURORS IN TRIALS

32 Juries for civil trials

The jury for a civil trial consists of 4 persons.

33 Juries for criminal trials

The jury for a criminal trial consists of 12 persons.

34 Reserve jurors

(1) The judge before which a civil or criminal trial is to be held may direct that not more than 3 persons be chosen and sworn as reserve jurors.

(2) Reserve jurors—

(a) are to be selected in the same way as ordinary jurors; and

(b) are liable to be challenged and discharged in the same way as ordinary jurors; and

(c) must take the same oath as ordinary jurors; and

(d) are otherwise subject to the same arrangements as other jurors during the trial.

(3) If a juror dies or is discharged after a trial starts but before the jury retires to consider its verdict, and a reserve juror is available, the reserve juror must take the vacant place on the jury.[1913]

(4) If 2 or more reserve jurors are available, the juror to take the place on the jury must be decided by lot or in another way decided by the judge.

(5) When a jury retires to consider its verdict, a reserve juror who has not been called on to take a place on the jury must be discharged from further attendance at the trial.

(6) The death or discharge of a reserve juror before the juror has been called on to take a vacant place on the jury does not affect the validity of the trial.

1913 See section 56 (Discharge or death of individual juror).

DIVISION 2 SUITABILITY OF JURORS

35 Information about prospective jurors to be exchanged between prosecution and defence in criminal trials

(1) If a party to a criminal trial obtains information about a person who has been summoned for jury service that may show the person is unsuitable to serve as a juror in the trial, the party must disclose the information to the other party as soon as practicable.

(2) The *Criminal Law (Rehabilitation of Offenders) Act 1986* does not apply to the disclosure of information under this section.[1914]

DIVISION 3 ATTENDANCE OF JURY PANEL

36 Sheriff to arrange for attendance of jury panel

(1) When a civil or criminal trial is about to begin, the sheriff must arrange for the attendance of a jury panel before the court.

(2) The panel must be formed from among the persons (the ***relevant prospective jurors***) who—

(a) have been summoned for jury service for the relevant jury service period; and

(b) have not, after being summoned, been excused from jury service or excluded from the list of prospective jurors because they are not qualified for jury service; and

(c) are not currently serving on a jury.

(3) The panel must be formed by selection from among the relevant prospective jurors in a way decided by the sheriff subject to any relevant direction issued by the senior judge administrator under section 13(c).

(4) When the panel is formed, the sheriff must give the instructions to the members of the panel necessary to ensure their attendance before the court.

37 Materials to be given by sheriff

(1) Before the attendance of the jury panel before the court, the sheriff must give the judge's associate or clerk—

(a) a list stating the names, locality addresses and occupations of all persons on the panel; and

(b) cards of identical size and shape, 1 for each member of the panel, on which is written the name, locality address and occupation of the member.

(2) If a person has no present remunerative occupation and is not engaged in domestic duties, the person's occupation is taken to be the person's last remunerative occupation and, if the person has never had a remunerative

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1914 The *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 6, places restrictions on disclosure of the criminal history of a person by someone if the rehabilitation period under the Act has come to an end.

occupation and is not engaged in domestic duties, a note to that effect must appear in place of a statement of occupation.

(3) In this section—

locality address, of a person, means the city, town, suburb or other locality in which the person resides.

DIVISION 4 SUPPLEMENTARY JURORS

38 Supplementary jurors

(1) If a trial is likely to be delayed because there are no persons or not enough persons, who have been summoned for jury service, available for the selection of a jury, the judge may, on application by a party to the proceeding, direct the sheriff to make up or supplement a jury panel by selecting from among persons who are qualified for jury service and instructing them to attend for jury service.

(2) The number of persons to be selected, and the way the selection is to be made, must be as directed by the judge.

(3) The persons instructed to attend for jury service under this section become (subject to being excused or discharged under this Act) members of the jury panel from which the jury for the trial is to be selected.

(4) Unless the person has a reasonable excuse, a person must not fail to comply with—

(a) an instruction to attend for jury service under this section; or

(b) a further instruction about jury service given by the sheriff or the judge.

Maximum penalty—10 penalty units or 2 months imprisonment.

(5) A contravention of subsection (4) may be dealt with either as an offence or a contempt of the court.

DIVISION 5 PRELIMINARIES TO JURY SELECTION

39 Defendant to be informed of right of challenge

Before the selection of a jury for a criminal trial begins, the court must inform the defendant that—

(a) the persons whose names are to be called may be sworn as jurors for the defendant's trial; and

(b) if the defendant wants to challenge any of them, the defendant, or the defendant's lawyer or other representative, must make the challenge before the person is sworn as a juror.

40 Challenge to jury panel as a whole

(1) A party to a civil or criminal trial who objects to the entire jury panel may challenge the entire jury panel by informing the judge of the reasons for the objection before any juror is sworn for the trial.

(2) The judge must decide the challenge before proceeding with the selection of the jury for the trial.

DIVISION 6 SELECTION OF JURY

41 Procedure for jury selection

(1) When a jury is to be selected for a civil or criminal trial—

(a) a selection must be made as directed by the judge from among the members of the jury panel by random selection of cards bearing the names of, or numbers representing, the members of the jury panel; and

(b) as each person is selected an officer of the court must call aloud the name of the person selected.

(2) However, the judge may direct that persons selected be identified by numbers only if the judge considers that, for security or other reasons, the persons' names should not be read out in open court.

(3) The judge's associate or clerk must inform the sheriff as soon as practicable of—

(a) the names of the persons sworn to serve on the jury or as reserve jurors; and

(b) if the judge orders that a juror or prospective juror be excused, discharged or fined—the name of the person and the terms of the order.

42 Peremptory challenges

(1) In a civil trial, each party is entitled to 2 peremptory challenges.

(2) If reserve jurors are to be selected for a civil trial, each party is entitled to—

(a) if 1 or 2 reserve jurors are to be selected—1 additional peremptory challenge; and

(b) if 3 reserve jurors are to be selected—2 additional peremptory challenges.

(3) In a criminal trial, the prosecution and defence are each entitled to 8 peremptory challenges.

(4) If reserve jurors are to be selected for a criminal trial, the prosecution and defence are each entitled to—

(a) if 1 or 2 reserve jurors are to be selected—1 additional peremptory challenge; and

(b) if 3 reserve jurors are to be selected—2 additional peremptory challenges.

(5) If there are 2 or more defendants in a criminal trial—

(a) each defendant is entitled to the number of peremptory challenges allowed to the defence under subsections (3) and (4); and

(b) the prosecution is entitled to a number of peremptory challenges equal to the total number available to all defendants.

43 Challenges for cause

(1) A party to a civil or criminal trial may challenge for cause against a person selected to serve on the jury or as a reserve juror.

(2) A challenge for cause under this section is made by objecting to the selection of the person against whom the challenge is made on either or both of the following grounds—

(a) the person is not qualified for jury service;

(b) the person is not impartial.

(3) A party who makes a challenge for cause must inform the judge of the reasons for the challenge and give the judge information and materials available to the party that are relevant to the challenge.

(4) If the judge is satisfied there are proper grounds to inquire into the qualification or impartiality of the person against whom the challenge is made, the judge may—

(a) permit the party to put questions to the person in a way and in a form decided by the judge; and

(b) if the person's answers to the questions give grounds for further inquiry—permit the examination or cross-examination of the person on oath.

(5) The *Criminal Law (Rehabilitation of Offenders) Act 1986* does not apply to the disclosure of information in response to questions asked under this section.[1915]

(6) After considering the evidence and submissions of parties, the judge must uphold or dismiss the challenge.

(7) The judge's decision under this section is not subject to interlocutory appeal but, if the final judgment of the court is liable to appeal, may be considered on an appeal against the final judgment of the court.

(8) A challenge for cause does not reduce the number of peremptory challenges available to the party who makes the challenge.

44 Time for challenges

(1) A peremptory challenge must be made before the officer assigned by the court to administer the oath begins to recite the words of the oath to the person challenged.

(2) A challenge for cause must be made before the officer assigned by the court to administer the oath begins to recite the words of the oath to the person challenged.

(3) A challenge for cause may also be made during a proceeding under section 47.

1915 The *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 6, places restrictions on disclosure of the criminal history of a person by someone if the rehabilitation period under the Act has come to an end.

DIVISION 7 FINAL STAGE OF JURY SELECTION PROCESS

45 Final stage of jury selection process

The court reaches the final stage of the jury selection process when all jurors and reserve jurors have been selected and sworn but the jury panel has not yet been discharged.

46 Judge's discretion to discharge juror in final stage of jury selection process

(1) When the judge reaches the final stage of the jury selection process, the judge may discharge a person who has been selected as a juror or a reserve juror if the judge considers there is reason to doubt the impartiality of the person.

(2) The judge may discharge a person under this section whether or not a challenge for cause is made.

(3) If a person is discharged under this section, another person must be selected from the jury panel to take the person's place as a juror or reserve juror.

47 Special procedure for challenge for cause in certain cases

(1) If a judge who is to preside at a civil or criminal trial is satisfied, on an application by a party under this section, that there are special reasons for inquiry under this section, the judge may authorise the questioning of persons selected to serve as jurors and reserve jurors when the court reaches the final stage of the jury selection process.

Example—

Prejudicial pre-trial publicity may be a special reason for questioning persons selected as jurors or reserve jurors in the final stage of the jury selection process.

(2) The application must be made to the judge at least 3 days before the date fixed for the trial to start unless the judge, for special reasons, dispenses with the requirement.

(3) On the application, the applicant may suggest, and the judge may decide, questions that are to be put to persons selected to serve as jurors or reserve jurors for the trial.

(4) The judge must put the questions in a way decided by the judge.

Example—

The judge might decide that the questions are to be put to the persons selected to serve as jurors or reserve jurors in each other's presence in open court, or that the questions are to be put to each person individually.

(5) If, after hearing the answers of a person questioned under this section, the judge considers further inquiry is justified, the judge may give the parties leave to cross-examine the person on oath (under limits fixed by the judge) to find out whether the person is impartial.

(6) When a person has answered the questions put under this section and any further examination allowed by the judge has finished, a party may make a

challenge for cause against the person on the ground that the person is not impartial.

(7) A party who makes a challenge under this section must inform the judge of the reasons for the challenge and, if the party has information or materials relevant to the challenge in addition to the information or materials already before the court, give the judge the information and materials.

(8) After considering the evidence and submissions of the parties the judge must—

(a) uphold the challenge and discharge the person selected to serve as a juror (or reserve juror); or

(b) dismiss the challenge.

(9) If the judge upholds the challenge and discharges the selected person, another person must be selected from the jury panel to fill the vacancy.

(10) When a person is selected to fill a vacancy under subsection (9)—

(a) a party may—

(i) if the party has not already exhausted the party's rights of peremptory challenge—challenge the person peremptorily; or

(ii) challenge the person for cause;

in the same way as on the original selection of persons to serve as jurors (or reserve jurors[1916]); and

(b) the person is also liable to be questioned, cross-examined and challenged under this section in the same way as the other persons selected as jurors or reserve jurors.

(11) A decision of the judge under this section is not subject to interlocutory appeal but, if the final judgment of the court is liable to appeal, may be considered on an appeal against the final judgment of the court.

48 Judge's discretion to discharge entire jury

(1) Before the court finishes the final stage of the jury selection process, the judge may discharge all the persons selected to serve as jurors 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.

(2) If all the persons selected to serve as jurors are discharged, another jury must be selected from the jury panel.

1916 See sections 42 (Peremptory challenges) and 43 (Challenges for cause).

DIVISION 8 PRESUMPTION OF AUTHORITY

49 Presumption of authority for challenge

If a challenge to a person selected as a juror or reserve juror is made by a lawyer or other representative of a party, the challenge is presumed in the absence of evidence to the contrary to have been made on the party's authority.

PART 7 JUROR'S REMUNERATION AND ALLOWANCES

63 Remuneration and allowances

A person who attends when instructed by the sheriff to attend under a summons to perform jury service, or who serves as a juror or reserve juror, is entitled to remuneration and allowances on the scale prescribed under a regulation.

64 Special payments in certain cases

(1) The Governor in Council may authorise a special payment compensating a person who suffers injury, damage or loss arising out of the person's jury service.

(2) A person may only apply for special compensation for financial loss arising out of inability to carry on a business or engage in a remunerative activity while performing jury service, if the applicant served as a juror (or reserve juror) in a trial that continued for at least 30 days.

(3) An application for special compensation under this section—

(a) must be made in writing to the Minister; and

(b) must include full details of the injury, damage or loss; and

(c) must be accompanied by all documentary evidence in the applicant's possession of the injury, damage or loss.

(4) On receiving an application under this section, the Minister may make inquiries to verify the details of the injury, damage or loss claimed by the applicant.

65 Fee for jury in civil cases

(1) If a party to a civil trial requires a jury, the party must pay to the registrar of the court before which the trial is to be conducted—

(a) the fee prescribed under a regulation before the trial begins; and

(b) the further fees required under a regulation as and when payment is required under the regulation.

(2) If the court before which a civil trial is to be conducted requires a jury, the plaintiff must pay to the registrar of the court—

(a) the fee prescribed under a regulation before the trial begins; and

(b) the further fees required under a regulation as and when payment is required under the regulation.

(3) If the trial does not proceed and no person attends the court for jury service, the party who paid the fee is entitled to the return of the fee less any amount necessarily spent by the sheriff in arranging for the attendance, or cancelling the attendance, of prospective jurors at the proposed trial.

PART 8 MISCELLANEOUS

66 Impersonation of members of jury panel or jury

A person must not pretend to be a member of a jury panel, a juror or a reserve juror.

Maximum penalty—2 years imprisonment.

67 Falsification of jury lists etc.

(1) A person must not falsify a record to be made or kept under this Act.

Maximum penalty—2 years imprisonment.

(2) A person must not obstruct or interfere with the proper formation of a jury under this Act.

Maximum penalty—2 years imprisonment.

68 Obligation to answer questions etc.

(1) The sheriff or a person authorised by the sheriff may ask a person reasonable questions to find out whether the person is qualified for jury service.

(2) The person must not fail to answer a question, unless the person has a reasonable excuse.

Maximum penalty—20 penalty units or 4 months imprisonment.

(3) The person must answer any question truthfully.

Maximum penalty—20 penalty units or 4 months imprisonment.

(4) The sheriff or a person authorised by the sheriff may ask a person to produce a document to find out whether the person is qualified for jury service.

(5) The person must not fail to comply with the request, unless the person has a reasonable excuse.

Maximum penalty—20 penalty units or 4 months imprisonment.

(6) The *Criminal Law (Rehabilitation of Offenders) Act 1986* does not apply to the disclosure of information in response to questions asked under this section.[13]

13 The *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 6, places restrictions on disclosure of the criminal history of a person by someone if the rehabilitation period under the Act has come to an end.

69 Employment not to be terminated or prejudiced because of jury service

A person must not terminate the employment of anyone, or prejudice anyone in employment, because the other person is, was, or will be, absent from employment on jury service.

Maximum penalty—1 years imprisonment.

69A Inquiries by juror about accused prohibited

(1) A person who has been sworn as a juror in a criminal trial must not inquire about the defendant in the trial until the jury of which the person is a member has given its verdict, or the person has been discharged by the judge.

Maximum penalty—2 years imprisonment.

(2) Subsection (1) does not prevent a juror making an inquiry being made of the court to the extent necessary for the proper performance of a juror's functions.

(3) In this section—

inquire includes—

(a) search an electronic database for information, for example, by using the Internet; and

(b) cause someone else to inquire.

70 Confidentiality of jury deliberations

(2) A person must not publish to the public jury information.

Maximum penalty—2 years imprisonment.

(3) A person must not seek from a member or former member of a jury the disclosure of jury information.

Maximum penalty—2 years imprisonment.

(4) A person who is a member or former member of a jury must not disclose jury information, if the person has reason to believe any of the information is likely to be, or will be, published to the public.

Maximum penalty—2 years imprisonment.

(5) Subsections (2) to (4) are subject to the following subsections.

(6) Information may be sought by, and disclosed to, the court to the extent necessary for the proper performance of the jury's functions.

(7) If there are grounds to suspect that a person may have been guilty of bias, fraud or an offence related to the person's membership of a jury or the performance of functions as a member of a jury, the court before which the trial was conducted may authorise—

(a) an investigation of the suspected bias, fraud, or offence; and

(b) the seeking and disclosure of jury information for the purposes of the investigation.

(8) If a member of the jury suspects another member (the suspect) of bias, fraud or an offence related to the suspect's membership of the jury or the performance of the suspect's functions as a member of the jury, the member may disclose the suspicion and the grounds on which it is held to the Attorney-General or the director of public prosecutions.

(9) On application by the Attorney-General, the Supreme Court may authorise—

(a) the conduct of research projects involving the questioning of members or former members of juries; and

(b) the publication of the results of the research.

(10) The Supreme Court may give an authorisation under subsection (9) on conditions the court considers appropriate.

(11) Information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding may be disclosed—

(a) in the course of the proceeding—by any person with the court's permission or with lawful excuse; or

(b) after the proceeding has ended—by the juror or someone else with the juror's consent.

(12) A former member of a jury may disclose jury information to a health professional who is treating the former member in relation to issues arising out of the former member's service on the jury.

(13) The health professional may ask the former member to disclose jury information for the purpose of treating the former member in relation to issues arising out of the former member's service on the jury.

(14) The health professional must not disclose jury information to anyone else unless the health professional considers it necessary for the health or welfare of the former member.

Maximum penalty—2 years imprisonment.

(15) Subsection (14) does not apply in as far as the health professional discloses information that identifies the health professional's patient to the sheriff for the purpose of the sheriff advising whether the patient was a former member of a jury.

(16) The sheriff may disclose to the health professional information advising whether the patient was a former member of a jury.

(17) In this section—

doctor includes a person registered as a medical practitioner under a law of the Commonwealth, or another State, that corresponds to the *Medical Practitioners Registration Act 2001*.

health professional means a person who practices a profession prescribed under a regulation for the definition, and includes a doctor and a psychologist.

jury information means—

(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.

psychologist means a person registered as a psychologist under the *Psychologists Registration Act 2001* or under a law of the Commonwealth, or another State, that corresponds to that Act.

treat, in relation to a patient of a health professional, means provide a service to the patient in the course of the patient's seeking or receiving advice or treatment.

SCHEDULE 3 DICTIONARY

section 3

civil trial means a trial before a court sitting in the exercise of a jurisdiction other than a criminal jurisdiction.

corrective services officer means 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*.

court means a court with authority to conduct a trial.

criminal trial means a trial on indictment or the trial of an issue by a court sitting in the exercise of a criminal jurisdiction.

detention centre employee means a person who—

(a) is or has been, in Queensland, a detention centre employee under the *Youth Justice Act 1992*; or

(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*.

elector means a person entitled to vote under the *Electoral Act 1992*.

electoral roll means an electoral roll for an electoral district under the *Electoral Act 1992*.

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.

jury district means a jury district established under this Act.

jury panel means a group of persons from among whom a jury is to be formed for a particular civil or criminal trial.

jury roll means a list of the persons qualified to serve as jurors for a particular jury district.

list of persons summoned for jury service see section 29(1).

member of Parliament means—

(a) a member of the Legislative Assembly; or

(b) a member of the Commonwealth Parliament.

notice to prospective jurors see section 18(1).

practice direction means a practice direction under section 13.

prospective juror means a person whose name is included in a list of prospective jurors prepared under this Act.[1917]

prospective juror questionnaire see section 18(2)(a).

qualified for jury service see section 4(1).

revised list of prospective jurors see section 25.

1917 See section 15 (Lists of prospective jurors).

Appendix D

Extracts from Queensland Statutes

PENALTIES AND SENTENCES ACT 1992 (Qld)

5 Meaning of penalty unit

(1) The value of a penalty unit is—

(a) for the *State Penalties Enforcement Act 1999* or an infringement notice under that Act, other than an infringement notice for an offence against a local law—$100; or

(b) for a local law, or an infringement notice under the *State Penalties Enforcement Act 1999* for an offence against a local law—the amount, not more than $100, prescribed under a regulation; or

(c) in any other case, for this or another Act—$100.

(2) If an Act expresses a penalty or other matter as a number (whether whole or fractional) of penalty units, the monetary value of the penalty or other matter is the number of dollars obtained by multiplying the value of a penalty unit by the number of penalty units.

(3) If an order of a court expresses a penalty or other matter as a monetary value, the number of penalty units is to be calculated by dividing the monetary value by the value of a penalty unit as at the time the order is made.

(4) For the purposes of this or another Act a reference to a penalty of a specified number of penalty units is a reference to a fine of that number of penalty units.

Example—

'Maximum penalty—10 penalty units' means the offender is liable to a maximum fine of 10 penalty units.

45 Power to fine

(1) An offender may be fined.

(2) The fine may be in addition to, or instead of, any other sentence to which the offender is liable.

(3) The maximum fine that a court may impose is—

(a) the appropriate maximum applicable to the offence under a provision of this or another Act relating to the offence; or

(b) if there is no such maximum—the maximum mentioned in section 46.

(4) This section has effect subject to a specific provision of another Act relating to the offence.

46 Fine limitations of certain courts

(1) If an Act creates an offence and does not provide a sentence, the maximum fine that a court may impose for a single offence is—

(a) if the court is a Magistrates Court and the offender is—

(i) an individual—165 penalty units; or

(ii) a corporation—835 penalty units; or

(b) if the court is a District Court and the offender is an individual—4175 penalty units.

(2) If an Act creates an offence and does not provide a sentence, there is no limit on the fine that the court may impose for a single offence if—

(a) the court is a District Court and the offender is a corporation; or

(b) the court is the Supreme Court.

47 Lesser fine than provided may be imposed

Unless an Act otherwise provides, a court may impose a lesser fine than the fine stated in the Act.

153 Imprisonment—liability to

(1) An offender liable to imprisonment for life, or for any other period, may be sentenced to imprisonment for any lesser period.

(2) An offender liable to imprisonment may be sentenced to pay a fine not exceeding the limits prescribed in section 46 in addition to, or instead of, the imprisonment.

***CRIMINAL PRACTICE RULES 1999* (Qld)**

47 Statement to accused person of right of challenge—Jury Act, s 39

(1) If the accused person pleads not guilty, the proper officer must address the accused person as follows—

> 'AB (and CD), these representatives of the community whom you will now hear called may become the jurors who are to decide between the Crown and you on your trial.
>
> 'If you wish to challenge them, or any of them, you, or your representative, must do so before the bailiff begins to recite the words of the oath or affirmation.'.

(2) In a private prosecution, the reference to the Crown must be replaced by a reference to the private prosecutor.

(3) In a Commonwealth prosecution, the reference to the Crown must be replaced by a reference to the prosecuting authority.

(4) The proper officer is taken to have complied with subrule (1) if the proper officer uses other words complying with the requirements of the *Jury Act 1995*, section 39.