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TERMS OF REFERENCE

In a letter to the Commission received on 14 August 2006, the Attorney General, the Hon R J Debus MP issued the following terms of reference:

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to inquire into and report on the operation and effectiveness of the system for selecting jurors under the Jury Act 1977.

In undertaking this inquiry, the Commission should 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.

PARTICIPANTS

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon James Wood AO QC (Commissioner-in-charge)

Professor Michael Tilbury

Officers of the Commission

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SUBMISSIONS

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this Issues Paper.

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The closing date for submissions is 17 February 2007.

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Issues Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other persons or organisations. Any request for a copy of a submission marked “confidential” will be determined in accordance with the Freedom of Information Act 1989 (NSW).

Other publication formats

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1. Introduction

- Background to the reference
- Use of juries
- Underlying principles and themes

BACKGROUND TO THE REFERENCE

1.1 This reference has been stimulated by two main concerns. First, the extent to which 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. Secondly, the fact that the burden of serving on juries is shared inequitably or in circumstances where the resource is not used to the best economic and efficient advantage.

1.2 Further, a review of the legislation in NSW is timely in light of the fact that substantial reforms concerning the composition of juries and the conditions of service have occurred in other jurisdictions,¹ and the fact that the last formal review of the *Jury Act 1977* (NSW) occurred in 1993-1994.²

USE OF JURIES

1.3 Although juries may be used in criminal trials in the Supreme and District Courts,³ in the Coroner's Court⁴ and in some civil trials,⁵ their use has diminished significantly in recent years.

Criminal trials

1.4 In the Supreme Court or District Court, an accused person who elects to go to trial will normally be tried by a judge and jury. Such a person may, however, be tried by judge alone where:

- that person makes an election before the date fixed for trial;

-
1. In, eg, Victoria: *Juries Act 2000* (Vic), and Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996); Tasmania: *Juries Act 2003* (Tas), and Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999); England and Wales: *Criminal Justice Act 2003* (Eng), R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001); New York: *The Jury Project* (Report to the Chief Judge of the State of New York, 1994).
 2. NSW, *Report of the NSW Jury Task Force* (1993); and M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994).
 3. *Criminal Procedure Act 1986* (NSW) s 121.
 4. See *Coroners Act 1980* (NSW) s 18.
 5. Civil actions are generally to be tried without a jury unless a jury is required in the interests of justice: *Supreme Court Act 1970* (NSW) s 85; *District Court Act 1973* (NSW) s 76A. See also *Defamation Act 2005* (NSW) s 21.

- the judge is satisfied that he or she made the election having sought and received advice about the election from a legal practitioner;
- all other accused persons in the trial make a similar election;
- each of the accused persons in the trial make an election with respect to all of the offences with which they have been charged;
- the Director of Public Prosecutions consents to the elections.⁶

1.5 An accused person who goes to trial for a Commonwealth offence following presentation of an indictment in the Supreme Court or the District Court cannot elect for a judge alone trial.⁷ However, there is a substantial body of indictable offences against both State and Commonwealth laws that can be tried summarily, either with the consent of the accused⁸ or without such consent.⁹ These further reduce the incidence of jury trials.

1.6 In 2005, only 0.4% of criminal cases overall proceeded to a defended hearing in the Supreme Court and District Court.¹⁰ This is consistent with the findings in our Report on majority verdicts by juries that, in 2003, only 0.5% of criminal cases overall proceeded to a defended hearing in the Supreme Court and District Court.¹¹ Although there has been no refinement of the statistics to identify the percentage of cases tried by a judge and jury, it would appear that juries continue to determine the question of guilt in less than 0.5% of all criminal trials in NSW.

Coroner's inquests and inquiries

1.7 Coroners are empowered to conduct inquests into deaths or suspected deaths¹² and inquire into fires and explosions.¹³ Such inquests or inquiries are usually held before a coroner without a jury.¹⁴ However, they must be held before a coroner with a jury where directed by the Minister or State Coroner,¹⁵ or where requested by a

6. *Criminal Procedure Act 1986* (NSW) s 132.

7. *Constitution* (Cth) s 80; *Brown v The Queen* (1986) 160 CLR 171.

8. *Crimes Act 1900* (NSW) s 476; and *Crimes Act 1914* (Cth) s 4J.

9. *Crimes Act 1900* (NSW) s 495-496A; and *Crimes Act 1914* (Cth) s 4JA.

10. NSW, Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2005*, Tables 1.3 and 3.2.

11. NSW Law Reform Commission, *Majority Verdicts* (Report 111, 2005) at para 1.6-1.7.

12. *Coroners Act 1980* (NSW) s 13.

13. *Coroners Act 1980* (NSW) s 15.

14. *Coroners Act 1980* (NSW) s 18(1).

15. *Coroners Act 1980* (NSW) s 18(3).

relative of the person who has died or is suspected of having died, or the secretary of any organisation of which the person was a member immediately before the death or suspected death.¹⁶

1.8 It is understood that juries are rarely used in Coroner's inquests or inquiries. Recent cases of the use of 6 person coronial juries include: in 2000, an inquest into the death of a man at the Star City casino;¹⁷ in 2002, an inquest into the shooting death of a man during a police siege,¹⁸ and an inquest into the death of a camper from a falling tree;¹⁹ and in 2005, an inquest into the death of an employee in a mining accident at Broken Hill.²⁰

Civil trials

1.9 Juries are not available for civil matters in the Local Courts and are now used very infrequently in the Supreme Court and District Court.

1.10 Until 1965 all actions for personal injuries could be tried by a judge and jury. During that year, legislation was passed removing that right in proceedings where the plaintiff claimed damages for personal injuries arising out of the use of a motor vehicle.²¹ Prior to this, trial by a jury had become the norm for disputed issues of fact in common law trials, being supported both by those who represented plaintiffs and those who represented the insurers of defendants, although it was open to the parties to dispense with a jury by consent. A statutory and inherent power in the Court to dispense with a jury was also recognised but it was not often invoked.

1.11 In most instances the trial was by a jury of four people, although a power did exist, and continues to exist,²² to order that there be a jury of twelve.

1.12 In 1970, the *Supreme Court Act 1970* (NSW) provided, as a general principle, that proceedings in civil cases should be tried

16. *Coroners Act 1980* (NSW) s 18(2).

17. S Gibbs, "Jury shown Star City death video" *Sydney Morning Herald* (9 May 2000) at 8.

18. "Jury clears marksman" *Daily Telegraph* (11 May 2002) at 7.

19. J Bartlett, "Jury to decide camper inquest" *Herald (Newcastle)* (30 May 2002) at 1.

20. "Inquest prompts mine safety recommendations" *ABC Premium News* (11 February 2005).

21. These were referred to as "running down cases". See *Motor Vehicles Third Party Insurance Amendment Act 1965* (NSW) and *Law Reform (Miscellaneous Provisions) Act 1965* (NSW).

22. *Jury Act 1977* (NSW) s 20.

without a jury unless the Court otherwise ordered.²³ There were several exceptions or qualifications to this general rule in the Common Law Division in that:

- a prima facie entitlement to have issues of fact tried by a jury was established where a party filed a requisition for a jury and paid the prescribed jury fee;²⁴
- running down cases were not to be tried by a jury unless all the parties consented or unless the Court, on the application of one party so ordered;²⁵
- where there were issues of fact on a charge of fraud, or a claim in respect of defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, the trial was to be by jury;²⁶
- where issues of fact arose in relation to a defence under certain workers' compensation provisions they were to be tried without a jury.²⁷

1.13 In 1988, the Court of Appeal held that the onus was on the applicant, who sought an order dispensing with a jury, to show that the party who requisitioned the jury, should be deprived of that mode of trial. It also held that, in exercising the discretion to dispense with a jury, the Court was not permitted to apply criteria which were of universal application to jury trials (for example, efficiency, brevity and costs) without considering their specific application to the facts, necessities and justice of the particular case, or to have regard to the consequences of the trial proceeding with a jury for other cases waiting in the Court's list.²⁸

1.14 The effect of this decision was to limit the number of common law cases where applications were made, or orders successfully sought, to dispense with juries in work injury cases or defamation

23. *Supreme Court Act 1970* (NSW) s 85.

24. *Supreme Court Act 1970* (NSW) s 86, although subject to the Court having the power, save as hereafter mentioned, to dispense with a jury: *Supreme Court Act 1970* (NSW) s 89(1).

25. *Supreme Court Act 1970* (NSW) s 87, consent invariably being refused, and orders by the Court rarely being made.

26. *Supreme Court Act 1970* (NSW) s 88, subject, however, to the Court having the power to order that any or all of the issues be tried without a jury where a prolonged examination of documents or scientific or local investigation were required and could not conveniently be made with a jury, or all parties consent to such an order: *Supreme Court Act 1970* (NSW) s 89(2).

27. See *Workers Compensation Act 1926* (NSW).

28. *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387.

cases which, by 1988, represented the bulk of litigation in the Supreme Court.

1.15 In 2001, amendments introduced a presumption in both the Supreme and District Courts of trial without a jury unless “the Court is satisfied that the interests of justice require a trial by jury in the proceedings”.²⁹ This followed upon a jury decision in which a plaintiff was awarded \$2.5m in damages for injuries received as the result of corporal punishment administered to him while a school pupil.³⁰ Following this amendment, the use of civil juries in the Supreme Court and District Court has all but ceased, save for proceedings for defamation.³¹

1.16 The limited use of juries in civil trials can be demonstrated by reference to the following statistics provided by the Supreme Court for the years 2004-2006:³²

2004	s 7A defamation trials	32	settled on or prior to hearing	11
			heard	21
	other cases (mainly medical negligence claims)	13	settled on or prior to hearing	10
			heard	3
2005	s 7A defamation trials	40	settled on or prior to hearing	15
			heard	25

29. *Courts Legislation Amendment (Civil Juries) Act 2001* (NSW) amending *Supreme Court Act 1970* (NSW) s 85 and repealing s 86-89; inserting *District Court Act 1973* (NSW) s 76A and repealing s 78-79A.

30. New appeal granted confined to damages assessment: *Trustees of the Roman Catholic Church v Hogan* [2001] NSWCA 381.

31. See *Defamation Act 2005* (NSW) s 21. Under this Act, a party may elect for trial by jury, unless the Court otherwise orders (s 21(1)). The Court may, however, order that such proceedings are not to be tried by jury if they involve a prolonged examination of records, or any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury (s 21(2)). See para 1.19-1.21.

32. Not reached cases and vacated fixtures are excluded.

2005 (cont'd)	other cases	6	settled on or prior to hearing	4
			heard	2
2006 (to 30 September)	s 7A defamation trials	17	settled on or prior to hearing	4
			heard	13
	other cases	4	settled on or prior to hearing	2
			heard	2
TOTALS		112	settled on or prior to hearing	46
			heard	66

1.17 Although civil juries are routinely used in defamation trials in the District Court (for s 7A issues and now for the wider purposes for which there is provision in the *Defamation Act*), they are all but non-existent for other civil trials. Of the 12 civil jury trials so far listed in the District Court in the 2006 calendar year, only 4 have proceeded to trial. In 2005, there were 4 jury trials in the District Court.

1.18 Other developments that have seen a decrease in the use of juries in civil trials have been the amendments to the workers' compensation legislation which have substituted modified rights to common law damages, with various thresholds and ceilings. The consequent decline in common law claims for work-related injuries has been substantial and this, combined with the presumption of trial without a jury in the Supreme Court and District Court, means that there will now be very few common law claims, other than defamation cases, tried by juries.

Defamation proceedings

1.19 The role of juries in defamation proceedings has changed over the years, as has the extent of their possible commitment. Prior to amendments in 1994, the jury was required to consider virtually all of

the factual issues.³³ In 1994 their role was confined to the issue whether the imputations pleaded were conveyed and whether they were defamatory,³⁴ with the result that jury trials in relation to these issues seldom lasted more than one or two days. The introduction of uniform law in 2005³⁵ means that juries will now be required to determine all factual issues other than damages. This has expanded the potential involvement of juries in defamation proceedings.

1.20 The incidence of jury trials in these cases will now increase, although plaintiffs may seek to avoid this consequence by bringing proceedings in the Supreme Court of the ACT, where trials will continue to take place without a jury.³⁶

1.21 By reason of the limited use of juries other than in criminal trials, this Issues Paper and the reference will, largely concentrate on juries in the criminal jurisdiction.

Cost of jury service

1.22 The Sheriff has provided the following estimate of jury costs for the 2005-2006 financial year:

Jury fees and travel	\$6,500,000
Staffing for jury management ..	1,916,528
Meals and refreshments	400,000
Supplies (including jury views)	40,000
Postage and stationery	300,000
TOTAL.....	9,156,528

1.23 For the period 1 July 2005 to 12 May 2006, \$4,840,135 was paid in fees to jurors who were empanelled to serve, and \$945,635 was paid to those who reported for service and were held in reserve or were kept waiting at court for more than 4 hours pending possible empanelment. The Sheriff has expressed concern that there is a degree of wastage in relation to this group of people who are summoned but not required to serve that could be overcome by better court management procedures.

33. *Defamation (Amendment) Act 1994* (NSW).

34. *Defamation Act 1974* (NSW) s 7A.

35. *Defamation Act 2005* (NSW).

36. Both the ACT and SA have departed from the uniform law in this respect.

UNDERLYING PRINCIPLES AND THEMES

1.24 It is not the purpose of this reference to question the merits or desirability of trial by jury. However, it is important to consider some of the underlying principles and themes that relate to juries and jury service.

Rights and duties of citizenship

1.25 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. Trial by jury is said to be “for the benefit of the community as a whole as well as for the benefit of the particular accused”.³⁷

1.26 Reducing categories of exemption from jury service is seen as spreading “the obligation of jury service more equitably among the community”.³⁸ If a large number of people are exempted or excused from jury service then a higher burden is imposed on those who are still eligible.³⁹

Representation

1.27 Representation in this context refers to a representative sample of the whole population. Perfect representation is obviously not possible since the process of jury selection is one involving random selection from a relatively small pool. Representation is not about achieving representation by particular groups on particular juries, but rather, as the New Zealand Law Commission has suggested:

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.⁴⁰

1.28 The High Court, in 1993, stated that “the relevant essential feature or requirement of the institution was, and is, that the jury be a body of persons representative of the wider community”.⁴¹

37. *Brown v The Queen* (1986) 160 CLR 171 at 201 (Deane J).

38. Tasmania, *Parliamentary Debates (Hansard)* House of Assembly, 19 August 2003 at 44. See also Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 4.

39. See Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 3.

40. New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 135.

1.29 In 1965, the UK Departmental Committee on Jury Service stated that:

A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues that face them the corporate good sense of that community. This cannot be in the keeping of the few, but is something to which all men and women of good will must contribute.⁴²

1.30 Amendments were made in 1977 in NSW because the “outmoded selection system and the proliferation of persons who may claim exemption from jury service” meant that jury rolls were then “not truly representative of the ordinary citizen”.⁴³ This was seen as a problem once again in 1993 when the NSW Jury Task Force declared that “a jury is not really representative of the community as a whole” because of the existing categories of disqualification, ineligibility and exemption as of right.⁴⁴ Other reviews have expressed similar concerns.⁴⁵

1.31 Concerns have sometimes been expressed that “citizens with better education or in high status employment [are] invariably excluded from jury duty”.⁴⁶ The Auld review of the criminal courts in England and Wales saw this trend as a particular concern in relation to “long and complex cases” where “a range of experience and intellect is most needed”.⁴⁷ It may be argued that if those who are exempted represent sections of the community with particular skills and experience, then the expectation that trial by jury will involve an informed and careful consideration of the issues is at risk.

41. *Cheatle v The Queen* (1993) 177 CLR 541 at 560.

42. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 53.

43. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 24 February 1977, at 4475.

44. NSW, *Report of the NSW Jury Task Force* (1993) at 23. This point was also raised in M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 173.

45. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) at ch 2; Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 3-4.

46. D Challenger (ed), *The Jury* (Australian Institute of Criminology Seminar: Proceedings No 11, 1986) at 2. See also Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.36.

47. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 137.

1.32 In a survey conducted in Western Australia in 1983, 88.9% of respondents felt that “highly educated persons such as professors, school teachers, doctors, [and] clergymen,” should not continue to be exempt from jury service.⁴⁸

People from culturally and linguistically diverse backgrounds

1.33 There is a danger that the absence of particular minority groups from juries may render them open to a charge of bias in some cases.⁴⁹

1.34 The Australian Law Reform Commission, in its report on multiculturalism and the law, considered that the exclusion of people who are not registered to vote and who have an inadequate command of English meant that juries were not truly representative of the community. This was seen as affecting the “perceived legitimacy” of the jury system. The Commission noted that some people from culturally diverse backgrounds fear that “jurors’ hostility and suspicion towards people of non-English speaking backgrounds may prejudice the chances of a fair trial where the accused or any witnesses or victims belong to particular ethnic minorities”.⁵⁰

Indigenous people

1.35 This danger of bias has been further highlighted in the Australian context by reference to the apparent under-representation of Indigenous people on juries compared with the over-representation of them as criminal defendants. The NSW Bureau of Crime Statistics and Research has reported that the rate of Indigenous appearances in Court on criminal charges is 13 times that of non-Indigenous Australians, and that their rate of imprisonment is 10 times that of non-indigenous Australians.⁵¹ A 1994 Australian Institute of Judicial Administration review noted that Indigenous people comprise 7% of the prison population but less than 0.5% of jurors.⁵² In 1986, a study conducted by the NSW Law Reform Commission reported that 0.4% of jurors were of Aboriginal origin, compared with 0.6% of people of

48. I M Vodanovich, “Public attitudes about the jury” in D Challinger (ed), *The Jury* (Australian Institute of Criminology Seminar: Proceedings No 11, 1986) at 81.

49. See England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 133.

50. Australian Law Reform Commission, *Multiculturalism and the Law* (Report 57, 1992) at para 10.44.

51. D Weatherburn, L Snowball, B Hunter, *The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the NATSISS Survey* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 104, 2006) at 1.

52. See M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 5.

Aboriginal origin in the general population.⁵³ More recent figures show that in 2001, Aboriginal people made up 1.9% of the NSW population⁵⁴ and, in 2004, Aboriginal people made up 16.8% of the NSW prison population.⁵⁵

1.36 A number of reasons have been provided for the low proportion of Indigenous jurors in NSW, including:

- the greater likelihood that members of transient populations will not be included in the electoral roll (from which the jury roll is compiled);⁵⁶
- the strict disqualification provisions that apply to people with criminal records;⁵⁷
- the fact that, in some regional districts, Indigenous jurors may be known or related to Indigenous defendants, particularly in light of their extended concept of family relationships;⁵⁸ and
- lower literacy rates and the ineffectiveness of written communication may mean that some people do not respond to jury notices.

Random selection

1.37 The High Court, in 1993, considered that one of the “unchanging 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”.⁵⁹ In an earlier case, the Court had observed that random selection was one of the characteristics of a jury that offered “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”.⁶⁰

53. NSW Law Reform Commission, *The Jury in a Criminal Trial: Empirical Studies* (Research Report 1, 1986) at para 3.29.

54. *The People of New South Wales: Statistics from the 2001 Census* (Community Relations Commission for a Multicultural New South Wales, 2003) at Table 2.2.

55. S Corben, *NSW Inmate Census 2004: Summary of Characteristics* (NSW, Department of Corrective Services, Statistical Publication No 26, 2004) at 3.

56. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 5.

57. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 5. See para 4.9-4.20 below.

58. L Anamourlis, *Preliminary consultation*.

59. *Cheatle v The Queen* (1993) 177 CLR 541 at 560.

60. *Kingswell v The Queen* (1985) 159 CLR 264 at 302.

1.38 The principle of random selection is expressly mentioned in the statutes of most Australian jurisdictions, including NSW.⁶¹

1.39 The right of peremptory challenge is to an extent inconsistent with the principle of random selection.⁶² The alternative is to confine the right of challenge to challenge for cause or to create a system for jury vetting of the kind seen in some States in the US. A certain level of peremptory challenge is generally considered not to offend the principles of random selection. There is a greater risk that the practice of jury vetting may overstep the mark.⁶³ It is not, however, the purpose of this reference to question the existing practice which permits both peremptory challenge and challenge for cause, or to consider any form of jury vetting which would permit exploration of the personal histories or attitudes of potential jurors.

1.40 Attention will, however, be given to the categories of people who are disqualified, ineligible or entitled to exemption as of right, since their exclusion or exemption from service can have a direct impact on the representativeness of the jury.⁶⁴

Participation

1.41 It has been suggested that “participation by the community helps to ensure that the justice system remains in touch with and accountable” to all the citizens of a State.⁶⁵ The NSW Jury Task Force in 1993 considered that jury service gave members of the community “the opportunity to contribute to law making, in the sense that juries help keep the judiciary in touch with current community thinking”.⁶⁶

1.42 Jury service is seen as an important point of contact between the court system and the public at large.⁶⁷ In the UK in 1965 the

61. *Juries Act 2003* (Tas) s 4; *Juries Act 2000* (Vic) s 4; *Jury Act 1977* (NSW) s 12; *Jury Act 1995* (Qld) s 26; *Juries Act 1927* (SA) s 29; *Juries Act 1957* (WA) s 14(2).

62. See discussions in Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 6.32-6.41.

63. See Queensland, Criminal Justice Commission, *Report by the Honourable W J Carter QC on his Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke-Petersen* (1993) at 480.

64. See England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 133; NSW, *Report of the NSW Jury Task Force* (1993) at 24; Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 3-4.

65. Tasmania, *Parliamentary Debates (Hansard)* House of Assembly, 19 August 2003 at 43.

66. NSW, *Report of the NSW Jury Task Force* (1993) at 14.

67. NSW, *Report of the NSW Jury Task Force* (1993) at 13.

Departmental Committee on Jury Service considered jury service to be a “valuable social and educational experience” and agreed with those who argued that “it is desirable for as many people as possible, from all walks of life, to play their part in the administration of justice”.⁶⁸ The NSW Law Reform Commission, in its review of the jury in criminal trials, observed:

The jury system is... an important link between the community and the criminal justice system. It ensures that the criminal justice system meets minimum standards of fairness and openness in its operation and decision-making, and that it continues to be broadly acceptable to the community and to accused people. The participation of laypeople in the system itself validates the administration of justice and, more generally, incorporates democratic values into that system.⁶⁹

One English legislator also recently observed:

It gives people an important role as jurors - as stakeholders - in the criminal justice system. Seeing the courts in action and participating in that process maintains public trust and confidence in the law.⁷⁰

Unequal burden on those who cannot be exempted or excused

1.43 Participation can be a burden in some cases. Currently the burden is unequally shared. Some people may be called upon too frequently, although whether this is the case is difficult to ascertain in the absence of statistics, and in circumstances where prior jury service, particularly recent service, can provide a good reason to be exempted or excused. If it does in fact occur then it is more likely to be the case in regional areas than in metropolitan areas.⁷¹

1.44 The Auld review in the UK observed that avoidance of jury service by many in the community “is unfair to those who do their jury service, not least because, as a result of others’ avoidance of it, they may be required to serve more frequently and for longer than would otherwise be necessary”.⁷²

68. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 59.

69. NSW Law Reform Commission, *The Jury in a Criminal Trial* (DP 12, 1985) at para 2.27.

70. United Kingdom, *Hansard* (House of Lords), 28 September 2000, col 995.

71. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.39.

72. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 140. See also Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.62.

1.45 The extent to which citizens may be called upon to perform jury service will vary according to their place of residence, and the incidence of trials at courts within the prescribed limit of their residence. In the Sydney metropolitan district in 2004 there were some 2,200,000 enrolled electors. In that same year 406 criminal matters proceeded to trial in the Supreme Court and District Court in Sydney and South West Sydney, requiring, about 5000 jurors.⁷³ If every enrolled elector was eligible to be a juror, and if 2004 was typical, this would suggest that, in any given year, each person on the electoral roll would stand an approximate 1 in 450 chance of actually serving. However, that chance would increase once people who are disqualified, ineligible, entitled to exemption or excused for good cause are removed from the available pool. The situation will, of course, be different in regional areas.

1.46 Lord Justice Auld considered it possible that, once patterns emerge following the removal of most categories of exemption, “local increases” could be permitted in the period during which a person may be excused for previous jury service.⁷⁴

Engendering public confidence

1.47 People are more likely to accept jury verdicts if they are seen as being representative, so the jury has a role in legitimising the system of which it is part.⁷⁵ For example, the High Court observed in 1986 that the:

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.⁷⁶

In an earlier case the High Court observed:

The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance

73. Allowing for aborted trials and trials that had a false start.

74. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 150.

75. See M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 17. See also R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 135, 139. But see also I M Vodanovich, “Public attitudes about the jury” in D Challenger (ed), *The Jury* (Australian Institute of Criminology Seminar: Proceedings No 11, 1986) at 75; M Findlay, “Reforming the jury: the common ground” in D Challenger (ed), *The Jury* (Australian Institute of Criminology Seminar: Proceedings No 11, 1986) at 155.

76. *Brown v The Queen* (1986) 160 CLR 171 at 202.

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.⁷⁷

Fair trial

1.48 The general opinion in the community is that “normally, the jury trial is the fairest form of trial available”.⁷⁸ However, in order to ensure a fair trial, it is important that a jury is composed in a way that avoids bias or apprehension of bias. As discussed later in this report this does have a bearing on the representative nature of the jury and the retention of certain categories of disqualification or exclusion.

1.49 Some jurisdictions give the judge an express power to discharge a jury in certain circumstances where its composition might make the trial unfair or appear to be unfair. For example, in NSW, the presiding judge has the power to discharge the jury if “the exercise of the rights to make peremptory challenges has resulted in a jury whose composition is such that the trial might be or might appear to be unfair”.⁷⁹ This power is, however, rarely exercised. In other jurisdictions it is considered that the principle of random selection is generally sufficient to ensure fairness and that any power to discharge should only be exercised where the competence of the jurors is in question.⁸⁰

77. *Kingswell v The Queen* (1985) 159 CLR 264 at 301.

78. *R v Abdroikov* [2005] 4 All ER 869 at 878 (CA).

79. *Jury Act 1977* (NSW) s 47A.

80. See *R v Ford* [1989] QB 868 at 871; New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 158-160.

2. Identifying qualified jurors

- Enrolment as an elector
- Identifying potential jurors
- Ability to read or understand english

ENROLMENT AS AN ELECTOR

2.1 In NSW “every person who is enrolled as an elector for the Legislative Assembly... is qualified and liable to serve as a juror”.¹ This is dependent upon age and citizenship as is the case in most Australian jurisdictions.²

ISSUE 2.1

Should the principal qualification for jury service be enrolment as an elector for the Legislative Assembly?

Citizenship

2.2 The requirement of citizenship arises from the electoral qualifications, which includes citizens, as well as British subjects who were enrolled as electors immediately before 26 January 1984.³ Permanent residency does not suffice, although there have been various proposals in other Australian jurisdictions to extend the franchise to permanent residents.

2.3 For example, a 1993 Queensland review argued that extending the franchise to permanent residents would broaden the group from which jurors are selected and “may facilitate a more frequent representation of racial and ethnic groups on juries”.⁴

2.4 The Victorian Parliamentary Law Reform Committee accepted, as a matter of principle, that there was merit in allowing permanent residents to serve as jurors. However, the Committee also acknowledged the current administrative difficulties in establishing an accurate database of non-citizen permanent residents.⁵ Reasons given for removing the citizenship limitation included that it:

1. *Jury Act 1977* (NSW) s 5.
2. *Juries Act 2000* (Vic) s 5(1); *Juries Act 1957* (WA) s 4; *Juries Act 1927* (SA) s 11(a); *Juries Act 2003* (Tas) s 6(1); *Juries Act 1963* (NT) s 9(1); *Juries Act 1967* (ACT) s 9. See also *Juries Act 1974* (Eng) s 1(1)(a).
3. *Parliamentary Electorates and Elections Act 1912* (NSW) s 20(1)(b).
4. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 6.
5. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.9-3.11.

- reduces the representativeness of juries;⁶
- encroaches on an accused's "right to have a trial by his or her peers";⁷
- prevents people who have a sufficient commitment to the community (that is, permanent residents) from participating in the administration of justice.⁸

2.5 In New Zealand a person is eligible to serve if he or she is registered as an elector.⁹ This includes not only citizens but also those who have been permanent residents of New Zealand and have "at some time resided continuously in New Zealand for a period of not less than one year".¹⁰ In England and Wales resident aliens were once able to serve as jurors if they had been domiciled in England or Wales for 10 years or more.¹¹

2.6 The Commission recognises that there would be practical difficulties involved in making non-citizens, such as permanent residents, qualified to serve as jurors when they are not included on the electoral roll. For that to work there would need to be a database, accessible to the Sheriff, that maintains a current record of the addresses of such people, which would require the co-operation of the Commonwealth Department of Immigration. Absent some such system, or alternatively one that allowed voluntary registration of permanent residents, there could be insurmountable problems in locating such people with an escalation of administrative costs.

ISSUE 2.2

Should qualification to serve as a juror be limited to Australian citizens?
Should the qualification be extended to permanent residents or to other classes of people?

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6. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.7.
 7. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.7.
 8. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.9.
 9. *Juries Act 1981* (NZ) s 6.
 10. *Electoral Act 1993* (NZ) s 74(1).
 11. *Juries Act 1870* (Eng) s 8.

Age

2.7 Citizens over the age of 18 are qualified to vote¹² and are, therefore, qualified to be enrolled as jurors.

2.8 Some jurisdictions specify an upper age limit beyond which people are not qualified to serve. For example, in SA a person is qualified if they are “not above the age of 70 years”.¹³ In NSW the qualification is not limited by an upper age, although a person aged 70 years or above has a right to claim exemption. Exemptions based on age are dealt with in Chapter 7.¹⁴

Disqualified from voting

2.9 Under NSW law, a number of people, despite being citizens and over 18 years of age, are disqualified from being enrolled as electors.¹⁵ They are:

- people meeting various classifications under the *Mental Health Act 1958* (NSW);
- people convicted of an offence and currently serving a sentence of imprisonment of 12 months or more for that offence;
- people holding a temporary entry permit or who are prohibited immigrants.¹⁶

IDENTIFYING POTENTIAL JURORS

Compiling the jury roll

2.10 The jury roll for a jury district that serves a particular court is compiled from the names of those people enrolled as electors for the Legislative Assembly in that district. A jury district usually comprises such electoral districts or parts or electoral districts that are closest to the court in question. At least once every 12 months, the Sheriff must select at random from the relevant electoral rolls a number of people who may be included on each jury roll. Each list of names of people so selected is referred to in the legislation as a “supplementary jury roll”. The Sheriff must, when deciding the number of people to include on a

12. *Parliamentary Electorates and Elections Act 1912* (NSW) s 20(1)(a).

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

14. Para 7.20-7.27.

15. This does not include the Commonwealth provisions which exclude from Commonwealth electoral rolls people who are members of proscribed “unlawful” organisations: *Crimes Act 1914* (Cth) s 30FD.

16. *Parliamentary Electorates and Elections Act 1912* (NSW) s 21.

supplementary jury roll, estimate the number of people who may be required to serve from time to time, allowing for people who are not qualified, or who are ineligible or who will duly claim exemption from service.¹⁷

2.11 The Sheriff sends a notice to each person whose name is included on the supplementary jury roll for a jury district, informing that person of the intention to include him or her on the jury roll, and describing the classes of people who are disqualified, ineligible or entitled to claim exemption as of right.¹⁸ The notice must contain a questionnaire to be completed by a respondent claiming disqualification, ineligibility or exemption from jury service.¹⁹

2.12 The Sheriff is under a duty to delete from the supplementary jury roll the names of persons whom the Sheriff determines are disqualified, ineligible or who have successfully claimed exemption from serving as jurors.²⁰ A right of appeal lies to a Local Court by any person dissatisfied with the Sheriff's determination not to delete his or her name.²¹ The current practice is that, after 28 days, the names of those who have not been removed from the supplementary jury roll are duly included on the roll for the jury district and are thereafter liable to be summoned to serve as jurors. A person remains on the jury roll for a period of 15 months, or such other period, not exceeding two years, as may be prescribed by regulation.²²

Need for a separate jury roll?

2.13 The existence of a separate jury roll arises from the days when there were no electoral rolls and the list was compiled based on a property qualification and posted on church doors. In later years it served a function whereby every three years those who were disqualified or ineligible from the pool of potential jurors were removed from the roll. However, if the exemptions are largely removed, then it would seem just as convenient to use the Electoral roll as it stands on the day that a summons is issued.

2.14 Summoning directly from the electoral roll may also have some other administrative benefits. For example, the current practice of sending out notices of inclusion may confuse some recipients who mistake the document for a notice requiring their attendance, with the

17. *Jury Act 1977* (NSW) s 12.

18. See para 3.7, 3.11, 3.14.

19. *Jury Act 1977* (NSW) s 13(1)(c).

20. *Jury Act 1977* (NSW) s 14.

21. *Jury Act 1977* (NSW) s 14(2), s 15.

22. *Jury Act 1977* (NSW) s 15A.

result that the Sheriff's Office must deal with many telephone inquiries. This process could, therefore, be streamlined if the procedure was altered so as to permit summoning directly from the electoral roll. Also, if the right to claim an exemption were retained for some groups of people, the Sheriff's current practice of excluding such people when they respond to the notice of inclusion, rather than including them and deferring the claim until such time as a summons is served reduces the number of people who could potentially serve, if prepared, at that later date.

2.15 There is precedent for summoning directly from the electoral rolls. In Queensland, the Principal Electoral Officer prepares jury rolls by listing all persons aged between 18 and 70, who live within a certain distance of the relevant court and who are on the electoral roll. The Officer then forwards the lists to the Sheriff who posts notices to randomly selected persons 6 weeks in advance of the court sittings for which jurors are required. These notices include a questionnaire designed to identify those who are ineligible or disqualified from service and also gives the opportunity for others to claim exemption as of right. A computer then randomly selects the names of those who will comprise the jury panels from which the juries will be selected.²³ In England and Wales, potential jurors are now also summoned directly from the electoral rolls.²⁴

2.16 In the ACT the jury roll is compiled by removing from the electoral roll those who are dead, not qualified, exempt or excused from serving.²⁵

2.17 The Tasmanian review noted that with the advent of computers, "there is no reason why panels cannot be drawn directly from the whole jury roll". Although the review also noted there were advantages in having discrete lists that were active for specified periods as this would enable "the Sheriff to ascertain those potential jurors who will serve during a given period".²⁶ The Tasmanian review also noted that the practice of notifying people of their inclusion on the jury roll had the disadvantage of increasing the administrative

23. *Jury Act 1995 (Qld)* Pt 4. See Queensland, Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland* (Issues Paper, 1991) at 10.

24. *Juries Act 1974 (Eng)* s 2, s 3.

25. *Juries Act 1967 (ACT)* s 19(2).

26. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 5.

workload of the Sheriff's office and of adding the costs involved in mailing out to all potential jurors.²⁷

2.18 One preliminary submission to the Commission proposed dispensing with notices of inclusion and summoning directly from the electoral roll. This would make every person on the electoral roll a potential juror.²⁸ A similar “one-step process for jury roll creation and summoning” was proposed in NSW in 1995 following a review of the system by Andersen Consulting. However, the proposal also involved potential jurors seeking to be excused by way of an “interactive” telephone system.²⁹ At the time, concerns were expressed about the ability to administer the telephone aspect of the proposed scheme in a way that ensured compliance.³⁰ The creation of the one-step process, however, was not challenged.

ISSUE 2.3

Is it necessary to have a jury roll that is separate from the electoral roll?

Using the electoral roll to identify and locate potential jurors

2.19 NSW uses the Electoral roll as the sole source for identifying and locating those who are to receive a notice of inclusion on the jury roll. This excludes those who are entitled to register as electors but neglect or refuse to do so.

2.20 The English Royal Commission on Criminal Justice in 1993 observed that the electoral roll seemed to be “the best available means of ensuring that juries reflect the composition of the population as a whole”. It also commented on the need to encourage people from ethnic minority communities to register to vote.³¹ However, in 2001, Lord Justice Auld noted that the use of the electoral roll in England resulted in an “under-representation of those in their early 20s, ethnic

27. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 5.

28. NSW, Jury Task Force, *Preliminary submission* at 2.

29. D Lennon, “Changes to the NSW Jury System”, paper presented at the *4th Biennial National Sheriff's Conference* (Brisbane, 3-5 July 1995) at 14.

30. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 5.55-5.57.

31. England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 131.

minorities and the more mobile sections of the community, such as those living in rented accommodation”.³²

2.21 The extent to which such comments can be applied to the circumstances in NSW is debatable given that registration as an elector is compulsory in Australia but not in England. A sample audit undertaken by the Australian Electoral Commission in March 2006 showed that 93.6% of the eligible population were enrolled for the correct electoral division. However, the Electoral Commission has also reported that the estimated participation of eligible 18 to 25 year olds at 30 June 2006 was only 76.7%.³³ The use of the electoral roll as the source for identifying and locating potential jurors has also given rise to concerns in NSW about the representation of more transient communities, for example, Indigenous people who do not register as electors.³⁴

2.22 Problems also arise as the result of eligible voters not reporting changes of address promptly, raising for consideration the possibility of the Sheriff being able to cross check personal details and addresses with other databases to identify those who are disqualified, and to ascertain current addresses.

Supplementing the roll by reference to other sources

2.23 Including people on the jury roll identified from sources other than the electoral roll could broaden the group from which jurors are selected and “facilitate a more frequent representation of racial and ethnic groups on juries”.³⁵ The extent to which this is achieved may depend on whether or not people other than eligible but unregistered voters could be added as a result.

2.24 Lord Justice Auld proposed supplementing or cross-checking the existing jury roll, so as to include persons who were entitled to registration as an elector,³⁶ by reference to other sources such as the authorities responsible for driver licensing and motor vehicle

32. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 137; see also at 144.

33. Australian Electoral Commission, *Annual Report 2005-2006* at 30.

34. See para 1.35-1.36.

35. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 6.

36. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 144-145.

registration, social security and revenue collection and telephone directories.³⁷

2.25 New York has followed this approach and now allows its commissioner of jurors to refer to a wide range of sources in selecting citizens to serve:

The commissioner of jurors shall cause the names of prospective jurors to be selected at random from the voter registration lists, and from such other available lists of the residents of the county as the chief administrator of the courts shall specify, such as lists of utility subscribers, licensed operators of motor vehicles, registered owners of motor vehicles, state and local taxpayers, persons applying for or receiving family assistance, medical assistance or safety net assistance, persons receiving state unemployment benefits and persons who have volunteered to serve as jurors by filing with the commissioner their names and places of residence.³⁸

Such provisions may be necessary in the US because of low voter registration rates. In 2004, 72% of voting-age citizens were registered to vote and only 58% of citizens aged 18-24 were registered.³⁹

2.26 Proposals to supplement the pool of potential jurors derived from the electoral roll have also been made in Australia, including by adding holders of driver licences⁴⁰ as well as names obtained from the Department of Social Security and the Taxation Office.⁴¹ However, unlike the proposals of the Auld review and the system in New York, some of these appear to envisage the possibility of going beyond entitlement to vote as a qualification by including permanent residents and others as well as those citizens who are eligible to register but have not done so. Otherwise adding (only) those currently entitled to vote but who are not registered would produce a smaller increase in Australia because of the high levels of voter registration.

37. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 144. See also NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 5-6.

38. New York, *Consolidated Laws - Judiciary* § 506.

39. US Census Bureau, *Voting and Registration in the Election of November 2004* (2006) at 1-4.

40. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 6 and 172-173; Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 6.

41. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 6.

Cross-checking the roll

2.27 The potential sufficiency of a jury pool can be affected by the fact that the addresses on the electoral roll are very often not up to date, with the consequence that many potential jurors do not receive the notice of inclusion, or a jury summons. In the 2005/2006 financial year, 172,000 notices of inclusion were sent to prospective jurors and 102,390 summonses. Of these, 13,000 were returned to sender, representing approximately 5% of all notices of inclusion and summonses sent out. This compares with figures in South Australia where, in 2002, approximately 5.5% of jury summonses were returned to sender.⁴²

2.28 This also occasions practical difficulty in the administrative costs of the Sheriff and the enforcement of what may appear to be a non-compliance with the summons. The problems could be reduced if the Sheriff's Office had the authority to match data against the records of other bodies, such as the Roads and Traffic Authority since changes of address could be identified before the Sheriff's Office sends out notices of inclusion or summonses. At present the RTA database is only consulted when the State Debt Recovery Officer is enforcing the penalty for non-attendance.⁴³

2.29 **Information about criminal records and charges.** The ability to cross-check against information held by Corrective Services, the Courts and NSW Police in relation to criminal records, pending trials and bail is also desirable so that people disqualified from jury service are not given a notice of inclusion in the first place or subsequently summoned to serve.⁴⁴ There have been reported incidents where people with convictions have been empanelled despite their disqualification,⁴⁵ since the current system depends on self-disclosure or, less commonly, on the potential juror with a criminal history being identified by counsel or by a police officer associated with the trial.

2.30 In the ACT the Sheriff can give any police officer a copy of the list of prospective jurors so that he or she may determine if any people are disqualified.⁴⁶ In SA there is a provision compelling the Commissioner of Police, at the request of the sheriff, to investigate and report on any matter relevant to determining whether a person is

42. South Australia, Sheriff's Office, *South Australian Jury Review (2002)* at 16.

43. L Anamourlis, *Preliminary consultation*; NSW, Jury Task Force, *Preliminary submission* at 3.

44. NSW, Jury Task Force, *Preliminary submission* at 4.

45. NSW Police, *Preliminary Submission* at 1.

46. *Juries Act 1967* (ACT) s 24(4) and (5).

disqualified or not.⁴⁷ Similar provisions are in place in Tasmania and Victoria,⁴⁸ except that, in Tasmania the Commissioner of Police must also furnish a report, at the request of the Director of Public Prosecutions, on any people who have committed, or are alleged to have committed, “non-disqualifying” offences in Tasmania or elsewhere.⁴⁹ In Victoria there was formerly also an informal system whereby the Police Commissioner passed a list including acquittals and non-disqualifying criminal convictions to the Director of Public Prosecutions to assist in exercising the right of peremptory challenge.⁵⁰

ISSUE 2.4

Should it be possible to use other sources of information to:

- (a) cross-check entries in the electoral roll, for example as to their current address or possible disqualification;
- (b) supplement the names of potential jurors derived from the electoral roll by including those who are entitled to register as electors but have not done so?

What other sources of information should be used to identify potential jurors?

ABILITY TO READ OR UNDERSTAND ENGLISH

2.31 Adequate ability to communicate in and/or understand the English language is a ground of ineligibility⁵¹ or disqualification⁵² in all jurisdictions, including NSW.⁵³ Questions of degree arise as to what is involved in an ability to read or understand or communicate in English.⁵⁴

2.32 The 1965 UK Departmental Committee on Jury Service recommended that “no one should be qualified to serve on a jury who

47. *Juries Act 1927 (SA)* s 12(1a).

48. *Juries Act 2003 (Tas)* s 23; *Juries Act 2000 (Vic)* s 26.

49. *Juries Act 2003 (Tas)* s 24. Such information is presumably used to allow challenges to particular jurors.

50. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 5.17. But see *Katsuno v The Queen* [1999] HCA 50.

51. *Juries Act 2003 (Tas)* Sch 2 cl 10; *Juries Act 2000 (Vic)* Sch 2 cl 3(f); *Jury Act 1995 (Qld)* s 4(3)(k); *Juries Act 1927 (SA)* s 13(b).

52. *Juries Act 1957 (WA)* s 5(b)(iii); *Juries Act 1963 (NT)* s 10(3)(c); *Juries Act 1967 (ACT)* s 10(c).

53. *Jury Act 1977 (NSW)* Sch 2 Item 11.

54. See para 7.3-7.6 below.

cannot read, write, speak and understand English without difficulty”.⁵⁵

2.33 The Victorian Parliamentary Law Reform Committee considered that the question of literacy levels was best dealt with by making people ineligible who are unable to read or understand English,⁵⁶ a test which currently reflects the ineligibility provision in NSW.⁵⁷

2.34 In other jurisdictions, for example, in the US, the ability to communicate in English is expressed as a ground of eligibility.⁵⁸

ISSUE 2.5

Should an ability to read or understand English be a qualification for jury service?

What should the level of ability be?

55. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 80.

56. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at 3.13.

57. *Jury Act 1977* (NSW) Sch 2 Item 11.

58. See *The Jury Project* (Report to the Chief Judge of the State of New York, 1994) at 26-27.

3. Current structure of exemption

- Disqualification
- Ineligibility
- Right to be exempted
- Exemption for good cause
- Issues arising

3.1 In NSW there are currently two categories of people who cannot serve as jurors because they are either disqualified or ineligible, and two categories who can be excused from service, namely those who are entitled to be exempted as of right, and those who may be excused for good cause.

3.2 In 1994 it was reported that, in the most recent draft jury roll for the Sydney district, 42% of those selected were removed on the basis of disqualification, ineligibility and exemption as of right.¹ This can be compared with South Australia where, in 2002, approximately 55% of persons summoned for jury service applied to be excused, to have their service deferred or successfully claimed an ineligibility to serve.²

3.3 The model adopted by the UK Departmental Committee on Jury Service in 1965 became the basis for the regime established in NSW in 1977 as well as in various other Australian jurisdictions.³ The earlier position in England and Wales was that “every person whose name is included in the jurors book as a juror... shall be liable to serve as such, notwithstanding that he may have been entitled by reason of some disqualification or exemption to claim that he ought not to be marked in the electors list as a juror”.⁴ Only female members of vowed religious communities were “not liable to serve on any jury”.⁵

3.4 In NSW it is an offence for a potential juror not to inform the Sheriff that he or she is disqualified or ineligible to serve.⁶ It is also an offence to provide false or misleading information to the Sheriff when claiming to be disqualified or ineligible or entitled to be exempted as of right.⁷

3.5 However, a jury verdict is not invalidated only by reason of the fact that a member of the jury was disqualified from serving as a juror or ineligible to do so.⁸

3.6 Exemption as of right or excusal for good cause depends upon self-disclosure to the Sheriff or to the Court, as, in a practical sense,

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1. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 38.
 2. South Australia, Sheriff's Office, *South Australian Jury Review* (2002) at 15.
 3. For example, in Victoria: Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) Vol 1 at para 3.2. See also Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.7.
 4. *Juries Act 1922* (Eng) s 2(1).
 5. *Juries Act 1922* (Eng) s 8(2)(b).
 6. *Jury Act 1977* (NSW) s 61.
 7. *Jury Act 1977* (NSW) s 62.
 8. *Jury Act 1977* (NSW) s 73.

does deletion from the jury roll by reason of disqualification or ineligibility.

DISQUALIFICATION

3.7 In NSW a person is disqualified from serving as a juror⁹ if he or she is:

- 1 A person who at any time within the last 10 years in New South Wales or elsewhere has served any part of a sentence of imprisonment (not being imprisonment merely for failure to pay a fine).
- 2 A person who at any time within the last 3 years in New South Wales or elsewhere has been found guilty of an offence and detained in a detention centre or other institution for juvenile offenders (not being detention merely for failure to pay a fine).
- 3 A person who is currently bound by an order made in New South Wales or elsewhere pursuant to a criminal charge or conviction, not including an order for compensation, but including the following:
 - (a) a parole order, a community service order, an apprehended violence order and an order disqualifying the person from driving a motor vehicle,
 - (b) an order committing the person to prison for failure to pay a fine,
 - (c) a recognizance to be of good behaviour or to keep the peace, a remand in custody pending trial or sentence and a release on bail pending trial or sentence.¹⁰

3.8 The principal reason for disqualifying people who have been defendants in the criminal justice system is the belief that their past criminal behaviour, and its consequences through the justice system, may impact upon their ability to be impartial.¹¹

3.9 Undischarged bankrupts are still excluded in Victoria and the ACT,¹² but that reason for disqualification has been removed from the list in other jurisdictions.¹³

9. *Jury Act 1977* (NSW) s 6(a).

10. *Jury Act 1977* (NSW) Sch 1.

11. See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.15-3.16.

12. *Juries Act 2000* (Vic) Sch 1 cl 8; *Juries Act 1967* (ACT) s 10(b).

3.10 In 1993, the Criminal Procedure Division of the Queensland Litigation Reform Commission recommended that there be only one category of automatic exemption that encompasses both disqualification and ineligibility.¹⁴

INELIGIBILITY

3.11 In NSW a person is ineligible to serve as a juror¹⁵ if he or she is:

- 1** The Governor.
- 2** A judicial officer (within the meaning of the *Judicial Officers Act 1986*).
- 3** A coroner.
- 4** A member or officer of the Executive Council.
- 5** A member of the Legislative Council or Legislative Assembly.
- 6** Officers and other staff of either or both of the Houses of Parliament.
- 7** An Australian lawyer (whether or not an Australian legal practitioner).
- 8** 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.
- 9** The Ombudsman and a Deputy Ombudsman.
- 10** A person who at any time has been a judicial officer (within the meaning of the *Judicial Officers Act 1986*) or a coroner, police officer, Crown Prosecutor, Public Defender, Director or Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions.
- 11** A person who is unable to read or understand English.
- 12** A person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror.¹⁶

13. See Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.62-3.64; and Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at 32.

14. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 3-4. See para 3.22-3.23 below.

15. *Jury Act 1977* (NSW) s 6(b).

16. *Jury Act 1977* (NSW) Sch 2.

3.12 A person is also ineligible if he or she is exempted under the *Jury Exemption Act 1965* (Cth),¹⁷ which, in general, excludes various Commonwealth office holders.

3.13 The UK Departmental Committee on Jury Service recommended that ineligibility should apply to those connected with the administration of law and justice.¹⁸ The principal concern appeared to be the desirability of preserving the system's appearance of impartiality. Sometimes the question of impartiality of a particular juror would seem best dealt with in the context of an application to be excused in a particular trial since the mere holding of a particular office within a broad range of ineligible occupations, may have no bearing whatsoever for that trial.

RIGHT TO BE EXEMPTED

3.14 In NSW the following people may be exempted from jury service as of right:¹⁹

- 1 Clergy.
- 2 Vowed members of any religious order.
- 3 Persons practising as dentists.
- 4 Persons practising as pharmacists.
- 5 Persons practising as medical practitioners.
- 6 Mining managers and under-managers of mines.
- 7 A person employed or engaged (except on a casual or voluntary basis) in the provision of fire, ambulance, rescue, or other emergency services, whether or not in the public sector.
- 8 Persons who are at least 70 years old.
- 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 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.

17. See below at para 5.51-5.53.

18. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 101.

19. *Jury Act 1977* (NSW) s 7.

- 13** A person who:
- (a) within the 3 years that end on the date of the person's claim for exemption, attended court in accordance with a summons and served as a juror, or
 - (b) within the 12 months that end on the date of the person's claim for exemption, attended court in accordance with a summons and who was prepared to, but did not, serve as a juror.
- 14** A person who is entitled to be exempted under section 39 on account of previous lengthy jury service.²⁰

3.15 The UK Departmental Committee on Jury Service saw the entitlement to be excused as of right as being available for "persons who, while well fitted to be jurors, should, because of the importance of their other duties to the community, be entitled to decline to serve":

The duties of some, but not all, of these professions, are so important that it would be against the public interest to compel them to give up their work temporarily in order to act as jurors

but added:

equally, individual members of these professions who on particular occasions are able to spare the time should not be prevented, as they are now, from doing so.²¹

3.16 The Committee also noted the extreme difficulty in drawing a line between those whose work necessitated them being excused as of right and those whose work did not. Two grounds were identified where it considered it appropriate for a person to be excused as of right, mainly where that was in the public interest because of:

- "the special and personal duties to the state of the individual members of the occupation"; and
- "the special and personal responsibilities of individual members of the occupation for immediate relief of pain or suffering".²²

The Committee noted that any right to be excused effectively gave certain people "a statutory right to choose to contract out of one of the ordinary responsibilities of citizenship".²³

20. *Jury Act 1977* (NSW) Sch 3.

21. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 100.

22. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 148.

23. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 151.

3.17 The Victorian Parliamentary Law Reform Committee observed that the initial hopes of the Departmental Committee that members of the group with the right to be exempted might nevertheless elect to serve, were not realised. The Victorian experience was that “persons who have a right to be excused from jury service almost always exercise the right”.²⁴ In that State it was observed, in 1996, that the right to be excused was the “main cause of under-representation within the jury system”.²⁵ This is likely also to be the case in NSW.

3.18 The Auld review of the criminal courts of England and Wales considered that while there may be “good reason” for excusing people when they must perform “important duties over the period covered by the summons”, there was no reason why they should be entitled to be excused as of right “simply by virtue of their position”.²⁶ Obviously the removal of a right of exemption would greatly increase the number of eligible people available for jury service.²⁷

EXEMPTION FOR GOOD CAUSE

3.19 In New South Wales a person may be excused from attendance for jury service, at any time before being summoned, for good cause because of “any matter of special importance or any matter of special urgency”.²⁸ A person who has been summoned for jury service may also be excused from attendance for jury service on the grounds of good cause.²⁹ Most jurisdictions have a provision allowing a person to be excused from attendance for jury service on the grounds of “good cause”, “reasonable cause”, or “good reason”.

3.20 Commonly applications to be excused are dealt with by the Sheriff, although where there is any doubt over the genuineness of the claim or its strength, the issue is usually reserved for the trial judge or the coroner holding the inquest. The Sheriff’s officers are assisted by guidelines in exercising the discretion to excuse.³⁰ There are many potential grounds for such an application including, 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

24. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.146.

25. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.147.

26. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 150.

27. See NSW, Jury Task Force, *Preliminary submission* at 2.

28. *Jury Act 1977* (NSW) s 18A.

29. *Jury Act 1977* (NSW) s 38.

30. See para 8.4, 8.12.

university or TAFE commitments or examinations, or cannot be replaced in their employment because of staff shortages or other exigencies of business. The Sheriff may require the request to be supported by a statutory declaration annexing, for example, a medical certificate or travel itinerary, while a judge can require the person seeking to be excused to give evidence on oath.

3.21 The justification for permitting people to be excused for good cause, and the process involved, are discussed below.³¹

ISSUES ARISING

Merging the categories

3.22 In some other States, the categories are somewhat more confined than they are in NSW. For example, Tasmania only has categories of disqualification and ineligibility. Only people over the age of 70 may be excused as of right,³² although they may be excused for “good reason”.³³ The same situation applies in Victoria.³⁴ In Queensland, there is a single category of those who are ineligible to serve,³⁵ but there is also a list of criteria for excusing potential jurors.³⁶ In England and Wales there are no categories of exemption as of right or ineligibility, only a relatively short list of qualifications, including that a juror not be a “mentally disordered person” and a list of disqualifications based on criminal charge or conviction.³⁷

3.23 A question arises whether there is any point in maintaining some of the categories as separate. This is particularly the case with respect to the categories of disqualification and ineligibility which appear to have the same consequence. It is, therefore, difficult to see why they should be separated unless the ineligibility criteria are clearly and directly linked to additional criteria relating, for example, to current office or substantial connection with some aspect that may have a direct bearing on a potential trial.

31. See Chapter 6.

32. *Juries Act 2003* (Tas) s 11.

33. *Juries Act 2003* (Tas) s 6, s 9(3), Sch 1 and Sch 2.

34. *Juries Act 2000* (Vic) s 5(2) and (3), s 8, Sch 1 and Sch 2.

35. *Jury Act 1995* (Qld) s 4(3).

36. *Jury Act 1995* (Qld) s 21.

37. See *Juries Act 1974* (Eng) s 1, Sch 1.

ISSUE 3.1

Should there continue to be separate grounds of disqualification and ineligibility?

Reducing the grounds

3.24 In the following chapters we examine more closely the various categories of people within the grounds of disqualification, ineligibility and entitlement to exemption as of right as well as the rationale for their exclusion.

3.25 Some are excluded simply because they are persons “whose professional or expert duties are so important to the community and so exacting that they ought not to be permitted to serve”.³⁸ However, the 1993 report of the NSW Jury Task Force observed that, while few would argue with some exclusions, it was “difficult to understand why a number of these groups should continue to be ineligible to serve as jurors”.³⁹

3.26 The 1994 Australian Institute of Judicial Administration review of jury management in NSW also noted that the list of exemptions appeared “far too wide” and that some were “difficult to reconcile”. It noted that the existing categories of ineligibility “may not only create a non-representative jury roll, but also reduce the franchise in such a way that the burdens of jury service, and its challenges, are not evenly shared among the citizens of New South Wales”.⁴⁰

3.27 The trend has clearly been to reduce the number of exemptions that are available. For example, Tasmania and SA have substantially reduced the categories of those who are ineligible or entitled to claim exemption.⁴¹ Reviews have consistently questioned the assumptions underlying many of the categories of those who are ineligible or

38. NSW, *Parliamentary Debates (Hansard) Legislative Assembly*, 24 February 1977, at 4478, quoting United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 93.

39. NSW, *Report of the NSW Jury Task Force* (1993) at 22. See also at 24.

40. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 173.

41. See *Juries Act 2003* (Tas) Sch 1 and Sch 2; *Juries Act 1927* (SA) Sch 3.

entitled to exemption as of right⁴² and recommended a reduction in the categories.⁴³

3.28 The NSW Jury Task Force in 1993 considered that the “maintenance of the present system is likely to encourage more special interest groups to claim an entitlement to exemption as of right in the future”.⁴⁴ It may be observed that the Victorian provisions relating to ineligibility, which were enacted in 2000, have already been subject to five separate sets of amendments.⁴⁵

3.29 The State of New York and England and Wales provide a precedent for the removal of most or all categories of exemption and the substitution of a system permitting potential jurors to be excused for good cause, with or without deferral.⁴⁶

Civil juries

3.30 Not all of the categories of exemption listed above would be strictly relevant to civil trials. For example, there would be fewer reasons for exempting those associated with the administration of the law and justice from jury service in the case of civil trials. Also the question of impartiality that may apply when people with criminal records serve as jurors in criminal cases may not apply so readily in civil cases. One possible approach might be to make people who are unable to serve on criminal juries available to serve on civil juries. This would, however, be subject to concerns about representativeness and random selection.

42. See United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 98; NSW, *Report of the NSW Jury Task Force* (1993) at 23-25; Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at para 2.5-2.11.

43. See M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 173; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.149; R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at para 34, para 40.

44. NSW, *Report of the NSW Jury Task Force* (1993) at 25.

45. *Juries Act 2000* (Vic) Sch 2. See *Juries (Amendment) Act 2002* (Vic) s 10; *Major Crime (Special Investigations Monitor) Act 2004* (Vic) s 18; *Major Crime Legislation (Office of Police Integrity) Act 2004* (Vic) s 29; *Public Administration Act 2004* (Vic) s 117(1), Sch 3 [108.2]; *Legal Profession (Consequential Amendments) Act 2005* (Vic) s 18, Sch 1 [54.2].

46. *Juries Act 1974* (Eng); New York, Consolidated Laws - Judiciary Art 16. See also M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 173, footnote 4.

3.31 Conversely, there may also be some categories of exemption that are appropriate to juries in civil trials which would not be strictly relevant for juries in most criminal trials. There is at least one precedent for treating civil juries differently from criminal juries. In Victoria people associated with the business of liability insurance were previously ineligible to serve on any civil jury.⁴⁷ An equivalent provision is not included in the current Act. This followed a recommendation by the Victorian Parliamentary Law Reform Committee which surmised that the category was originally intended to “prevent juries becoming tainted with knowledge about insurance and insurable risk”. The Committee considered that the availability of insurance is now “quite well known in the community and that a judge’s direction to disregard matters relating to insurance will be acted upon by the jury”.⁴⁸

ISSUE 3.2

Should the categories for excluding, exempting or excusing jurors be the same for civil juries as they are for criminal juries?

47. *Jury Act 1967 (Vic)* s 5. See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.200-3.201.

48. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.201.

4. Disqualification on the grounds of criminality

- General reasons for disqualification
- People who have been charged or convicted
- People awaiting trial or sentencing
- Identifying people with criminal histories

4.1 In NSW a person may be disqualified on various grounds of past criminal conduct or alleged criminal conduct.¹

GENERAL REASONS FOR DISQUALIFICATION

4.2 In NSW it has been suggested that this category of disqualification is justified because people who have “come into conflict with the law, particularly those who have served gaol sentences, could bear some ill will towards the Crown and so increase the probability of disagreement in criminal proceedings”.² This justification may lose some of its strength now that majority verdicts are available in most criminal trials,³ as has been the case for many years in civil trials.

4.3 In addition to resentment arising from their treatment by the criminal justice system, it has also been assumed that criminality and dishonesty will make such people unsuitable candidates for jury service.⁴ One review simply referred to excluding those “whose recent criminal record indicates that they may not be fitted to pass judgment on their fellow citizens”.⁵ Another review observed that a person who had been convicted and sentenced might “find it difficult to regard the police dispassionately”.⁶ In Queensland it has been additionally suggested that the defence might object to people who are under probation or community service orders serving on the grounds they might “have a stake in trying to please the authorities”.⁷ In more general terms, it has been suggested that confidence in the administration of justice may suffer if “a person with a recent and serious criminal record is allowed to serve as a juror”.⁸ The New Zealand Law Commission considered that the appearance of justice

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1. *Jury Act 1977* (NSW) s 6(a); Sch 1. See para 3.7 above.
 2. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 24 February 1977, at 4478-4479.
 3. *Jury Amendment (Verdicts) Act 2006* (NSW).
 4. Queensland, Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland* (Issues Paper, 1991) at 11. See also New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 179.
 5. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 99.
 6. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 134.
 7. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 5.
 8. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 134.

was probably the strongest argument in favour of excluding people with criminal records from jury service.⁹

4.4 The Victorian Parliamentary Law Reform Committee considered that the disqualification of anyone who has served a prison sentence at any time within the previous 5 years was justified “because of a probable community expectation that these persons have attributes which are incompatible with jury service”.¹⁰

4.5 In England, the Royal Commission on Criminal Justice raised the question whether, “contrary to general belief, the role played by jurors with prior criminal convictions is indistinguishable from the role played by any other category of juror”. However, it considered that any changes to the law could only take place after a proper study into the possible influence of such people on jury verdicts.¹¹ Some anecdotal evidence considered by the UK Departmental Committee on Jury Service suggested that around 1965, a time when only those convicted of “infamous” crimes were excluded from juries, the presence of jurors with known criminal records did not apparently result in perverse verdicts.¹²

4.6 It has also been suggested that a large proportion of the Indigenous population of NSW may be excluded by such provisions.¹³

4.7 The question has been asked whether the availability to the Crown of a right of peremptory challenge might not be an additional way of ensuring that those with a criminal background do not serve as jurors “in the interests of justice”.¹⁴ For such a right to be exercised, the prosecution would need access to the personal details of the potential jurors, which is presently not permitted.¹⁵ One preliminary submission to this Commission suggested the adoption of a more subjective test, so that people who were not “fit and proper” to serve as jurors could be excluded,¹⁶ it being argued that the term “fit and

9. New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 179.

10. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.43.

11. England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 132.

12. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmd 2627, 1965) at para 132.

13. See NSW, *Report of the NSW Jury Task Force* (1993) at 22; Redfern Legal Centre, *Preliminary submission*.

14. See Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) at ch 2.

15. See the juror confidentiality provisions: *Jury Act 1977* (NSW) s 29 and s 37.

16. NSW Police, *Preliminary submission* at 2.

proper” is already being applied in numerous pieces of legislation in NSW.¹⁷

4.8 Queensland formerly had a provision that disqualified any person “of bad fame or repute”.¹⁸ Such a test would, however be very subjective, and could require some form of inquiry akin to that which is seen in the US, and which could be the cause of delay and dispute. The Queensland Supreme Court’s Litigation Reform Commission rejected this provision as an “arbitrary and subjective” category of exclusion.¹⁹

PEOPLE WHO HAVE BEEN CHARGED OR CONVICTED

Custodial sentences for adult offenders

4.9 Disqualifications of people who are sentenced have generally been based on length of sentence and time since conviction, and these differ from jurisdiction to jurisdiction. For example, some jurisdictions will specify a sentence of a particular length as a permanent bar on serving.²⁰ Some, like NSW, make no such provision. Other jurisdictions are very strict. For example, Queensland maintains an absolute ban on people who have ever been convicted of an indictable offence or sentenced to imprisonment.²¹

4.10 Some specify that a person must have served a particular period of imprisonment within a certain number of years.²² For example, in NSW any term of imprisonment served in the previous 10 years will disqualify a person from jury service.²³

17. *Firearms Act 1996* (NSW) s 11(3)(a); *Security Industry Act 1997* (NSW) s 15(1)(a); *Passenger Transport (Taxi-cab Services) Regulation 2001* (NSW) cl 5; and *Passenger Transport (Bus Services) Regulation 2000* (NSW) cl 5A.

18. *Jury Act 1929* (Qld) s 7(1)(e).

19. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 5.

20. 3 years in Tasmania and Victoria: *Juries Act 2003* (Tas) Sch 1 cl 1; *Juries Act 2000* (Vic) Sch 1 cl 1. 2 years in WA and SA: *Juries Act 1957* (WA) s 5(b)(i); *Juries Act 1927* (SA) s 12(1)(b). 1 year in the ACT: *Juries Act 1967* (ACT) s 10(a).

21. *Jury Act 1995* (Qld) s 4(3)(m) and (n).

22. 3 months or more for an indictable offence in the past 5 years in Tasmania: *Juries Act 2003* (Tas) Sch 1 cl 1(3); 3 months or more for any offence in the past 10 years in Victoria: *Juries Act 2000* (Vic) Sch 1 cl 2.

23. *Jury Act 1977* (NSW) Sch 1 item 1. 5 years in WA: *Juries Act 1957* (WA) s 5(b)(ii). 7 years in the Northern Territory: *Juries Act 1963* (NT) s 10(3)(a)(ii).

4.11 Two substantially competing principles need to be balanced:

- allowing people who have served their time, undertaken rehabilitation, and become eligible voters to become fully functioning members of society;²⁴
- ensuring that the jury system is impartial.²⁵

For example, in 1965 the UK Departmental Committee on Jury Service asked:

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?²⁶

4.12 The New Zealand Law Commission considered the current emphasis on the “reintegration” of offenders and observed:

Legal barriers to social and civic participation, such as disqualification from jury service, not only serve as a constant reminder to offenders that they are not permitted to truly reintegrate, but may help to persuade them that any efforts to do so are wasted.²⁷

The Queensland Criminal Justice Commission also raised the question whether:

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.²⁸

24. See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.23; Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) at ch 2.

25. See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.23; Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) at ch 2.

26. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 131.

27. New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 181.

28. Queensland, Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland* (Issues Paper, 1991) at 11.

The Commission observed that the disqualification of people who have “committed only minor criminal offences which have resulted in non-custodial penalties may now be particularly harsh”.²⁹

4.13 The question then becomes at what point to draw the line in terms of seriousness of the offence and the length of time since the sentence was served. The UK Departmental Committee on Jury Service concluded that “any disqualification should be as limited as is consistent with the proper administration of justice and the maintenance of public confidence in the jury system”.³⁰ In Victoria, different periods of disqualification apply dependent on the sentence served: for example, 2 years disqualification for anyone sentenced for any offence; 5 years disqualification for anyone sentenced to imprisonment for an aggregate of less than 3 months; 10 years disqualification for anyone sentenced to imprisonment for an aggregate of 3 months or more; and disqualification for life for anyone convicted of treason or of an indictable offence and sentenced to an aggregate of 3 years or more.³¹ Other Australian jurisdictions also stipulate different periods of disqualification for different sentences.³²

4.14 Questions arise as to whether the fact of sentencing or the length of sentence imposed should be the appropriate measure for determining if a person is disqualified. For example, it has been suggested that “disqualification should not be determined by reference to the period of imprisonment, but instead should take into account the nature of the offence committed”.³³ However, there would be formidable difficulties involved in identifying all of the offences which ought to disqualify a person from serving as a juror.³⁴

29. Queensland, Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland* (Issues Paper, 1991) at 11.

30. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 140.

31. *Juries Act 2000* (Vic) Sch 1 cl 1-5.

32. See *Juries Act 1927* (SA) s 12(1).

33. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.29.

34. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.30. See also United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 141.

ISSUE 4.1

Should people who have been subject to custodial sentences continue to be disqualified from jury service?

What level of penalty ought to disqualify a person from jury service?

How long after the termination of the sentence should a person continue to be disqualified?

Custodial sentences for young offenders

4.15 As the legislation is currently structured, the disqualification period for young offenders is less than that for adult offenders, and is defined in somewhat different terms in that it depends on the person having “been found guilty of an offence”, an expression which is potentially ambiguous. Moreover it is a definition that may not adequately reflect the available sentencing discretion and practice in relation to young offenders.³⁵

4.16 The Victorian Parliamentary Law Reform Committee considered that a disqualification period of 5 years was too long for young offenders, preferring instead a period of 2 years from the end of the sentence. The Committee weighed up the competing considerations of:

- the “law’s concession to youth” so that young offenders “especially should be allowed to put their former offending into the past”; and
- the fact that young people “sentenced to detention are often guilty of quite serious criminal conduct”.³⁶

ISSUE 4.2

Should separate provision be made for the disqualification of young offenders?

Should there be any modification of the disqualification criteria for those people who have been dealt with as a juvenile, but who have now attained their majority?

Non-custodial orders

4.17 NSW currently disqualifies people bound by orders of a court in criminal proceedings including parole orders, community service orders, apprehended violence orders, orders disqualifying a person

35. Under *Young Offenders Act 1997 (NSW)* and *Children (Criminal Proceedings) Act 1987 (NSW)*.

36. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.55.

from driving and recognizances.³⁷ Most other Australian jurisdictions include a similar range of non-custodial orders as a ground for disqualifying people from jury service.³⁸

4.18 As noted earlier, the current wording of this head of disqualification does not embrace all of the potential sentencing orders that are available which do not involve a term of imprisonment. Nor does it provide for those who are subject to preventative detention and other similar orders³⁹ or for those who might be excluded from the Commonwealth electoral roll by virtue of membership of a declared unlawful association.⁴⁰ Similarly no mention is made of those who may be the subject of child protection orders⁴¹ or the subject of a registration requirement⁴² or the subject of extended supervision or continuing detention orders. Such people might otherwise fall outside the earlier criteria for disqualification.

4.19 The Victorian Parliamentary Law Reform Committee recommended the repeal of provisions that disqualified people who were subject to a recognizance or a community based order. One reason for doing so was that “most people would accept that persons in these categories in general should be permitted to serve... unless there is some specific reason for their exclusion”.⁴³ The Committee preferred to rely on the trial judge’s ability to exclude people in individual cases where the interests of justice so require. However, the Committee recommended the disqualification (for a period of 5 years) of those who were subject to an “intensive corrections order” or a suspended sentence.⁴⁴ A review by the Tasmanian Department of Justice questioned whether it was fair that a person subject to a probation order without conviction should be disqualified, when a person who is convicted but fined is not disqualified.⁴⁵

37. *Jury Act 1977* (NSW) Sch 1.

38. *Juries Act 2003* (Tas) Sch 1 cl 2; *Juries Act 1927* (SA) s 12(1)(e); *Juries Act 2000* (Vic) Sch 1 cl 3 and cl 4; *Juries Act 1957* (WA) s 5(b)(ii)(III).

39. Under the *Terrorism (Police Powers) Act 2002* (NSW) and reciprocal legislation.

40. *Crimes Act 1914* (Cth) s 30FD.

41. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW).

42. *Child Protection (Offenders Registration) Act 2000* (NSW).

43. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.49.

44. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.52-3.53.

45. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 2.

4.20 The Victorian Parliamentary Law Reform Committee also considered a suggestion that people subject to an intervention order under the *Crimes (Family Violence) Act 1987* (Vic) should be disqualified. The Committee concluded that such people should not be disqualified because the orders “do not result from a criminal proceeding and they do not constitute a criminal sanction”.⁴⁶

ISSUE 4.3

What non-custodial or other orders should disqualify a person from jury service?

Orders not specifically covered

4.21 The current grounds of disqualification were formulated prior to later legislation which has provided for additional sentencing options such as home detention, compulsory drug treatment detention, and which also provided for a different regime for the enforcement of fines, and for the use of community service, and of imprisonment as a final sanction. These are not listed specifically in the indicative list of orders that may be made “pursuant to a criminal charge or conviction”, although most would probably fall within the general category. The current grounds also do not specify the nature of the charge or conviction or offence which should trigger their application.

ISSUE 4.4

Should the grounds be amended so as to reflect in a more precise and currently relevant way, the criteria for disqualification?

PEOPLE AWAITING TRIAL OR SENTENCING

4.22 In NSW a person is disqualified who has been remanded “in custody pending trial or sentence” or released “on bail pending trial or sentence”.⁴⁷ Some other jurisdictions also disqualify from service those who have been remanded in custody or released on bail.⁴⁸ South Australia disqualifies those who have been charged with an offence

46. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.61.

47. *Jury Act 1977* (NSW) Sch 1 item 3(c).

48. *Juries Act 2003* (Tas) Sch 1 cl 4; *Juries Act 2000* (Vic) s 6 and s 7. See also *Juries Act 1974* (Eng) Sch 1 cl 5.

punishable by imprisonment but the charge has not yet been determined.⁴⁹

4.23 The English Royal Commission on Criminal Justice in 1993 expressed concern that it was “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” and recommended that people on bail should be disqualified from jury service.⁵⁰ A subsequent government report considered that a pending trial might “improperly affect” such a juror’s attitude to the proceedings.⁵¹

4.24 The Victorian Parliamentary Law Reform Committee, however, considered that the presumption of innocence required that those charged with offences not be disqualified from jury service.⁵² This was also the view adopted by the New Zealand Law Commission.⁵³

4.25 One submission received by the Commission has suggested that the omission from this category of people who are awaiting trial or sentence, but for whom bail has been dispensed with, appeared to be “inadvertent”, citing an occasion on which such a person charged with dangerous driving had served on a District Court jury.⁵⁴

ISSUE 4.5

Should people who are awaiting trial or sentencing be disqualified from jury service?

Should this category be varied so as to include those awaiting trial or sentence, who have been released unconditionally or otherwise?

49. *Juries Act 1927 (SA) s 12(1)(f)*.

50. England and Wales, *Royal Commission on Criminal Justice (Report, 1993)* at 132.

51. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria (Final Report, 1996)* at para 3.56, citing Scottish Office, Home and Health Department, *Firm and Fair: Improving the Delivery of Justice in Scotland (Cm 2600, 1994)* at 15-16.

52. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria (Final Report, 1996)* at para 3.59.

53. The NZ Commission considered that the bias against the criminal justice system that might be held by such a person could equally be held by their close family members, but these people could not sensibly be excluded: New Zealand, Law Commission, *Juries in Criminal Trials (Report 69, 2001)* at para 184.

54. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 1.

IDENTIFYING PEOPLE WITH CRIMINAL HISTORIES

4.26 As noted earlier, there is no foolproof system for vetting the electoral roll to exclude those people who fall within this category of disqualification. Cross-checks with police and court records, with adult and juvenile correctional systems, or with the Probation and Parole Service or Juvenile Justice are not made, and the Sheriff does not have on-line access to the records of these bodies. Exclusion accordingly depends substantially on truthful self-reporting in response to the questionnaire that the Sheriff sends with the notice of inclusion on the jury roll.

5. **Ineligibility based on occupation**

- Involvement in the administration of law and justice
- Other government officials
- People exempt under Commonwealth provisions

INVOLVEMENT IN THE ADMINISTRATION OF LAW AND JUSTICE

5.1 Certain categories of people who are associated with the administration of law and justice in NSW are currently ineligible, including those who have been “at any time” a judicial officer, a coroner, police officer, Crown Prosecutor, Public Defender, Director or Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions. Also ineligible are people who answer the somewhat imprecise description of an “Australian lawyer (whether or not an Australian legal practitioner)”, as well as those “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”.¹

5.2 In NSW in 1977 it was suggested that people within this kind of group should be ineligible to serve because their “presence on juries would, in view of their close association with the administration of law and justice, be inconsistent with the concept of juries as a distinct element in the process of law, drawn from the community at large”.²

5.3 A number of reasons have been offered as to why such persons should not be eligible to serve on juries. They include the following:

- excluding those “whose work is concerned with the administration of justice or the enforcement of the law” is necessary “in order completely to preserve the lay character of jury service”;³
- people “with knowledge or experience of a legal or quasi-legal nature might, if on a jury, exercise undue influence on their fellow jurors”;⁴

1. *Jury Act 1977* (NSW) Sch 2 Items 2, 3, 8 and 10.
 2. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 24 February 1977, at 4478, quoting United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 93.
 3. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 99 and 103. See also Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.75-3.76.
 4. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 99 and 104; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.76. See also Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 2.

- jurors with a background in crime detection and law enforcement, for example, police officers, might undermine the jury's appearance of impartiality;⁵ and
- judicial officers may have “special knowledge which should not enter into a jury's deliberations”.⁶

5.4 On the question of risk of bias, Lord Justice Auld questioned whether there was any greater risk of prejudice from criminal justice system professionals than there was from other jurors who were expected to “put aside any prejudices they may have” including:

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.⁷

He suggested that the question of bias of individual jurors was one for the trial judge:

Provided that the judge was so satisfied, the over-all fairness of the tribunal and of the trial should not be at risk.⁸

Upon that basis it might be expected that those who are directly involved in law enforcement or as prosecutors or public defenders, would be excused from service as jurors in criminal trials. They could be seen as having a direct or personal interest in the outcome of any prosecution. The same considerations would not apply to a civil jury trial.

Australian lawyers

5.5 In NSW, “an Australian lawyer (whether or not an Australian legal practitioner)” is ineligible to serve as a juror.⁹ Although a somewhat imprecise definition,¹⁰ it is assumed that it is intended to embrace any person admitted to the legal profession in NSW, or any other Australian jurisdiction, whether or not they currently hold a

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5. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 103.
 6. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.76.
 7. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 147.
 8. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 147.
 9. *Jury Act 1977* (NSW) Sch 2 item 7.
 10. As it is in the context of legal professional privilege: see NSW Law Reform Commission, *Uniform Evidence Law* (Report 112, 2006) at para 14.82-14.100.

practising certificate.¹¹ If so, it would not include a lawyer who holds an academic position as a teacher of law, who has never been admitted to the legal profession, even though such a person might teach criminal law or criminology and have much greater relevant knowledge than a practising lawyer whose specialty is conveyancing or corporate law.¹²

5.6 While Victoria has a similar provision to the one in NSW,¹³ in all other Australian jurisdictions the restriction is limited to practising lawyers.¹⁴ Some jurisdictions include articulated clerks,¹⁵ and employees of practising lawyers.¹⁶

5.7 The Victorian Law Department, in 1967, based the wider ineligibility of “duly qualified” legal practitioners on the fact that they held “legal knowledge and experience” that could possibly have an “undue influence” on other jurors.¹⁷ The Department observed that if this view was valid:

it would apply as much to academic lawyers as to practising lawyers. Accordingly no distinction is made between them.¹⁸

On the other hand, the Law Reform Commission of WA, in 1980, acknowledged that there was a risk that people with legal knowledge who are not practising lawyers, such as “articled clerks, teachers of law at tertiary institutions, law graduates and, possibly, senior law students” might unduly influence the other jurors, but added “equally, however, he or she may be of benefit in helping them to clarify the issues”.¹⁹

11. See *Legal Profession Act 2004* (NSW) s 5 and s 6.

12. See New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 188.

13. *Juries Act 2000* (Vic) Sch 2 cl 1(e). See *Legal Profession Act 2004* (Vic) s 1.2.2 and s 1.2.3.

14. *Juries Act 2003* (Tas) Sch 2 cl 3; *Juries Act 1927* (SA) Sch 3; *Jury Act 1995* (Qld) s 4(3)(f); *Juries Act 1957* (WA) Sch 2 Part 1 cl 1(f); *Juries Act 1963* (NT) Sch 7; *Juries Act 1967* (ACT) Sch 2 Part 2.1 Item 5.

15. *Juries Act 1963* (NT) Sch 7.

16. *Juries Act 2000* (Vic) Sch 2 cl 2(c); *Juries Act 1967* (ACT) Sch 2 Part 2.1 Item 5.

17. See also the New Zealand Law Commission’s concern that jurors who are lawyers might usurp the role of the judge on both legal and factual issues: New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 189.

18. Victoria, Law Department, *Jury Service in Victoria*: (Joint paper presented to the Honourable the Attorney-General by the Secretary and Assistant Secretary to the Law Department, 1967) Appendix A.

19. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.19.

5.8 In Queensland, new provisions in 1995 removed lawyers from the list of exceptions.²⁰ This was contrary to the recommendation of the Supreme Court’s Litigation Reform Commission, in 1993, that “members of the legal profession (admitted to practice and in fact engaged in legal work)” be automatically exempt from service.²¹ However, the new provision did not commence before a 1996 amendment saw the reintroduction of the exemption of lawyers “actually engaged in legal work”.²² The second reading speech considered the possibility that a lawyer might influence the other members of the jury and perhaps lead to a perceived (or actual) tainted verdict. It was also suggested that jury service could lead to conflicts of interest as the result of ethical and professional responsibilities arising from the status of barristers’ and solicitors’ as officers of the court. The preferred approach for lawyers was “to put the situation beyond conjecture and make them ineligible for jury service”.²³

5.9 Lord Justice Auld considered it “unlikely” that lawyers would exercise undue influence on their fellow jurors because of their status or position, suggesting that “people no longer defer to professionals or those holding particular office in the way they used to do”.²⁴ One Queensland Member of Parliament put it so:

This provision is based on the proposition that lawyers, if allowed into the jury room, would be so convincing, so persuasive and so overwhelming in their presence that mere mortals in the jury room could not possibly arrive at a verdict without being overawed by the presence and contribution of a practising lawyer... some may say, “Oh for the good old days when that may have been so.” I am sure that my colleagues at the Bar Association would rejoice in a situation where their mere presence in a jury room would have such a persuasive effect.²⁵

5.10 Lord Justice Auld suggested that in a number of US States, where judges, lawyers and other relevant professionals have served on juries, experience has shown that “their fellow jurors have not allowed

20. See *Jury Act 1995* (Qld) s 4(3) as originally enacted.

21. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 8.

22. *Jury Amendment Act 1996* (Qld) s 3.

23. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 16 May 1996 at 1192.

24. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 147.

25. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 5 December 1996 at 5026.

them to dominate their deliberations”.²⁶ In England and Wales, the provisions making law and justice professionals ineligible to serve have since been repealed.²⁷ Members of the judiciary and those involved in the administration of justice must now seek to be excused or deferred. The current guidelines suggest that an application on the basis that such a juror may be known to one of the parties in the trial should normally result in the juror’s service being deferred or in the juror being moved to a trial in “an alternative court where the excusal grounds may not exist”.²⁸

5.11 Other reasons for excluding lawyers from juries, whether practising or not, which have been identified, include the contentions that:

- jurors must apply “their common sense, general knowledge and their life experience rather than any expert knowledge gained from a position within the justice system”;²⁹ and
- jurors should obtain the information necessary to their verdict through the trial process and the directions of the judge, not by referring to the specialist legal knowledge of one or other of their number.³⁰

5.12 One submission to the Victorian Parliamentary Law Reform Committee’s review suggested that the ineligibility of lawyers was originally based on the fact that lawyers in the 19th century were a “fairly small group with a good network of communication”.³¹ This is certainly not the case today in a profession that is characterised by widely divergent areas of practice and specialisation where many members do not practice in the criminal law and where, for many, obtaining a qualification as a lawyer provides little more than a background to their employment in government service or in the corporate business world. This raises a potential question whether the ineligibility should be confined to those who have particular experience or a substantial practice in the criminal law, or to those who are currently in practice as a lawyer.

26. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 147.

27. *Criminal Justice Act 2003* (Eng).

28. England and Wales, “Guidance for summoning officers when considering deferral and excusal applications” Item 18.

29. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.85.

30. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.85-3.86.

31. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.83.

5.13 The limitation to practising lawyers in some jurisdictions is seen by some as a “sensible compromise”.³² Some preliminary submissions to this review have, however, questioned the continuing ineligibility of lawyers as a class.³³

ISSUE 5.1

Should lawyers or a particular group of lawyers, continue to be ineligible to serve on juries?

Under what conditions, if any, should lawyers be ineligible to serve on juries?

Past and present judicial officers and coroners

5.14 Judicial officers are ineligible in all Australian jurisdictions,³⁴ although not so in some overseas jurisdictions. Their position is somewhat different from that of people who are directly or principally engaged in the investigation, prosecution or defence of criminal cases, by reason of the obligations of independence and impartiality that attach to their office.

5.15 Lord Justice Auld gave special consideration to the position of judges as potential jurors. He considered that their inclusion could contribute “both to the work of individual juries and to improvement of the jury system as a whole”³⁵ noting particularly 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”.³⁶ It was suggested that problems associated with a judge who is a juror being known to the trial judge or lawyers in the courtroom could be dealt with by excusing the judge on a discretionary basis in particular circumstances.³⁷

32. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.88.

33. NSW, Jury Task Force, *Preliminary submission* at 2. See also Legal Aid NSW, *Preliminary submission* at 2.

34. *Jury Act 1977* (NSW) Sch 2 item 2; *Juries Act 2003* (Tas) Sch 2 cl 2; *Juries Act 2000* (Vic) Sch 2 cl 1(b); *Jury Act 1995* (Qld) s 4(3)(d); *Juries Act 1957* (WA) Sch 2 Part 1 cl 1(a)-(ea); *Juries Act 1927* (SA) Sch 3; *Juries Act 1963* (NT) Sch 7; *Juries Act 1967* (ACT) Sch 2 Part 2.1 items 2, 13, 16.

35. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 148.

36. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 147.

37. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 148.

5.16 It must be recognised that judicial officers and coroners could influence other jurors if their office was known, and that, if they chose, they could supplement or explain any directions of law given by the trial judge. That would not occur if they were subject to some statutory obligation not to disclose their office or to correct or supplement the summing up.

5.17 The New York Jury Project observed that allowing serving judges to be jurors ran the risk of conflicting with the Code of Judicial Conduct which requires that a judge “should regulate [his or her] extra-judicial activities to minimize the risk of conflict with [his or her] judicial duties”.³⁸ Such a conflict could possibly arise if the judge realised that a particular jury direction was erroneous yet, consistent with the presiding judge’s charge to the jury, felt bound to give effect to it.

ISSUE 5.2

Should judicial officers continue to be ineligible for jury service?
Under what conditions, if any, should judicial officers be ineligible for jury service?

Administration of justice and corrections

5.18 In NSW former and serving police officers, Crown Prosecutors, Public Defenders, Directors or Deputy Directors of Public Prosecutions, or Solicitors for Public Prosecutions are ineligible; as are persons currently “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”.³⁹ These provisions replace a more specific list which formerly made employees of certain government departments ineligible to serve, for example, employees of the Department of Corrective Services, the Department of the Attorney-General and of Justice, and the Police Department.⁴⁰ Such provisions were too broad in some respects and too narrow in others. The current formulation is potentially broad enough to cover those who are engaged but not employed in the public sector to provide some

38. *The Jury Project* (Report to the Chief Judge of the State of New York, 1994) at 29-30.

39. *Jury Act 1977* (NSW) Sch 2 item 8, an exclusion which does not, however, extend to person who previously were so employed or engaged, but no longer have that status.

40. *Jury Act 1977* (NSW) Sch 2 items 5, 7, 8 (as originally enacted). See also *Jury Act 1995* (Qld) s 4(3)(g), (h), (i).

of the services previously provided exclusively by government. In Victoria this category is limited to those employed “in the public sector within the meaning of the Public Administration Act 2004”.⁴¹

5.19 The trend towards a functional description is being adopted in other jurisdictions. For example, in Tasmania ineligibility extends to “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”.⁴² This formulation is broader than the NSW provision in that it extends to volunteers, for example, prison visitors. The Victorian Parliamentary Law Reform Committee noted that Prison Fellowship volunteers might have a conflict of interest in some cases or be unable to bring an impartial mind to the case being tried. However, it considered that their ineligibility was not justified on the grounds that such people could seek to be excused if the circumstances of the case required it.⁴³

5.20 In SA, government employees (or other prescribed employees) whose duties “are connected with the investigation of offences, the administration of justice or the punishment of offenders” are ineligible to serve.⁴⁴

5.21 Police officers are expressly ineligible in some jurisdictions, including NSW.⁴⁵ In some jurisdictions this extends to former police officers.⁴⁶

5.22 In 1965, the UK Departmental Committee on Jury Service considered it essential to the public confidence in the impartiality and lay character of the jury that all “those whose work is connected with the detection of crime and the enforcement of law and order must be excluded”.⁴⁷ The Committee also went so far as to state that civilian employees of the police service should also be ineligible on the grounds that, if they are employed for some time, “no matter in what capacity” they will:

41. *Juries Act 2000* (Vic) Sch 2 cl 1(f).

42. *Juries Act 2003* (Tas) Sch 2 cl 4.

43. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.122-3.123.

44. *Juries Act 1927* (SA) Sch 3.

45. *Jury Act 1977* (NSW) Sch 2 item 10; *Juries Act 2003* (Tas) Sch 2 cl 5; *Juries Act 2000* (Vic) Sch 2 cl 1(g); *Juries Act 1957* (WA) Sch 2 Part 1 cl 2(h); *Jury Act 1995* (Qld) s 4(3)(g); *Juries Act 1963* (NT) Sch 7.

46. That is, those that have held such an office at any time: *Jury Act 1977* (NSW) Sch 2 item 10, *Juries Act 2000* (Vic) Sch 2 cl 1(g); within the past 10 years: *Juries Act 2003* (Tas) Sch 2 cl 5.

47. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 103.

become identified with the service through their everyday contact 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.⁴⁸

5.23 The NSW Department of Corrective Services has noted that some officers of the Department are now being summoned and required to attend court in order to seek exemption. The Department reported that “they are invariably granted exemption when it is explained to the court that they are involved in either law enforcement, the administration of justice or penal administration and therefore likely to have contact with inmates and offenders in the course of their employment”. The Department has, therefore, proposed that its officers be once more included in the list of those who are ineligible to serve as jurors and that the exclusion should not be confined to those employed or engaged in “penal administration”,⁴⁹ a term which it has assumed, perhaps incorrectly, is confined to those who hold administrative office within the Department.

ISSUE 5.3

Should ineligibility for jury service continue to apply to people currently 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?

Should this ineligibility apply to civil trials as well as criminal trials?

Retirees previously involved in the administration of law or justice

5.24 There is also a question whether the categories of people listed above, or some of them, should continue to be ineligible to serve even when they have retired from the relevant positions.

5.25 At present in NSW, judicial officers, coroners, police officers, Crown Prosecutors, Public Defenders, Directors or Deputy Directors of Public Prosecutions or Solicitors for Public Prosecutions are permanently ineligible, while those who are “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”

48. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 110.

49. NSW Department of Corrective Services, *Preliminary submission* at 1.

are ineligible only for the term of their employment. Similarly it would seem that, once a person has been admitted to the legal profession, there would be a lifetime ineligibility, even though he or she did not have a current engagement or involvement in any activity involving the law.

5.26 The UK Departmental Committee on Jury Service while considering it desirable that some restriction ought to be placed on people associated with the administration of law and justice who have retired, highlighted the problem of a person who, at 18, was employed by the police service as a shorthand typist but never subsequently worked for the service.⁵⁰ Rather than introducing a permanent bar for some occupations but not others, the Departmental Committee recommended that such people should be ineligible only for a period of ten years after ceasing to follow the occupation in question.⁵¹ This is the approach that has been adopted in Victoria and Tasmania.⁵² It has also been adopted in the Northern Territory but only applies in relation to judicial officers.⁵³

5.27 WA has adopted a system of excluding holders of judicial office and legal practitioners for life, while imposing a 5 year ineligibility on various others involved in the administration of law or justice. This went against the recommendation of the Law Reform Commission of WA which concluded that there was no need to exclude certain people after retirement because they would be near the age of ineligibility in any case.⁵⁴

5.28 One preliminary submission to this Commission suggested that there could be a period of ineligibility of 2 years from the date resignation or retirement.⁵⁵

50. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 113.

51. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 115.

52. *Juries Act 2000* (Vic) Sch 1 cl 1; *Juries Act 2003* (Tas) Sch 2.

53. *Juries Act 1963* (NT) Sch 7.

54. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.25. In NSW, however, age does not give rise to automatic ineligibility, rather it can be relied on as an exemption as of right from the age of 70.

55. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 3.

ISSUE 5.4

Should any categories of people who have retired from positions associated with the administration of law and justice continue to be ineligible for jury service and, if so, which of these categories?

Should there be a period of ineligibility and, if so, what should it be for any or all of those categories?

Spouses of ineligible people

5.29 A question has been raised as to whether the spouses of ineligible people should also be ineligible to serve. This restriction was removed in NSW in 1996. The ineligibility is still in place in South Australia.⁵⁶ It also exists in the Northern Territory but is limited to judges, and includes de facto partners as well as spouses.⁵⁷

5.30 The exclusion of spouses, where it exists, is apparently based on a belief that “these people are so influenced by their partners that they would be unable to remain impartial as jurors”.⁵⁸ The UK Departmental Committee on Jury Service, in 1965, concluded that “the fact that someone is married to, or is some other close relation of, a member of an ineligible occupation, is no reason why he or she should for that reason also be ineligible”.⁵⁹ This position was endorsed by the Law Reform Commission of WA in 1980 and the Tasmanian Department of Justice’s review in 1999.⁶⁰

5.31 The South Australian Sheriff’s Office, in 2002, suggested that the practice of excluding spouses may be a safe practice to adopt and was justified in less populated areas.⁶¹

5.32 A separate question arises as to the desirability of spouses or partners removing themselves from certain cases, for example, where their spouse or partner, or others known to them, have some

56. See, eg, *Juries Act 1927 (SA)* Sch 3.

57. *Juries Act 1963 (NT)* Sch 7.

58. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 37. See also United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 116.

59. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 117.

60. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.29; Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 2.

61. South Australia, Sheriff’s Office, *South Australian Jury Review* (2002) at 14.

connection with the prosecution case.⁶² One submission suggested that “it would be a rare accused who would accept with equanimity the fact that the spouse of his/her prosecutor is sitting in judgment”.⁶³ Several law reform bodies have considered that the question of spouses being excused should be dealt with on a case by case basis when a spouse considers that his or her status may cause difficulties.⁶⁴ This could arise following a request to be excused for good cause, or possibly by way of a challenge for cause.

ISSUE 5.5

Should the spouses or partners of any categories of people who hold or have held positions associated with the administration of law and justice be ineligible for jury service?

OTHER GOVERNMENT OFFICIALS

5.33 In NSW, the Governor, members and officers of the Executive Council and Members and officers and other staff of the NSW Parliament are ineligible to serve as jurors.⁶⁵

The Governor and Lieutenant Governor

5.34 The Governor is ineligible in most jurisdictions.⁶⁶ This could be justified by reference to the numerous official duties attaching to that office, and by reference to the fact that the Governor represents the Head of State on whose behalf, or in whose name, criminal prosecutions are brought. While the exclusion does not directly refer to the Lieutenant Governor, it is invariably the case, under the present system, that the holder of such office would be ineligible by reason of their holding office as Chief Justice or President of the Court of Appeal. This would change if the ineligibility of judicial officers were to be removed.

62. See United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 117.

63. N R Cowdery, *Preliminary submission* at 1.

64. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.76; Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.30. See also para 9.29-9.31 below.

65. *Jury Act 1977* (NSW) Sch 2 items 1, 4, 5.

66. *Juries Act 2003* (Tas) Sch 2 cl 1; *Juries Act 2000* (Vic) Sch 2 cl 1(a); *Jury Act 1995* (Qld) s 4(3)(a); *Juries Act 1927* (SA) Sch 3.

Members of parliament

5.35 Members of parliament are generally ineligible in all Australian jurisdictions.⁶⁷ Some jurisdictions also ban former members of parliament from jury service for certain periods of time, such as 5 or 10 years.⁶⁸

5.36 The 1965 UK Departmental Committee on Jury Service recommended that members and officers of both Houses of Parliament should only be entitled to be excused as of right because of their “special and personal duties to the state”.⁶⁹

5.37 In Victoria, members of parliament and the Governor were previously entitled to exemption as of right. The Victorian Parliamentary Law Reform Committee recommended they should be redesignated as ineligible because of the need to maintain the separation of powers between the executive, legislative and judicial branches of government.⁷⁰ In Victoria, ineligibility now applies to anyone who has been a member of parliament at any time within the preceding 10 years.⁷¹

5.38 The Law Reform Commission of Western Australia considered that members of parliament should be ineligible because it is “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”. The Commission also considered that members of parliament should be excluded because the parliament’s power to punish for contempt meant that members could be called upon to exercise a judicial or quasi-judicial function.⁷²

5.39 Other reasons for exempting members of parliament which have been identified include the circumstances that:

67. *Jury Act 1977* (NSW) Sch 2 item 5; *Juries Act 2003* (Tas) Sch 2 cl 6; *Juries Act 2000* (Vic) Sch 2 cl 1(i); *Juries Act 1957* (WA) Sch 2 Part 1 cl 2; *Juries Act 1927* (SA) Sch 3; *Jury Act 1995* (Qld) s 4(3)(b); *Juries Act 1963* (NT) Sch 7; *Juries Act 1967* (ACT) Sch 2 Part 2.1 item 14.

68. *Juries Act 1957* (WA) Sch 2 Part 1 cl 2; *Juries Act 2000* (Vic) Sch 2 cl 1(i).

69. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 148.

70. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.154.

71. *Juries Act 2000* (Vic) Sch 2 cl 1(i).

72. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.12.

- “being elected representatives, they could feel inhibited during jury deliberations for a variety of reasons”;⁷³
- “jury service has the potential to lead them to be in conflict with their constituency”.⁷⁴

Some of these concerns could be overcome by the secrecy provisions which apply to jury deliberations, while others appear to rest on dubious notions of potentially conflicting interests.

5.40 It is recognised that the adoption of a public position in law and order debates could give rise to an apprehension of bias in particular cases. Peremptory challenges, or challenges for cause, could, however, deal with this.

5.41 The continued ineligibility of members of parliament has been questioned.⁷⁵ Moreover, their direct involvement in the criminal process could be an informative experience that might be of assistance in the performance of their parliamentary duties. While it would be undesirable for members of parliament to be required to serve while the parliament was sitting, the same demands do not necessarily arise between sittings, except for ministers and shadow ministers. Again, the availability of an application to be excused for good cause or deferred could accommodate most situations.

ISSUE 5.6

Should members of the NSW Parliament, or some members (for example, ministers or shadow ministers) continue to be ineligible for jury service?

Officers of the Parliament

5.42 In NSW ineligibility applies to “officers and other staff of either or both of the Houses of Parliament”.⁷⁶ It is the broadest exemption available in this context of all the Australian jurisdictions.

5.43 The Victorian Parliamentary Law Reform Committee recommended that some officers of the Parliament should continue to be exempt “in order that they may freely attend to their parliamentary duties”, but considered that the category should be limited to “senior officers whose attendance is necessary for the proper functioning of

73. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 16 May 1996 at 1192.

74. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 16 May 1996 at 1192.

75. NSW, Jury Task Force, *Preliminary submission* at 2.

76. *Jury Act 1977* (NSW) Sch 2 item 6.

the Parliament”. These senior officers were “the Clerks of each House, the Usher of the Black Rod and the Serjeant-at-Arms”.⁷⁷

5.44 Questions do arise as to the justification for the ineligibility of the other staff members whose position is not dissimilar from that of the personal staff of ministers or of public servants who are eligible to serve. In particular, it is most unlikely that more than one or two staff members would ever be summoned at the one time, and if particular problems or emergencies arose, the right to apply to be excused would normally suffice. The ineligibility of officers of the Parliament has been questioned.⁷⁸

ISSUE 5.7

Should officers and/or other staff of the NSW Parliament continue to be ineligible for jury service?

Senior public servants

5.45 Senior public servants were once included among the exemptions available in NSW. Permanent heads of departments and members of the Public Service Board were ineligible⁷⁹ and members and secretaries of all statutory corporations, boards and authorities were entitled to be excused as of right.⁸⁰ These no longer appear in any of the lists of exemptions, although some senior public servants will still be ineligible if they are employed in “the public sector in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration”.⁸¹ This position is consistent with the 1994 Australian Institute of Judicial Administration review which recommended amendment or removal of the exemptions relating to particular members of the public service, and statutory authorities, unless the exemptions could be justified in terms of occupation or duties.⁸²

5.46 Some jurisdictions, for example, the Commonwealth, continue to offer an exemption for higher ranking public servants.⁸³ The

77. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.155.

78. NSW, Jury Task Force, *Preliminary submission* at 2.

79. *Jury Act 1977* (NSW) Sch 2 items 9 and 10 (since amended).

80. *Jury Act 1977* (NSW) Sch 3 item 11 (since amended).

81. *Jury Act 1977* (NSW) Sch 2 item 8.

82. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 173-174.

83. *Jury Exemption Regulations 1987* (Cth) reg 4.

Queensland Supreme Court's Litigation Reform Commission observed that the Commonwealth's jury exemption provisions were "a good example of regulations instigated by bureaucrats for their own comfort".⁸⁴ The Commission recommended that submissions be made to the Standing Committee of Attorneys to remove the "anomaly" of exempting such a great number of Commonwealth employees.⁸⁵

5.47 The UK Departmental Committee on Jury Service agreed with this approach when it decided not to include "members of the higher civil service" in the category of those who should be excused as of right. The Committee considered that some such office holders might "on occasions have very strong claims upon the discretion of summoning officers if they ask to be excused on account of their duties".⁸⁶ A similar approach was taken by the Tasmanian Department of Justice's 1999 review.⁸⁷

ISSUE 5.8

Should any public servants be ineligible to serve as jurors?
If so, what should be the relevant criteria for ineligibility?

Supervisory bodies

5.48 In some jurisdictions, including NSW and Victoria, the Ombudsman and Deputy Ombudsman are both listed as people who are ineligible to serve.⁸⁸ In Victoria, employees of the Ombudsman are also ineligible.⁸⁹ It is not clear on what basis they continue to be exempt, save possibly because of the importance of their duties, or because of their specialised knowledge gained through performing their functions concerning complaints against the police.⁹⁰

84. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 6.

85. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 5.

86. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 151.

87. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 2.

88. *Jury Act 1977* (NSW) Sch 2 item 9; *Juries Act 2000* (Vic) Sch 2 cl 1(k).

89. *Juries Act 2000* (Vic) Sch 2 cl 1(l).

90. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.130.

5.49 The inclusion of the Ombudsman and Deputy Ombudsman raises the question of whether officers of other similar organisations ought also to be ineligible to serve. These could include the Commissioner of the Independent Commission Against Corruption, the Commissioner of the Police Integrity Commission, the employees of those organisations and their relevant inspectors. Most of these officers would currently be ineligible either as Australian lawyers or because of their law enforcement background. Victoria currently lists the Director or Acting Director of Police Integrity, the Special Investigations Monitor or acting Special Investigations Monitor and their employees as being ineligible for jury service.⁹¹

5.50 The Victorian Parliamentary Law Reform Committee recommended the repeal of the exemption for the Ombudsman and his or her officers.⁹²

ISSUE 5.9

Should the Ombudsman or Deputy Ombudsman continue to be ineligible for jury service?

Should officers of other supervisory bodies, such as the Independent Commission Against Corruption and the Police Integrity Commission, also be ineligible for jury service?

PEOPLE EXEMPT UNDER COMMONWEALTH PROVISIONS

5.51 The *Jury Exemption Act 1965 (Cth)* exempts the following people from jury service: the Governor General, Justices of the High Court and other Courts established by the Commonwealth, members of the Parliament and Federal Executive Council, members of the Australian Industrial Relations Commission and Fair Pay Commission, members of the Australian Federal Police, Defence Force members and Reserves who are rendering continuous full-time service.⁹³ Regulations also exempt Commonwealth employees above a certain salary level and there are other exemptions relating to the “administration of justice”, “public need” (quarantine) and “public administration” (including ministerial staff and advisers and parliamentary officers).⁹⁴

5.52 It is not easy to identify any particular reason why a special category of exemption should apply to Commonwealth Public

91. *Juries Act 2000 (Vic)* Sch 2 cl 1 (la), (lb), (lc), (ld).

92. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.131.

93. *Jury Exemption Act 1965 (Cth)* s 4 and Schedule.

94. *Jury Exemption Regulations 1987 (Cth)*.

Servants, or to members of the Defence Forces who are not required to be available for current operations, where no such exemption applies to many of those who hold comparable positions within the States and Territories.

5.53 Other reviews have commented on the broadness of the exemptions and have recommended an approach be made to the Commonwealth government with a view to the repeal of many of them.⁹⁵ This has a relevance in that Commonwealth agencies look to the State and Territory courts to litigate both criminal and civil cases in which they have an interest, both in relation to the prosecution of offences under Commonwealth law and civil cases when the Commonwealth, or its instrumentalities, is a party.

ISSUE 5.10

Should NSW request that the Commonwealth repeal any or all of the exemptions under the *Jury Exemption Act 1965* (Cth)?

95. See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.205; Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 5-6.

6. Right to exemption based on occupation

- Health professionals
- Emergency services
- Clergy and religious
- Mining managers and under-managers of mines
- Groups not included

6.1 There are a number of professions and callings to which an entitlement to be excused as of right attaches. The categories have been reduced over time and some of those previously listed can now only apply to be excused for good cause. Some of these professions are included in the Sheriff's guidelines as examples where a person may be excused for "good cause", for example, marine pilots (who are still included in some jurisdictions) and nurses.

6.2 The 1994 Australian Institute of Judicial Administration ("AIJA") review recommended the removal of categories of exemption as of right based only on professional qualification or occupation.¹ A similar question to those mentioned above in relation to ineligibility arises as to whether certain people should be entitled to be excused simply because they are practising within a certain profession or calling the importance or value of which justifies an exemption.² The alternative is for them to seek to be excused on the basis that they need to be available to perform their duties during the proposed period of jury service,³ which may depend upon the expected length of the trial, their commitments during that period and the availability of a replacement.

6.3 The New York Jury Project observed that some occupational exemptions were a source of public discontent about jury service:

Ordinary wage earners do not understand why they must disrupt their lives periodically to serve on juries, while highly-paid professionals need not endure the same burden. Working people who must use vacation time to serve on juries are justifiably upset that medical personnel and lawyers can be spared by their patients and clients for a month or more of vacation every year, yet don't have to sit on juries.⁴

6.4 The Law Reform Commission of Western Australia considered that it would be a simple matter for most occupations to accommodate jury service:

Because of the entitlement in most occupations of annual leave, long service leave and sick leave, provision is made as a matter of course for the duties of a particular employee to be performed temporarily by a substitute. It would seem to be a small

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1. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 173-174.
 2. See para 5.42-5.53.
 3. See R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 150.
 4. *The Jury Project* (Report to the Chief Judge of the State of New York, 1994) at 33.

additional step to make adequate provision for a replacement during jury service.⁵

ISSUE 6.1

Should the members of any profession or calling be entitled to claim an exemption as of right from jury service?

HEALTH PROFESSIONALS

6.5 People practising as pharmacists, dentists and medical practitioners are entitled to claim an exemption as of right in NSW.⁶ This accords with the recommendation of the UK Department Committee on Jury Service that practising medical practitioners, dentists and pharmaceutical chemists should be entitled to claim exemption because of their “special and personal responsibilities... for the immediate relief of pain or suffering”.⁷ The UK recommendations also included practising nurses, midwives and veterinary surgeons in this category.⁸ These are not included in the NSW list, although nurses are currently listed in the Sheriff’s guidelines as persons who can be excused for “good cause”.⁹ This raises a question whether other health professionals should be dealt with in a similar way.

6.6 In Queensland and Victoria, medical practitioners are not entitled to exemption. Other jurisdictions, however, continue to grant exemptions to health professionals, some in quite broad terms. For example, in Western Australia, in addition to practising medical practitioners, dentists and pharmacists, practising veterinary surgeons, psychologists, nurses, chiropractors, physiotherapists and osteopaths are also entitled to exemption as of right.¹⁰

6.7 The 1994 AIJA review recommended that the exemption of doctors and dentists should not be retained “without explanation of duties”.¹¹ Some preliminary submissions received by this Commission

5. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.39.
6. *Jury Act 1977* (NSW) Sch 3 items 3, 4, 5.
7. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 148 and 149.
8. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 150.
9. Sheriff’s Office of NSW, *Jury Act, 1977: Policy and Practice Guidelines* (November 2005) at para 3.4.2.
10. *Juries Act 1957* (WA) Sch 2 Part 2 cl 2.
11. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 173.

questioned whether dentists and pharmacists should be entitled to exemption as of right,¹² as distinct from applying to be excused for good cause. The exemption of medical practitioners was also questioned in some preliminary submissions.¹³

ISSUE 6.2

Should members of any of the health professions be entitled to claim exemption as of right from jury service?
If so, which categories should have that right?

EMERGENCY SERVICES

6.8 In NSW people “employed or engaged (except on a casual or voluntary basis) in the provision of fire, ambulance, rescue, or other emergency services, whether or not in the public sector” have a right to be exempted from jury service.¹⁴ Until recently such people were ineligible for service,¹⁵ presumably on the ground that their jobs were essential to the well-being of the community in emergency situations. It seems odd that individuals within this category are now given the right to determine for themselves how essential their job is.

6.9 Only one submission received by this Commission so far has questioned the continuation of this exemption.¹⁶

ISSUE 6.3

Should members of any of the emergency services be entitled to claim exemption as of right from jury service?
Should any conditions be attached to that right?

CLERGY AND RELIGIOUS

6.10 Clergy and vowed members of any religious order currently have a right to claim exemption in NSW.¹⁷ Only three other Australian

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12. Law Society of NSW, *Preliminary submission* at 1; NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 3-4; UnitingCare NSW.ACT, *Preliminary submission* at 2.
 13. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 4; UnitingCare NSW.ACT, *Preliminary submission* at 2.
 14. *Jury Act 1977* (NSW) Sch 3 item 7.
 15. *Jury Act 1977* (NSW) Sch 2 former items 13-15.
 16. UnitingCare NSW.ACT, *Preliminary submission* at 2.
 17. *Jury Act 1977* (NSW) Sch 3 items 1 and 2.

jurisdictions have an express provision granting a right to exemption to clergy or religious.¹⁸

6.11 The UK Departmental Committee on Jury Service in 1965 considered that members of the clergy and religious orders should be ineligible since certain aspects of jury service could be considered incompatible with their calling. In particular it was noted that “their calling would incline them to compassion and they might feel it difficult to consider the claims of justice alone”. It was also considered that members of religious orders, particularly monks and nuns in enclosed orders, “would almost certainly lack the necessary experience for service on a jury”.¹⁹

6.12 The English Royal Commission on Criminal Justice in 1993 could not identify any reason why clergy or members of religious orders should not be eligible for jury service. It recommended, however, that practising member of a religious sect should be excused where jury duty would be seen as “incompatible with their tenets or beliefs”.²⁰ This option has been implemented in Tasmania and Victoria.²¹

6.13 The conclusions of the English Royal Commission were supported by Lord Justice Auld who observed that the reasons offered by the 1965 review were inadequate since aspects of the “pastoral role and compassionate instincts” attributed to the clergy and religious were shared by many others in the community.²²

6.14 Likewise, the New York Jury Project observed:

while a small number of religious sects believe that their members are forbidden to sit in judgment of others, there is no basis to exempt all clergy from jury service; rather, this exemption reflects some generalized (and demonstrably erroneous) notion that clergy will be unable to apply temporal law or are more likely to be lenient or biased in a particular fashion than are other citizens.²³

18. *Juries Act 1957* (WA) Sch 2 Part 2 cl 3; *Juries Act 1963* (NT) s 11, Sch 7; *Juries Act 1967* (ACT) Sch 1 Part 2.2 item 1, 2.

19. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 120.

20. England and Wales, *Royal Commission on Criminal Justice (Report, 1993)* at 132.

21. *Juries Act 2003* (Tas) s 9(3)(h); *Juries Act 2000* (Vic) s 8(3)(j).

22. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 148.

23. *The Jury Project* (Report to the Chief Judge of the State of New York, 1994) at 32.

The 1994 AIJA review also recommended amendment or removal of the exemption of members of the clergy and religious orders.²⁴

6.15 The Victorian Parliamentary Law Reform Committee, in its 1996 review, identified some practical considerations. For example, it was noted that clergy in small communities may well be in receipt of confidential information that will bear directly on the case being tried.²⁵ It was also noted that some clergy have a calling which requires 24 hour availability to their congregations.²⁶ However, these concerns could be overcome by practical measures including the right to be excused for good cause if there is a personal conflict arising from past contact with a defendant or victim in a criminal trial and/or by a full time pastor arranging a “locum” for the duration of the jury service or otherwise by the availability of an application to be excused where this is not practicable.

6.16 The Law Reform Commission of WA suggested that clergy “should be available at all times to give comfort to the sick or dying and to carry out their pastoral responsibilities”.²⁷ This view presumably influenced the retention of the WA provision that allows exemption to “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”.²⁸

6.17 Some preliminary submissions to this Commission supported allowing clergy the right to claim an exemption from jury service. The reasons given included assertions that:

- clergy “by virtue of their pastoral responsibilities, can at times be conflicted in their responsibilities to provide compassionate care to those in need, in a confidential and sensitive environment”;²⁹
- jury service may, for individual clergy, impair future pastoral ministry to both victims and offenders as well as to their families and other supporters;³⁰

24. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 173.

25. See also Catholic Archdiocese of Sydney, *Preliminary submission* at 3-4.

26. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.94-3.95. See also UnitingCare NSW.ACT, *Preliminary submission* at 2.

27. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.40.

28. *Juries Act 1957* (WA) Sch 2 Part 2 cl 3. The qualification in WA derives originally from *Juries Act 1870* (Eng) s 9 and Sch.

29. Churches of Christ in NSW, *Preliminary submission* at 1.

30. Catholic Archdiocese of Sydney, *Preliminary submission* at 4.

- some clergy and religious may be seen as biased because they undertake “advocacy work for the less privileged and marginalised in society... as a necessary condition in service to the wider community”;³¹
- conscientious grounds can exist which should be capable of exercise in the discretion of individual clergy.³²

6.18 One preliminary submission questioned whether there was any theological basis for the right to exemption.³³ Indeed, it can be argued that jurors do not sit in judgment on defendants, but rather determine whether the facts exist to support a particular finding.

6.19 Another submission raised the question of whether the exemption should be limited to clergy in “active ministry”,³⁴ a requirement that applies to the health professionals listed above.³⁵

6.20 Another submission considered that the exemption for clergy ought to be reviewed,³⁶ while other preliminary submissions considered that vowed members of any religious order should not be entitled to exemption as of right.³⁷

ISSUE 6.4

Under what circumstances, if any, ought clergy and/or religious be entitled to claim an exemption as of right from jury service?

MINING MANAGERS AND UNDER-MANAGERS OF MINES

6.21 Mining managers and under-managers of mines³⁸ were first granted a right to exemption in 1918.³⁹ The exemption was granted “in the interests of the men whose lives these managers have in their charge”, it being noted that “mining accidents cannot be regulated to suit the convenience of the sittings of the courts”.⁴⁰ At the time a

31. Catholic Archdiocese of Sydney, *Preliminary submission* at 4.

32. Lutheran Church of Australia, *Preliminary submission* at 1.

33. UnitingCare NSW.ACT, *Preliminary submission* at 2.

34. UnitingCare NSW.ACT, *Preliminary submission* at 1.

35. See para 6.5.

36. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 3.

37. Law Society of NSW, *Preliminary submission* at 1; NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 3.

38. *Jury Act 1977* (NSW) Sch 3 item 6.

39. *Jury (Amendment) Act 1918* (NSW).

40. NSW, *Parliamentary Debates (Hansard) Legislative Assembly*, 1 October 1918 at 1831.

manager or under-manager was required to exercise daily personal supervision of their mine.⁴¹ The *Coal Mines Regulation Act 1982* (NSW) now allows for the appointment of deputy managers who have “full charge and control” in the absence of the mining manager.⁴² Under-managers also have “full charge and control” in the absence of the mining manager or deputy manager.⁴³

6.22 In WA, mining managers were removed from the list of those entitled to claim an exemption, following recommendations by the Law Reform Commission.⁴⁴

6.23 Some preliminary submissions questioned whether mining managers and under-managers of mines should be entitled to exemption as of right.⁴⁵ Given the possibility of appointing deputy managers, there would appear to be no compelling reason for granting mining managers and under-managers of mines a blanket right of exemption. Staffing issues for particular mines or particular safety concerns could be dealt with by an application to be excused for good cause.

ISSUE 6.5

Should mining managers and under-managers of mines continue to be entitled to exemption from jury service?

GROUPS NOT INCLUDED

6.24 The trend has been against expanding the categories of exemptions as of right, although other potential categories can be identified by reference to identifiable groups of people who routinely seek to be excused for good cause.

41. *Coal Mines Regulation Act 1912* (NSW) s 5(1). See also NSW, *Parliamentary Debates (Hansard)* Legislative Council, 26 November 1918 at 3004.

42. *Coal Mines Regulation Act 1982* (NSW) s 38.

43. *Coal Mines Regulation Act 1982* (NSW) s 39.

44. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.43.

45. Law Society of NSW, *Preliminary submission* at 1; NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 4; UnitingCare NSW.ACT, *Preliminary submission* at 2.

Teachers

6.25 Teachers are no longer exempt in NSW.⁴⁶ However, teachers and lecturers will generally be excused for good reason if they are scheduled to supervise or assess an approaching examination, if they are scheduled to supervise or assess an HSC assessment task, or if the service is to take place in the first two weeks of a term or semester.⁴⁷

6.26 In the ACT, professors, lecturers, schoolmasters and schoolteachers “engaged in full-time teaching or organised classes at a university, college or school” are entitled to claim exemption as of right.⁴⁸ Formerly teachers and lecturers were exempt in Tasmania,⁴⁹ as was the case in Queensland.⁵⁰

6.27 The Victorian Parliamentary Law Reform Committee, in the face of submissions from various educational and teachers’ associations, recommended the repeal of the teachers’ exemption in that State, preferring to rely on individual applications to be excused in appropriate cases.⁵¹

ISSUE 6.6

Should the teaching staff at schools, universities and colleges be entitled to exemption as of right from jury service?
If so, under what conditions?

Students

6.28 Students do not fall within any of the categories of ineligibility or exemption in NSW. However, the Sheriff’s guidelines recognise that a student can be excused when jury service is likely to occur at a time when he or she is required to attend his or her educational institution

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- 46. School teachers were previously exempt under *Jury Act 1912* (NSW) s 5(n).
 - 47. Sheriff’s Office of NSW, *Jury Act, 1977: Policy and Practice Guidelines* (November 2005) at para 3.45. See also M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 42.
 - 48. *Juries Act 1967* (ACT) Sch 2 Part 2.2 Item 3.
 - 49. *Jury Act 1899* (Tas) s 7A, Sch 1 Item 5.
 - 50. *Jury Act 1929* (Qld) s 8(1)(h). See Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 3.
 - 51. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.159, 3.161.

or when examinations or assessments are scheduled.⁵² Evening and weekend students would, therefore, generally not be entitled to seek to be excused. Previously they were only excused if they were preparing for exams or compulsory projects.⁵³

6.29 Higher School Certificate students who have attained the age of 18 years and are otherwise qualified to serve as jurors are normally excused for good cause, as are other students where service is likely to interfere significantly with their studies or examination prospects. This has particular significance for those students who are faced with the compulsory levy attaching to the Higher Education Contribution levied by the Commonwealth government.

ISSUE 6.7

Should students be entitled to exemption as of right from jury service?
If so, under what conditions?

Small business owners and employees

6.30 The plight of small business owners, especially sole traders, is raised formally from time to time,⁵⁴ and is frequently raised in support of an application to be excused for good cause. For example, in NSW in 1993 the State Chamber of Commerce applied for business-owner operators and sole traders to be included in the list of those entitled to exemption as of right.⁵⁵

6.31 One preliminary submission to this Commission has observed that removing even one person from a small operation may have adverse consequences, especially “in regional areas, where the business involves key personnel with specialist skills that are difficult to replace at short notice, particularly in the current climate of acute skill and labour shortages”. Consequences include the inability to make up lost revenue, the failure to fulfil contracts and the resulting loss of future business and the risk of breaching occupational health and safety requirements if key personnel are absent.⁵⁶ This could have

52. Sheriff's Office of NSW, *Jury Act, 1977: Policy and Practice Guidelines* (November 2005) at para 3.4.5.

53. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 42.

54. See eg, Tasmania, *Parliamentary Debates (Hansard)* House of Assembly, 19 August 2003 at 47.

55. See NSW, *Report of the NSW Jury Task Force* (1993) at 24.

56. Australian Business Ltd, *Preliminary submission* at 1.

additional weight at present if there is an identifiable shift from employment to self-employment particularly in the service industries.

6.32 In a survey conducted in Western Australia in 1983, however, 46.7% of respondents considered that “loss of business” should not be “an acceptable excuse to avoid jury service, for a private employer, partner in a firm etc”.⁵⁷ Their exclusion from jury service potentially denies the input of experienced business professionals who might better understand the issues and evidence in certain types of trials.

6.33 The New York Jury Project put a similar point of view about an exemption based on ownership of a small business:

If persons who work for hourly wages can be compelled to spend time on jury service, then sole proprietors of businesses can do so, too - particularly where the sole proprietor employs others in his or her business establishment.⁵⁸

This is generally dealt with by the person seeking to be excused for good cause. In Tasmania and Victoria, for example, the statutory list of “good reasons” includes “substantial financial hardship” resulting from a person’s attendance.⁵⁹ In NSW, the Sheriff’s guidelines allow consideration to be given to excusing sole traders or private contractors who can demonstrate that they would be “significantly financially disadvantaged” by being required to serve as a juror and that they “cannot be replaced by another person in the conduct of their business”.⁶⁰

6.34 A question does arise as to whether there should be a system for providing some measure of compensation for the owners of small businesses, or sole traders so as to permit them or their key employees to serve as jurors. Otherwise, a potentially large group of people is likely to be excluded from service, with adverse effects for the objective of securing a representative jury. An alternative possibly is to ensure that the system allows people within this group to defer their service, or to be excused from lengthy trials and allocated short ones.

ISSUE 6.8

How should the concerns of small business owners and employees be met?

57. I M Vodanovich, “Public attitudes about the jury” in D Challinger (ed), *The Jury* (Australian Institute of Criminology Seminar: Proceedings No 11, 1986) at 81.

58. *The Jury Project* (Report to the Chief Judge of the State of New York, 1994) at 33.

59. *Juries Act 2003* (Tas) s 9(3)(e); *Juries Act 2000* (Vic) s 8(3)(f).

60. Sheriff’s Office of NSW, *Jury Act, 1977: Policy and Practice Guidelines* (November 2005) at para 3.4.3.

7. Other grounds of exemption

- Inability to read and understand English
- Miscellaneous conditions
- Age
- Carer responsibilities
- Distance from court
- Previous jury service
- Conscientious objection

INABILITY TO READ AND UNDERSTAND ENGLISH

7.1 In NSW a person is ineligible to serve as a juror if he or she is “unable to read or understand English”.¹ This category seems to have general acceptance,² and has been considered by this Commission in its Report concerning deaf or blind jurors.³

7.2 The Tasmanian Department of Justice’s review noted that this category may have the potential to reduce the number of jurors from non-English speaking backgrounds. The review considered that the alternative, of allowing people to serve irrespective of their ability in English, would be impractical and expensive if interpreters were to be required.⁴

Assessing ability

7.3 The definition of the requirement varies between jurisdictions in that some States and Territories require an ability to read, write and speak English⁵ whereas, in others the test turns upon whether the juror can communicate in or understand the English language adequately.⁶ Questions sometimes arise as to whether any more stringent test of literacy or comprehension should be adopted. In this respect it cannot be overlooked that some people who have become Australian citizens, but who have come from communities adopting a different alphabet or writing style, may be able to speak and communicate in English but have only a limited ability to read it.

7.4 The Victorian Parliamentary Law Reform Committee considered that any more stringent test of ability in English, than an ability to communicate in and understand the English language, as a qualification for service was undesirable, on the grounds that, by excluding people from non-English speaking backgrounds and groups with literacy difficulties, it would make juries less representative of

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1. *Jury Act 1977* (NSW) Sch 2 Item 11. See also para 2.31-2.34.
 2. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.141-3.142. See also *Juries Act 2003* (Tas) Sch 2 cl 10.
 3. NSW Law Reform Commission, *Blind or Deaf Jurors* (Report 114, 2006).
 4. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 2.
 5. *Juries Act 1963* (NT) s 10(3)(c); *Jury Act 1995* (Qld) s 4(3)(k).
 6. *Juries Act 2000* (Vic) Sch 2 cl 3(f); *Juries Act 2003* (Tas) Sch 2 cl 10.

the community as a whole.⁷ Likewise, in the UK, the 1965 Departmental Committee on Jury Service rejected the adoption of any mechanism for the assessment of the literacy of jurors or of their ability to comprehend English.⁸

7.5 The English Royal Commission on Criminal Justice did not identify any particular problem in this respect but recommended that there be further research on the question.⁹

7.6 Judges currently have the ability to stand jurors aside in the interests of justice and could do so if they were not satisfied of their ability to read or understand English.¹⁰

ISSUE 7.1

What should be the requirement for eligibility concerning a juror's ability to read, understand or communicate English?

MISCELLANEOUS CONDITIONS

7.7 The next paragraphs consider a number of physical conditions including disability, sickness and infirmity which give rise to ineligibility and pregnancy which gives rise to a right to claim exemption.

Disability

7.8 In NSW and in a number of other jurisdictions, a disability which impacts upon a person's ability to discharge the duties of a juror is expressly a ground of ineligibility.¹¹ This is different from the other criteria of ineligibility in that it requires an assessment of whether or not the disability will impact upon the particular individual's ability to act as a juror.

7. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.12.
8. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 78-79.
9. England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 135.
10. See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.13.
11. *Jury Act 1977* (NSW) Sch 2 item 12; *Juries Act 2003* (Tas) Sch 2 cl 9; *Juries Act 2000* (Vic) Sch 2 cl 3(a); *Jury Act 1995* (Qld) s 4(3)(l); *Juries Act 1957* (WA) s 5(b)(iv); *Juries Act 1927* (SA) s 13(a); *Juries Act 1967* (ACT) s 10(e); *Juries Act 1963* (NT) Sch 7.

7.9 At present NSW makes no distinction between a person with a disability who is unable to perform the role of a juror, even with assistance, and one who could perform the role with some form of assistance or accommodation. Accommodation has been provided in many NSW court houses for jurors with physical disabilities, including provision in the jury box for an elevator and room for a wheelchair.

7.10 In some jurisdictions, people who are mentally or intellectually incapable of performing the duties of a juror are sometimes excluded by way of a separate ground of either disqualification or ineligibility.¹² In NSW, by implication, it is accepted that they fall within the category of those who are unable to discharge the duties as a result of “infirmity or disability”.

7.11 The Victorian Parliamentary Law Reform Committee proposed that people should be ineligible for jury service if “their physical, intellectual or mental disability or disorder makes them incapable of effectively performing the functions of a juror”.¹³ One submission to the Victorian review suggested that the idea of providing reasonable assistance should be included in the criterion.¹⁴ The Tasmanian Department of Justice’s review considered that, while some people with a disability may actually be unable to perform as a juror, “in most cases, a person with a disability will be capable of performing the functions of a juror”.¹⁵ The NSW Law Reform Commission has already considered this issue in respect of jurors who are deaf or blind.¹⁶

7.12 Listing people with physical disabilities among those who are ineligible follows the recommendation of the UK Departmental Committee on Jury Service which was swayed by evidence “showing that many such persons... undergo a good deal of apprehension and embarrassment when they are told that as the law now stands they cannot be exempted but must apply for excusal if actually summoned”.¹⁷

12. *Juries Act 2003* (Tas) Sch 2 cl 9.

13. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.140. This was adopted in Tasmania: *Juries Act 2003* (Tas) Sch 2 cl 9. This Commission has given consideration to this question: NSW Law Reform Commission, *Blind or Deaf Jurors* (Report 114, 2006).

14. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.136.

15. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 2.

16. See NSW Law Reform Commission, *Blind or Deaf Jurors* (Report 114, 2006).

17. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 127.

7.13 With respect to those with mental or intellectual disabilities, the UK Departmental Committee on Jury Service noted that mental disabilities varied widely, were often not permanent and “many of those who are mentally disordered may not be fully aware of the fact”. The review therefore recommended only that those receiving certain types of mental health treatments should be ineligible.¹⁸

7.14 One submission to this Commission has asserted that, in NSW, people with intellectual disabilities were being summoned for jury service. This gives rise to a number of concerns, including the sufficiency of the procedures for identifying and excusing such people and the distress and confusion often caused by receipt of a summons.¹⁹ Absent the assistance of near relatives, or the provision of a certificate from a treating medical practitioner, or actual evidence of behaviour that is indicative of a psychiatric condition or intellectual disability, it is difficult to detect those who might fall within this category.

ISSUE 7.2

Should disability which impacts upon a person's ability to discharge the duties of a juror continue to be a ground of ineligibility?
Should such disability be more precisely defined?

Sickness or infirmity

7.15 In NSW and some other jurisdictions, a person is ineligible to serve as a juror if he or she is unable, because of sickness or infirmity, to discharge the duties of a juror.²⁰ In other jurisdictions, sickness or infirmity is an express ground that may qualify as a “good cause” for which the person may be excused from attendance for jury service.²¹

7.16 It has been reported that sickness or infirmity is one of the more common grounds for removal from the roll in NSW,²² although inevitably this can give rise to questions of degree and as to whether the condition is of an ongoing or permanent nature. In addition, where

18. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 128.

19. Law Society of NSW, *Preliminary submission* at 2.

20. *Jury Act 1977* (NSW) Sch 2 item 12; *Juries Act 1957* (WA) s 5(b)(iv); *Juries Act 1927* (SA) s 13(a); *Juries Act 1963* (NT) Sch 7.

21. *Juries Act 2003* (Tas) s 9(3)(a) and (b); *Juries Act 2000* (Vic) s 8(3); *Jury Act 1995* (Qld) s 21(1); *Juries Act 1967* (ACT) s 14(a); *Juries Act 1957* (WA) Sch 3; *Juries Act 1927* (SA) s 16(2)(c). See also para 8.7-8.8.

22. L Anamourlis, *Preliminary consultation*; M Wilkie, “Inside the Jury” in D Challenger, *The Jury* (Australian Institute of Criminology, Seminar: Proceedings No 11, 1986) at 188.

the condition is temporary it is commonly encountered on an application to be excused made following receipt of a summons, or on the day of the trial.

ISSUE 7.3

Should inability to discharge the duties of a juror because of sickness or infirmity continue to be a ground of ineligibility or should it be dealt with as an application to be excused for good cause?

Pregnancy

7.17 The entitlement of pregnant women to be excused as of right²³ was first introduced in NSW in 1977 when a woman's general entitlement to be excused as of right was removed.²⁴

7.18 The NSW Jury Task Force questioned why pregnant women "irrespective of the stage of the pregnancy" should have a right to be excused.²⁵ The 1994 AIJA review recommended amendment or removal of the pregnancy exemption.²⁶ The Victorian Parliamentary Law Reform Committee considered that most women in the early stages of pregnancy would be capable of serving.²⁷ The Committee considered that anyone unable to perform jury service on account of pregnancy could apply to be excused on an individual basis.²⁸

7.19 In the ACT, pregnant women are entitled to be excused on the grounds of "good cause".²⁹

ISSUE 7.4

Should pregnancy continue to be a ground of exemption as of right from jury service?

23. *Jury Act 1977* (NSW) Sch 3 item 9.

24. See *Jury Act 1912* (NSW) s 3(3) inserted by *Administration of Justice Act 1968* (NSW) s 10.

25. NSW, *Report of the NSW Jury Task Force* (1993) at 23.

26. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 174.

27. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.172-3.173. See also NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 4.

28. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.172-3.173.

29. *Juries Act 1967* (ACT) s 14(b). See also para 8.7.

AGE

7.20 In NSW, people who are at least 70 years old have the right to claim exemption.³⁰ Until 1997, the age for a right to exemption was set at 65.³¹ The Law Reform Commission recommended a change in the age in 1986 because of concerns about the serious under-representation of jurors aged 65 and over.³²

7.21 Exemptions based on age still represent a substantial proportion of the exemptions claimed in NSW.³³ This has also been the case in other jurisdictions.³⁴ Some jurisdictions have seen an increase in the age limit for jury service where age has been a precondition to eligibility. In some jurisdictions service after the relevant age has been made optional.

7.22 For example, in Tasmania in 2003, the age limit of 65 was removed and substituted by a provision allowing those over 70 to elect not to serve.³⁵ In Queensland, where previously males between 65 and 70 could opt out of jury service,³⁶ people over 70 are now ineligible unless they elect to be eligible.³⁷ In Western Australia, people over 70 are ineligible to serve, while those between 65 and 70 may elect not to serve.³⁸ In the ACT, people over 60 are eligible to serve but are entitled to claim exemption as of right.³⁹

7.23 The NSW Jury Task Force questioned the earlier restriction allowing persons over 65 to claim exemption.⁴⁰ The extension to 70 years in NSW does not address the underlying concern that a large number of people who may otherwise be physically and intellectually capable of serving, can seek exemption on the ground of age alone. In

30. *Jury Act 1977* (NSW) Sch 3 item 8.

31. See *Jury Amendment (Qualifications) Regulation 1996* (NSW).

32. NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial* (Report 48, 1986) at para 4.35. See also M Wilkie, "Inside the Jury" in D Challenger, *The Jury* (Australian Institute of Criminology, Seminar: Proceedings No 11, 1986) at 189.

33. L Anamourlis, *Preliminary consultation*.

34. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.147.

35. *Juries Act 2003* (Tas) s 11.

36. *Jury Act 1929* (Qld) s 3, s 6(1)(b) and s 8(3). At the time women under 70 were entitled to claim exemption irrespective of age: *Jury Act 1929* (Qld) s 8(3).

37. *Jury Act 1995* (Qld) s 4(3)(j) and (4).

38. *Juries Act 1957* (WA) s 5(a)(ii), Sch 2 Part 2 cl 5.

39. *Juries Act 1967* (ACT) Sch 2 Part 2.2 item 7.

40. NSW, *Report of the NSW Jury Task Force* (1993) at 23.

Victoria, there is no exemption based on age, however, “advanced age” amounts to a good reason to be excused.⁴¹

7.24 In Queensland it has been suggested that the age of 70 is appropriate as a cut off as it is the retirement age already established for judges.⁴² In NSW, the retirement age for judges is 72 years,⁴³ however, the age for acting judges has been extended to 75 years.⁴⁴

7.25 Arguments in favour of retaining reasonable age limits include:

- the difficulties of old age that may accompany such activities as sitting in court for protracted periods, or travelling to and from a court;⁴⁵
- avoidance of the administrative difficulties that will arise if a large number of elderly people are summoned and then seek to be excused;⁴⁶
- avoidance of the “unfair” burdens on elderly people involved in seeking to be excused on a discretionary basis and the distress caused to them and their relatives;⁴⁷ and
- the belief that jury service is a duty that ought not “be demanded of people at an age when they are entitled to the freedom that comes in retirement”.⁴⁸

7.26 Reasons for not imposing a restriction based on age include the fact that:

- age bears little relation to the ability of a person to serve as a juror, especially if the grounds of illness or disability are retained;⁴⁹

41. *Juries Act 2000* (Vic) s 8(3)(i). See also para 8.7.

42. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 5.

43. *Judicial Officers Act 1986* (NSW) s 44.

44. *Supreme Court Act 1970* (NSW) s 37(4).

45. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 68.

46. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 5; Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 16 May 1996 at 1192.

47. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 16 May 1996 at 1192; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.166.

48. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 68.

49. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.165.

- excluding the elderly will make juries less representative of the community;⁵⁰ and
- the older age group will generally be retired (and, therefore, available) and may come from those groups that have previously been exempted or excused from jury service⁵¹ yet could bring particular skills and experience to the task.

7.27 It has been noted that many people above the age of 70 may be perfectly capable of carrying out jury service and perfectly willing to do so.⁵² It could be argued that the current exemption as of right unnecessarily encourages people within this group who are still capable of serving to seek exemption. It may, therefore, 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, rather than relying on a presumptive right to exemption based on age alone. Lord Justice Auld, in his review of the criminal courts in England and Wales, took a rather more limited approach, in relation to people within the lower age group of 65 to 70 to show “that they are so physically or mentally unfit as not to be able to act effectively as jurors”.⁵³ No suggestion was made of extending this provision to people aged more than 70.

ISSUE 7.5

Should age be a ground of ineligibility or exemption from jury service?
 What conditions should attach to any requirement of ineligibility or right of exemption?

CARER RESPONSIBILITIES

7.28 In NSW exemptions as of right are available for people who have the “care, custody and control of children under the age of 18 years (other than children who have ceased attending school) and who, if exempted, would be the only person exempt... in respect of those

50. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.165.

51. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.165.

52. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 16 May 1996 at 1192.

53. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 150.

children” as well as people who reside with, and have full-time care of, a person who is “sick, infirm or disabled”.⁵⁴

7.29 A sizeable number of otherwise eligible people are deleted from the NSW roll by reason of these rights to exemption.⁵⁵ This is also the case in other jurisdictions.⁵⁶ The consequence is to exclude a large number of women from serving as jurors in the 25-50 year age group.

7.30 Other jurisdictions, for example the ACT, have made care of children a ground to be excused for good cause rather than a ground of exemption as of right.⁵⁷

7.31 One suggestion that could encourage such people to serve would be to allow jurors to claim fees paid for substitute carers who were engaged during the period of the jury service.⁵⁸

Care of people under 18 years

7.32 Unlike NSW, most other jurisdictions that retain the care of children as a ground for exemption or to be excused make no reference to the age of the children. However, in WA the age limit for having children under care as a ground of exemption is 14 years.⁵⁹

7.33 In other jurisdictions, such as SA, NT, ACT, Queensland, Tasmania and Victoria, care of children no longer entitles a person to exemption, although in some of these jurisdictions it is an express ground for excusing a person from service. In Victoria, for example, one of the grounds for excusing a person is that “the person has the care of dependants and alternative care during the person’s attendance for jury service is not reasonably available for those dependants”.⁶⁰

7.34 One preliminary submission to this Commission questioned whether the right of exemption for the care of a person under 18

54. *Jury Act 1977* (NSW) Sch 3 items 10, 11.

55. See L Anamourlis, *Preliminary consultation*. See also M Wilkie, “Inside the Jury” in D Challenger, *The Jury* (Australian Institute of Criminology, Seminar: Proceedings No 11, 1986) at 188; and NSW Law Reform Commission, *The Jury in a Criminal Trial: Empirical Studies* (Research Report 1, 1986) at para 4.4.

56. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.147.

57. *Juries Act 1967* (ACT) s 14(c). See also para 8.7.

58. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 4. See para 9.76 below.

59. *Juries Act 1957* (WA) Sch 2 Part 2 cl 4.

60. *Juries Act 2000* (Vic) s 8(3)(h). See also *Juries Act 2003* (Tas) s 9(2)(g); *Juries Act 1967* (ACT) s 14(c).

should continue to be available.⁶¹ Another submission considered this exemption to be particularly “unacceptable”.⁶²

Care of people in need of full-time care

7.35 It may be noted that the right of exemption for carers of persons who are sick, infirm or disabled is not qualified by the additional provision attaching to the care of children, which it would seem was intended to apply to sole carers. One preliminary submission to this Commission questioned the exemption.⁶³

ISSUE 7.6

Should the care of children or of others continue to be a ground of exemption as of right?

What, if any, conditions should attach in order for it to be exercised?

DISTANCE FROM COURT

7.36 Currently a person who resides more than 56 km from the place where he or she is required to serve is entitled to claim an exemption.⁶⁴ The distance from the Sydney CBD to the nearest part of the Blue Mountains National Park is 56 km.⁶⁵

7.37 This distance requirement may cause problems. For example, Nelson Bay has 20,000 people who are in the habit of commuting to Newcastle to work, but who can claim the 56 km exemption on the ground of distance alone. On the other hand, there are people from

61. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 4.

62. NSW, Jury Task Force, *Preliminary submission* at 2.

63. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 4.

64. *Jury Act 1977* (NSW) Sch 3 item 12.

65. However, it should be noted that people living near the centre of Sydney will only be required to serve in the Sydney jury district. This is because the South Sydney jury district consists of postcodes in the electoral districts surrounding the courthouses in the centre of Sydney. There are also jury districts for Penrith, Campbelltown and Parramatta each of which consist of the postcodes in the electoral districts surrounding the courthouses in Penrith, Campbelltown and Parramatta respectively. There is no overlap between the jury districts. Under current arrangements it is, therefore, not possible for a person living near the Blue Mountains to be called for jury service in the Sydney jury district.

Church Point and Scotland Island who are within the 56 km zone for Sydney but for whom transport is very difficult.⁶⁶

7.38 One submission to this Commission has suggested that the right to exemption on the ground of distance is particularly “unacceptable”.⁶⁷ Its origin is unclear, but it is arguably an arbitrary provision which does not take into account modern transport or work patterns, or the availability, or non-availability, in particular regions, of public transport. It is also likely, in rural districts, to place a greater burden on town residents and to exclude those from outlying districts, even though they are very much part of the local community, and will normally conduct their business and shopping in those towns.

7.39 The Victorian Parliamentary Law Reform Committee, in considering the Victorian limit of 32 km, proposed an extension to 50 km for the Melbourne jury district and 100 km for the rest of Victoria. The 100 km radius from a courthouse was proposed on the basis that it would represent a drive of about one hour each way, which was not considered unreasonable, at least for short trials.⁶⁸

7.40 One preliminary submission to this Commission suggested that the distance should be increased to 100 km, but questioned what impact that might have on people in regional areas who did not have access to transport.⁶⁹ Another submission also pointed to the unavailability of public transport for some people in rural areas who might otherwise be within the 56 km limit.⁷⁰ Each objection could be resolved by way of an application to be excused for good cause.

7.41 In England and Wales, there is no exemption based upon distance from the court. However, in summoning jurors, the Lord Chancellor is to have regard to the “convenience of the persons summoned and to their respective places of residence, and in particular to the desirability of selecting jurors within reasonable daily travelling distance of the place where they are to attend”.⁷¹

ISSUE 7.7

What geographical criteria, if any, should be applied in determining whether a person should be exempted or excused from jury service?

66. L Anamourlis, *Preliminary consultation*.

67. NSW, Jury Task Force, *Preliminary submission* at 2.

68. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.177.

69. Law Society of NSW, *Preliminary submission* at 1.

70. UnitingCare NSW.ACT, *Preliminary submission* at 2.

71. *Juries Act 1974* (Eng) s 2(2).

PREVIOUS JURY SERVICE

7.42 In NSW a person may be excused as of right who:

- served as a juror at any time within the preceding 3 years; or
- within the preceding 12 months, was summoned, attended court and was willing to serve as a juror but was not required to do so.⁷²

A person may also be excused as of right if he or she served as a juror in a trial or coronial inquest and the judge or coroner, at the end of the trial or inquest, made an order that the jurors who attended the trial or inquest “for a lengthy period” were entitled to be exempted as of right from serving as jurors for a period specified in that order.⁷³

7.43 Such provisions, which are duplicated in some forms in most jurisdictions,⁷⁴ are aimed at ensuring that the burden of jury service is shared as evenly as possible among those who are liable to serve.⁷⁵ A possible area of uncertainty, however, arises in relation to what constitutes attending a trial or inquest for a “lengthy period”.

ISSUE 7.8

On what terms, if any, should people be exempted or excused from jury service on the grounds of previous jury service or attendance for jury service?

CONSCIENTIOUS OBJECTION

7.44 Currently conscientious objection to jury service is not a ground of exemption in NSW. As a general ground of exemption, conscientious objection is only specifically provided for in SA.⁷⁶ The Sheriff’s Guidelines in NSW recognise conscientious objection on the grounds of religious belief in so far as they allow consideration to be given to excusing Christadelphians, Seventh Day Adventists, Jehovah’s Witnesses and Brethren from jury service.⁷⁷

72. *Jury Act 1977* (NSW) Sch 3 item 13.

73. *Jury Act 1977* (NSW) s 39 and Sch 3 item 14.

74. *Juries Act 2003* (Tas) s 14; *Juries Act 2000* (Vic) s 13; *Jury Act 1995* (Qld) s 22; *Juries Act 1927* (SA) s 16; *Juries Act 1963* (NT) s 18AB; *Juries Act 1967* (ACT) s 18A; *Juries Act 1974* (Eng) s 8.

75. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.181.

76. *Juries Act 1927* (SA) s 16(2)(c).

77. Sheriff’s Office of NSW, *Jury Act, 1977: Policy and Practice Guidelines* (November 2005) at para 3.4.7.

7.45 In a previous report this Commission recommended that conscientious objection to jury service should be recognised as a ground of exemption as of right as follows:

A person who objects on the grounds of conscientious belief to serving on a jury whether the grounds of that belief are or are not of a religious character and whether that belief is or is not part of the doctrine of any religion.⁷⁸

7.46 The Victorian Parliamentary Law Reform Committee, in considering the possibility of giving people with a conscientious objection to jury service a right to be exempted, noted the concern that such a ground could be abused by people lacking a genuinely held belief. The Committee, however, preferred that it be available as a good cause for a person to be excused from service.⁷⁹

7.47 Tasmania has recognised that a “good reason” to be excused from service is that “the beliefs or principles of the religious society or body of which the person is a practising member are incompatible with jury service”.⁸⁰ A similar provision exists in Victoria.⁸¹

7.48 The issue which potentially arises is the extent to which the genuineness of such a belief should be explored, and whether it is sufficient for the claim to be made without further support, or whether proof is required of membership of some organisation or religious group which maintains such a tenet as part of its doctrine. The practical reality, however, is that if a juror unsuccessfully invokes this as a ground to be excused, then the same result will be achieved by counsel, most probably the prosecutor, exercising a right of peremptory challenge to avoid having a reluctant and potentially non-participating juror empanelled, with the likely consequence of a hung jury. While this could be overcome in most cases, by a majority verdict, that would not be so in a murder trial.

ISSUE 7.9

What provision, if any, should be made for people who have a conscientious objection to jury service?

78. NSW Law Reform Commission, *Conscientious Objection to Jury Service* (Report 42, 1984) at para 5.21.

79. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.195, 3.198-3.199.

80. *Juries Act 2003* (Tas) s 9(3)(h).

81. *Juries Act 2000* (Vic) s 8(3)(j).

8. Excused for good cause

- Reasons in other jurisdictions
- Guidelines
- Right of appeal
- Deferral

8.1 Most jury statutes include a provision allowing a person to be excused from attendance for jury service on the grounds of “good cause”, “reasonable cause”, or “good reason”.

8.2 In New South Wales the Sheriff may excuse a person from attendance for jury service, at any time before being summoned, for good cause because of “any matter of special importance or any matter of special urgency”.¹ A person who has been summoned for jury service may also be excused by the Sheriff or by the Court or Coroner from attendance for jury service on the grounds of good cause for the whole or any part of the time that his or her attendance is required.² A person does not, however, have good cause to be excused on the ground that the person is entitled to be exempted as of right if that person was entitled but failed without reasonable cause, to claim exemption in response to the questionnaire earlier sent out with the notice of inclusion.³

8.3 In many instances the decision is made on the day of the trial, either by a local officer of the Sheriff authorised to exercise that power or by the Judge, usually by the latter when the claim to be excused is questionable. In the 2005/2006 financial year, 39,896 potential jurors were excused for good cause before attending, and of those who attended for jury service, 9,490 were excused by the Sheriff and 2,541 by a Judge.

8.4 In Australia, excusal for good cause is dealt with in several ways. Some jurisdictions provide express legislative guidance for determining what constitutes “good cause”. For example, in Tasmania and Victoria the good causes for which the Sheriff may excuse a person from service are listed in the statute and include illness and incapacity, substantial hardship or inconvenience, caregiving, religious beliefs, and “any other matter of special urgency or importance”.⁴ In other jurisdictions such as New South Wales, good cause is not defined by statute and there is no legislative guidance for determining what constitutes good cause.⁵ The Sheriff has, however, developed guidelines for the assistance of the Office of the Sheriff, and the website of that office provides some limited guidance as to the procedure which those who seek to be excused must follow.

1. *Jury Act 1977* (NSW) s 18A.

2. *Jury Act 1977* (NSW) s 38.

3. *Jury Act 1977* (NSW) s 38(2).

4. *Juries Act 2003* (Tas) s 9(3); *Juries Act 2000* (Vic) s 8(3).

5. See M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 41 and 175.

8.5 The NSW Jury Task Force in 1993 considered that there was merit in having a limited automatic class of exclusion leaving those who would be entitled “as of right” to apply to be excused on the grounds that “in their particular case there would be undue hardship or inconvenience”.⁶ This would involve a significant change for those who fall within the exemption as of right category, who could previously elect to be removed from the list, but who could serve if they wished. They would now have to serve unless they could provide a good reason not to. It might also involve a substantial change in the work of the jury section of the Sheriff’s Office.⁷

8.6 In England and Wales, Lord Justice Auld 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”.⁸

ISSUE 8.1

Should those, or some of those, within the present category of exemption as of right, be required instead to apply to be excused from jury service by demonstrating a good cause?

REASONS IN OTHER JURISDICTIONS

8.7 In other jurisdictions, excuses that qualify as “good cause” for which the Sheriff may, at his or her discretion, excuse a person from attendance for jury service include the following:

- illness, poor health or incapacity;⁹
- pregnancy;¹⁰
- substantial or undue personal hardship (including financial) or inconvenience resulting from attendance for jury service;¹¹

6. NSW, *Report of the NSW Jury Task Force (1993)* at 25.

7. L Anamourlis, *Preliminary consultation*.

8. R E Auld, *Review of the Criminal Courts of England and Wales (HMSO, 2001)* at 151.

9. *Juries Act 2003 (Tas)* s 9(3)(a) and (b); *Juries Act 2000 (Vic)* s 8(3)(a) and (b); *Jury Act 1995 (Qld)* s 21(1)(e); *Juries Act 1967 (ACT)* s 14(a); *Juries Act 1957 (WA)* Sch 3; *Juries Act 1927 (SA)* s 16(2)(c).

10. *Juries Act 1967 (ACT)* s 14(b).

11. *Juries Act 2003 (Tas)* s 9(3)(d) and (e); *Juries Act 2000 (Vic)* s 8(3)(e) and (f); *Jury Act 1995 (Qld)* s 21(1)(a) and (b); *Juries Act 1957 (WA)* Sch 3.

- excessive time or excessive inconvenience in travelling to court;¹²
- substantial inconvenience to the public (or a section of the public) resulting from the person's attendance for jury service;¹³
- the existence of caregiving obligations in circumstances where suitable alternative care is not readily available;¹⁴
- the person is one of two or more partners from the same business partnership, or one of two or more employees in the same establishment, who have been summoned to attend as jurors on the same day;¹⁵
- the existence of religious or conscientious beliefs of the person that are incompatible with jury service;¹⁶
- having already performed jury service within the previous 3 years;¹⁷
- the advanced age of the person;¹⁸ and
- any matter or circumstance variously described as being of special or sufficient weight, importance or urgency.¹⁹

8.8 In Tasmania several of these grounds may justify a person being permanently excused from jury service, namely, continuing poor health, disability or religious belief.²⁰

8.9 A number of these reasons are treated as grounds for a person to be excused as of right in some jurisdictions but as excuses qualifying as good cause in others. For example, in New South Wales a person with the caregiving duties previously mentioned is eligible to claim exemption as of right whereas in Tasmania, where all categories of

12. *Juries Act 2003* (Tas) s 9(3)(c); *Juries Act 2000* (Vic) s 8(3)(d).

13. *Juries Act 2003* (Tas) s 9(3)(f); *Juries Act 2000* (Vic) s 8(3)(g); *Jury Act 1995* (Qld) s 21(1)(c).

14. *Juries Act 2003* (Tas) s 9(3)(g); *Juries Act 2000* (Vic) s 8(3)(h); *Jury Act 1995* (Qld) s 21(1)(d); *Juries Act 1967* (ACT) s 14(c).

15. *Juries Act 1927* (SA) s 16(2)(b); *Juries Act 1967* (ACT) s 15.

16. *Juries Act 2003* (Tas) s 9(3)(h); *Juries Act 2000* (Vic) s 8(3)(j); *Juries Act 1927* (SA) s 16(2)(c).

17. *Juries Act 1927* (SA) s 16(2)(a).

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

19. *Juries Act 2003* (Tas) s 9(3)(i); *Juries Act 2000* (Vic) s 8(3)(k); *Juries Act 1967* (ACT) s 14(d); *Juries Act 1957* (WA) Sch 3; *Juries Act 1927* (SA) s 16(2)(c). See also *Jury Act 1977* (NSW) s 18A.

20. *Juries Act 2003* (Tas) s 10.

exemption as of right have been removed, a caregiver may only claim excusal on the grounds of good cause.²¹

8.10 The Victorian Parliamentary Law Reform Committee suggested an additional ground on which a person could be excused for good cause, namely “whether in the opinion of the sheriff or judge there are factors personal to the prospective juror which would justify excusal on the grounds that he or she may be unable to properly and impartially fulfil the duties of a juror”.²² This ground would deal with situations where, for example, a spouse of a lawyer engaged in the trial is empanelled.²³

8.11 The New York Jury Project simply proposed two grounds 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.²⁴

ISSUE 8.2

Should there be a statutory list of “good reasons” for excusing a person from jury service or should the power to excuse be left at large to be exercised at the discretion of the Sheriff or of the trial judge or coroner? If the former, what reasons should be included on that list?

GUIDELINES

8.12 The absence of legislative guidance has led some jurisdictions to establish jury summoning guidelines setting out the criteria governing excusal for good cause. Because determining whether a person has good cause to be excused from attendance for jury service requires an exercise of discretion by the Sheriff, guidelines are of assistance in ensuring that the Sheriff or the Sheriff’s delegate exercises the discretion in a consistent manner, particularly in jurisdictions where good cause is not statutorily defined such as New South Wales. The

21. *Jury Act 1977* (NSW) Sch 3 items 10 and 11; *Juries Act 2003* (Tas) s 9(3)(g).

22. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 3.192.

23. See N R Cowdery, *Preliminary submission* at 1.

24. *The Jury Project* (Report to the Chief Judge of the State of New York, 1994) at 34.

use of guidelines also acts as a safeguard against the Sheriff using the discretion to “pack the jury”. In New South Wales, jury summoning guidelines have been developed by the Sheriff’s Office but they are informal in nature and are not made publicly available or routinely provided to the Courts. In other jurisdictions, such as England and Wales, where the statute merely requires a “good reason” for a person to be excused,²⁵ guidelines are formalised and made publicly available.²⁶

8.13 If the present categories of ineligibility and exemption as of right from jury service in NSW are reduced, it is likely that the number of applications by persons summoned for jury service to the Sheriff for excusal for good cause will increase. If this occurs, there is a danger that this will shift the burden of excusal to the Sheriff or to the Courts. Further should the good causes for which the Sheriff or the Courts may excuse a person from service be listed in legislation, as is the case in Tasmania and Victoria, there is a risk that this list may become a de-facto list of categories of people who may be exempted as of right. There is a similar risk where the good causes for which the Sheriff may excuse a person from service are listed in published guidelines.

8.14 Concerns have been expressed in NSW about the exercise of the discretion to excuse people for good cause. One preliminary submission to this review suggested that “good cause” needs to be stated more clearly so that employers and employees could be more certain of their rights. The statutory lists of grounds in Victoria, Queensland and Tasmania are seen as providing better grounds for relief than the current system in NSW.²⁷

ISSUE 8.3

Should there be published guidelines for excusing people from jury service?
 Should they be in addition to or instead of any statutory list of reasons?
 What reasons should the guidelines identify as constituting good cause?

25. *Juries Act 1974* (Eng) s 9(2).

26. Under *Juries Act 1974* (Eng) s 9AA. See England and Wales, Department for Constitutional Affairs, “Guidance for summoning officers when considering deferral and excusal applications” «http://www.hmcourts-service.gov.uk/docs/guidance_for_summoning_officers_0405%20.doc» (accessed 20 October 2006); England and Wales, Department for Constitutional Affairs, *Jury Summoning Guidance* (Consultation Paper, 2003).

27. Australian Business Ltd, *Preliminary Submission* at 2.

RIGHT OF APPEAL

8.15 In some jurisdictions, such as Victoria, South Australia and the United Kingdom, there is express statutory provision for an appeal to the court from a decision of the Sheriff (or equivalent officer) refusing to grant a claim to be excused for good cause.²⁸ At present, there is no express provision in New South Wales permitting such an appeal, although there is a de facto appeal in that an applicant who has been denied excusal by the Sheriff can always renew the application before a judge. However, a person who claims to be disqualified, ineligible or exempt as of right may appeal to a Local Court from a determination of the Sheriff not to exclude that person from the jury roll, or to amend the jury roll so as to have that effect.²⁹

ISSUE 8.4

Should there be a right of appeal against a decision not to excuse a person for good reason?

DEFERRAL

8.16 It is worth considering whether people who are excused for good reason may also defer their jury service either to a specified or unspecified future date, and whether the granting of any application to be excused could, or should, be made conditional on deferral, so as to ensure that such people are not unreasonably or irresponsibly avoiding their civic duty which is important for the preservation of the institution of trial by jury.

8.17 The English Royal Commission on Criminal Justice in 1993 recommended that “every effort” be made to “offer alternative dates at a time that will be more convenient if that gives an applicant an adequate opportunity to rearrange his or her affairs in order to leave time for the jury service to be performed”.³⁰ Lord Justice Auld similarly proposed that applications to be excused could be dealt with by deferral of service, citing the New York precedent.³¹ In England and Wales it is now the case that a person’s attendance may not be

28. *Juries Act 2000* (Vic) s 10; *Juries Act 1974* (Eng) s 9A; *Juries Act 1927* (SA) s 16(5).

29. *Jury Act 1977* (NSW) s 15.

30. England and Wales, *Royal Commission on Criminal Justice (Report, 1993)* at 132.

31. R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 151.

deferred if he or she has already been granted a deferral of attendance under the same summons.³²

8.18 The New York Jury Project proposed a tightly controlled system whereby a juror who is not entitled to be excused should be entitled to only one deferral as of right and required to nominate a date or dates on which he or she could serve within the following 6 months.³³ This Project observed that a discretionary system allowing for deferral relies on the ability of officials to distinguish between “situations where a citizen can make alternate arrangements if allowed to defer service to a more convenient time” and those where a more general or lengthier release from service is appropriate.³⁴ For example, there are many circumstances in the guidelines for England and Wales, where the relevant officer is encouraged to grant a deferral in the first instance. These include MPs who should be offered deferral to a time when parliamentary duties permit and students and teachers who should be offered deferral to a period outside of term time. Those seeking to be excused on the grounds of work commitments should be offered a deferral unless exemption is clearly necessary.³⁵

8.19 The New Zealand Law Commission has also recommended the adoption of a deferral system preferring it to the adoption of a stricter set of guidelines for excusing jurors. The Commission expected that under such a system “the existing criteria for excusal will be interpreted much more strictly, because many people who claim that ‘attendance on that occasion would cause or result in undue hardship or serious inconvenience’ will be able to defer to a more convenient time rather than be excused altogether”³⁶.

8.20 Several Australian jurisdictions allow a person to apply for deferral to another specified period.³⁷ In Victoria, for example, this is supported up by a computer system that allows potential jurors to record their preferred dates for service. In SA, the Sheriff or Judge

32. *Juries Act 1974* (Eng) s 9A(2), (2A).

33. *The Jury Project* (Report to the Chief Judge of the State of New York, 1994) at 36.

34. *The Jury Project* (Report to the Chief Judge of the State of New York, 1994) at 35.

35. England and Wales, Department for Constitutional Affairs, “Guidance for summoning officers when considering deferral and excusal applications” [«http://www.hmcourts-service.gov.uk/docs/guidance_for_summoning_officers_0405%20.doc»](http://www.hmcourts-service.gov.uk/docs/guidance_for_summoning_officers_0405%20.doc) (accessed 20 October 2006).

36. New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 156.

37. *Juries Act 2000* (Vic) s 7; *Juries Act 2003* (Tas) s 8; *Juries Act 1963* (NT) s 17A.

may excuse a person upon condition that his or her name is included among the jurors to be summoned at a “specified subsequent time” or that he or she attend in compliance with the summons as directed by the Sheriff.³⁸

8.21 There may, however, be problems with managing a system whereby people are offered alternative times that are more suitable. It has been suggested that a system of recording preferred times did not work previously in NSW. Often people who deferred came up with another excuse when the deferred date arrived.³⁹ In the Australian jurisdictions mentioned above there is no express provision that enforces a person’s subsequent choice of date. The New York Jury Project observed that allowing multiple deferrals “does not foster public respect for the jury system”.⁴⁰

8.22 One submission to this review supported the possibility of deferring service until a time that is more convenient to a prospective juror. It envisaged swapping a person who has been summoned onto a panel for a future date in order to overcome the problems of short-term illness or work commitments.⁴¹

8.23 Another alternative is to ensure that there is flexibility in the system to excuse jurors for whom service in a lengthy trial would occasion hardship or otherwise ground an application to be excused, on condition that they be available and moved to a panel allocated to a short trial.

ISSUE 8.5

What provision, if any, should be made for potential jurors to defer jury service?

Should it be possible to reallocate potential jurors to serve in a trial that would avoid or limit the hardship that may be occasioned by requiring them to serve in the trial to which their panel is allocated?

38. *Juries Act 1927 (SA) s 16(4)*.

39. L Anamourlis, *Preliminary consultation*.

40. *The Jury Project (Report to the Chief Judge of the State of New York, 1994)* at 36.

41. NSW, Jury Task Force, *Preliminary submission* at 3.

9. Management of jury service

- Selection and empanelment
- Accommodating jurors
- Enforcement of compliance with jury duty
- Jurors' employment
- Compensation to jurors

9.1 The system of jury selection, empanelment and management needs to be designed with the interests of potential jurors in mind particularly bearing in mind the responsible performance of a civic duty that jury service entails, which can occasion personal hardship, financial hardship and a good deal of inconvenience and distress. The more the system is designed to accommodate the concerns and needs of jurors, the less likely it is that some will seek exemption on the grounds of inconvenience or hardship.

9.2 The 1994 AIJA review of the NSW jury system observed:

When discussing the management of juries we are talking of a limited and precious resource. The requirement that citizens perform jury duty is an imposition on the freedom of the individual, and therefore juror usage not only must be efficient and economical from an administrative point of view, but also must recognise the legitimate concerns, apprehensions, expectations and frustrations of citizens participating in jury duty.¹

9.3 The Tasmanian review of jury service in 1999 observed that the jury selection processes generally appeared to have been “designed with the interests of the system in mind”, the interests of jurors playing “little part in their development”.²

9.4 In this section we outline some of the conditions or incidents of service as a juror that may lessen its attraction to lay citizens and encourage reliance on rights to exemption or applications to be excused.

SELECTION AND EMPANELMENT

9.5 The current system for selection and empanelment in NSW has been examined earlier. In this section we identify some of the problems that arise in implementing that procedure.

Selection boundaries

9.6 In NSW the current practice is to include on the jury rolls the registered electors resident in the postcode areas from the electoral districts closest to the relevant courts. Each electoral district or part of

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1. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 167.
 2. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 6.

an electoral district serves only one court or group of courts.³ So, for example, in the Sydney South region, the electorates surrounding the Sydney District Court and Supreme Court complexes are used to compile the jury roll for those courts, while the electorates surrounding Parramatta are used to compile the jury roll for the District Court at Parramatta. This division occurs, notwithstanding the fact that people living in or around Parramatta would not be able to claim an exemption as of right based on the 56km distance criterion if called upon to serve at the Sydney District Court.

9.7 Basing jury rolls on electoral districts has caused problems in regional areas, for example, where the roll is drawn from an electoral district the boundaries of which do not necessarily represent a 56 km radius from the location of the courthouse, or the nearest courthouses at which people on that roll may be summoned to attend.⁴ In some areas the result may be a substantial reduction in the available jury pool for that courthouse.

9.8 We propose to make inquiries to identify what proportion of State electors, if any, are not included on a jury roll because of the current 56 km limit and as to whether this imposes additional burdens on those living nearest to some regional courthouses.⁵

9.9 Options other than establishing jury pools based on electoral districts include using postcode districts, local government areas and/or census collection districts. In its submission to the Victorian Parliamentary Law Reform Committee, the Victorian State Electoral Office preferred the use of census collection districts (which are smaller than postcode districts) on the basis that postcode districts change quite frequently.⁶ The jury districts in Tasmania are defined by census collection districts.⁷

9.10 Questions arise as to the most effective method of determining the geographic areas from which jurors are to be selected for particular courthouses and whether jurors should be available for selection for only one courthouse when they are within easy reach of more than one courthouse. This question is relevant not only to

3. *Jury Regulation 2004* (NSW) cl 3(1)(a).

4. NSW, Jury Task Force, *Preliminary submission* at 4.

5. In Victoria it was suggested that in country towns “some people may serve on a jury too often”: Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 4.9.

6. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 4.16.

7. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 5.

potential jurors in the Sydney region but also to potential jurors who live in electoral districts between major regional centres.

ISSUE 9.1

How should the geographic areas from which jurors are chosen for particular courts be selected?

Volunteers

9.11 It is sometimes suggested that interested people could make themselves available to serve as jurors by registering or notifying that willingness to the Sheriff.⁸ It is believed by some that this would get around the problem of those who are unwilling to serve.

9.12 This approach would be undesirable for a number of reasons, since:

- **it tends to undermine the general principle of representativeness of the jury that is achieved by random selection;⁹**
- **volunteer jurors, in their own way, would be as “exclusive” a group as the judiciary is sometimes claimed to be;¹⁰**
- **volunteer jurors may have particular personal agendas that they wish to pursue through jury service; and**
- **regular volunteers, as “old hands”, might come to exercise an undue influence on less experienced randomly selected jurors.**

ISSUE 9.2

What provision, if any, should be made for people to volunteer for jury service?

8. *Tasmania, Parliamentary Debates (Hansard) House of Assembly, 19 August 2003 at 53; F Weston, “Why am I not on jury list?” (letter to the editor) Sun-Herald (8 October 2006) at 30; M J Stocker, Preliminary submission (Ministerial correspondence); G R Williams, Preliminary submission (Ministerial correspondence).*
9. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service (Cmnd 2627, 1965) at para 54.*
10. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service (Cmnd 2627, 1965) at para 54.*

Matters impacting upon the convenience of jurors

Sufficient notice of attendance

9.13 Currently in NSW a juror need only be given 7 days notice of the date when they are required to attend unless a judge of the court “otherwise orders”.¹¹ The usual notice period is 4 to 5 weeks. However, a court may require a jury to be empanelled at much shorter notice, sometimes of even a day or two. Such short notice may be given when, for example, a trial judge wishes to recommence an aborted trial. In these cases Sheriff’s officers deliver the jury summonses in person.

9.14 One submission to this review has drawn attention to instances of summonses being given at short notice of only two weeks or less. The short notice is said to involve considerable inconvenience to some businesses, the more so when final confirmation that a person is required to attend is given only within one or two days preceding the trial.¹² This may lead unnecessarily to jurors seeking to be excused, who, if given more time, would have been prepared to serve.

9.15 In Tasmania, potential jurors must be given at least 14 days notice of attendance.¹³ The Tasmanian review of jury service in 1999 considered that three weeks notice was “totally inadequate”, observing that it was “far too short for a person to reorganise their business and personal affairs”.¹⁴

9.16 One preliminary submission received by the Commission suggested that “a system which provides more regular and advance notice for jury duty may mitigate these difficulties somewhat”.¹⁵

Attendance on the wrong day

9.17 There has been a recent case where a juror attended on the wrong day and was mistakenly empanelled. An appeal to the NSW Court of Criminal Appeal was upheld quashing the conviction on the basis that the empanelment of the jury was invalid and ineffective.¹⁶

11. *Jury Act 1977* (NSW) s 26(3).

12. Australian Business Ltd, *Preliminary submission* at 2.

13. *Juries Act 2003* (Tas) s 27.

14. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 6.

15. Australian Business Ltd, *Preliminary submission* at 2. See also NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 5.

16. It was also held that the empanelment could not be saved by *Jury Act 1977* (NSW) s 73 which applied where a disqualified or ineligible person was empanelled or where there had been an irregularity or omission or error in the relevant jury roll, card or summons prepared or issued in relation to the trial: *R v Brown* [2004] NSWCCA 324.

It has been suggested that the Act should be amended to meet this situation when jurors attend the court in response to a summons.¹⁷

Case management

9.18 There has been a perennial complaint that jurors are unnecessarily kept waiting around and that their time is often wasted.¹⁸ That there is always room for improvement in this regard has generally been accepted.¹⁹ The fact that complaints continue to be made reinforces the point that the system places less consideration on the needs and interests of jurors than it does on the system itself.

9.19 One preliminary submission identified the problem of jurors attending court in response to a summons only to be told that the trial is not proceeding, particularly where the parties are not ready to proceed or where there has been a last minute plea. It has been suggested that this is one of the principal causes of jury service being depicted in a bad light.²⁰ Not only are individuals inconvenienced by having to attend when not required, they are also potentially lost to the system for 12 months because they are entitled to claim a right of exemption as having attended and been willing to serve.²¹ The submission suggested that some form of penalty as to costs should be imposed.²²

9.20 Equally problematic and annoying for jurors is the taking of lengthy breaks during the trial while legal argument takes place in relation to the admissibility of evidence and so on.²³ With proper management a trial judge should take steps to avoid such interruptions, which do involve a waste of jurors' time, by:

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17. NSW, Jury Task Force, *Preliminary submission* at 3.
 18. United Kingdom, *The Law and Practice with Regard to the Constitution, Qualifications, Selection, Summoning, &c of Juries* (Report of the Departmental Committee, Cd 6817, 1913) Vol 1 at 27.
 19. See, eg, United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 286-288; R E Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) at 218; Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 78; Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 5.2-5.12.
 20. NSW, Jury Task Force, *Preliminary submission* at 3.
 21. *Jury Act 1977* (NSW) Sch 3 item 13(b).
 22. NSW, Jury Task Force, *Preliminary submission* at 3. If there was to be some monetary impost it may be more appropriate that it take the form of a one day attendance fee equivalent to that payable if the members of the jury who attended had been empanelled.
 23. Particularly where they call for an extensive examination on the voir dire or a Basha inquiry: *R v Basha* (1989) 39 ACrimR 337.

- dealing, so far as practicable, with all such questions, including potential questions as to the joinder of co-accused or severance of the indictment, pre-trial;
- deferring argument on such issues until they can be determined outside normal court hours; or by
- similar techniques which would minimise mid-trial interruptions in the orderly flow of the evidence, addresses and summing up.

Attendance on more than one day before empanelment

9.21 There appears to be no provision limiting the period of time which a person must attend in response to a summons,²⁴ although in practice there is an expectation that most jurors will be allocated a trial or discharged on the day of attendance. The current practice in the Sydney District Court is to summon panels of jurors on Monday for trials commencing on Monday or Tuesday and to summon panels of jurors on Wednesday for trials that commence on that day, meaning that no potential juror has to wait for more than 2 days before empanelment.²⁵

9.22 A practice also exists whereby separate panels can be joined where there is an insufficiency of jurors in attendance, even though these panels have been summoned separately for the Supreme and District Courts.²⁶

9.23 Attendance on more than one day without selection can be a substantial negative aspect for some potential jurors, particularly if they are advised that they are to regard themselves as on call for a nominated period.

9.24 The Victorian Parliamentary Law Reform Committee proposed the introduction of a “one trial or one day” system whereby people would be required to attend for only one day if they were not empanelled. This aimed to reduce the inconvenience experienced by persons summoned for jury service.²⁷

24. See *Jury Act 1977* (NSW) s 53. There would appear to have been a practice in England that jurors were required to serve for a fortnight and could sit on multiple trials as required during that period, and for any additional period that is occupied by the trial for which they were empanelled: See England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 136.

25. K Shadbolt, *Preliminary consultation*.

26. See *Jury Act 1977* (NSW) s 51(1)(c).

27. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 5.12. See also Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 5.

When individual jurors are discharged

9.25 If, after a jury is empanelled but before the trial proper has commenced, a juror is discharged, the usual practice is for the remaining 11 jurors to be discharged. One submission to this review has suggested that it would be appropriate, in those circumstances, to include the remaining 11 jurors in another panel for that trial to be supplemented from a waiting pool²⁸ or to return them to the general pool for potential selection in another trial.²⁹

Length of trial

9.26 It has been generally observed that people may be particularly unwilling to attend for jury service because of the danger of being allocated a lengthy trial. One preliminary submission noted that some prospective jurors panic prematurely because of their knowledge of some notoriously long trials. Many prospective jurors do not understand that they may not even be empanelled, for example, because defendants plead guilty at the last minute, or because their names are not called, or because they become subject of a peremptory challenge.³⁰

9.27 The Sheriff's Office currently has a system of identifying the lengthier trials and of giving potential jurors the opportunity to elect to serve on a shorter trial. However, it remains the fact that for lengthy trials, and particularly those which involve controversial or notorious issues, panels of up to 100 jurors are often required, so as to allow for jurors to be excused, and for the peremptory challenges which are often extended by consent in these cases.³¹

9.28 One preliminary submission suggested that it might be useful to examine whether it would be possible for key personnel who might otherwise be excused for good cause, to be allocated to panels for short trials.³²

ISSUE 9.3

What additional strategies could be adopted to make jury service more convenient for jurors?

28. NSW, Jury Task Force, *Preliminary submission* at 2.

29. NSW, Jury Task Force, *Preliminary submission* at 3.

30. Redfern Legal Centre, *Preliminary Submission*.

31. *Jury Act 1977* (NSW) s 42(2).

32. Australian Business Ltd, *Preliminary Submission* at 2.

Dealing with bias and conflicts of interest

9.29 The possibility of jurors being affected by actual or ostensible bias can arise from time to time as a result of the juror having some interest in the proceedings or some relationship with the participants. This is likely to occur more frequently if the traditional categories of ineligibility are abolished or reduced. The issue may arise before the trial commences or once the trial is under way.

Before or at the commencement of proceedings

9.30 The current practice in NSW is for counsel to inform the panel of jurors in waiting, at the commencement of proceedings, of the names of the parties in civil proceedings or of the defendants in criminal proceedings, as well as the names of the principal witnesses that will be called and the general nature of the case.³³ The trial judge will then call upon the jurors on the panel to apply to be excused if they consider that they are not able to give impartial consideration to the case. Where a juror makes that application he or she is usually invited to state briefly the reason for the application so as to avoid abuse of the system. A similar procedure applies in proceedings before a Coroner.³⁴ The reasons given at this stage could include, for example, that the juror was recently a victim of a similar offence to the one being tried, or knows one of the witnesses or one of the parties. Any application that is made at this time is dealt with as an application for good cause.

9.31 The Law Reform Commission of WA observed that such concerns were best dealt with by the potential juror disclosing the circumstances of this kind to the appropriate authorities in advance of the hearing. In this context the Commission recommended that examples of potential conflicts be brought to the attention of each jury panel, such as relationships (either personal or by reason of employment) with the judge, any legal practitioners in the case or the accused.³⁵

After the commencement of proceedings

9.32 If, after empanelment, circumstances emerge that may affect an individual juror's ability to give the case an impartial consideration, then the judge has the power to discharge that juror and to determine

33. *Jury Act 1977* (NSW) s 38(7) and (8).

34. *Jury Act 1977* (NSW) s 38(9).

35. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Report, Project No 71, 1980) at para 3.20 and 3.68-3.70.

whether to continue the trial with the remaining members of the jury.³⁶

9.33 The Queensland Jury Act has a provision that allows a juror to report to the Attorney-General or Director of Public Prosecutions any suspicion which that juror has concerning the existence of bias or fraud on the part of any other juror, or the commission by that juror of an offence related to his or her membership of the jury or the performance of his or her functions as a member of the jury.³⁷ In NSW there have been instances where jury misconduct has been reported in relation to private views³⁸ or in relation to private inquiries by jurors designed to obtain additional information about the accused on trial.³⁹ If these came to light during the trial, the jury would normally be discharged without proceeding to a verdict. If they are not discovered until after the trial, this may well constitute grounds for a successful appeal leading to a retrial.

ACCOMMODATING JURORS

9.34 It has been suggested, from time to time, that improving the conditions for the physical accommodation of jurors during the trial might make jury service more palatable and result in potential jurors being less inclined to seek exemption.

9.35 Generally, juror accommodation both before empanelling and during deliberations is seen as sub-standard.⁴⁰ This appears to be a trend in jury reviews across all jurisdictions.⁴¹ The problems apply particularly to the assembly or waiting stage, for which the accommodation provided is either cramped or non-existent or arranged on an ad hoc basis away from the courthouse. Additionally many jury rooms are very small with only limited privacy for toilet facilities or for exercise.

9.36 There have been some proposals for flexible sitting hours to allow jurors to go about essential business or see to other personal

36. *Jury Act 1977* (NSW) s 22.

37. *Jury Act 1995* (Qld) s 70(8).

38. For example, *R v Skaf* [2004] NSWCCA 37.

39. Such inquiries are an offence under *Jury Act 1977* (NSW) s 68C although the extent to which a juror might lawfully disclose such information, within the existing restrictions contained in *Jury Act 1977* (NSW) Part 9 Div 3 are somewhat uncertain.

40. NSW, *Report of the NSW Jury Task Force* (1993) at 26-36.

41. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 6.26-6.30.

matters.⁴² Such arrangements involve a difficult balancing exercise in that providing breaks in sittings,⁴³ while convenient or desirable for some jurors, may prolong trials unnecessarily and impose “avoidable” costs on jurors and their employers.⁴⁴

9.37 The provision of business facilities like facsimile machines and computer terminals which could be used during breaks in the sittings has also been suggested as a means of reducing the inconvenience of jury service, as could some relaxation of the current practice of discouraging jurors from bringing mobile telephones to court.⁴⁵ There would, however, be a need to achieve some certainty as to their proper use so as to discourage the kinds of external inquiries that jurors may make about the accused and the trial that are forbidden by law. While it would be impractical, and unduly expensive, for substantial improvement to be made to many of the physical facilities reserved for jurors in many of the existing court houses in NSW, there would seem to be merit in ensuring that the need for comfortable facilities is built into future planning, both in relation to assembly and waiting rooms and also in relation to the jury rooms themselves.

9.38 Several reviews have emphasised a more general sensitivity to the needs of jurors, not only in terms of physical accommodation, but also in terms of communication and general efficiency of the system.⁴⁶

ISSUE 9.4

What strategies could be adopted to accommodate jurors and potential jurors better?

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42. See England and Wales, *Royal Commission on Criminal Justice (Report, 1993)* at 134; NSW, *Report of the NSW Jury Task Force (1993)* at 30; M Findlay, *Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994)* at 175.
 43. Usually involving half day sittings on Fridays in lengthy trials.
 44. C Merritt, “It’s time to hurry up” *Weekend Australian* (SA 1st edition) (14 October 2006) at 3.
 45. See R E Auld, *Review of the Criminal Courts of England and Wales (HMSO, 2001)* at 223.
 46. Supreme Court of Queensland, *Litigation Reform Commission, Reform of the Jury System in Queensland (Report of the Criminal Procedure Division, 1993)* at 77-80; NSW, *Report of the NSW Jury Task Force (1993)* at 12-14; R E Auld, *Review of the Criminal Courts of England and Wales (HMSO, 2001)* at para 214-227.

ENFORCEMENT OF COMPLIANCE WITH JURY DUTY

Failure to attend

9.39 In the 2005/2006 financial year, of the approximately 40,000 people who were finally required to attend,⁴⁷ 12,202 failed to attend.

9.40 The New Zealand Department for Courts, in 2001, confirmed that only 15-25 per cent of jurors who are summoned in New Zealand actually attend for service.⁴⁸ Note that in New Zealand, all reasonable steps are taken to ensure that any person who is disqualified or ineligible is removed from the jury list before summonses are issued.⁴⁹

Procedure and penalties

9.41 The Act imposes a penalty not exceeding 20 penalty units on anyone who fails to attend for jury service.⁵⁰ However, the Act also allows the Sheriff, in the first instance, to serve a notice on a person who fails to attend for jury service requiring payment of 10 penalty units (\$1,100).⁵¹

9.42 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 good reason for failure to attend, choose to pay the fine of 10 penalty units, or choose to have the matter heard before a Local Court. The Sheriff's Office tries to clarify the contentious issues with the person who failed to attend before the matter goes to a Local Court. Approximately 10 matters per month go before a Local Court. In the four years, April 2002-March 2006, 64 people were fined in the Local Courts for failure to attend for jury service. Fines imposed ranged from \$25 to \$2,000. Charges were dismissed for a further 45 people and one person was dismissed subject to a good behaviour bond.

9.43 If the person fails to respond to the initial letter or to a reminder, the Sheriff will issue a penalty notice for failure to attend for jury service.⁵² This replaced an earlier system for summary

47. Subtracting from those summoned for jury service, the people who have been excused for cause and those who have been advised in advance that they are not required.

48. See New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 284.

49. *Juries Act 1981* (NZ) s 13(2).

50. *Jury Act 1977* (NSW) s 63(1).

51. *Jury Act 1977* (NSW) s 64(2)(a).

52. *Jury Act 1977* (NSW) s 66.

disposal before a Magistrate.⁵³ A penalty notice for failure to attend imposes a fine of 15 penalty units.⁵⁴ Some 2,000 penalty notices are issued for failure to attend in each year. Many of these are withdrawn because the electoral roll did not correctly record the person's address. In the 2005/2006 financial year only 165 penalty notices were eventually paid.

9.44 A question arises whether fines or penalties of this order actually achieve deterrence or are regarded as an acceptable cost of avoiding service. It has been suggested that the number of people making penalty payments in response to the initial notice has been reduced since the penalty was increased to \$1,100.⁵⁵ It is not clear, at this stage, whether this has also resulted in increased compliance.

9.45 One preliminary submission raised concerns that the current effective penalty of \$1,100 may still not be sufficient to deter those who are on a "reasonable income". However, it also suggested that stricter enforcement or harsher penalties might be "self-defeating" as matters that could alienate the community.⁵⁶

ISSUE 9.5

Are the current procedures and penalties for enforcing jury service adequate?

JURORS' EMPLOYMENT

9.46 There are two related concerns, namely protecting a juror's employment during service, and preventing, where desirable, the continued employment of some juror's during the period of jury service.

Protecting jurors' jobs

9.47 An employer in NSW cannot dismiss an employee, or injure him or her in employment or prejudicially alter his or her position for the reason that the person has been summoned to serve as a juror, or threaten any of the above actions. Actions and threats of action of this kind constitute offences and each carry a separate penalty of 20

53. See M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) at 44.

54. *Jury Act 1977* (NSW) s 66(2).

55. L Anamourlis, *Preliminary consultation*.

56. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 5.

penalty units (\$2,200) where an employer is convicted of such an offence. The court may order that the employer pay compensation and reinstate the employee.⁵⁷ Failure to give effect to an order for reinstatement also constitutes an offence, which carries a similar penalty of 20 penalty units. The onus is placed on the employer to show that the dismissal or other detriment was not because of the juror's service.⁵⁸

9.48 The NSW provision was first introduced in 1947 at the same time that the qualification to serve as a juror was extended from a property based franchise to all males who were enrolled to vote.⁵⁹ It was modelled on provisions in the *Industrial Arbitration Act 1940* (NSW) which offered similar protections to employees who were dismissed or treated prejudicially as a result of industrial union activities, so long as the activities did not interfere with the performance of the employee's duties.⁶⁰ The provision, which was not introduced in response to any particular incident, was intended to overcome the problems of proof associated with citing an employer for contempt of court.⁶¹

9.49 Notwithstanding these provisions, there is still evidence of people complaining that their employment is jeopardised, particularly by lengthy jury service, or that they have missed important career opportunities as a result of jury service.⁶² There has also been at least one very recent report of a juror being dismissed as a result of prolonged jury service.⁶³ Consideration may need to be given to the status of these provisions in the light of recent amendments to Federal workplace legislation, and the extent to which proceedings can be maintained for unfair dismissal. If they no longer have effect,⁶⁴ then

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

58. *Jury Act 1977* (NSW) s 69(2). See also *Juries Act 1967* (ACT) s 44AA(2).

59. *Jury (Amendment) Act 1947* (NSW) s 5(mm) inserting s 84B into the *Jury Act 1912* (NSW).

60. *Industrial Arbitration Act 1940* (NSW) s 95. See NSW, *Parliamentary Debates (Hansard)* Legislative Council, Hon R R Downing, Second Reading Speech, 25 November 1947 at 1413.

61. At common law, dismissing an employee because he or she served as a juror is a contempt because it has a tendency to interfere with the administration of justice: *Attorney-General v Butterworth* [1963] 1 QB 696. See NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, Mr Martin, Second Reading Speech, 13 November 1947 at 1124.

62. See, eg, "Jury duty a service out of line with modern life", *Sydney Morning Herald* (29 September 2006) at 14 (letter to the editor).

63. C Merritt, "It's time to hurry up" *Weekend Australian* (SA 1st edition) (14 October 2006) at 3.

64. See *New South Wales v Commonwealth of Australia* [2006] HCA 52 at para 948 (Callinan J).

this could provide a very strong incentive for jurors who are concerned about job security to seek to be excused from jury service, or even simply pay the fine for non-attendance.

9.50 It has been suggested that the current penalty is insufficient and should be substantially increased.⁶⁵ In some other jurisdictions the amount of the fine is already higher and there is the possibility of a sentence of imprisonment. In the ACT, for example, a fine of up to 50 penalty units (that is, \$5,000 for individuals and \$25,000 for corporations) can be imposed and/or imprisonment for 6 months.⁶⁶

9.51 It is understood that during the period April 2002-March 2006 only one employer has been fined in the Local Courts for dismissing an employee who was summoned to jury service. It is unlikely that there has only been one instance of an employee being dismissed or injured or prejudiced in their employment over this period, but statistics as to the incidence of such conduct do not exist. It is also understood that the Sheriff's Office deals informally with some instances of threatened dismissals of employees who undertake jury service.

ISSUE 9.6

Are the current provisions protecting a juror's employment during jury service adequate?

Employment during jury service

9.52 The problem has been raised of employers requiring jurors to work at times when they are not required for jury service, possibly as a condition of having their current salary or wage maintained. In some cases, this practice is said to have had a negative effect on jurors who have become physically exhausted by the end of a trial of several weeks. It has been suggested that a provision should be added forbidding employers from requiring that jurors work during the times when they are not required for jury service.⁶⁷ This was the case under some Federal award provisions that formerly applied to Victoria, whereby employees on afternoon or night shifts who were required to serve as jurors for more than half a day were not required to report for work until the expiration of their jury service.⁶⁸ Provisions of this sort could have the effect of reducing the incentive of some jurors to seek to be excused from jury service.

65. K Shadbolt, *Consultation*.

66. *Juries Act 1967* (ACT) s 44AA.

67. K Shadbolt, *Consultation*.

68. See, eg, *Pastrycooks (Victoria) Award 1999* (AW792620CRV) cl 27.

ISSUE 9.7

Should employers be prevented from requiring jurors to work at times when they are not required for jury service?

COMPENSATION TO JURORS

9.53 Although the question of compensation in the form of attendance, travelling and refreshment fees is not identified directly in our terms of reference, it will be covered in this review since the adequacy of these fees has a direct and significant relationship to the willingness of some people to serve as jurors, and accordingly has some relevance to the categories of exemption or excusal.

9.54 In NSW “a person is entitled to be paid for attendance for jury service at a court or coronial inquest only if the person attends for service in accordance with the summons and does not then successfully apply to be excused from service”.⁶⁹ Such payments may include, where relevant, an attendance fee, a travelling allowance and a refreshment allowance.⁷⁰

9.55 The question of compensating jurors for attendance at court has had a long and controversial history. The modern debate commenced with the UK Mersey Committee which reported in 1913:

We regard jury service... as one of the duties which every citizen owes to the State, and we do not consider that the performance of this duty should be paid for. But we distinguish between remuneration for the service, and payment of the out-of-pocket expenses which the performance of the service may entail. These out-of-pocket expenses ought ... [to be] paid to all jurymen summoned (whether they are actually called into the jury box or not) according to fixed scales.⁷¹

9.56 While the NSW attendance fees goes beyond the category of out-of-pocket expenses, some would argue that they still fall short of being an adequate remuneration for the performance of the service.

9.57 It is generally believed that improvements in the remuneration and conditions of jury service would encourage more people to participate in the system and reduce the number of applications to be

69. *Jury Act 1977* (NSW) s 72(1).

70. *Jury Regulation 2004* (NSW) cl 5(1).

71. **United Kingdom**, *The Law and Practice with Regard to the Constitution, Qualifications, Selection, Summoning, &c of Juries* (Report of the Departmental Committee, Cd 6817, 1913) Vol 1 at 46.

excused or of the exercise of claims to exemption as of right.⁷² Such improvements may also be a way of making juries, particularly in longer trials, more representative than they are at present. Clearly there are self-employed people or proprietors of small businesses who cannot afford to be away from work for any lengthy period,⁷³ not only because of the loss of income, but also because of the destructive effects of their absence on the viability of the business. Such people will generally seek to be excused and the judge will often grant their application. If the application is refused it is almost inevitable that there will be a peremptory challenge since no party wishes a disgruntled juror to be empanelled.

Attendance allowances

9.58 In NSW the attendance fee varies according to the length of the trial as follows:⁷⁴

Attendance fee Day of attendance	Fee per day \$
1st:	
(a) if a person attends for less than 4 hours on that day but is not selected for jury service	Nil
(b) if a person attends for less than 4 hours on that day and is selected for jury service	41.80
(c) if a person attends for more than 4 hours on that day (whether or not the person is selected for jury service)	83.90
2nd–5th	83.90
6th–10th	97.50
11th and subsequent days	113.70

72. See, eg, Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 6.21; T Dick, “Crime doesn’t pay, but then neither does jury duty” *Sydney Morning Herald* (28 September 2006) at 2.

73. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 6.25; T Dick, “Crime doesn’t pay, but then neither does jury duty” *Sydney Morning Herald* (28 September 2006) at 2.

74. *Jury Regulation 2004* (NSW) Sch 1 Scale A.

If a person attending for jury service is paid his or her full wage or salary on a day of attendance by his or her employer (not being an amount that is the difference between the person's full wage or salary and the attendance fee)	Nil
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The attendance allowance is treated as income for both taxation and social security purposes.

Continuing normal salary or wages

9.59 The final item in the above table provides that employees, whose employers continue to pay their full salary during the period of the jury service are not entitled to receive any attendance fees. It also assumes that an employer who elected to continue paying an employee during jury service could make the usual wage or salary payment less the attendance fee, allowing the juror to claim the attendance allowance from the Sheriff.⁷⁵ A common provision in many awards and enterprise agreements in NSW required an employer to make up the difference between the attendance allowance and the juror's normal wage.⁷⁶ Such arrangements would appear to reflect a recommendation of the NSW Law Reform Commission in 1986 that jurors, whose employers continued to pay them during jury service, should not be advantaged over those whose employers did not.⁷⁷ It is also consistent with the NSW Jury Task Force's recommendation that any persons being paid a full wage or salary by their employer during the course of jury service should not receive an additional attendance allowance.⁷⁸

9.60 The current practice of the Sheriff's office is to deny the attendance allowance to jurors who are State government employees who are entitled to special leave on full pay during jury service⁷⁹ and those whose private sector employers are known to continue paying a full wage or salary for the duration of jury service. All other employees may claim the attendance allowance. This system, however, depends upon the honesty of the employees in reporting receipt of the allowance and the diligence of the employers in recouping the

75. See also *Jury Regulation 2004* (NSW) cl 5(2).

76. See, eg, *Animal Welfare, General (State) Award (2001) 322 NSW Industrial Gazette 531* (Publication No B9691) cl 24(ii); *Speedibake Enterprise Agreement 2003* (IRC3/6671; EA04/29) cl 18; *Speedo Australia Certified Agreement 2003* (IRC3/5005; EA03/204) cl 5.6(b).

77. NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial* (Report 48, 1986) at para 6.41.

78. NSW, *Report of the NSW Jury Task Force* (1993) at 41.

79. *Public Sector Employment and Management (General) Regulation 1996* (NSW) cl 94.

allowance if they have paid their employees fully for the period of service.⁸⁰

9.61 Although the *Jury Act* provides that “an employer shall not dismiss a person in his or her employment or injure the person in his or her employment or alter his or her position to his or her prejudice by reason of the fact that the person is summoned to serve as a juror”,⁸¹ it seems to have been assumed that this provision, the breach of which constitutes an offence, does not prevent an employer suspending the payment of the employee’s wages or salary during the trial.⁸² This assumption does not sit entirely comfortably with the subsequent provision of the Act to the effect that, where an employer is convicted of the offence mentioned, the Court may order that the employer pay the employee a specified sum by way of reimbursement for the salary or wages lost by the employee, and that the employee be reinstated in his or her old or a similar position. Having regard to the interpretation which has been placed on the primary provision mentioned above, it would seem that this provision for reimbursement and reinstatement has been assumed as applicable only to the circumstance where the employee has been dismissed, or demoted, or denied some opportunity for promotion, or otherwise penalised, in each case, for the sole reason that he or she has been required to serve as a juror, and does not of itself require the employer to maintain the juror’s current salary or wage.

9.62 It is not known to what extent employers require jurors to use up their annual leave entitlements during their period of service, nor is it clear whether it would be lawful for them to require that an employee does this.⁸³ Having regard to the reasons for employees having an

80. Terms in many awards and enterprise agreements required employees to produce proof of receipt of attendance allowances so that employers could adjust their pay rates accordingly: see, eg, *Animal Welfare, General (State Award) (2001) 322 NSW Industrial Gazette 531 (Publication No B9691) cl 24(iii)*; *Speedibake Enterprise Agreement 2003 (IRC3/6671; EA04/29) cl 18*; *Speedo Australia Certified Agreement 2003 (IRC3/5005; EA03/204) cl 5.6(b)*.

81. *Jury Act 1977 (NSW) s 69(1)*.

82. See, eg, the recent case of the discharge of a jury in the District Court where an employer stopped the salary of a juror: G Jacobsen, “Juror cries poor and halts trial” *Sydney Morning Herald* (29 November 2006) at 1. Note that the UK provisions specify that detriment does not include a failure to pay remuneration during the period of jury service unless such payment is required by the juror’s employment contract: *Employment Rights Act 1996 (UK) s 43M(3)*.

83. According to the New Zealand Law Commission, some employment contracts in that country expressly provide that employees must use their annual leave entitlement for jury service: New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 488. Express terms in some NSW

annual leave entitlement, it would seem undesirable for employers to be permitted to take that course. When such matters come to the attention of the Sheriff's Office, the current practice is to advise employers that requiring employees to use annual leave entitlements in order to serve on a jury amounts to prejudice under the provisions that protect a juror's employment during jury service.⁸⁴

9.63 In Victoria, employees who have been summoned as a juror and who have attended court are entitled to be reimbursed by their employer an amount equal to the difference between the amount of compensation for jury service and the amount that they would have been entitled to receive in respect of their ordinary hours of work had they not been summoned for jury service.⁸⁵ So far as the current research by the Commission shows, Victoria is the only jurisdiction in Australia that has an express general provision which has the effect of ensuring that the salary or wages of jurors is maintained during their jury service.

9.64 State government employees in NSW have been given similar protection by way of a regulation⁸⁶ and some NSW awards and work place agreements have achieved a similar protection.⁸⁷ Employers were also required, under Federal awards, to compensate employees for the loss of pay arising from jury service (that is, the usual wage for the period less any jury attendance allowances). However, recent amendments to Commonwealth workplace legislation have removed this protection.⁸⁸ It has been suggested that this amendment, without any change to the law in NSW, may significantly increase the number of people seeking to avoid jury service.⁸⁹ It should be noted that the Commonwealth legislation expressly does not exclude State laws relating to "attendance for service on a jury"⁹⁰ although the extent to

awards and enterprise agreements granted employees leave of absence during jury service: See, eg, *Animal Welfare, General (State) Award (2001) 322 NSW Industrial Gazette 531 (Publication No B9691) cl 24(i)*; *Speedibake Enterprise Agreement 2003 (IRC3/6671; EA04/29) cl 18*; *Speedo Australia Certified Agreement 2003 (IRC3/5005; EA03/204) cl 5.6*.

84. See para 9.47, above.

85. *Juries Act 2000 (Vic) s 52*.

86. *Public Sector Employment and Management (General) Regulation 1996 (NSW) cl 94*.

87. See, eg, *Animal Welfare, General (State) Award (2001) 322 NSW Industrial Gazette 531 (Publication No B9691) cl 24*; *Speedibake Enterprise Agreement 2003 (IRC3/6671; EA04/29) cl 18*; *Speedo Australia Certified Agreement 2003 (IRC3/5005; EA03/204) cl 5.6*.

88. See *Workplace Relations Act 1996 (Cth) s 527(2)(f)*.

89. See Law Society of NSW, "Jury out on IR reforms" (Media release, 30 June 2005).

90. *Workplace Relations Act 1996 (Cth) s 16(3)(l)*.

which this extends to State law granting jurors an entitlement to be reimbursed by their employers is open to question.⁹¹

9.65 The Victorian solution, which involves making employers bear a substantial part of the costs of jury service, does not command general support. Some consider that employers ought not to have to bear the burden of what is essentially a civic responsibility rather than an industrial matter:

a citizen's civic duty to attend jury service is a reflection of the relationship between a citizen and the community. As such, an individual performing jury service is in no way linked to the employment relationship with an individual employer. The relationship is between the individual and the State. If it can be construed that during the performance of jury duty the individual becomes the employee of the State, then it is the state's responsibility to compensate the individual appropriately for their service.⁹²

9.66 The New Zealand Law Commission in 2001, commented:

Putting the cost onto employers, particularly for long periods of service, would be a significant burden for them, especially for small businesses. It is possible that this could lead to more employers seeking to have their staff excused from jury service rather than paying for the leave. Given that jury service is a benefit to the community, it seems reasonable that the community, through taxes, should pay for that benefit, rather than putting the burden onto employers.⁹³

Others, however, would counter that “jury service is a civic duty, and corporate citizens also have a part to play”.⁹⁴

Amount of payment

9.67 In NSW in 1978, the juror allowance for the first five days of a trial was in line with the average weekly minimum wage.⁹⁵ The NSW Jury Task Force in 1993 was unanimously of the view that attendance allowances were “inadequate” and needed to be increased.⁹⁶ Payment

91. See *New South Wales v Commonwealth of Australia* [2006] HCA 52 at para 945, 948 (Callinan J).

92. See, eg, Commerce Queensland, *Policy Issue - Queensland Government's Review of Jury Service Up For Comment* (2003) at 2.

93. New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 484.

94. Law Society of NSW, “Jury out on IR reforms” (Media release, 30 June 2005).

95. The Australian Bureau of Statistics stopped compiling statistics on the average weekly minimum wage in 1982: NSW, *Report of the NSW Jury Task Force* (1993) at 38.

96. NSW, *Report of the NSW Jury Task Force* (1993) at 39.

for actual loss of earnings was considered and rejected as too administratively costly.⁹⁷ An additional concern with compensating some jurors more than others is that it could create the appearance of unfairness and suggest that the contribution of some jurors is valued more highly than that of others.⁹⁸ The Task Force, however, concluded that the allowances should be set at the 1985 levels (which were based on the 1982 average weekly minimum wage with the addition of the National Wage Increase of 8.5%), adjusted for movements in the CPI (75% only).⁹⁹ In 1995, the scale of juror attendance fees was rationalised and the amounts to be paid were increased.¹⁰⁰ Since that date the amounts have been increased by regulation on an annual basis so that the current allowances are now 26% greater than they were in 1995.

9.68 In NSW there have recently been calls to increase the allowance substantially, pointing out that the maximum payment of \$568.50 per week (after 10 days' service) is well below the average full time adult weekly earnings of \$1,035 per week.¹⁰¹

9.69 The UK Departmental Committee on Jury Service in 1965 gave consideration to the practice then in place of compensating jurors according to the rates set for the attendance of "general witnesses". It concluded that the rates should be set at a more realistic level, opting for the scale of subsistence allowances for members of local authorities.¹⁰²

9.70 The English Royal Commission on Criminal Justice in 1993 observed that the compensation offered in England was "wholly inadequate to compensate for loss of earnings in most cases, especially for those who are self-employed".¹⁰³ This appears to have been a concern from time to time in most Australian jurisdictions.¹⁰⁴ It has been reported that jurors in a recent five months trial in NSW requested an additional week's allowance because of the effect on their

97. NSW, *Report of the NSW Jury Task Force* (1993) at 41.

98. See New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 485.

99. NSW, *Report of the NSW Jury Task Force* (1993) at 39-40.

100. *Jury Act 1977 - Regulation 1995 No 43* (NSW) cl 2(b).

101. S Marsden, "Law pay levels for jurors 'unacceptable', NSW barristers say" *AAP General News Wire* (20 October 2006) at 1.

102. United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1965) at para 294-296.

103. England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 132.

104. See, eg, Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 6.22.

health and well-being.¹⁰⁵ Another District Court jury was recently discharged because the jury allowance was insufficient for one juror to meet her financial obligations when her employer stopped her salary for the duration of her jury service.¹⁰⁶

9.71 The South Australian Sheriff's Office in 2002 suggested that inadequate compensation to jurors may be "eroding community confidence in the jury system as a fundamental institution of the criminal justice system".¹⁰⁷ It cited the example of a surgeon summoned for jury service who believed that the low level of juror payments implied that the court system did not value the contribution of jurors. It has also been claimed in that State recently that increasing numbers of people are refusing to perform jury service because it is costing them too much in lost earnings.¹⁰⁸ South Australia pays a minimum of \$20 per day if the juror is paid a full wage during the jury service together with a further sum of up to \$80 upon proof of loss as a result of jury service.

9.72 The Supreme Court of Queensland's Litigation Reform Commission considered the possibility of setting jurors' fees within a given range depending on actual economic loss. In this way, jurors who were not engaged in paid employment and who suffered no actual economic loss would be paid the minimum fee. The Commission ultimately rejected any such proposal on a number of grounds, including that it was arguably "inequitable to pay people different rates for performing identical functions."¹⁰⁹

9.73 The Victorian Parliamentary Law Reform Committee proposed that the burden of compensation for jury service should be borne by the community rather than by individuals and small businesses. The Committee, therefore, proposed a daily amount based on the average weekly salary.¹¹⁰

105. S Marsden, "Law pay levels for jurors 'unacceptable', NSW barristers say" *AAP General News Wire* (20 October 2006) at 1; NSW Bar Association, "Jurors shouldn't suffer for doing their duty" (Media Release, 20 October 2006).

106. G Jacobsen, "Juror cries poor and halts trial" *Sydney Morning Herald* (29 November 2006) at 1.

107. South Australia, Sheriff's Office, *South Australian Jury Review* (2002) at 18.

108. C James, "Call to increase jury pay" *The Advertiser (Adelaide)* (21 August 2006) at 6.

109. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 68-70.

110. Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at para 6.24.

9.74 Some other reviews have considered the possibility that a juror should be put “in the same financial position as he or she would have been in but for the jury service”, including payments for overtime.¹¹¹

Compensation to employers

9.75 One preliminary submission raised the possibility of providing compensation to employers who continue paying employees while they are performing jury service.¹¹² While some may view the contribution by employers of their staff to jury service as part of their civic duty, one submission has been received pointing out that some employers have had to bear the costs of hiring additional staff or paying overtime to existing staff members to cover periods when employees are absent on jury service, and to this extent they are subsidising the system.¹¹³

Recoupment of personal expenses

9.76 One preliminary submission raised the possibility of jurors claiming for the fees paid for substitute care rendered necessary by the jury service.¹¹⁴ In New Zealand, jurors are entitled to claim for the actual and reasonable costs of childcare incurred because of attendance for jury service.¹¹⁵

9.77 Such an approach is also possible under the provisions in England and Wales which make allowance for regulations to prescribe payment to a juror for financial loss arising from his or her jury service:

where in consequence of his attendance for that purpose he has incurred any expenditure (otherwise than on travelling and subsistence) to which he would not otherwise be subject or he has suffered any loss of earnings, or of benefit under the enactments relating to social security, which he would otherwise have made or received.¹¹⁶

Travelling allowance

9.77 The provisions for the travelling allowance are as follows:

On each day of attendance, for one journey each way between the place of residence of a person attending for jury service, as shown

111. Tasmania, Department of Justice and Industrial Relations, *Review of the Jury Act 1899* (Legislation, Strategic Policy and Information Resources Division, Issues Paper, 1999) ch 4.

112. NSW, Jury Task Force, *Preliminary submission* at 4.

113. Australian Business Ltd, *Preliminary submission* at 2.

114. NSW, Office of the Director of Public Prosecutions, *Preliminary submission* at 4.

115. *Jury Rules 1990* (NZ) r 28(6).

116. *Juries Act 1974* (Eng) s 19(1)(b).

on the jury roll, and the court or inquest attended, the person is entitled to be paid at the rate of 28.10 cents per kilometre with:

- (a) a minimum payment of \$3.95 each way (being a minimum payment for 14 kilometres each way), and
- (b) a maximum payment of \$28.10 each way (being a maximum payment for 100 kilometres each way),

whether or not public transport is used.¹¹⁷

9.79 In 1995 the travelling allowance was based on the “specified journey rate” prescribed by the *Public Sector Management Act 1988* (NSW). The 1995 figure followed recommendations by the Jury Taskforce which considered that jurors’ travelling allowances should “reflect, as closely as possible, actual travel costs”.¹¹⁸ The travelling allowance has been adjusted every year since 1995 at the same time that the jurors’ attendance allowances are increased. However, the increase in automotive fuel prices in the period since 1997 is in the order of 84%,¹¹⁹ a substantially larger increase than the 27% increase in the travel allowance in the same period.¹²⁰ The mileage rate would have to be in the order of 40.6 cents per kilometre in order to reflect changes in the price of fuel since 1997.

9.80 The current system, using a single mileage rate, replaced an earlier arrangement whereby jurors and potential jurors who used public transport rather than private motor vehicles were reimbursed the actual costs of public transport. The previous system was considered inefficient because people had to present their train and bus tickets to Sheriff’s officers for payment. The Jury Taskforce preferred a system based on mileage whereby a computer made all of the necessary calculations and issued automatic payments.¹²¹

9.81 In New Zealand, jurors are entitled to claim actual travelling costs to attend for jury service if travelling by public transport.¹²² If travelling by private motor vehicle, jurors are entitled to claim a

117. *Jury Regulation 2004* (NSW) Sch 1 Scale B.

118. NSW, *Report of the NSW Jury Task Force* (1993) at 42.

119. Calculated from the average retail price of 1 litre of unleaded petrol in Sydney: Australian Bureau of Statistics, *Average Retail Prices of Selected Items, Eight Capital Cities* (6403.0, December 1997); Australian Bureau of Statistics, *Average Retail Prices of Selected Items, Eight Capital Cities* (6403.0.55.001, June 2006).

120. Calculated from the travelling allowance quoted in *Jury Amendment (Attendance Fees) Regulation 1997* (NSW) Sch 1.

121. NSW, *Report of the NSW Jury Task Force* (1993) at 42.

122. *Jury Rules 1990* (NZ) r 28(4).

travelling allowance and may also claim the actual and reasonable costs of car parking.¹²³

Refreshment allowance

9.82 The provision for the refreshment allowance is as follows:

If a juror in either a civil or criminal matter is released by the trial judge during a luncheon adjournment, the juror is entitled to be paid a refreshment allowance of \$6.10.¹²⁴

9.83 As a general practice, jurors are not released at lunchtime and are supplied with lunches without cost. The refreshment allowance is made available to any juror who does not partake of the food provided by the courts. It is unlikely that this allowance has any relevance for the willingness of people to serve, assuming that the meals are adequate.

9.84 In 1993, the Jury Taskforce recommended that “jurors not be locked up at lunchtime in the absence of special circumstances” and proposed the refreshment allowance so that jurors could make their own arrangements for meals.¹²⁵ While the refreshment allowance has been included in the regulation, the general practice of the courts has been not to release jurors during the luncheon adjournment.

ISSUE 9.8

Are the provisions for the reimbursement and/or compensation of jurors and potential jurors who attend for jury service adequate?

123. *Jury Rules 1990 (NZ)* r 28(4) and (5).

124. *Jury Regulation 2004 (NSW)* Sch 1 Scale C.

125. NSW, *Report of the NSW Jury Task Force (1993)* at 44.

Appendices

- Appendix A: Preliminary submissions
- Appendix B: Preliminary consultations

Appendix A: Preliminary submissions

Australian Business Ltd, 5 October 2006

Catholic Archdiocese of Sydney, 13 October 2006

Churches of Christ in New South Wales, 25 September 2006

N R Cowdery AM QC, 27 September 2006

Law Society of New South Wales, 29 September 2006

Legal Aid New South Wales, 29 September 2006

Lutheran Church of Australia, 14 September 2006

R Lutton, 7 November 2006 (Ministerial correspondence)

NSW Department of Corrective Services, 9 October 2006

NSW Jury Task Force, 3 October 2006

NSW Police, 4 October 2006

**Office of the Director of Public Prosecutions (NSW),
27 September 2006**

Redfern Legal Centre, 21 September 2006 (by telephone)

M J Stocker, 31 October 2006 (Ministerial correspondence)

UnitingCare NSW.ACT, 27 September 2006

G R Williams, 16 October 2006 (Ministerial correspondence)

Appendix B: Preliminary consultations

Lynn Anamourlis, Manager, Jury Branch, Sheriff's Office, Downing Centre, Sydney, 8 September 2006

His Honour Judge Ken Shadbolt, District Court of NSW, 19 October 2006

Hon Justice G R Barr, Supreme Court of NSW, 23 October 2006

Gary Byles, Sheriff of New South Wales and Lynn Anamourlis, 9 November 2006

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