NSW LAW REFORM COMMISSION

REPORT 117

Jury selection

September 2007

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New South Wales Law Reform Commission

Letter to the Attorney General

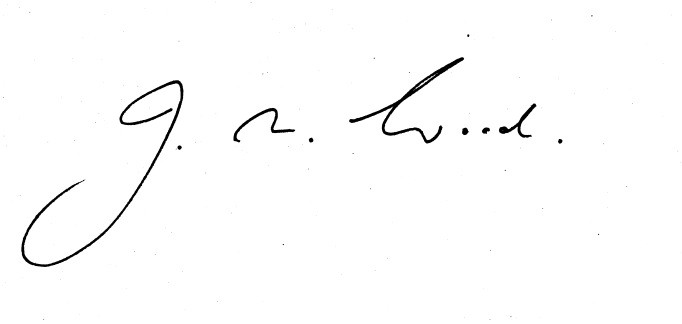
To the Hon John Hatzistergos

Attorney General for New South Wales

Dear Attorney

Jury service

We make this Report pursuant to the reference to this Commission received 14 August 2006.



The Hon James Wood AO QC

Chairperson

September 2007

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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

Professor Jane Goodman-Delahunty
Professor Michael Tilbury
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Recommendations

RECOMMENDATION 1 – see page 29

Every person who is enrolled as an elector for the NSW Legislative Assembly should be qualified and liable to serve as a juror.

RECOMMENDATION 2 – see page 31

The heading of "exclusion from jury service" should be adopted in preference to the separate headings of ineligibility and disqualification for listing those who may not undertake jury service.

RECOMMENDATION 3 – see page 39

People who are currently serving a sentence of imprisonment should be excluded from jury service. Imprisonment for the purposes of this exclusion should include sentences served by way of periodic detention and home detention and suspended sentences.

RECOMMENDATION 4 – see page 45

A person should be excluded from jury service for life if they have been sentenced to imprisonment for:

(a) any offence for which life imprisonment is the maximum available penalty;

(b) any offence constituting a "terrorist act" punishable under State or Federal law; and

(c) any public justice offence under Part 7 of the *Crimes Act 1900* (NSW).

A person should be excluded from jury service for 10 years from the date of expiry of any sentence or sentences of imprisonment aggregating three years or longer.

A person should be excluded from jury service for five years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years, but exceeding six months, imposed in respect of an indictable offence.

A person should be excluded from jury service for two years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years in respect of a summary offence, and aggregating less than six months in respect of any indictable offence.

A "sentence of imprisonment" should include: home detention, periodic detention, a sentence of imprisonment that has been suspended, and a sentence of imprisonment by way of compulsory drug treatment detention; and should not include a sentence of imprisonment that has subsequently been quashed on appeal, either wholly, or converted to a non-custodial sentence, or become the subject of a pardon.

A person on parole or released on probation after serving part of a sentence of imprisonment should be taken to be serving the sentence until expiry of the overall term.

RECOMMENDATION 5 – see page 46

People who are subject to limiting terms under the *Mental Health (Criminal Procedure) Act 1990* (NSW), or detention orders under *Crimes Act 1914* (Cth) Part 1B, Division 6, should be excluded from jury service only during the currency of the limited term or detention order.

RECOMMENDATION 6 – see page 49

A person should be excluded from jury service for three years from the date of expiry of any sentence or control order served in a detention centre or other institution for juvenile offenders.

The exclusion should not apply where the sentence or control order is later quashed on appeal or converted to a non-custodial sentence, or becomes the subject of a pardon.

A person on parole or released on probation after serving part of a sentence or control order should be taken to be serving the sentence until expiry of the overall term.

"Detention centre or other institution for juvenile offenders" should include Juvenile Justice Centres.

RECOMMENDATION 7 – see page 57

A person should be excluded from jury service when he or she is currently bound by an order made in NSW or elsewhere pursuant to or consequent upon a criminal charge or conviction not including an order for compensation.

All currently available orders that meet this description in NSW should be identified in a non-exhaustive statutory list.

The non-exhaustive list should include express reference to:

- an apprehended violence order under *Crimes Act 1900* (NSW) s 562ZU;
- a disqualification from driving a motor vehicle, but only where the disqualification is for 12 months or more;
- an order committing a person to prison for failure to pay a fine, but only so as to disqualify that person during the currency of the imprisonment;
- a remand in custody pending trial or sentence;
- a release pending trial or sentence, including a release under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11, whether on bail or not;
- a bond under s 9 or s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW);
- a parole order;
- a community service order;
- an extended supervision order;
- an order under anti-terrorism legislation;

- a probation order;
- a child protection order;
- a child protection registration requirement;
- a non-association or place restriction order; and

a requirement to participate in pre-trial diversionary programs, intervention programs, circle sentencing or other forms of conferencing.

RECOMMENDATION 8 – see page 59

The Sheriff should have access to criminal records databases in order to determine whether potential jurors should be excluded from jury service.

RECOMMENDATION 9 – see page 63

The Governor and anyone acting as Governor should be excluded from jury service.

RECOMMENDATION 10 – see page 66

Judicial officers, including acting judicial officers, should be excluded from jury service during the currency of their commission and for three years from the date of the termination of their last commission.

RECOMMENDATION 11 – see page 66

Members or officers of the Executive Council should be excluded from jury service.

RECOMMENDATION 12 – see page 71

Parliament should give consideration to the question of the extent and preservation of the statutory exclusion and common law immunity of its members in relation to jury service.

RECOMMENDATION 13 – see page 72

Officers and other staff of either or both of the Houses of Parliament should be eligible for jury service.

RECOMMENDATION 14 – see page 79

As a class, Australian lawyers should be eligible for jury service, subject to the exceptions noted below.

RECOMMENDATION 15 – see page 79

Ineligibility should continue to apply to lawyers who currently hold office as a:

- Crown Prosecutor;
- Public Defender;
- Director or Deputy Director of Public Prosecutions;
- Solicitor for Public Prosecutions;

- Solicitor General;
- Crown Advocate; or
- Crown Solicitor.

The exclusion of lawyers within this category should expire three years after they cease to hold any such office.

RECOMMENDATION 16 – see page 79

Australian lawyers and paralegals employed or engaged in the public sector in the provision of legal services in criminal cases should continue to be excluded from serving as jurors while so engaged or employed.

RECOMMENDATION 17 – see page 85

People who are currently employed or engaged (except on a casual or voluntary basis) in the NSW Police Force, the Australian Federal Police, the Australian Crime Commission, the NSW Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption in law enforcement or criminal investigation, other than clerical, administrative or support staff, should be excluded from jury service. The exclusion should extend for three years after the termination of the relevant position or office.

RECOMMENDATION 18 – see page 88

People employed or engaged in the public sector in the administration of justice should be eligible for jury service, save so far as they would be ineligible by reason of other grounds of ineligibility.

RECOMMENDATION 19 – see page 89

Corrective Services Officers and Juvenile Justice Officers should be excluded from jury service.

Employees, members and officers of the Department of Corrective Services, Parole Board, Serious Offenders Review Council, the Mental Health Review Tribunal, Probation and Parole Service and Justice Health, who have direct access to prisoners or information about prisoners, should be excluded from jury service.

RECOMMENDATION 20 – see page 92

The Ombudsman and Deputy Ombudsman should continue to be excluded from jury service. The exclusion should be extended to those holding divisional offices as Deputy or Assistant Ombudsmen, and to officers of the Ombudsman, other than clerical, administrative or support staff.

RECOMMENDATION 21 – see page 93

Spouses and partners of those who are excluded from jury service should not be excluded from jury service.

RECOMMENDATION 22 – see page 94

The regime for the exclusion of people from jury service for civil trials should be the same as that for criminal trials.

RECOMMENDATION 23 – see page 98

To qualify for jury service a person must be sufficiently able to read and communicate in English to enable them properly to carry out the duties of a juror.

The Sheriff and the presiding judge should each have the ability to discharge people who are not sufficiently able to communicate in English.

Guidelines should be developed to facilitate and standardise the process of identifying those who are not sufficiently able to communicate in English.

RECOMMENDATION 24 – see page 100

Sickness, infirmity or disability which renders a person unable to discharge the duties of a juror should no longer be a ground of exclusion, but should be considered as a ground of excusal for good cause.

RECOMMENDATION 25 – see page 103

The Commonwealth should be encouraged to review the categories of exemption applicable to Commonwealth Public Servants and office-holders in order to confine them to those who have an integral and substantial connection with the administration of justice or who perform special or personal duties to the government.

RECOMMENDATION 26 – see page 115

No person should be entitled to be excused from jury service as of right solely because of his or her occupation, profession or calling. He or she should be able to apply, on a case by case basis, to be excused for good cause.

RECOMMENDATION 27 – see page 124

No person should be entitled to be exempted from jury service as of right because of personal characteristics or situations. They should, however, have the capacity to apply, on a case by case basis, to be excused for good cause.

RECOMMENDATION 28 – see page 125

Jury Act 1977 (NSW) s 39, which relates to the exemption as of right of certain people who have previously performed jury duty, should be retained.

The exemption should be extended to anyone employed by a small business (fewer than 25 employees) which has had another employee serve as a juror in NSW within the preceding 12 months.

RECOMMENDATION 29 – see page 131

The Sheriff and the court should be able to excuse people from jury service for "good cause" either permanently or for a set period.

RECOMMENDATION 30 – see page 131

The practice should be encouraged of allowing jurors who seek to be excused, in court, on grounds which might cause them embarrassment or which might relate to their personal health or circumstances, to reduce those grounds to a document to be handed up to the judge.

RECOMMENDATION 31 – see page 132

"Good cause" should be defined to encompass situations where:

(a) service would cause undue hardship or serious inconvenience to an individual, to his or her family, or to the public;

(b) some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror; or

(c) a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror.

RECOMMENDATION 32 – see page 134

Potential jurors, if otherwise eligible to be excused, should be allowed an opportunity to defer and to nominate dates within the coming 12 months when they will be available.

Multiple deferrals should be discouraged by an appropriate exercise of discretion.

RECOMMENDATON 33 – see page 136

Guidelines should be prepared and published to assist the Sheriff's exercise of discretion in excusing jurors for good cause or in deferring the time at which those who seek to be excused might still be required to serve.

The guidelines, which should also be made available to all judges, should take into account the following matters:

(a) the demonstration of illness, poor health or disability, which would make jury duty unreasonably uncomfortable or incompatible with the good health of the juror, although only on production of a medical certificate;

(b) the pregnancy of the juror where, in the particular circumstance, service has been shown on production of a medical certificate to be unreasonably uncomfortable, or incompatible with the good health of the juror;

(c) the existence of substantial or undue personal hardship (including financial) or undue inconvenience to an ongoing business or professional practice resulting from attendance for jury service;

(d) the fact that excessive time or excessive inconvenience would be involved in travelling to and from court;

(e) the occasioning of substantial inconvenience to the public (or a section of the public) or the functioning of government resulting from the person's attendance for jury service;

(f) the existence of caregiving obligations for young children or people with a disability where:

(i) suitable alternative care is required and is shown not to be reasonably available; or

(ii) special circumstances exist in relation to the person in care that justify the carer being excused.

(g) the fact that the person is one of two or more partners from the same business partnership, or one of two or more employees in the same business establishment (being one with fewer than 25 staff members), who have been summoned to attend as jurors during the same period;

(h) the holding of objectively demonstrated religious or conscientious beliefs that would be incompatible with jury service;

(i) the existence of a particular pastoral or ongoing counselling relationship between a member of the clergy or health professional and the accused or a victim or their families, such that the juror might be unable to bring (or appear to be unable to bring) an unbiased mind to the case;

(j) the existence of a previous or current professional contact between the accused, a victim or a witness in a particular case, such that the juror might be unable to bring (or appear to be unable to bring) an unbiased mind to the case;

(k) the age of the person in circumstances where, on that account, jury service would be unduly onerous;

(l) the fact that the juror has a high public profile to the extent that his or her anonymity might be lost if required to serve, resulting in a possible risk to his or her personal safety;

(m) pre-existing conflicting commitments such as pre-booked travel or holidays, special events, such as weddings, funerals or graduations, or examinations, compulsory study courses, or practical exercises required of students;

(n) the fact that the person is a teacher or lecturer who is scheduled to supervise or assess students approaching examinations, or to supervise or process an assessment task, or if the service is to take place in the first two weeks of a term or semester;

(o) the fact that the person is a member of the staff of the NSW Ombudsman attached to the Corrections team or the Police and child protection team; and

any other matter or circumstance of special or sufficient weight, importance or urgency.

RECOMMENDATION 34 – see page 141

The Sheriff should have the power, with a right of appeal to the District Court, to excuse jurors who can demonstrate an ongoing cause to be excused, either permanently or for a limited period.

RECOMMENDATION 35 – see page 142

A person whose application to be excused or deferred has been refused by the Sheriff should be able to bring forward a further application to a duty judge of the trial court for redetermination on a day before the date for the return of the summons.

RECOMMENDATION 36 – see page 150

The Sheriff should be able to access and use a smart electoral roll, if it becomes available, for the purpose of establishing jury service areas and summoning jurors.

If no such system is developed, the Sheriff should be given direct real-time electronic access to the existing electoral rolls.

RECOMMENDATION 37 – see page 152

Pending the possible introduction of a smart electoral roll, the Sheriff should have the authority and capacity to cross-check data relating to a potential juror's residential address with records held by other government agencies.

The Sheriff should have the authority and capacity to cross-check data relating to a potential juror's criminal and custodial history and status with records held by other government agencies.

Otherwise, jury vetting should not be introduced in NSW.

RECOMMENDATION 38 – see page 154

Consequential amendments should be made to the provisions of the remaining provisions of the *Jury Act 1977* (NSW) that rely on the current definition of "jury district".

RECOMMENDATION 39 – see page 155

The current system of selection should be altered so that people living within a specified radius of the trial court should be summoned directly from the relevant electoral listings.

It should be possible to summon jurors to serve at any one of the courts within the permitted radius of their place of residence, subject to excusal on the grounds that they have already been called, or are currently serving, as a juror at one of the other courts, and also to the right to be excused for previous service at any court within the specified time.

RECOMMENDATION 40 – see page 159

There should be provision for the withdrawal of a summons for jury service upon proof that a person is ineligible to serve or that good cause exists to be excused.

RECOMMENDATION 41 – see page 160

The period of notice for attendance at a court for jury service pursuant to a summons should be no less than four weeks, unless a judge of the court otherwise orders.

RECOMMENDATION 42 – see page 167

There should be an ongoing review of the adequacy of penalties for people who do not respond to summonses for jury service, and a comprehensive system for following up those who fail to comply with their obligations under the *Jury Act*.

RECOMMENDATION 43 – see page 181

The ability of trial counsel to agree to an extension of the statutory number of peremptory challenges should be subject to leave being given by the judge, pursuant to application made before the date fixed for trial.

RECOMMENDATION 44 – see page 181

The justification for the continued availability of the right to peremptory challenge should be kept under review.

RECOMMENDATION 45 – see page 186

Provision should be made to empower the court to empanel up to three additional jurors where the judge estimates that the trial will take in excess of three months. If more than 12 jurors remain when the jury is about to retire to consider its verdict, the additional jurors should be balloted out

RECOMMENDATION 46 – see page 186

At the outset of the trial, the judge should fully inform the jury of the rationale, nature and operation of the additional jury system.

RECOMMENDATION 47 – see page 187

The requirement that a jury "consist of 12 persons returned and selected in accordance with [the] Act" should expressly be made subject to the provision allowing for the empanelment of additional jurors.

RECOMMENDATION 48 – see page 188

No provision should be made for further peremptory challenges where it is proposed to empanel additional jurors.

RECOMMENDATION 49 – see page 189

Provision should be made to the effect that: (a) a fresh ballot must be conducted each time the jury is required to retire to consider its verdict; (b) if a criminal trial is not concluded after a verdict is given, the jurors selected in the ballot must rejoin the jury for the continuation of the trial; and (c) where the jury retires for the last time, additional jurors who are balloted out may be discharged from further service as jurors for the trial.

RECOMMENDATION 50 – see page 190

The foreperson or speaker of the jury should be excluded from, or disregarded in, the balloting out of additional jurors.

The *Jury Act 1977* (NSW) should be clarified, by way of a note, to ensure that s 51(1)(c) will have the effect of allowing the Sheriff to supplement the panel for a particular trial or inquest for which there are insufficient prospective jurors from among those who have been summoned to attend a court of a different tier or an inquest, in the same jury district, including, for example, allowing jurors summoned to the Sydney District Court to serve in the Supreme Court sitting at Darlinghurst or at King Street, and vice versa.

The court should be given an express power to discharge a juror without discharging the whole jury in circumstances where the court is satisfied that:

(a) the juror:

(i) has come within a category of exclusion as a result of some change in circumstances after empanelment; or

(ii) is, by reason of illness, unable to continue to serve as a juror; or

(iii) displays a lack of impartiality; or

(iv) refuses to take part in jury deliberations; or

(v) has engaged in misconduct in relation to the trial; or

(iv) should not be required to continue to serve for any other reason that the judge considers sufficient, and

(b) the interests of justice do not require that the whole jury be discharged,

and to order that the trial continue with the remaining jurors, so long as the number of remaining jurors meet the requirements of *Jury Act 1977* (NSW) s 22.

The court should also be given an express power to order that the trial continue in circumstances where one of the jurors has died.

The court should be given an express power to discharge a juror without discharging the whole jury and to order that the trial continue in circumstances where that juror has been improperly empanelled, which would include a discretion to discharge the whole jury where the interests of justice so require.

The requirement that a jury "consist of 12 persons returned and selected in accordance with [the] Act" be made expressly subject to provisions allowing the court to order that a trial continue with fewer jurors in the event of the death or discharge of one or more jurors.

RECOMMENDATION 55 – see page 207

Section 73(a) of the *Jury Act 1977* (NSW) should be amended to extend its operation to any person who was otherwise empanelled by error where the error was not discovered during the trial and cured by the discharge of that person as a juror.

The saving provisions of s 73 should be amended so as to exclude the case of juror personation.

RECOMMENDATION 56 – see page 209

Consideration should be given to amending s 5F of the *Criminal Appeal Act 1912* (NSW) to include an express provision for the review by the Court of Criminal Appeal of any order made by the trial judge following an application for the discharge of a juror and for the continuation of the trial with a reduced number of jurors or for the discharge of the jury as a whole.

RECOMMENDATION 57 – see page 210

During the trial, a juror should be expressly authorised to report to the trial judge any suspicion which he or she 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 concerning any other question relating to the capacity or willingness of that juror to perform his or her functions according to law, or, if not reported at that stage, then to the Attorney General, Director of Public Prosecutions or Sheriff.

RECOMMENDATION 58 – see page 223

Jurors should be entitled to a basic daily allowance which can be supplemented by a capped amount to provide a measure of compensation for any loss of earnings or income as a result of jury service. A review should be undertaken with a view to increasing the daily allowance and establishing a capped additional amount which would be available by way of compensation for those who suffer such a financial loss.

The payment of any allowance for loss of earnings or income should depend upon the production of a certificate of loss of earning or income.

RECOMMENDATION 59 – see page 223

People who attend for jury service in response to a summons, but are released in less than four hours, should receive a part allowance.

RECOMMENDATION 60 – see page 224

Jurors should be paid the daily attendance allowance for days during a trial when they are not required to be present in court but only when they have not been paid by their employers for those days.

RECOMMENDATION 70 – see page 249

Employers should be prohibited from requiring employees to work on days on which they actually attend for jury service; and from requiring jurors to work outside sitting times in order to make up for time lost while serving as jurors.

RECOMMENDATION 71 – see page 251

The penalties applying to offences relating to the termination of employment, prejudicial alteration of position, or threat thereof, to jurors should be increased to 50 penalty units and/or imprisonment for up to 12 months for natural persons, and 200 penalty units for corporations.

The penalties should be applicable both to the employer, and to any person acting on behalf of the employer who is responsible for the breach, as well as to those directors and employees of a corporation who, under the current law, might be similarly liable to prosecution for the relevant conduct.

RECOMMENDATION 72 – see page 254

The NSW government should enter discussion with the Commonwealth to identify and resolve any anomalies or uncertainties relating to jury service provisions arising by reason of Commonwealth employment laws.

RECOMMENDATION 73 – see page 264

A review should be established to examine the formation of a separate division within the Sheriff's Office dedicated to the management of the jury system in NSW, or to the establishment of a separate jury commissioner's office, with the responsibility for the provision of jury services throughout NSW.

RECOMMENDATION 74 – see page 264

The review should include a re-examination of all of the information provided to jurors, including the orientation video.

1. Introduction

- Background
- The role of the jury in the justice system
- The composition of the jury

BACKGROUND

Past reviews

1.1 The NSW Jury Task Force conducted the last formal review of the Jury Act 1977 (NSW) in 1993-1994.[1] The last substantial relevant amendments to the Act were made in 1996[2] and, since that time, the provisions have been monitored by the Jury Task Force.

1.2 This Commission last published a major report that dealt generally with the question of jury service in 1986.[3] More specific reports have included one on the question of conscientious objection to jury service, published in 1984,[4] and one on deaf or blind jurors, completed in 2006.[5]

1.3 Substantial reviews and reforms concerning the composition of juries and the conditions of service have occurred in other Australian jurisdictions, and in England and Wales.[6]

This review

1.4 The Commission produced an issues paper, IP 28, in November 2006,[7] and has received a broad and representative range of submissions from lawyers, judges, various interest groups, and members of the public who have undertaken jury service. The Commission has consulted with relevant agencies, both here and in Victoria and England, and has also conducted an extensive literature review.

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1. *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).*
2. *Jury Amendment Act 1996 (NSW).*
3. *NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986).*
4. *NSW Law Reform Commission, Conscientious Objection to Jury Service, Report 42 (1984).*
5. *NSW Law Reform Commission, Blind or Deaf Jurors, Report 114 (2006).*
6. *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, Issues Paper (Legislation, Strategic Policy and Information Resources Division, 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).*
7. *NSW Law Reform Commission, Jury Service, Issues Paper 28 (2006).*

1.5 In conducting our review, a number of broad concerns about the jury system have been brought to our attention, including that:

- *juries have become unrepresentative of the community because of the numbers of people who are either disqualified, ineligible to serve, or who exercise their entitlement to be excused as of right or apply to be excused for good reason;*
- *the conditions of service and financial hardship have operated as an impediment for many people;*
- *the burden of serving on juries is being shared inequitably or in circumstances where the resource is not used to best economic and efficient advantage; and*
- *the current categories for disqualification, ineligibility, and exemption are very broad and may not achieve the objectives of the system.*

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

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

will seek exemption on the grounds of inconvenience or hardship, or simply ignore their obligations.[8]

Lack of empirical data

1.8 There is a general absence of empirical data about the selection, empanelment and representative nature of juries. This is because few studies on the issues have been conducted in NSW over the past 20 years,[9] *and it is very difficult to collect any useful data from the jury computer system currently maintained by the Sheriff of NSW.*

1.9 In preparing this Report, we have had some regard to data from other Australian and overseas jurisdictions, although we recognise the limitations that arise from the fact that each jurisdiction has different procedures and criteria for selection, exemption and empanelment.

THE ROLE OF THE JURY IN THE JUSTICE SYSTEM

1.10 The jury has long been regarded as an essential part of the criminal justice system,[10] *an institution that exists "for the benefit of the community as a whole as well as for the benefit of the particular accused".*[11] *Historically, the jury has been perceived as the bastion of liberty against the excesses of executive and judicial power.*[12] *In modern times, its justification is found in the role that it plays in ensuring a fair trial in the case of serious criminal offences and in the resulting public confidence that this creates in the criminal justice system. As Justice Deane explained:*

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8. *Redfern Legal Centre, Submission, 12; NSW Young Lawyers, Submission, 1; Legal Aid Commission of NSW, Submission, 2-3.*
9. *See NSW Law Reform Commission, The Jury in a Criminal Trial: Empirical Studies, Research Report 1 (1986); M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration, 1994); T McGrath and S Ryan, "Social and psychological issues : do particular conditions of jury service place jurors under special risk of stress and contribute to the need of attention for debriefing?" (Paper delivered at the Criminology Research Council Sub-Group on Juror Stress and Debriefing Conference, 29 June 2004) reporting the findings from a 2001 evaluation of the NSW Juror Support Program; J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published.*
10. *R v Lisoff [1999] NSWCCA 364, [49].*
11. *Brown v The Queen (1986) 160 CLR 171, 201 (Deane J). See also Kingswell v The Queen (1985) 159 CLR 264, 301 (Deane J).*
12. *Brown v The Queen (1986) 160 CLR 171, 197 (Brennan J); Ford v Blurton (1922) 38 TLR 801 at 805 (Atkin LJ); P Devlin, Trial by Jury (Stevens and Sons, 1956), 164.*

> *The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people.*[13]

The positive responses of those who have served as jurors shows that jury service does, indeed, bolster public confidence in the administration of justice.[14]

1.11 It is, therefore, important to promote jury service and ensure that those who serve continue to find it a worthwhile experience, and that some current features of the jury system, such as ineffective communication, poor remuneration and conditions for jurors, or inefficient systems of selection and empanelment, should not act as barriers to service.

Current use of juries in NSW

1.12 Although juries may be used in criminal trials in the Supreme and District Courts,[15] *in the Coroner's Court*[16] *and in some civil trials,*[17] *their use has diminished significantly in recent years. The limited use of juries other than in trials for serious criminal offences means that this Report will largely concentrate on juries in the criminal jurisdiction.*

Criminal trials

1.13 In 2005, only 0.4% of criminal cases overall proceeded to a defended hearing in the Supreme Court and District Court.[18] *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 determine the question of guilt in less than 0.5% of all criminal trials in NSW.*

1.14 Juries are not available for criminal matters in the Local Courts. In the Supreme Court or District Court, an accused person who elects

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13. *Kingswell v The Queen (1985) 159 CLR 264, 301 (dissenting).*
14. *See para 15.3.*
15. *Criminal Procedure Act 1986 (NSW) s 121.*
16. *See Coroners Act 1980 (NSW) s 18.*
17. *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.*
18. *NSW, Bureau of Crime Statistics and Research, NSW Criminal Court Statistics 2005, Tables 1.3 and 3.2. See also NSW Law Reform Commission, Majority Verdicts, Report 111 (2005), [1.6]-[1.7].*

to go to trial will normally be tried by a judge and jury. Such a person may, however, before the date fixed for trial, elect to be tried by judge alone so long as a number of conditions are met, including that the judge is satisfied that he or she has sought and received advice about the election from a legal practitioner; the Director of Public Prosecutions consents to the election; and any co-accused make similar elections.[19]

1.15 An accused person who is tried for a Commonwealth offence following presentation of an indictment in the Supreme Court or the District Court cannot elect to be tried by a judge alone. This is because s 80 of the Commonwealth Constitution guarantees trial by jury for any "trial on indictment of any offence against any law of the Commonwealth".[20] *However, the incidence of jury trials has been reduced by the substantial body of offences against both State and Commonwealth laws that can be tried summarily, either with the consent of the accused*[21] *or without such consent.*[22] *The incidence of jury trials for breaches of Commonwealth laws has been further reduced by the increasing resort to civil penalties rather than criminal sanctions in areas of Commonwealth regulation.*[23]

1.16 ***Unfitness to stand trial.*** *Formerly, under NSW law, the question of unfitness to be tried, for an offence under State law, was determined by a jury, subject to the right of the accused to elect to have that issue tried by a judge alone. As a result of recent amendments, the question of unfitness is now determined by a judge alone.*[24] *Where the accused is found unfit for trial, and a special hearing is held, that hearing is also determined by the judge alone, unless an election to have that hearing determined by a jury is made by:*

- *the accused, and the court is satisfied that the person sought and received advice in relation to the election from an Australian legal practitioner and understood the advice; or*
- *an Australian legal practitioner representing the accused; or*
- *the prosecutor.*[25]

Where questions of unfitness arise in relation to Federal offences tried on indictment, they are determined by the court to which the

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19. Criminal Procedure Act 1986 (NSW) s 132.
20. Constitution (Cth) s 80; Brown v The Queen (1986) 160 CLR 171.
21. Crimes Act 1900 (NSW) s 476; and Crimes Act 1914 (Cth) s 4J.
22. Crimes Act 1900 (NSW) s 495-496A; and Crimes Act 1914 (Cth) s 4JA.
23. See Australian Law Reform Commission, Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report 95 (2002).
24. Mental Health (Criminal Procedure) Act 1990 (NSW) s 11.
25. Mental Health (Criminal Procedure) Act 1990 (NSW) s 21(1).

proceedings would have been referred had the accused been committed for trial.[26]

Coroner's inquests and inquiries

1.17 Coroners are empowered to conduct inquests into deaths or suspected deaths[27] *and inquire into fires and explosions.*[28] *Such inquests or inquiries are usually held before a coroner without a jury.*[29] *However, they must be held before a coroner with a jury where directed by the Minister or State Coroner,*[30] *or where requested by a relative of the person who has died or is suspected of having died, or by the secretary of any organisation of which the person was a member immediately before the death or suspected death.*[31]

1.18 It is understood that juries are rarely used in Coroner's inquests or inquiries. Recent cases of the use of six-person coronial juries include: in 2000, an inquest into the death of a man at the Star City Casino;[32] *in 2002, an inquest into the shooting death of a man during a police siege,*[33] *and an inquest into the death of a camper from a falling tree;*[34] *and in 2005, an inquest into the death of an employee in a mining accident at Broken Hill.*[35]

Civil trials

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

1.20 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

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26. *See Crimes Act 1914 (Cth) Part 1B Div 6, in particular s 20B. The question whether Constitution (Cth) s 80 prevents the picking up of Mental Health (Criminal Procedure) Act 1990 (NSW) s 11 has not been considered. Compare Kesavarajah v The Queen (1994) 181 CLR 230.*
27. *Coroners Act 1980 (NSW) s 13.*
28. *Coroners Act 1980 (NSW) s 15.*
29. *Coroners Act 1980 (NSW) s 18(1).*
30. *Coroners Act 1980 (NSW) s 18(3).*
31. *Coroners Act 1980 (NSW) s 18(2).*
32. *S Gibbs, "Jury shown Star City death video" Sydney Morning Herald (9 May 2000) at 8.*
33. *"Jury clears marksman" Daily Telegraph (11 May 2002) at 7.*
34. *J Bartlett, "Jury to decide camper inquest" Herald (Newcastle) (30 May 2002) at 1.*
35. *"Inquest prompts mine safety recommendations" ABC Premium News (11 February 2005).*

injuries arising out of the use of a motor vehicle.[36] Subsequent changes to the law further reduced the use of juries in civil matters.[37] Finally, 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".[38] This amendment, and subsequent interpretation,[39] has all but stopped the use of civil juries in the Supreme Court and District Court, save for proceedings for defamation.[40] The introduction of uniform defamation law in 2005[41] means that juries will now be required to determine all factual issues other than those relating to damages.

THE COMPOSITION OF THE JURY

1.21 In order to ensure a fair trial in serious criminal cases, it is important that a jury is composed in a way that avoids bias or apprehension of bias. People are more likely to accept jury verdicts if they are seen as being representative. In this way, the jury has a role in legitimising the system of which it is part.[42] For example, the High Court observed, in 1986, that the:

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36. *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).*
37. *Chiefly the introduction of Supreme Court Act 1970 (NSW) s 85 and a decision of the Court of Appeal 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: Pambula District Hospital v Herriman (1988) 14 NSWLR 387.*
38. *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.*
39. *Note in particular the decision in Maroubra Rugby League Club v Malo [2007] NSWCA 39.*
40. *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)).*
41. *Defamation Act 2005 (NSW).*
42. *See M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 17. See also R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 135, 139; J Horan and D Tait, "Do juries adequately represent the community? A Case study of civil juries in Victoria" (2007) 16 Juournal of Judicial Administration 179, 185. But see also I M Vodanovich, "Public attitudes about the jury" in D Challinger (ed), The Jury, Australian Institute of Criminology Seminar: Proceedings No 11 (1986), 75; M Findlay, "Reforming the jury: the common*

> *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.*[43]

1.22 The two principal concepts discussed in this context are the representative nature of the jury and the principle of random selection. The two concepts are interrelated. Random selection is one of the chief means of securing a representative jury. Indeed, the High Court has identified that random selection is an important historical aspect of the representative character of the jury.[44]

The representative jury

1.23 It has long been accepted that a representative jury is expected. Representation in this context refers to a representative sample of the population at large. 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".[45]

1.24 Perfect or proportional 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. The representative nature of juries depends upon everyone who is qualified to serve, whatever their background, age, race or ethnic origins, having an opportunity to serve.[46] *The corollary of this must be that people who are qualified to serve should not be able to compromise the representative nature of juries by seeking to avoid jury service on other than acceptable grounds.*

1.25 It is obvious that there are defensible reasons for excluding certain people from jury membership, either because they are not suitable to provide that service, or because the nature of their office or duties would be inconsistent with the important principle of preserving the jury as an independent and impartial trier of fact.[47] *These justifiable exclusions from the "representative" jury will, however, vary "with contemporary standards and perceptions" so that exclusions that were justified in past eras, for example, the exclusion of women or the*

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ground" in D Challinger (ed), The Jury, Australian Institute of Criminology Seminar: Proceedings No 11 (1986), 155.

43. *Brown v The Queen (1986) 160 CLR 171, 202.*
44. *Cheatle v The Queen (1993) 177 CLR 541, 549, 560-561.*
45. *Cheatle v The Queen (1993) 177 CLR 541, 560.*
46. *New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), [135].*
47. *See chapters 3 and 4.*

exclusion of men who did not meet the property qualification, may not be justified today.[48]

1.26 From time to time, there have been reductions in the categories of exemption in order to advance the objective of representativeness. For example, 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".[49] *Lack of true representativeness 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.*[50] *Reviews in other jurisdictions have expressed similar concerns.*[51]

1.27 The legitimacy of these concerns has been supported by the submissions received, which generally agreed that the current categories of disqualification, ineligibility and exemption operate to exclude many who could properly and profitably serve as jurors, and that they require revision.[52] *This is an issue which is addressed in successive chapters of this Report.*

Benefits

1.28 A properly representative jury will ensure a number of positive outcomes for the criminal justice system.

1.29 ***Impartiality.*** *It has been observed that broadly representative juries "promote impartiality by reflecting a greater cross-section of community experience (and prejudice) so that no one view dominates".*[53]

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48. *Cheatle v The Queen (1993) 177 CLR 541, 560-561.*
49. *NSW, Parliamentary Debates (Hansard) Legislative Assembly, 24 February 1977, at 4475.*
50. *NSW, Report of the NSW Jury Task Force (1993), 23. This point was also raised in M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 173.*
51. *Tasmania, Department of Justice and Industrial Relations, Review of the Jury Act 1899, Issues Paper (Legislation, Strategic Policy and Information Resources Division, 1999), ch 2; Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), 3-4.*
52. *NSW Bar Association, Submission, [6], [7]; A Allan, Submission, 1; J Kane, Submission; NSW Young Lawyers, Submission, 12.*
53. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), 24.*

It has also been observed that systems where particular groups appear to be regularly excluded may be open to accusations of bias.[54]

1.30 ***Legitimacy.*** *The legitimacy of the system has been said to rest on "all groups within the community participating on juries"*[55] *and, by broad representation, bringing to bear on the issues at trial "the corporate good sense of that community".*[56]

1.31 In our previous review of juries in criminal trials, in 1986, we observed that:

> *The representative character of the jury ensures that it performs its essential function of maintaining the values applied in the administration of criminal justice in accordance with the standards of ordinary people. The public clearly has a vital interest in the proper administration of justice. The jury is the most important means by which members of the public can observe the system at work and participate in it. This fosters a greater sense of community responsibility for the overall effectiveness of the system.*[57]

1.32 ***Competence.*** *A broadly representative jury system also arguably produces more competent juries, not only because it ensures that professionals and experts will serve, but also because of the diversity of expertise, perspectives and experience of life that is imported into the system.*[58]

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54. *NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.6]. This view is recognised in some jurisdictions, such as NSW, where 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": Jury Act 1977 (NSW) s 47A. In other jurisdictions, however, 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: See R v Ford [1989] QB 868, 871; New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), [158]-[160].*
55. *New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), 55.*
56. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [53].*
57. *NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.3].*
58. *New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), 55.*

Risk of bias in appearing to exclude particular groups

1.33 A risk has been identified that the absence of particular minority groups from juries may render such juries open to a charge of bias in some cases.[59]

1.34 ***People from culturally and linguistically diverse backgrounds.*** *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".*[60]

1.35 ***Inclusion of Indigenous people.*** *Particular attention has been drawn to the apparent under-representation of Indigenous people on juries compared with their over-representation 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 time that of non-Indigenous Australians.*[61] *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.*[62] *More recent figures show that, in 2001, Aboriginal people made up 1.9% of the NSW population*[63] *and that, in 2004,*

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59. *See England and Wales, Royal Commission on Criminal Justice, Report (1993), 133.*
60. *Australian Law Reform Commission, Multiculturalism and the Law, Report 57 (1992), [10.44].*
61. *D Weatherburn, L Snowball, B Hunter, The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the NATSISS Survey, Crime and Justice Bulletin, No 104 (NSW Bureau of Crime Statistics and Research, 2006), 1.*
62. *See M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 5. 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 Aboriginal origin in the general population: NSW Law Reform Commission, The Jury in a Criminal Trial: Empirical Studies, Research Report 1 (1986), [3.29].*
63. *The People of New South Wales: Statistics from the 2001 Census (Community Relations Commission for a Multicultural New South Wales, 2003), Table 2.2.*

Aboriginal people made up 16.8% of the NSW prison population.[64] The disparity appears to be even greater when it is considered that a greater proportion of the population is Aboriginal in some country areas of NSW, such as Bourke and Dubbo.[65]

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

- *the transience of some Indigenous people due to family ties and kinship obligations, higher unemployment, lack of relevant services, and systemic discrimination from service providers,[66] and the likelihood that they will either not be included in the electoral roll or will be recorded at a previous address;[67]*
- *the extensive disqualification provisions that currently apply to people with criminal histories;[68]*
- *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;[69]*
- *the fact that, even if they get to the point of empanelment, some Indigenous people may seek to be excused from jury service in cases involving Indigenous defendants for fear of damaging their standing within certain Indigenous communities if they are seen to have been part of the conviction of another member of that community;[70] and*
- *the lower literacy rates within these groupings and the ineffectiveness in some instances of written communication, which may mean that some people do not respond to jury notices and may not meet the requisite ability in the English language.[71]*

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64. *S Corben, NSW Inmate Census 2004: Summary of Characteristics, Statistical Publication No 26 (NSW, Department of Corrective Services, 2004), 3.*
65. *Australian Bureau of Statistics, Population Distribution, Aboriginal and Torres Strait Islander Australians (2006).*
66. *Aboriginal Legal Service, Submission, 6.*
67. *M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 5.*
68. *M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 5. See para 3.1.*
69. *L Anamourlis, Preliminary consultation.*
70. *J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 71.*
71. *See para 5.2.*

It may also be the case that Indigenous people who overcome all of the barriers to selection outlined above will still be subject to a peremptory challenge before they are empanelled.[72]

1.37 Some of the results of this under-representation can be said to be:

- *the further alienation of Indigenous communities from the criminal justice system, which does not appear to seek their participation in any capacity except as an accused;*
- *the reduced opportunity for the perspective of Aboriginality to be understood by juries; and*
- *the knowledge that any accused is unlikely to be tried by a jury with an Indigenous member.*[73]

1.38 Several submissions stressed the need to rectify the under-representation of Indigenous people on NSW juries.[74]

Spreading the burden of service

1.39 If a large number of people are exempted or excused from jury service, a higher burden is potentially imposed on those who are still eligible.[75] *Reducing categories of exemption from jury service is seen as spreading "the obligation of jury service more equitably among the community".*[76]

1.40 Currently, the burden is unequally shared. There is a risk that 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 this does in fact occur, then it is more likely to be the case in regional areas than in metropolitan ones.[77]

1.41 The Auld Review observed that, in England and Wales, 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'

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72. See para 10.30.
73. Aboriginal Legal Service, Submission, 4-5.
74. NSW Bar Association, Submission, [4]; NSW Public Defender's Office, Submission, 2; Aboriginal Legal Service, Submission.
75. See Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), 3.
76. Tasmania, Parliamentary Debates (Hansard) House of Assembly, 19 August 2003, 44. See also Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), 4.
77. Law Reform Commission of Western Australia, Exemption from Jury Service, Report, Project No 71 (1980), [3.39].

avoidance of it, they may be required to serve more frequently and for longer than would otherwise be necessary".[78]

1.42 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. As we note later (x-ref), there are several geographic districts within the State where there is either no prospect, or a significantly reduced prospect, of people living within these districts ever being required for jury duty.

1.43 One submission agreed that the current categories of disqualification, ineligibility and exemption, by producing an unrepresentative jury, place an unfair burden on those who do not fit the categories.[79]

Random selection

1.44 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".[80] *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".*[81]

1.45 The principle of random selection is expressly mentioned in the statutes of most Australian jurisdictions, including NSW,[82] *and is sought to be achieved by the random calling up of jurors initially from the jury roll, and then by the balloting procedure followed on the day of empanelment.*

1.46 Random selection ensures trial by a jury of peers who are not personally interested in the outcome and, as a consequence, able to adjudge innocence or guilt impartially and with open minds.

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78. *R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 140. See also Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.62].*
79. *NSW Bar Association, Submission, [7].*
80. *Cheatle v The Queen (1993) 177 CLR 541, 560.*
81. *Kingswell v The Queen (1985) 159 CLR 264, 302.*
82. *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).*

Peremptory challenge

1.47 The right of peremptory challenge[83] is to an extent inconsistent with the principle of random selection[84] and, if exercised on racial, or similar discriminatory grounds, can skew the composition of the jury. A certain level of peremptory challenge has generally been considered not to offend the principles of random selection. 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, although the latter does present a greater risk of overstepping the mark.[85] Later in this Report, we discuss some of the unsatisfactory aspects which attach to the existing practice, which permits both peremptory challenge and challenge for cause, although we do not recommend any immediate change to that practice. Nor do we recommend any form of jury vetting, which would permit exploration of the personal histories or attitudes of potential jurors.[86]

Volunteers

1.48 It is sometimes suggested that interested people could make themselves available to serve as jurors by registering or notifying that willingness to the Sheriff.[87] It is believed by some that this would reduce any problem arising as the result of those who are unwilling to serve being excused.

1.49 The Commission considers that the system should not allow for volunteers, because it tends to undermine the general principle of representativeness of the jury system being achieved by random selection;[88] may entrench people in the system who consistently misunderstand or misapply directions;[89] and may invite the participation of jurors with particular personal agendas, or those with a vigilante attitude.[90]

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83. See para 10.13-10.42.

84. See discussions in Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [6.32]-[6.41].

85. 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), 480.

86. See para 8.36-8.38.

87. 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); M J Stocker, Submission, 2,9; G R Williams, Preliminary submission (Ministerial correspondence).

88. United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [54].

89. NSW Young Lawyers, Submission, 20.

90. See J Goldring, Submission, 5.

1.50 A significant number of submissions supported this position.[91] *One submission suggested that allowing volunteers to serve as jurors was "antithetical to the democratic ambition of jury duty".*[92]

Special panels

1.51 The possibility has been raised from time to time of introducing special panels for the trial of Indigenous offenders or of those from particular racial groups[93] *or of those who are charged, for example, with complex forms of economic crime.*[94]

1.52 In England and Wales, there has been ongoing debate on the question of the use of juries in fraud and other complex trials, arising initially from the deliberations of the Fraud Trials Committee, which reported in 1986. The majority of the Committee recommended the replacement of juries for trials of serious and complex fraud by a "Fraud Trials Tribunal," consisting of a judge and a small number of suitably qualified lay members.[95] *The recommendation was not implemented, in the hope that other procedural and evidential reforms that were implemented in 1987 would alleviate much of the problem.*[96] *The Royal Commission on Criminal Justice, in 1993, declined to make recommendations in the absence of empirical evidence.*[97] *More recently, Lord Justice Auld's Review of the Criminal Courts in England and Wales considered that the arguments in favour of replacing trial by judge and jury in serious and complex fraud trials were persuasive.*[98] *He recommended a system whereby the trial judge could direct a trial*

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91. NSW Bar Association, Submission, [35]; Legal Aid Commission of NSW, Submission, 15; NSW Public Defender's Office, Submission, 10; Redfern Legal Centre, Submission, 11; NSW Jury Task Force, Submission, 3; NSW Young Lawyers, Submission, 20.

92. NSW Bar Association, Submission, [35].

93. Compare the historical juries de medietate linguae: J Stephen, New Commentaries on the Laws of England (Butterworths, 1883) Vol 4, 422-423.

94. M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 177, J Horan and D Tait, "Do juries adequately represent the community? A Case study of civil juries in Victoria" (2007) 16 Journal of Judicial Administration 179, 182-183; R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 156-159, 200-213; England and Wales, Royal Commission on Criminal Justice, Report (1993), [8.42]-[8.44]. But see New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), [157]-[160], [165]-[175].

95. England and Wales, Fraud Trials Committee Report (HMSO, 1986), [8.47]-[8.51].

96. R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 204.

97. England and Wales, Royal Commission on Criminal Justice, Report (1993), Chapter 8, [76]-[81].

98. R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 204.

by judge and lay members, unless the defendant opted for trial by judge alone.[99] *In doing so, he rejected the idea of special juries, on the same grounds as the earlier Fraud Trials Committee, namely:*

> *It would be difficult to empanel a jury, even from such a restricted category, who would collegiately have the degree of specialist knowledge or expertise which, by definition, they would be required to have for the particular subject matter in each case. And, even if suitably qualified juries, maybe smaller than 12, could be found, it would be unreasonable to expect them to serve the length of time that many such fraud trials now take.*[100]

The UK Government has since sought to solve the perceived problem of complex fraud trials by making express provisions that such trials may be conducted without a jury. The Bill is currently before the Parliament.[101]

1.53 The Commission does not favour the adoption of special panels as a way of addressing any imbalance in representation or in background knowledge and capacity to understand the issues. Reasons for this position include: the general lack of support for such an approach in other jurisdictions; the practical difficulties involved in establishing special panels; the lack of relevant empirical evidence on the issue in NSW; and the potential conflict with s 80 of the Constitution with regards to Commonwealth offences.

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99. R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 207-209.

100. R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 205.

101. Fraud (Trials Without a Jury) Bill 2006 (UK).

2. Qualification, disqualification and ineligibility

- Terminology
- Historical background
- Qualification
- A single category of exclusion

TERMINOLOGY

2.1 There are a number of terms employed to indicate the inclusion or exclusion of people from among those who may serve as jurors. People who are permitted to serve as jurors are generally referred to as being "qualified" or "eligible" to serve. Those who are not permitted to serve as jurors are generally referred to as being "disqualified" or "ineligible" to serve. In NSW at present, the two different terms of exclusion, "disqualification" and "ineligibility" refer to distinct groups. The basic distinction is that people who are excluded because of criminal history are "disqualified", while people who are excluded for other reasons, such as occupation or incapacity, are "ineligible". The NSW regime of qualification, disqualification and ineligibility follows the essential features of the model adopted by the Departmental Committee on Jury Service in England and Wales in 1965.[1]

2.2 Categories of inclusion and exclusion can often be different sides of the same coin. For example, people who are unable to speak English can be excluded by either a statement that such people are ineligible, or by a statement that only people who can speak English are qualified to serve. Also, the qualification that, for example, people be enrolled as electors can also carry with it the disqualifications that apply to enrolment as an elector, such as, mental incapacity or imprisonment for more than 12 months.

HISTORICAL BACKGROUND

2.3 The composition of the jury and the obligations and incidents of service have changed from time to time to keep pace with contemporary demands and conditions,[2] *as is illustrated in the following brief history of jury service in NSW.*

Early provisions for juries

2.4 There is some doubt whether the right to trial by jury was extended to NSW's first British settlers in what was then a convict colony.[3] *The free settlers persistently petitioned the Governor and the*

1. *The UK recommendations were also adopted in other Australian jurisdictions. For example, in Victoria: Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996) Vol 1, [3.2]. See also Law Reform Commission of Western Australia, Exemption from Jury Service Report, Project No 71 (1980), [3.7].*
2. *See Ng v The Queen (2003) 217 CLR 521, [33].*
3. *R v Valentine (1871) 10 SCR 113, 133; Myerson v Smith's Weekly Publishing Co Ltd (1924) 41 WN (NSW) 58, 59; and R W Miller and Co v Wilson (1932)*

United Kingdom administration for the granting of the right, but, apart from the use of juries by coroners, it was not until the 1820s that anything approximating jury trial was available in the Colony. In 1823, the Imperial New South Wales Act provided for a Supreme Court. In that court, criminal trials were to be conducted by a judge and a jury of seven commissioned officers of the army or navy.[4] Civil actions, which were otherwise to be conducted by the Chief Justice and two assessors (who needed to be magistrates or justices of the peace), could be tried by a jury of 12 men, provided the parties to the action agreed to such a course.[5] The property qualification for membership of such a jury was the possession, in NSW, of a freehold estate of 50 acres or more of cleared land or a freehold dwelling house or tenement valued at £300 or more.[6] The 1823 Act also allowed for the establishment of a lower court structure, consisting of Courts of General or Quarter Sessions.[7] The criminal matters in Quarter Sessions were tried by juries of 12, following an order by the NSW Supreme Court, in 1824, that the justices of the peace in the district of Sydney were to conduct jury trials, as was the practice in England. This included the compilation of jury lists.[8] In practice, the justices of the peace excluded all people with prior criminal convictions.[9]

2.5 In 1828, the New South Wales Constitution Act continued the arrangements for the Supreme Court,[10] but this time gave the Court discretion to order a jury trial in civil matters on the application of one of the parties.[11] The Act also effectively terminated the trial of criminal matters by civilian juries in the Courts of Quarter Session, but left open the possibility that provision for such trials could be made by local ordinance.[12]

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32 SR (NSW) 466, 475. See also J M Bennett, "The Establishment of Jury Trial in New South Wales" (1961) 3 Sydney Law Review 463, 463-464.

4. *4 George IV c 96 (Imp) s 4.*
5. *4 George IV c 96 (Imp) s 6.*
6. *4 George IV c 96 (Imp) s 7.*
7. *4 George IV c 96 (Imp) s 19.*
8. *R v The Magistrates of Sydney (NSW Supreme Court, 14 October 1824, Forbes CJ, reported in Australian, 21 October 1824). See also G D Woods, A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900 (Federation Press, 2002), 57.*
9. *G D Woods, A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900 (Federation Press, 2002), 58.*
10. *9 George IV c 83 (Imp) s 5, s 8.*
11. *9 George IV c 83 (Imp) s 8.*
12. *9 George IV c 83 (Imp) s 10.*

First NSW provisions for qualification, exemption and disqualification

2.6 In 1829, NSW legislation first provided for the qualification of jurors, for exemption (with their consent), and for disqualification.[13] Civil juries were to be constituted by 12 people. Males aged between 21 and 60 having real estate producing income of at least £30 per annum, or personal property worth at least £300, were competent jurors. Those who were exempt included judicial officers, Members of the Legislative Council, people holding offices under the Government, clergy, practising lawyers, gaolers, medical practitioners and apothecaries, military and naval officers on full pay, licensed pilots and masters of vessels employed in the service of the Crown, police, school masters, and parish clerks. The Act further provided for parties to request a special jury comprising justices of the peace, bank directors, city councillors and people of the degree of esquire or higher.[14] An Act passed in 1832 continued the 1829 arrangements,[15] but also provided for criminal trials by 12 civilians in a limited range of cases where the Governor, members of the Executive Council, or Military or Naval officers had an interest.[16]

2.7 In 1833, an accused arraigned in the Supreme Court was given the right to request a trial by a jury of 12 civilians, instead of trial by a military jury of seven.[17] The criminal juries composed of civilians were made subject to the same exemptions as the civil juries, but the disqualification on the grounds of criminal conviction was removed, except in the case of those serving current sentences or who had been convicted of any treason, felony or other infamous crime.[18] The 1833 Act also made civilian juries available to the Courts of Quarter Sessions once again.[19]

2.8 Military juries were finally abolished altogether in 1839 and all criminal issues of fact were to be tried by juries of 12.[20] Civil juries of four (special juries) were introduced in 1844, the parties still retaining an option to apply for juries of 12, called "common juries". Trial by assessors was then abolished.[21]

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13. Juries for Civil Issues Act of 1829 (NSW) (10 George IV No 8) s 2-5.
14. Juries for Civil Issues Act of 1829 (NSW) (10 George IV No 8) s 20-28.
15. Jury Trials Act of 1832 (NSW) (2 William IV No 3).
16. Jury Trials Act of 1832 (NSW) (2 William IV No 3) s 40.
17. Jury Trials Amending Act of 1833 (NSW) (2 William IV No 12) s 2.
18. Jury Trials Amending Act of 1833 (NSW) (2 William IV No 12) s 3, s 4.
19. Jury Trials Amending Act of 1833 (NSW) (2 William IV No 12) s 12.
20. Jury Trials Act of 1839 (NSW) (3 Victoria No 11) s 2.
21. Jury Trials Act of 1844 (NSW) (8 Victoria No 4) s 1.

The 1847 consolidation

2.9 The law on juries and jurors was consolidated in 1847,[22] incorporating the liability of all men over 21 years of age with property of prescribed value to serve on common juries, and retaining provisions for special juries. The 1847 Act provided that certain people were "absolutely freed and exempted from being returned and from serving upon any juries whatsoever" and were not to be "inserted in the lists" prepared under the Act.[23] These people included judicial officers, members of the Executive and Legislative Councils, certain public servants and officers of the City of Sydney, clergy, practising lawyers, practising medical practitioners and pharmacists, military and naval personnel on full pay, licensed pilots and masters of vessels, police, schoolmasters and parish clerks, household officers and servants of the Governor, certain bank employees and people who were "incapacitated from discharging the duty of jurymen by disease or infirmity". People over 60 years of age were also entitled to claim an exemption.

20th century developments

2.10 The Jury Act 1901 (NSW) adopted the adult propertied male qualification for jury service,[24] disqualifying unnaturalised men resident in NSW for less than seven years and those convicted of named serious crimes.[25] The Act listed those qualified and liable who could claim an exemption, mirroring more or less the 1847 provisions, but adding gaolers and certain members of the "volunteer force".[26] The Act provided that all crimes and misdemeanours prosecuted in the Supreme Court, the Circuit Courts and the Courts of Quarter Sessions were to be tried by juries of 12.[27] Civil issues of fact and assessments of damages were still to be tried by special juries of four,[28] unless either party applied for a jury of 12.[29] The police were responsible for compiling jury rolls at the direction of the Sheriff.

2.11 These provisions were repeated in the Jury Act 1912 (NSW), which was not repealed until 1977, when the present Jury Act was passed. In 1947, the right to serve on juries was extended to women if they applied,[30] and the property qualification was abolished.[31] At the

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22. *Jurors and Juries Consolidation Act of 1847 (NSW) (11 Victoria No 20).*
23. *Jurors and Juries Consolidation Act of 1847 (NSW) (11 Victoria No 20) s 2.*
24. *Jury Act 1901 (NSW) s 3.*
25. *Jury Act 1901 (NSW) s 4.*
26. *Jury Act 1901 (NSW) s 5.*
27. *Jury Act 1901 (NSW) s 28(1).*
28. *Jury Act 1901 (NSW) s 30.*
29. *Jury Act 1901 (NSW) s 31.*
30. *Jury (Amendment) Act 1947 (NSW) s 3.*

same time, the special jury was abolished.[32] *The provision requiring special petty sessions to be called to consider the jury lists for each jury district and to remove those who were disqualified and exempt was amended to give the justices the power to remove "the names of all men who in the opinion of the justices are, from the nature of their calling, liable to suffer undue hardship from being called to serve as jurors or whose call so to serve would occasion undue public inconvenience".*[33] *In 1968, it became obligatory for women to be included on the jury roll, but a woman could elect to discontinue her liability.*[34]

The current Act

2.12 When the current Jury Act was introduced in 1977, the Attorney General stated that the stage had been reached where the jury rolls then in use were not truly representative of the ordinary citizen because of an outmoded selection system and the proliferation of people who could claim exemption from jury service.[35] *The primary aim of the new Act was to ensure:*

> *that jury service, so far as is practicable, will be shared equally by all adult members of the community.*[36]

2.13 In order to achieve this aim, liability to perform jury service was extended to all those enrolled to vote, each jury roll being compiled at random from the current electoral roll. Responsibility for preparing jury rolls was transferred from the police to the Sheriff. In addition, the exemption of some classes of people who were previously exempted from jury service was removed. For example, bank officers and most State public servants became liable to serve. The current provisions relating to jury service, which are contained in the 1977 Act, are described, where relevant, throughout the remainder of this Report.

QUALIFICATION

2.14 In order to qualify as a juror, a person must be enrolled as an elector for the NSW Legislative Assembly and not fall within one of the categories of disqualification or ineligibility.

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31. Jury (Amendment) Act 1947 (NSW) s 2.
32. Jury (Amendment) Act 1947 (NSW) s 4.
33. Jury Act 1912 (NSW) s 13(3), inserted by Jury (Amendment) Act 1947 (NSW) s 5(d)(i).
34. Administration of Justice Act 1968 (NSW) s 10.
35. NSW, Parliamentary Debates, Legislative Assembly, 24 February 1977, 4475.
36. NSW, Parliamentary Debates, Legislative Assembly, 22 February 1977, 4254.

Enrolment as an elector

Current law

2.15 In NSW, "every person who is enrolled as an elector for the Legislative Assembly... is qualified and liable to serve as a juror".[37] *This is dependent upon age and citizenship. The requirement of citizenship arises from the fact that electoral qualification extends only to citizens and British subjects who were enrolled as electors immediately before 26 January 1984.*[38] *Permanent residency does not suffice. Citizens over the age of 18 years are qualified to vote*[39] *and are, therefore, qualified to be enrolled as jurors.*

2.16 In NSW, a number of people, despite being citizens and aged 18 years or over, are disqualified from being enrolled as electors[40] *and, as a result, are not qualified to serve as jurors.*[41] *They are:*[42]

- *people who, because of being of unsound mind, are "incapable of understanding the nature and significance of enrolment and voting";*
- *people convicted of an offence and currently serving a sentence of imprisonment of 12 months or more for that offence;*[43]
- *people holding a temporary entry permit or who are prohibited immigrants.*[44]

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37. *Jury Act 1977 (NSW) s 5.*
38. *Parliamentary Electorates and Elections Act 1912 (NSW) s 20(1)(b).*
39. *Parliamentary Electorates and Elections Act 1912 (NSW) s 20(1)(a).*
40. *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.*
41. *Jury Act 1977 (NSW) s 5.*
42. *Parliamentary Electorates and Elections Act 1912 (NSW) s 21.*
43. *We note that the High Court has recently held invalid amendments in 2006 to the Commonwealth Electoral Act 1918 (Cth) that rendered ineligible to vote prisoners serving any sentence of imprisonment for a federal offence, while upholding the validity of the pre-2006 legislation which confined such ineligibility to prisoners serving a sentence of three years or longer: see Roach v Electoral Commissioner «http://www.highcourt.gov.au/media/Roach» at 3 September 2007. The reasons for the decision are unavailable at the date of this Report, but seem unlikely to apply to the NSW legislation considered here.*
44. *This category presumably applies to British subjects who were on the electoral roll before 26 January 1984. It was added as part of a series of amendments in Parliamentary Electorates and Elections (Amendment) Act 1982 (NSW) which resulted from a meeting of Commonwealth and State ministers which dealt with the discrimination involved in including British subjects on the electoral rolls but excluding permanent residents of non-British origin.*

2.17 We do not see any reason to recommend that people falling within these categories of disqualification from voting should be eligible to serve as jurors. Their enrolment is under the control of the Electoral Commission, and the Sheriff has to rely on that Office to detect and remove from the roll any person who might fall within a relevant category of disqualification as an elector.

Moving beyond the electoral roll

2.18 The electoral roll is generally accepted as the basis from which jurors are selected. However, some submissions supported supplementing the roll by reference to other databases. These submissions dealt with two distinct problems – the problem of under-enrolment or incorrect enrolment of those who are already qualified to register as electors; and the problem of resident non-citizens not being entitled to serve.

2.19 ***The problem of under-enrolment.*** *Concerns have been expressed that sole reliance upon the electoral roll may give rise to a significant under-representation on juries of a number of groups, most significantly Indigenous people and young people.*[45] *There is precedent in the United States for supplementing the jury lists by reference to other databases to include citizens who have otherwise not enrolled to vote.*[46]

2.20 As already noted, Indigenous people are generally less likely than other members of the community either to be enrolled as electors or enrolled at the correct address, and this is likely to be one of the contributing factors to their apparent under-representation on juries.[47]

2.21 It is also possible that a significant number of young people aged 18 to 25 years are currently not being called on to serve as jurors because they have not been correctly enrolled. A sample audit undertaken by the Australian Electoral Commission in March 2006 showed that 93.6% of the eligible population were enrolled for the

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45. *NSW Public Defender's Office, Submission, 2; Redfern Legal Centre, Submission, 14; NSW Bar Association, Submission, 1; J Goldring, Submission, 1; Aboriginal Legal Service, Submission.*
46. *For example, in New York, the Commissioner of Jurors may refer to "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": New York, Judiciary Law (Consol 2007) § 506.*
47. *See para 1.36.*

correct electoral division. However, the Electoral Commission also estimates that the participation of eligible 18 to 25 year olds at 30 June 2006 was only 76.7%.[48] *On the other hand, figures provided by the Sheriff's Office for the 2005-2006 financial year show only a substantial under-representation of 18 and 19 year-olds, with people aged 20-41 years being relatively evenly represented across that age group. The 20-41 years age group, however, appears to be relatively under-represented on juries compared with those aged 42-59 years.*

2.22 The under-representation in particular age groups is likely to be due to a number of factors including their mobility, child care responsibilities, tardiness in enrolling to vote between electoral cycles, delays in including updated electoral information in jury lists, and to the fact that those in their late teens and twenties may be excused from service because of TAFE and university commitments.

2.23 The situations described above could be alleviated by accessing more up-to-date electoral data for the purpose of summoning jurors, by cross-checking with records from other government agencies for current addresses, and by some of the procedures which we later examine in relation to the exercise of the discretion to excuse jurors for cause. These matters are dealt with more fully in chapter 7.

2.24 ***Permanent residents and those with temporary visas.*** *There have been various proposals in other Australian jurisdictions to extend eligibility for jury service to permanent residents,*[49] *and several submissions supported such a change.*[50] *Reasons offered included that:*

- *potentially excluding people from culturally and linguistically diverse backgrounds who have made Australia their home, but have not yet acquired citizenship, could undermine the representative nature of juries;*[51] *and*
- *including people who are permanent residents is an important symbolic way of addressing the apprehension of bias held by*

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48. Australian Electoral Commission, Annual Report 2005-2006, 30.

49. Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report (Criminal Procedure Division, 1993), 6; Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.7]-[3.11].

50. NSW Bar Association, Submission, [3]; Office of the DPP (NSW), Submission; Legal Aid Commission of NSW, Submission, 3-4; NSW Public Defender's Office, Submission, 2; M J Stocker, Submission, 4; NSW Young Lawyers, Submission, 2.

51. NSW Bar Association, Submission, [3].

> *members of minority immigrant groups who are charged with crimes.*[52]

Additionally, there are those who have made Australia their home, and who would willingly serve as jurors, but are unable to do so because of concerns that acquiring Australian citizenship would deprive them of citizenship in their country of origin.[53]

2.25 Although there was some support for allowing permanent residents to serve as jurors, there was no support for visitors or holders of temporary visas doing so.[54] *Several submissions recognised that the inclusion of permanent residents would involve considerable administrative complexity, since there is no readily accessible database from which they could be selected.*[55] *It was noted that the alternative of allowing permanent residents to register to serve would undermine the principle of random selection,*[56] *while one submission suggested that citizenship should continue to be an important requirement since its acceptance indicates a willingness to participate in the duties of citizenship.*[57]

2.26 It should also be noted that, since 95% of people living in Australia are citizens (and 75% of those who were born overseas are citizens),[58] *the problem of apparent under-representation, particularly among more recent arrivals, may be more due to the requirement that jurors understand English*[59] *and to the exercise of the right of peremptory challenge*[60] *than to them not acquiring status as an elector.*

2.27 ***Commission's conclusion.*** *While it would be desirable to increase the involvement of some minority groups so as to reinforce the representative nature of juries, it would seem to be impractical and unduly expensive to include permanent residents, due to the absence of any accessible and up to date listing of their names and current*

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52. *Legal Aid Commission of NSW, Submission, 4.*
53. *M J Stocker, Submission, 3.*
54. *NSW Bar Association, Submission, [4]; NSW Young Lawyers, Submission, 2.*
55. *Legal Aid Commission of NSW, Submission, 4. NSW Bar Association, Submission, [5]; NSW Jury Task Force, Submission, 1.*
56. *Legal Aid Commission of NSW, Submission, 4.*
57. *J Goldring, Submission, 1.*
58. *Australian Bureau of Statistics, Measures of Australia's Progress (1370.0, 2004). It should be noted that there is a high level of citizenship among some nationalities, eg, Greece (98%), Hungary (97.1%), the Lebanon (97%), Egypt (96.3%) and Vietnam (96%). Nationalities with sizeable numbers of non-citizens include: UK, New Zealand, Italy, Malaysia, Germany and the People's Republic of China: Australia, Department of Immigration and Multicultural Affairs, Population Flows: Immigration Aspects (2007), 95.*
59. *See para 5.2-5.10.*
60. *See para 10.13-10.42.*

addresses.[61] Otherwise, we are satisfied that citizenship should remain the criterion for jury eligibility, since it represents an acceptance of the laws of the community and a commitment to important mutual rights and obligations. We do not see any case for pursuing those who are eligible but neglect to enrol as electors; nor do we see any case for allowing temporary residents to serve as jurors.

RECOMMENDATION 1

Every person who is enrolled as an elector for the NSW Legislative Assembly should be qualified and liable to serve as a juror.

Not disqualified

2.28 In NSW, a person is currently disqualified from serving as a juror[62] if he or she has been subject to aspects of the criminal justice system, including if they have served any part of a sentence of imprisonment in the past 10 years, or are subject to certain orders of a court pursuant to a criminal charge or conviction, including a remand in custody and a release on bail pending trial or sentence. These categories of disqualification are dealt with in Chapter 3.

Not ineligible

2.29 Currently, in NSW, a person is ineligible to serve as a juror[63] if he or she falls within a number of occupational categories. These include the Governor, judicial officers and coroners, Members of Parliament and the Executive Council, officers and other staff of the Houses of Parliament, Australian lawyers, the Ombudsman and deputy Ombudsman. Also included are public sector employees engaged in law enforcement, criminal investigation, the provision of legal services in criminal cases and the administration of justice or penal administration, as well as former members of certain of the professions and occupations mentioned. The categories of ineligibility include, additionally, those who are "unable to read or understand English" and those who are "unable, because of sickness, infirmity or disability, to discharge the duties of a juror".

61. *J Goldring, Submission, 1.*
62. *Jury Act 1977 (NSW) s 6(a) and Sch 1.*
63. *Jury Act 1977 (NSW) s 6(b) and Sch 2.*

2.30 A person is also ineligible if he or she is exempted under the Jury Exemption Act 1965 (Cth), which excludes various Commonwealth office holders and employees.[64]

2.31 All of these categories of ineligibility are dealt with in Chapters 4 and 5 of this Report.

A SINGLE CATEGORY OF EXCLUSION

2.32 There would appear to be no point in maintaining separate headings of disqualification and ineligibility since they have the same consequences, namely, an inability to serve as a juror, and a potential for prosecution for any failure to inform the Sheriff of any applicable ground of disqualification or ineligibility,[65] *or for the provision of false or misleading information to the Sheriff when claiming to be disqualified or ineligible.*[66] *The validity of a jury verdict, once delivered, does not depend upon any distinction between these headings since it will not be invalidated only by reason of the fact that a juror was disqualified from serving or was ineligible to do so.*[67] *This may reflect the fact that most, if not all, of the categories of disqualification and ineligibility largely depend on self-reporting, since the Sheriff currently has limited power or opportunity to inquire into the background of potential jurors. Otherwise, the saving provision is designed to achieve a finality in litigation.*

2.33 Submissions generally agreed that there is no need to maintain the distinction between disqualification and ineligibility for jury service.[68]

2.34 We see merit in combining the categories previously listed under "disqualification" and "ineligibility" into a single heading of exclusion from jury service. This is the case in Queensland,[69] *where it was*

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64. *See below at para 5.17-5.23.*
65. *Jury Act 1977 (NSW) s 61.*
66. *Jury Act 1977 (NSW) s 62.*
67. *Jury Act 1977 (NSW) s 73. It should be noted, however, that, if the disqualification or ineligible status of a juror is identified before verdict, the trial is a nullity: Petroulias v The Queen [2007] NSWCCA 134.*
68. *NSW Bar Association, Submission, [9]; NSW Public Defender's Office, Submission, 3; Redfern Legal Centre, Submission, 5; G J Samuels, Submission; NSW Jury Taskforce, Submission, 1; NSW Young Lawyers, Submission, 4. But see J Goldring, Submission, 2.*
69. *Jury Act 1995 (Qld) s 4(3).*

recommended in 1993 that there be only one category of automatic exemption that encompasses both disqualification and ineligibility.[70]

2.35 For the remainder of this Report, when referring to the existing law, we will continue to use the categories of ineligibility and disqualification. However, when making recommendations for reform, we will refer to the single concept of "exclusion".

RECOMMENDATION 2

The heading of "exclusion from jury service" should be adopted in preference to the separate headings of ineligibility and disqualification for listing those who may not undertake jury service.

Reducing the categories of exclusion

2.36 We also see merit in revising and removing some of the categories that currently fall within these separate headings, either because we consider that they are unjustified or because we consider that greater definition is required.

2.37 In reducing the categories of exclusion, it should be noted that some people are currently excluded because they were considered to be those "whose professional or expert duties are so important to the community and so exacting that they ought not to be permitted to serve".[71] *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".*[72]

2.38 The 1994 Australian Institute of Judicial Administration review of jury management in NSW 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".[73]

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70. *Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), 3-4.*
71. *NSW, Parliamentary Debates (Hansard) Legislative Assembly, 24 February 1977, 4478, quoting United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [93].*
72. *NSW, Report of the NSW Jury Task Force (1993), 22, 24.*
73. *M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 173.*

2.39 Other reviews have consistently questioned the assumptions underlying many of the categories of those who are excluded[74] and recommended a reduction in the categories.[75] Similar concerns exist in relation to the far-reaching grounds of disqualification arising by reason of the potential juror having a criminal conviction or other contact with the criminal justice system.

2.40 The trend in other States, and in England and Wales, has been to reduce the number of exemptions that are available, including categories of ineligibility. For example, Tasmania and SA have substantially reduced these categories,[76] as has Victoria.[77] In England and Wales, the categories of ineligibility formerly included in the Juries Act 1974 (Eng) have been replaced by a list of qualifications. These include that a juror be registered as a Parliamentary or local government elector, be not less than 18 nor more than 70 years of age, have been ordinarily resident for any period of at least five years since attaining the age of 13, and not be a "mentally disordered person".[78] There is also a list of disqualifications based on criminal charge or conviction.[79]

2.41 Both England and Wales and the State of New York provide a precedent for the removal of most or all categories of exemption arising by reason of a juror's office or employment, and the substitution of a system permitting potential jurors to be excused for good cause, with or

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74. *See United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [98]; NSW, Report of the NSW Jury Task Force (1993), 23-25; Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), [2.5]-[2.11].*
75. *See M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 173; Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.149]; R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 149, 151.*
76. *See Juries Act 2003 (Tas) Sch 1 and Sch 2; Juries Act 1927 (SA) Sch 3.*
77. *Although it should be noted that the Victorian provisions relating to ineligibility, which were enacted in 2000, have already been subject to five separate sets of amendments: 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].*
78. *Juries Act 1974 (Eng) s 1(1).*
79. *See Juries Act 1974 (Eng) s 1(3), Sch 1.*

without deferral.[80] *We propose a system of excuse and deferral in chapter 7.*[81]

2.42 We are of the view that limiting the current categories of exclusion would assist in widening the jury pool and spreading the burden of service. We next consider how these categories should be limited or modified.

80. *Juries Act 1974 (Eng); New York, Judiciary Law (Consol 2007) art 16 . See also M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 173, footnote 4.*
81. *See para 7.14-7.42.*

3. Disqualification arising from criminal history

- Rationale for exclusion
- Service of a sentence of imprisonment
- Juvenile offenders in detention
- People bound by orders of a criminal court
- Identifying criminal histories

3.1 Currently, in NSW, a person may be disqualified from serving as a juror on the various grounds of past criminal conduct or other contact with the criminal justice system:[1]

> ***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.*[2]

3.2 It should be noted at the outset that the bare fact of conviction for an offence is insufficient in NSW to disqualify a person from jury service. To be disqualified, the person must meet one of the grounds outlined above, namely, having served part of a sentence of imprisonment or being subject to a continuing order. Those who have been convicted and fined, or those who have been convicted, but with no other penalty imposed,[3] *are not currently disqualified from jury service.*

RATIONALE FOR EXCLUSION

3.3 There are two principal reasons for excluding people who have been defendants in the criminal justice system. The first is the possibility that their past criminal behaviour, and its consequences as a result of their involvement in the justice system, may impact upon their ability to be impartial,[4] *or make them amenable to improper influence from criminal associates. The second concerns the importance*

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1. *Jury Act 1977 (NSW) s 6(a).*
2. *Jury Act 1977 (NSW) Sch 1.*
3. *Crimes (Sentencing Procedure) Act 1999 (NSW) s 10A.*
4. *See Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.15]-[3.16].*

of preserving the public confidence in the jury system, which might potentially be threatened if it became publicly known that people with the requisite criminal records, or facing trial, had been allowed to serve on a jury.[5]

3.4 Although it would require an enormous effort to determine, with any precision, the number of electors in NSW who would currently fall within the ambit of the disqualification provisions applicable at the present time, it can be noted that a recent BOCSAR study showed that, by 2005, 1 in every 200 people who had been born in NSW in 1984, and, therefore, aged 21 years, had received a prison sentence.[6]

3.5 The Commission received mixed responses in the submissions which dealt with the current heads of disqualification. For example, some submissions argued that people should not be disqualified simply because they have served a custodial sentence or have been placed on some form of conditional release.[7] *It was contended that rehabilitation was an important goal of sentencing which should not be arbitrarily assumed to have failed.*[8] *It was further argued that restoration to the ordinary incidents of citizenship, such as jury service, is an important step in the reintegration and rehabilitation process.*[9] *Some submissions contended that those within the heads of disqualification applicable to people awaiting trial should be allowed the benefit of the presumption of innocence, and entitled to participate as jurors.*[10] *Others, however, argued for the retention of the status quo, with some slight modifications.*[11]

3.6 Although the NSW Police proposed a further category of people who should be excluded as "not fit or proper to serve", because of their

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5. *Criminal justice agencies consultation.*
6. *J Hua, J Baker, S Poynton, Generation Y and Crime: A Longitudinal study of contact with NSW criminal courts before the age of 21, NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 96 (2006), 7.*
7. *Legal Aid Commission of NSW, Submission, 9; NSW Bar Association, Submission, [10]; J Goldring, Submission, 2.*
8. *NSW Bar Association, Submission, [10]; Redfern Legal Centre, Submission, 6. See also Aboriginal Legal Service, Submission, 7; J Goldring, Submissiom, 2.*
9. *See NSW Public Defender's Office, Submission, 3. See also United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [131]; New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), [181]; Queensland, Criminal Justice Commission, The Jury System in Criminal Trials in Queensland, Issues Paper (1991), 11. But see Commonwealth Director of Public Prosecutions, Submission, 1-2.*
10. *J Goldring, Submission, 2; NSW Public Defender's Office, Submission, 4. But see Commonwealth Director of Public Prosecutions, Submission, 2-3.*
11. *NSW Jury Taskforce, Submnission, 1; Commonwealth Director of Public Prosecutions, Submission, 1-2; G J Samuels, Submission, 2.*

background or disqualification from performing certain functions or holding certain forms of employment under various statutes,[12] we are of the view that this would be too broad as a criterion for exclusion, and that it would be very difficult to apply. We consider that these concerns would be better addressed by maintaining appropriate grounds for exclusion on the basis of criminal history, and by the remedies of setting aside by consent or of challenging for cause, where some additional circumstance is identified that would make it undesirable for the juror to serve.

3.7 We next examine the current grounds of disqualification and identify those areas that we consider require greater definition or amendment. In this respect, it is apparent that, while the various relevant criteria are, on a first impression, stated in clear and precise terms, on deeper analysis, definitional problems emerge which need to be addressed, so as to provide greater certainty as to those who are either disqualified or subject to any other ground of ineligibility. It is important that these definitional problems are addressed because of the current undesirable consequences arising from the empanelment of people who are disqualified or ineligible to serve as jurors. (x-ref)

SERVICE OF A SENTENCE OF IMPRISONMENT

3.8 As we have noted, the Jury Act provides for disqualification of people within this category as follows:

> *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).[13]*

People currently serving a sentence

3.9 There was general agreement, in the submissions received and consultations, that people who are currently serving sentences of imprisonment should be excluded.[14]

3.10 Obviously, such people could not, in a practical sense, serve as jurors if they were detained in full-time custody, and some would, in

12. *NSW Police, Preliminary submission, 1-2.*
13. *Jury Act 1977 (NSW) Sch 1 item 1.*
14. *NSW Bar Association, Submission, [10]; J Goldring, Submission, 2; Legal Aid Commission of NSW, Submission, 9.*

any event, lose the right to remain on the electoral roll, which is a precondition to being able to serve as a juror.[15]

3.11 Some uncertainty, however, exists as to whether this head of disqualification is confined to those who are serving a sentence in full-time custody, or by way of periodic or home detention; or extends additionally to those who are subject to sentences of imprisonment that have been suspended. We are of the view that any uncertainty in this respect should be rectified, as these are clear cases where impartiality and community confidence in juries would be called into question if such people were permitted to serve, although released into the community.

RECOMMENDATION 3

People who are currently serving a sentence of imprisonment should be excluded from jury service. Imprisonment for the purposes of this exclusion should include sentences served by way of periodic detention and home detention and suspended sentences.

People who have completed a custodial sentence

Current law

3.12 In NSW, the service of any part of a sentence of imprisonment within the previous 10 years will currently disqualify a person from jury service.[16]

3.13 There are some practical problems in the interpretation and/or application of this item in addition to the uncertainty already noted concerning the kind of sentences of imprisonment to which it applies, for example, suspended sentences and home detention. They include the fact that:

- *it applies irrespective of the seriousness of the offence which led to the sentence, or to the length of the sentence, and would therefore apply as much to a defendant who was convicted in a Local Court of a minor offence that resulted in a very short prison sentence as it would to a person convicted in the Supreme Court of a very serious offence and sentenced to a lengthy term of imprisonment for murder;*

15. *Parliamentary Electorates and Elections Act 1912 (NSW) s 21. See para 2.16 above.*
16. *Jury Act 1977 (NSW) Sch 1 item 1. The 10-year disqualification may be compared with that applicable to similar grounds for disqualification in other States, eg: five years in WA: Juries Act 1957 (WA) s 5(b)(ii); and seven years in the NT: Juries Act 1963 (NT) s 10(3)(a)(ii).*

- *if construed literally, it does not cater for the situation where, on appeal, the conviction and sentence were each set aside, or where a non-custodial sentence was substituted for a custodial sentence, yet pending the appeal the juror had been held in custody;*
- *similarly, it does not apply to the situation, which is addressed in other States,[17] where, subsequent to the person commencing to serve a sentence, he or she is given a free pardon;*
- *it is not entirely clear whether the 10-year period of disqualification runs from the time of release on parole or probation, or from the date of expiry of the balance of the term;*
- *it is not clear whether a person serving a limiting term imposed after a special hearing[18] would fall within its ambit, and if so what would be the position of any such person who, at a later date, recovered his or her mental health, was found fit to be tried, and then acquitted after a regular trial;[19] and*
- *it is also not clear whether the exclusion would apply to a person charged with an offence under Commonwealth laws who was found unfit to be tried and subject to a detention determination.[20]*

Law in other jurisdictions

3.14 There is no uniformity in the legislation of the States or Territories concerning the circumstances in which the serving of a sentence of imprisonment will lead to disqualification, or as to the length of any consequent disqualification. Some jurisdictions draw a distinction based on whether the sentence was imposed for a summary or indictable offence, while others draw a distinction based on the length of the sentence or aggregate sentences imposed.

3.15 The periods of potential disqualification also vary markedly, in that, in some instances, the fact of conviction and service of a sentence of imprisonment will lead to a life disqualification,[21] whereas, in other instances, depending on the nature of the offence, and/or the term of the sentence, the period of disqualification may be one of only five years.[22]

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17. *Juries Act 2003 (Tas) Sch 1 cl 1(2), Juries Act 2000 (Vic) Sch 1 cl 1; Juries Act 1957 (WA) s 5(b)(i); Juries Act 1967 (ACT) s 10(a).*
18. *Pursuant to Mental Health (Criminal Procedure) Act 1990 (NSW) s 23.*
19. *Mental Health (Criminal Procedure) Act 1990 (NSW) s 30.*
20. *Pursuant to Crimes Act 1914 (Cth) s 20BB or s 20BC.*
21. *For example: Juries Act 2003 (Tas) Sch 1 cl 1(1)(a); Juries Act 1957 (WA) s 5(b)(i); Juries Act 1927 (SA) s 12(1)(a) and (b); Jury Act 1995 (Qld) s 4(3).*
22. *For example, Juries Act 2000 (Vic) Sch 1 cl 3(a); Juries Act 1957 (WA) s 5(b)(ii).*

3.16 In some States, there is a sliding differential scale for disqualification so that different periods of disqualification apply dependent on the sentence served. For example, in Victoria, there is a two years disqualification for anyone sentenced for any offence; five years disqualification for anyone sentenced to imprisonment for an aggregate of less than three months; 10 years disqualification for anyone sentenced to imprisonment for an aggregate of three months or more; and disqualification for life for anyone convicted of treason or of an indictable offence and sentenced to an aggregate of three years or more.[23]

3.17 One result of this is that eligibility to serve as a juror may vary according to the current place of residence of the juror. For example, some people may be barred for life in some jurisdictions but eligible, after a lapse of time, in another. No doubt the differences between the jurisdictions are attributable to local issues and to the different dates of enactment of the relevant legislation. In recognition of the mobility of Australian citizens between States and Territories, there is a case for securing uniformity, particularly as the various State and Territory Acts contemplate that the fact of conviction and consequent length of sentence, wherever imposed, will determine the relevant period of disqualification. We do not, however, consider it within our terms of reference to make any recommendation to that effect. Rather, our purpose is to identify criteria for exclusion which would eliminate any existing anomalies or uncertainties and satisfy the requirements of justice within NSW.

Balancing principles

3.18 This brings us back to the question, which was addressed in several submissions and consultations, as to whether past offenders, who have served sentences of imprisonment, should have a greater opportunity to re-exercise the civic act of jury duty after a period of rehabilitation.[24]

3.19 Two substantially competing principles need to be balanced:

- *allowing people who have served their time, undertaken rehabilitation, and become eligible voters once again to become fully functioning members of society; and*

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23. Juries Act 2000 (Vic) Sch 1 cl 1-5. Other Australian jurisdictions also stipulate different periods of disqualification for different sentences: Juries Act 1927 (SA) s 12(1); Juries Act 2003 (Tas) Sch 1 cl 1, Juries Act 1957 (WA) s 5.

24. See para 3.5.

- *ensuring that juries remain impartial and that the public retains confidence in them.*[25]

The validity of these competing principles was recognised by those with whom we consulted or who provided submissions. Our attention was also drawn to the concern that the existing criterion results in the effective exclusion from jury service of a substantial number of Indigenous people who receive short-term sentences for minor offences, and who, as a result, constitute a disproportionate part of the prison population.[26]

3.20 In considering the period of exclusion which would follow the expiry of the sentence, the question becomes whether some line or lines should be drawn in terms of seriousness of the offence involved, as indicated either by its nature or by the length of the sentence imposed. The UK Departmental Committee on Jury Service concluded in this regard 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".[27]

3.21 Some submissions supported a general reduction of the 10-year period during which a person who has served his or her sentence should be ineligible to serve,[28] *while others proposed relating the period of the ineligibility to the length of the sentence that was served or to particular kinds of offence.*[29] *Some proposed confining the disqualification only to cases where the sentence had been imposed in relation to an indictable offence.*[30]

3.22 One submission, which questioned the retention of any significant period of disqualification, noted that "people with convictions, particularly for minor offences have the same interest as the wider

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

26. Aboriginal Legal Service, Submission, 8. The rate of imprisonment of Indigenous people is 10 times that of non-Indigenous Australians: D Weatherburn, L Snowball, B Hunter, The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the NATSISS Survey, Crime and Justice Bulletin, No 104 (NSW Bureau of Crime Statistics and Research, 2006), 1.

27. United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [140].

28. Legal Aid Commission of NSW, Submission, 9; M J Stocker, Submission, 5; Redfern Legal Centre, Submission, 6.

29. Aboriginal Legal Service, Submission, 8-9; G J Samuels, Submission; NSW Public Defender's Office, Submission, 3.

30. Criminal Justice Agencies Consultation.

population in protecting their communities against the kind of serious crimes that merit a jury trial".[31]

The Commission's conclusion

3.23 The reach of the current provision is somewhat broad, and could possibly allow people to serve as jurors who should be excluded for life. At the same time, it may unnecessarily exclude those who need not be excluded for as long as 10 years, for example, those sentenced to a short term of imprisonment for some minor summary offence, and who have not re-offended. We consider that this criterion could be usefully redrawn to provide for:

- *exclusion for life of any person who has been sentenced to imprisonment for:*
  - *any offence for which life imprisonment is the maximum available penalty;*
  - *any offence constituting a "terrorist act" punishable under State or Federal law;*[32] *and*
  - *any public justice offence under Part 7 of the Crimes Act 1900 (NSW), which includes offences relating to interference with the administration of justice, judicial officers, witnesses and jurors, perjury and false statements.*[33]
- *exclusion for 10 years from the date of expiry of any sentence or sentences of imprisonment aggregating three years or longer;*
- *exclusion for five years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years, but exceeding six months, imposed in respect of an indictable offence;*
- *exclusion for two years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years in respect of a summary offence, and aggregating less than six months in respect of any indictable offence.*

3.24 We also consider it appropriate to make it clear that a "sentence of imprisonment" for the purpose of this item includes home detention, periodic detention, a sentence of imprisonment that has been suspended, and a sentence of imprisonment by way of compulsory drug treatment detention. Additionally, we consider it important to adopt a similar provision to that appearing in the Tasmanian and Northern Territory legislation that would make it clear that a person on parole

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31. Legal Aid Commission of NSW, Submission, 9.
32. See Criminal Code (Cth) Part 5.3.
33. Crimes Act 1900 (NSW) Part 7.

or released on probation after serving part of a sentence of imprisonment is taken to be serving the sentence until expiry of the overall term.[34]

3.25 Additionally, in the context of proceedings under the Mental Health (Criminal Procedure) Act 1990 (NSW), we consider it appropriate to exclude those who are subject to limiting terms from this sliding scale, since such terms do not follow a conviction but rather a finding, on the limited evidence available, that the accused committed the offence charged.[35] *Such a finding is provisional, and will be displaced in the event of the accused recovering his or her mental health and then being tried according to law. The preferable course, accordingly, would be to provide for the ineligibility of such people during the currency of the limited term, and thereafter to leave their situation to be governed according to the outcome of any subsequent trial. Alternatively, they could be independently excused on the grounds of their continuing incapacity, either as a result of their disqualification from being an elector*[36] *or as a result of their being excused for cause. Similar considerations apply to those who are charged under Commonwealth legislation, who are found unfit to be tried, and become the subject of a detention order following the finding of a prima facie case.*[37]

3.26 Next, we consider it necessary to include a proviso similar to that appearing in most other Australian jurisdictions creating an exception where the sentence of imprisonment has subsequently been quashed on appeal, either wholly, or converted to a non-custodial sentence, or becomes the subject of a pardon.

3.27 We do not, however, favour attempting an exercise which would define, in any more specific way than that outlined above, a regime that would fix varying periods of disqualification related to specific offences. Any such exercise would become extremely complex, would be largely subjective, and would fail to take into account the varying degrees of objective and subjective criminality involved in individual offences within each category.

3.28 What is required is a clear and workable set of criteria which potential jurors can understand, which is shorn of the anomalies or uncertainties which currently exist in relation to this item, and which could be detected by automated inquiry of the national criminal database, in similar fashion to that available in Victoria, or at least by

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34. Juries Act 2003 (Tas) s 1(4); and Juries Act 1963 (NT) s 10(1)(a).
35. Mental Health (Criminal Procedure) Act 1990 (NSW) s 23.
36. Parliamentary Electorates and Elections Act 1912 (NSW) s 21(a).
37. Pursuant to Crimes Act 1914 (Cth) s 20BB or s 20BC.

extending to the Sheriff access to the criminal history database maintained by the NSW Police.

RECOMMENDATION 4

A person should be excluded from jury service for life if they have been sentenced to imprisonment for:

(a) any offence for which life imprisonment is the maximum available penalty;
(b) any offence constituting a "terrorist act" punishable under State or Federal law; and
(c) any public justice offence under Part 7 of the *Crimes Act 1900* (NSW).

A person should be excluded from jury service for 10 years from the date of expiry of any sentence or sentences of imprisonment aggregating three years or longer.

A person should be excluded from jury service for five years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years, but exceeding six months, imposed in respect of an indictable offence.

A person should be excluded from jury service for two years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years in respect of a summary offence, and aggregating less than six months in respect of any indictable offence.

A "sentence of imprisonment" should include: home detention, periodic detention, a sentence of imprisonment that has been suspended, and a sentence of imprisonment by way of compulsory drug treatment detention; and should not include a sentence of imprisonment that has subsequently been quashed on appeal, either wholly, or converted to a non-custodial sentence, or become the subject of a pardon.

A person on parole or released on probation after serving part of a sentence of imprisonment should be taken to be serving the sentence until expiry of the overall term.

RECOMMENDATION 5

People who are subject to limiting terms under the *Mental Health (Criminal Procedure) Act 1990* (NSW), or detention orders under *Crimes Act 1914* (Cth) Part 1B, Division 6, should be excluded from jury service only during the currency of the limited term or detention order.

JUVENILE OFFENDERS IN DETENTION

3.29 As the legislation is currently structured, the effective disqualification period for people who have been detained in a detention centre or other institution for juvenile offenders is three years, and is defined in somewhat different terms, in that it depends on the person having "been found guilty of an offence".[38] *This expression is potentially ambiguous, although it most probably embraces offenders who have pleaded guilty to a charge. Moreover, it is a definition that may not adequately reflect the available sentencing discretions and practices in relation to young offenders.*[39]

3.30 Otherwise, it shares similar definitional difficulties to those discussed in relation to adult imprisonment, namely, whether the three-year period dates from release from detention, or from the expiry of the control order or sentence as a whole, and what the position is where the relevant sentence or order is later quashed on appeal or converted to a non-custodial sentence, or where a pardon is granted. Additionally, it applies to a person who is detained for any period, irrespective of the nature and seriousness of the offence, or of the duration of the sentence or control order.

3.31 Some submissions supported a shorter period of exclusion for young people who have served a period in custody,[40] *chiefly upon the basis that their rehabilitation would be encouraged by their reintegration into society with full rights once they had attained the age of 18 years. Others suggested the disqualification should only apply to those dealt with according to law in the District or Supreme Courts.*[41]

3.32 This head of disqualification is likely to apply to a relatively small group of offenders. In the 2005/2006 financial year, 468 young

38. *Jury Act 1977 (NSW) Sch 1 item 2.*
39. *Under Young Offenders Act 1997 (NSW) and Children (Criminal Proceedings) Act 1987 (NSW).*
40. *NSW Public Defender's Office, Submission, 4; M J Stocker, Submission, 6; J Goldring, Submission, 2; Consultation.*
41. *Criminal Justice Agencies, Consultation.*

people were admitted to detention centres or other institutions for juvenile offenders under control orders.[42]

3.33 Some of these offenders may have attained the age of adulthood. A discretion exists in a sentencing judge, when sentencing an offender under the age of 21 years, to direct that they serve the whole or any part of that sentence as a juvenile offender[43] *although, effectively, not beyond the age of 21.5 years.*[44]

3.34 Conversely, some young offenders who commenced their detention in Juvenile Justice Centres may be transferred to a correctional centre, including an adult correctional centre, for example, when the Director General is satisfied that their behaviour warrants such an order.[45] *Those offenders and other offenders who, while juveniles, were dealt with according to law for serious crimes and transferred from a detention centre to an adult correctional centre would presumably be subject to the longer period of disqualification under item 1 of the Schedule.*

3.35 Otherwise, the potential size of the group caught by this category is limited by the fact that juror eligibility depends upon the person attaining the age of 18 years, and by the further fact that control orders, in particular, tend to be relatively short, the average being in the order of six months.[46]

3.36 We recognise the force of the argument that the rehabilitation of young offenders, and their reintegration into society as quickly as possible, and with full rights, is important. However, the rate of recidivism for young offenders is high. A study of 5,476 young people aged between 10 and 18 years who made their first appearance in the Children's Court in 1995 showed that, by the end of 2003, 68% of them had reappeared at least once in a criminal court.[47]

3.37 To a significant extent, regrettably, those young people who fall foul of the criminal justice system tend to come from dysfunctional and

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42. *Information supplied by Jennifer Mason, Director General, Department of Juvenile Justice, 1 May 2007.*
43. *Children (Criminal Proceedings) Act 1987 (NSW) s 19.*
44. *The eligibility ceases at 21 years, unless the term of the sentence or any non parole period will end within the following six months, in which case the detention can continue for that further period: Children (Criminal Proceedings) Act 1987 (NSW) s 19.*
45. *Children (Detention Centres) Act 1987 (NSW) s 28.*
46. *Information supplied by Jennifer Mason, Director General, Department of Juvenile Justice, 1 May 2007.*
47. *S Chen, T Matrugliou, D Weatherburn, and J Hua, The Transition from Juvenile to Adult Criminal Careers, Crime and Justice Bulletin, No 86 (NSW Bureau of Crime Statistics and Research, 2005), 2.*

deprived backgrounds, to have low levels of literacy and to have substance abuse problems. Moreover, many are likely to be living on the streets, disinterested in registering as electors, and difficult to trace because of their itinerant lifestyle.[48] *While these factors may mean that it is impractical for such young persons to serve as jurors, we also recognise that a rehabilitated offender with a background of offending in adolescent years may be better placed than others to understand or interpret offending by similarly situated defendants.*

3.38 While we have considered whether the three years disqualification is excessive, particularly for those who may have offended once and been subjected to a short term control order, we have concluded that any variation in that period would involve little more than tokenism. Such a change would have little impact on the jury pool, and would overlook the pragmatic considerations relative to juvenile offending and the associated anti-social attitudes.

3.39 Accordingly, we do not recommend any change in this item beyond clarifying that:

- *it does not apply where the sentence or control order is later quashed on appeal or converted to a non-custodial sentence, or where the offender receives a free pardon;*
- *the period of disqualification runs from the time of the expiry of the control order or sentence, and not from the time of release from detention;*
- *the expression "detention centre or other institution for juvenile offenders" includes Juvenile Justice Centres.*

3.40 Otherwise, we consider it appropriate that young offenders who commence their sentences in juvenile detention, but who are later transferred to adult correctional centres to complete their sentences, be treated as if they fall within the adult offender category. Those offenders who have been permitted to complete sentences or control orders in detention or correctional centres for juveniles up to the age of 21.5 years should be treated according to this category of ineligibility.

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48. See, eg, D Weatherburn and B Lind, Social and Economic Stress Child Neglect and Juvenile Delinquency (NSW Bureau of Crime Statistics and Research, 1997); J Baker, Juveniles in Crime - Part 1: Participation Rates and Risk Factors (NSW Bureau of Crime Statistics and Research, 1998).

RECOMMENDATION 6

A person should be excluded from jury service for three years from the date of expiry of any sentence or control order served in a detention centre or other institution for juvenile offenders.

The exclusion should not apply where the sentence or control order is later quashed on appeal or converted to a non-custodial sentence, or becomes the subject of a pardon.

A person on parole or released on probation after serving part of a sentence or control order should be taken to be serving the sentence until expiry of the overall term.

"Detention centre or other institution for juvenile offenders" should include Juvenile Justice Centres.

PEOPLE BOUND BY ORDERS OF A CRIMINAL COURT

3.41 NSW currently disqualifies people who are bound by orders of a court in criminal proceedings, including those who are subject to parole orders, community service orders, apprehended violence orders, orders disqualifying them from driving a motor vehicle, and recognizances.[49] *Unlike the grounds for disqualification previously considered, this head of disqualification does not continue once the order has been discharged or has run its course. Most other Australian jurisdictions include a similar range of non-custodial orders as a ground for disqualifying people from jury service.*[50]

3.42 Some submissions contended that being subject to non-custodial orders should not be a ground for disqualification.[51] *One submission noted that people who are subject to such orders "have not been found to be incapable or unsuitable for living and participating in the community",*[52] *although this does need to be understood in the light of the fact that their capacity to do so is subject to the conditions or restrictions attaching to the relevant order. Another, however, preferred to retain the current provisions excluding people who are subject to non-custodial orders from serving as jurors.*[53]

49. *Jury Act 1977 (NSW) Sch 1 item 3.*
50. *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).*
51. *NSW Public Defender's Office, Submission, 4; Redfern Legal Centre, Submission, 6; J Goldring, Submission, 2.*
52. *Redfern Legal Centre, Submission, 6.*
53. *NSW Jury Taskforce, Submission, 1.*

3.43 In addition to the general reasons given above in relation to people with criminal histories, the determinative factor in excluding those who are bound by orders of a criminal court is that, while these orders are in force, the offender is very close to the criminal justice system. He or she is also likely, in some cases, to be under continuing supervision by the Probation and Parole Service, Juvenile Justice or other similar bodies, and potentially brought back for further consideration in the event of any breach.

3.44 Several of the orders contemplated by this category cannot be strictly said to have been made "pursuant to a criminal charge". The legislative intention is no doubt clear, but there would be merit in rewording the item by adding the words "or consequent upon" after the words "pursuant to".

3.45 We also propose the amendment of this item so as to make it clear that the wording is inclusive so as to encompass other potential orders which may become available in the future and which are of a similar kind.

3.46 For greater certainty, we consider it desirable that the existing list should be supplemented to include all available orders that would currently come within the description of an order made pursuant to or consequent upon a criminal charge or conviction not including an order for compensation. The advantage of express reference to these orders is to make potential jurors aware that this head of disqualification may apply in their case, otherwise there is a risk of them reading this exclusion as exhaustive in relation to the orders that give rise to disqualification. To some extent, this could be ameliorated by cross-checking with the national criminal database or with NSW Police records, although self-identification will continue to be important, particularly for people who have changed their names and places of abode.

3.47 We next deal with these individual orders.

Apprehended violence orders

3.48 Apprehended violence orders are expressly mentioned, and presumably include both apprehended domestic violence orders and apprehended personal violence orders.[54]

3.49 The Victorian Parliamentary Law Reform Committee considered a proposal that people subject to an intervention order under the Crimes (Family Violence) Act 1987 (Vic) should be disqualified. The

54. Crimes Act 1900 (NSW) Part 15A.

Committee rejected the proposal on the grounds that such orders "do not result from a criminal proceeding and they do not constitute a criminal sanction".[55] We received several submissions to similar effect, noting that sometimes[56] such orders are made as a matter of consent, often against both parties, without any adjudication on the merits of the case, and without the party subject to the order having been charged with any offence.[57]

3.50 There are potentially two categories of people bound by apprehended violence orders: those bound as a result of an application being made to a court;[58] and those who are automatically bound as a result of being convicted of or pleading guilty to a relevant offence.[59] It would seem only the second category of people would fall within item 3 of Schedule 1, which depends on the existence of an order made "pursuant to a criminal charge or conviction".

3.51 It is by no means clear that those who are the subject of apprehended violence orders, particularly interim orders, are generally not law-abiding. It was for this reason that several submissions suggested that this head of disqualification was unnecessary.[60]

3.52 However, as it is qualified by the precondition that the order be made in a context where the person bound by the order had either been charged with an offence or convicted of it, we do not favour any relaxation of this head of disqualification, so long as it is confined to the currency of the order. Any further refinement that takes into account the circumstances giving rise to the order would require an investigation that would not be justified because of the considerable administrative difficulty involved.

3.53 We do, however, recognise that some jurors may be unaware of, or fail to appreciate the significance of the fact that disqualification depends on the order being made in the context of criminal proceedings. In such cases, they would assume that the disqualification applies, additionally, to those who have become the subject of an order pursuant to a complaint not amounting to, or associated with, a charge

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55. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.61].*
56. *Under Crimes Act 1900 (NSW) s 562BA and s 562BBA.*
57. *Legal Aid Commission of NSW, Submission, 8-9; Redfern Legal Centre, Submission, 6.*
58. *Crimes Act 1900 (NSW) s 562ZQ.*
59. *That is, an offence within s 545AB or one that answers the description of a domestic violence offence: Crimes Act 1900 (NSW) s 562ZU.*
60. *Legal Aid Commission of NSW, Submission, 8-9; Redfern Legal Centre, Submission, 6.*

or conviction. There would be merit in ensuring that any handbook of jury information makes this distinction clear.

Disqualification from driving a motor vehicle

3.54 We regard this category as problematic, as there are many circumstances in which a person can be disqualified from driving a motor vehicle either directly, as a consequence of a conviction for a motoring offence, or indirectly, as a sanction for a failure to pay a fine imposed at the time of such conviction. In some circumstances, the disqualification will be imposed automatically following a conviction,[61] giving rise to a question whether such a disqualification can be said to arise as the result of "an order", as distinct from an administrative act. In other cases, the disqualification will be imposed in the exercise of the court's sentencing discretion.

3.55 One submission argued that this was an unnecessary ground for disqualification from jury service.[62]

3.56 Moreover, similarly to the case with apprehended violence orders, some jurors may fail to appreciate that disqualification as a juror for this reason currently depends upon the existence of an order by a court disqualifying that person from driving a motor vehicle. A person would, for example, not be ineligible if his or her licence was suspended only because of accrued demerit points.[63]

3.57 A significant number of people are disqualified from driving each year in NSW. For example, 16,000 drivers are disqualified for driving with a prescribed content of alcohol.

3.58 Apart from NSW, a disqualification from driving a motor vehicle only excludes a person from jury service in South Australia, and then only if the disqualification is for a term in excess of six months.[64] This reflects the position in the original enactment of the Jury Act 1977 (NSW) which disqualified from jury service "a person who at any time within the last 5 years in New South Wales or elsewhere... has been disqualified by order of a court from holding a licence to drive a motor vehicle or omnibus for a period in excess of 6 months".[65] The provision was originally enacted, in 1977, to exclude from juries people convicted for driving under the influence. The government, at the time, preferred

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61. Road Transport (General) Act 1999 (NSW) s 25.
62. Legal Aid Commission of NSW, Submission, 9.
63. Under Road Transport (Driver Licensing) Act 1998 (NSW) s 14-s 18.
64. Juries Act 1927 (SA) s 12(1)(d)(ii).
65. Jury Act 1977 (NSW) Sch 1 item 3(d). This older form was abandoned in 1987 in favour of something akin to the current provision: Jury (Amendment) Act 1987 (NSW) Sch 1[22].

to err on the side of caution in excluding people who it considered would be unable to "point to their own good character and general fitness for the task" of serving as a juror.[66] *Driving under the influence was seen as "a highly anti-social act which rarely reaches the stage of a gaol sentence unless it has resulted in either the death of or serious injury to an innocent third party".*[67] *It was therefore necessary to add those disqualified from driving in order to exclude such people from juries.*

3.59 By reason of the range of circumstances giving rise to disqualification, the existence of automatic disqualification provisions, and the number of people potentially affected, we are of the view that this head of disqualification should only apply where the disqualification is for 12 months or more, regardless of the method by which the disqualification is imposed. That is, whether imposed by reason of a formal court order, or by reason of an automatic disqualification following upon a conviction, the majority of people convicted for high range prescribed content of alcohol and negligent driving causing death or grievous bodily harm are disqualified from driving for at least 12 months.[68] *This recommendation will not include people whose licences are suspended for accrued demerit points, as the maximum period of suspension available is only five months.*[69]

3.60 Given the variety of ways in which a driving disqualification can be imposed, and the different periods of disqualification that can be imposed, we consider that disqualification from driving for more than

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66. *NSW, Parliamentary Debates (Hansard) Legislative Council, 2 March 1977, 4647.*
67. *NSW, Parliamentary Debates (Hansard) Legislative Council, 2 March 1977, 4751.*
68. *For the period September 2004-December 2006, of the 97% of cases of high range pca that resulted in licence disqualification, over 99% were for 12 months or more; for the period January 2005-December 2006, of the 81% of cases of mid range pca that resulted in disqualification, 81% were disqualified for 12 months or more; and for the period January 2003-December 2006, of the 57% of cases of low range pca that resulted in licence disqualification, only 7.5% were disqualified for 12 months or more: Road Transport (Safety and Traffic Management) Act 1999 (NSW) s 9(2)(a), (3)(a) and (4)(a). For the period January 2003-December 2006, of the 85% of cases of negligent driving causing death that resulted in disqualification, over 99% were disqualified for 12 months or more; of the 74% of cases of negligent driving causing grievous bodily harm that resulted in disqualification, 95% were disqualified for 12 months or more; and of the 27% of cases of negligent driving that resulted in disqualification, only 4% were disqualified for 12 months or more: Road Transport (Safety and Traffic Management) Act 1999 (NSW) s 42(1)(a), (1)(b) and (1)(c).*
69. *Road Transport (Driver Licensing) Act 1998 (NSW) s 16(5).*

12 months should be listed as the relevant ground of exclusion arising from driver's licence disqualification however imposed.

Imprisonment for failure to pay a fine

3.61 Imprisonment for failure to pay a fine is a ground of disqualification in NSW, but only during the currency of the imprisonment. Such a term of imprisonment does not count as "any part of a sentence of imprisonment" for the purposes of disqualifying a person from jury service for 10 years.

3.62 It may be noted that imprisonment for failure to pay a fine is no longer available in NSW as a direct sanction and, to that extent, it might be thought unnecessary to maintain the relevant exceptions to items 1 and 2 of the schedule. However, it can still arise as a final sanction where a person fails to comply with the ascending ranges of sanctions available in the context of fine enforcement by the State Debt Recovery Office.[70]

3.63 It is also the case that imprisonment for non-payment of a fine continues to be available as a sanction in other jurisdictions. Clearly, someone who is currently serving a sentence for this reason is unable physically to perform jury service. Different considerations apply once any imprisonment or detention for this reason has run its course, and the current provision is in our view appropriate.

Awaiting trial or sentencing

3.64 In NSW, a person is disqualified who has been remanded "in custody pending trial or sentence" or released "on bail pending trial or sentence".[71]

3.65 Some submissions contended that people awaiting trial should be entitled to serve as jurors because of the presumption of innocence.[72] *Other submissions agreed that people awaiting trial or sentencing should be disqualified.*[73] *One submission suggested that the ban should apply only in relation to people facing trial for an offence that attracts a maximum penalty of more than two years imprisonment.*[74]

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70. *Fines Act 1996 (NSW) Part 4 Division 6.*
71. *Jury Act 1977 (NSW) Sch 1 item 3(c).*
72. *NSW Public Defender's Office, Submission, 4; J Goldring, Submission, 2. But see Commonwealth Director of Public Prosecutions, Submission, 2-3.*
73. *NSW Bar Association, Submission, [12]; M J Stocker, Submission, 6; Commonwealth Director of Public Prosecutions, Submission, 2-3.*
74. *Redfern Legal Centre, Submission, 6.*

3.66 While we recognise the importance of the presumption of innocence, we accept that people, whether bailed or not, and even where bail has been dispensed with, should continue to be ineligible to serve on juries when facing trial or sentence themselves. This is because it is difficult to see how they could give a completely detached consideration to the question of the guilt of others. Additionally, we believe that the public confidence in the justice system would be at risk if people facing trial or sentence were to serve on criminal juries.

3.67 In recommending that people released pending sentence should be included, we note that this category will include people on "Griffiths remands", those subject to intervention program orders,[75] and other forms of release for rehabilitation or participation in intervention programs.[76]

3.68 One submission drew attention to the fact that people who are awaiting trial or sentence, but for whom bail has been dispensed with, are not caught by the existing category.[77] We consider that this is an oversight that should be addressed.

Recognizance to be of good behaviour or to keep the peace

3.69 For similar reasons, we do not see any justification in relaxing this ground of disqualification during the currency of a bond, at least with respect to a good behaviour bond under s 9 of the Crimes (Sentencing Procedure) Act 1999 (NSW). People subject to the restrictions of a bond are potentially too close to the criminal justice system during its currency, given the possible consequences of a breach. Moreover, the public confidence in the system could be threatened by the knowledge that a person was able to serve as a juror, or did so, while subject to the conditions of a bond imposed as a consequence of a conviction.

3.70 It would, however, be appropriate to update the restriction by the use of the term "bond" in place of the term "recognizance" in order to reflect the current wording of the Crimes (Sentencing Procedure) Act 1999 (NSW).

3.71 We note that different considerations may apply to those subject to a bond as part of a conditional discharge[78] where, by reason of the trivial nature of the offence, or the extenuating favourable

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75. Criminal Procedure Act 1986 (NSW) Ch 7 Part 4.
76. Under Crimes (Sentencing Procedure) Act 1999 (NSW) s 11.
77. See NSW, Office of the Director of Public Prosecutions, Preliminary submission, 1.
78. Crimes (Sentencing Procedure) Act 1999 (NSW) s 10.

circumstances of the offender, the matter is dealt with without recording a conviction. There is a case for excepting this form of bond from the disqualification. However, the administrative difficulties in maintaining a distinction would militate against creating an exception.

Other orders

3.72 Since enactment of this provision, there have been significant developments in sentencing law and practice, and in the criminal law. These have resulted in the current wording of this head of disqualification not embracing all the potential orders that are now available once a person has been charged with an offence or convicted of it, and which do not involve imprisonment as a punishment. For example, it does not provide for those who are subject to extended supervision orders,[79] or orders under anti-terrorism legislation.[80] Similarly no mention is made of those who may be subject to:

- *a probation order;[81]*
- *a child protection order;[82]*
- *a registration requirement;[83]*
- *a pre-trial diversionary program;[84]*
- *a non-association or place restriction order;[85] or*
- *a requirement to participate in an intervention program, circle sentencing or other form of conferencing.[86]*

All of these available categories should be specifically listed so as to place potential jurors on notice of circumstances which would preclude them from serving.

3.73 We note that if our earlier recommendations concerning items 1 and 2 are accepted, dating the relevant period of disqualification from the time of expiry of the sentence rather than from the time of release, it might be strictly unnecessary to include parole orders in this category.

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79. Crimes (Serious Sex Offenders) Act 2006 (NSW) s 6.
80. Under the Terrorism (Police Powers) Act 2002 (NSW) and reciprocal legislation.
81. Crimes (Administration of Sentences) Act 1999 (NSW) Part 6.
82. Child Protection (Offenders Prohibition Orders) Act 2004 (NSW).
83. Child Protection (Offenders Registration) Act 2000 (NSW).
84. Juvenile and adult drug courts and Pre-Trial Diversion of Offenders Act 1985 (NSW).
85. Crimes (Sentencing Procedure) Act 1999 (NSW) s 17A.
86. Pursuant to Crimes (Sentencing Procedure) Act 1999 (NSW) Part 8C.

RECOMMENDATION 7

A person should be excluded from jury service when he or she is currently bound by an order made in NSW or elsewhere pursuant to or consequent upon a criminal charge or conviction not including an order for compensation.

All currently available orders that meet this description in NSW should be identified in a non-exhaustive statutory list.

The non-exhaustive list should include express reference to:

- an apprehended violence order under *Crimes Act 1900* (NSW) s 562ZU;
- a disqualification from driving a motor vehicle, but only where the disqualification is for 12 months or more;
- an order committing a person to prison for failure to pay a fine, but only so as to disqualify that person during the currency of the imprisonment;
- a remand in custody pending trial or sentence;
- a release pending trial or sentence, including a release under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11, whether on bail or not;
- a bond under s 9 or s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW);
- a parole order;
- a community service order;
- an extended supervision order;
- an order under anti-terrorism legislation;
- a probation order;
- a child protection order;
- a child protection registration requirement;
- a non-association or place restriction order; and
- a requirement to participate in pre-trial diversionary programs, intervention programs, circle sentencing or other forms of conferencing.

IDENTIFYING CRIMINAL HISTORIES

3.74 At present, the Sheriff's Office in NSW does not have direct access to criminal records or to any database maintained by Corrective Services or Juvenile Justice. It relies on people who are disqualified identifying themselves, or upon such people being identified by those who may be involved or interested in the trial for which they are called. It cannot be ruled out that juries may, from time to time, include one or more members who may fall within one of the categories of disqualification.[87] *A recent case has highlighted the issue, where a*

87. *Such concerns have not been limited to the present regime, with concerns about people charged or convicted of serious offences serving as jurors being expressed in NSW in 1949 and England in 1965: See Sydney Morning Herald*

disqualified driver was identified part way through a trial, resulting in the discharge of the jury in question.[88]

3.75 In other jurisdictions, the Sheriff has a statutory right to obtain information about criminal histories of people who may be selected for jury service. For example, 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.[89] *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 disqualified or not.*[90] *A similar provision is in place in Tasmania, where 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.*[91]

3.76 In Victoria, which also has a similar provision,[92] *the Juries Commissioner arranges for an electronic national criminal records check to be made against all people who may potentially be required for jury service, by reference to the categories of exclusion applicable in that State. The response received may be "yes" or "no" according to whether or not that person is recorded on the register, or "pending", in which case further investigation may be required, for example, to determine whether some entry in another State or Territory may have an equivalence to one of the Victorian disqualification categories. It also addresses this ground of disqualification by a specific question in the questionnaire given to prospective jurors.*

3.77 This system may not necessarily pick up a juror who has undergone a name change and who elects not to disclose a prior conviction but, to date, there has been a high level of compliance with juror self-identification[93] *and the system appears to work well.*

(27 March 1949), 1; United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [95], [132].

88. *This was because irregularities are only cured if discovered once the verdict has been delivered: Petroulias v The Queen [2007] NSWCCA 134.*
89. *Juries Act 1967 (ACT) s 24(4) and (5).*
90. *Juries Act 1927 (SA) s 12(1a).*
91. *Juries Act 2003 (Tas) s 24. Such information is presumably used to allow challenges to particular jurors. 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: Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [5.17]. But see Katsuno v The Queen (1999) 199 CLR 40.*
92. *Juries Act 2000 (Vic) s 26.*
93. *R Monteleone, Consultation.*

RECOMMENDATION 8

The Sheriff should have access to criminal records databases in order to determine whether potential jurors should be excluded from jury service.

4. Occupational ineligibility

- The Governor
- Judicial officers and coroners
- Members or officers of the Executive Council
- Members of the Legislative Council or Legislative Assembly
- Officers and other staff of the Parliament
- Lawyers
- Public sector employees
- Ombudsman and Deputy Ombudsman
- Spouses and partners of ineligible people
- Civil juries

4.1 In NSW, a person is currently ineligible to serve as a juror[1] if he or she comes within the following occupational categories:

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.[2]*

4.2 The NSW categories of occupational ineligibility for jury service can be traced to the 1965 report of the UK Departmental Committee on Jury Service, which recommended that ineligibility by reference to occupational category should apply to those connected with the administration of law and justice.[3] The suggested rationale lies in the desirability of preserving community confidence in the impartiality of the criminal justice system.

4.3 We take the view that the categories of people who are excluded from serving as jurors should be governed by this consideration, and that this heading should be confined to those who have an integral and substantially current connection with the administration of justice, most particularly criminal justice, or with the formulation of policy affecting its administration, and to those who perform special or personal duties to the State.

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1. *Jury Act 1977 (NSW) s 6(b).*
2. *Jury Act 1977 (NSW) Sch 2.*
3. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [101].*

4.4 We also note that there is a degree of overlap between some of the categories, as well as some imprecision in their definition, which could give rise to an uncertainty as to the extent of their reach. This uncertainty is undesirable in the current system because of the consequences of ineligible people being empanelled and serving, as well as the penalties that may be imposed on people who provide false information concerning their eligibility. The possibility that the presence of an improperly empanelled juror will lead to a retrial[4] has led to the Sheriff's Office erring on the side of caution in excusing potential jurors and, thereby, reducing the number of people available to serve.

4.5 We shall now deal with each of the existing categories.

THE GOVERNOR

4.6 We accept that the Governor and any person acting as Governor should continue to be ineligible because the holder of that office represents the Crown, in whose name prosecutions are conducted. A person "acting as Governor" will usually either be the Chief Justice (as Lieutenant Governor) or President of the Court of Appeal, who would each be independently ineligible as current judicial officers.[5]

RECOMMENDATION 9

The Governor and anyone acting as Governor should be excluded from jury service.

JUDICIAL OFFICERS AND CORONERS

4.7 Judicial officers and coroners are permanently ineligible in all Australian jurisdictions.[6] In the United States, it has become common for judges to serve on juries, and some judges have written positively about their experience,[7] regarding it as an opportunity which has

4. *See para 11.32-11.34.*
5. *See para 4.7.*
6. *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 cl 2; Juries Act 1963 (NT) Sch 7; Juries Act 1967 (ACT) Sch 2 Part 2.1 items 2, 13, 16.*
7. *See, eg, R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 147-148; S S Abrahamson, "Justice and Juror" (1986) 20 Georgia Law Review 257, 276-278, 296-297; and C L Hinchcliff, "Portrait of a juror: A selected bibliography" (1986) 69 Marquette Law Review 495, 496-499.*

enhanced their performance as judges by reason of the insight gained into the workings of a jury. Several judges in this State have indicated that they would welcome a similar opportunity.

4.8 The Auld review recommended the removal of this category of ineligibility. It did, however, identify one practical difficulty in rendering judicial officers eligible for jury service, namely, that "potential judge/jurors may often know or be known to the trial judge or advocates or others involved in the trial". Lord Justice Auld noted that this could compromise their independence and/or, "dependent on their seniority or personality", inhibit the trial judge or advocates in "their conduct of the [particular] case".[8] The solution, it was suggested, lay in the ability of the judicial officer in question to seek to be excused from service in that trial.

4.9 As a result of amending legislation in response to the Auld review,[9] judicial officers in England and Wales are now eligible for jury service and routinely serve as such. The Department for Constitutional Affairs has issued guidelines which contemplate the deferral of service where judicial officers seek to be excused on the grounds that they may be known to one of the parties involved in a trial. In the normal course of events, the guidelines encourage deferral to an alternative court where similar reasons for an application may not exist.[10]

4.10 Some submissions suggested that judicial officers and coroners, as a class, should now be eligible to serve.[11] Most other submissions, however, suggested that judicial officers and coroners should continue to be ineligible.[12]

4.11 One submission noted that the geographic concentration of courts and the relatively small size of the legal profession means that judicial officers serving as jurors in NSW are likely to know the trial judge and to be known by the lawyers in the case. Deferral to another time in another court may, therefore, not be so effective a solution in this State.

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

9. Criminal Justice Act 2003 (Eng) Sch 33.

10. England and Wales, Department for Constitutional Affairs, "Guidance for summoning officers when considering deferral and excusal applications", [18] «http://www.hmcourts- service.gov.uk/docs/guidance for_summoning officers_0405%20.doc» (accessed 20 October 2006).

11. NSW Public Defender's Office, Submission, 4-5; M J Stocker, Submission, 6; NSW Bar Association, Submission, 4.

12. Redfern Legal Centre, Submission, 7; J Goldring, Submission, 3; NSW Jury Task Force, Submission, 1; NSW Young Lawyers, Submission, 7-8; A Abadee, Consultation.

It was also said to be undesirable to disrupt the business of courts whose judicial officers are called away as jurors, even though they are highly likely to be the subject of a peremptory challenge or to be exempted for good cause, either because they are too close to the judge or lawyers in the trial, or because they have had some prior knowledge of the accused when appearing for, or sitting in judgment on, him or her.[13] *There is also the further consideration that Supreme Court judges may have to stand aside from the Court of Criminal Appeal in any appeal involving that party if they served as a juror in his or her trial.*

4.12 We agree that, for these reasons, judicial officers and coroners should continue to be excluded from juries while they remain in office. We have, however, considered whether former judicial officers or coroners should continue to be excluded, and whether they should be eligible to serve where they have not held a permanent or acting commission for a certain number of years. Differing views were expressed in our consultation with representatives from the criminal justice system. Some people at that meeting suggested that retired judicial officers should be immediately available to serve as jurors, while others recommended a qualifying or cooling-off period.[14]

4.13 Given the current compulsory age of retirement of 72 years for judicial officers or 75 years for acting judges, there may not be much opportunity for them to serve as jurors. However, it is a fact that many judicial officers do retire before reaching the compulsory retirement age. They would have no difficulty in performing jury service, subject to the need to apply to be excused if they feel that they are still too close to the judge, or the lawyers, or the parties involved.

4.14 The satisfactory experience of service by judges in the US and England and Wales leads us to the view that judicial officers and coroners should be eligible to serve as jurors once a period of three years has passed from the date of the termination of their last commission as a judicial officer or acting judge. This would provide a reasonable period of absence from direct contact with the criminal law and from those who are involved in its administration.

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13. NSW Bar Association, Submission, [17].
14. Criminal Justice Agencies Consultation.

RECOMMENDATION 10

Judicial officers, including acting judicial officers, should be excluded from jury service during the currency of their commission and for three years from the date of the termination of their last commission.

MEMBERS OR OFFICERS OF THE EXECUTIVE COUNCIL

4.15 We accept that Ministers of the Crown as members of the Executive Council[15] and its officers should continue to be ineligible to serve as jurors while holding such office. Reasons for this position include:

- *their direct involvement in the promotion and passage of legislation affecting the criminal law;*
- *their responsibility for the enforcement or the administration of laws of the State; and*
- *their need to attend the regular meetings of the Executive Council.*

4.16 No submissions treated members of the Executive Council as a group separately from their consideration of Members of Parliament as a group. The general opinion in one consultation was that Ministers of the Crown should be excluded,[16] while another considered that they should not be excluded.[17]

RECOMMENDATION 11

Members or officers of the Executive Council should be excluded from jury service.

MEMBERS OF THE LEGISLATIVE COUNCIL OR LEGISLATIVE ASSEMBLY

4.17 In common law jurisdictions, the question of eligibility or otherwise of Members of Parliament is generally governed by two distinct sources of law.[18] First, by an immunity that attaches at common law to Members of Parliament that prevents members being compelled to attend other courts because of the superior claims of Parliament to their attendance. Secondly, by statute rendering

15. *Ministers are appointed from among the members of the Executive Council: Constitution Act 1902 (NSW) s 35E(1).*
16. *Criminal Justice Agencies Consultation.*
17. *A Abadee, Consulation.*
18. *See generally R v Richards; ex parte Fitzpatrick and Browne (1955) 92 CLR 157.*

Members of Parliament ineligible for jury service, or granting them an exemption as of right.

Common law immunity

4.18 One of the ancient privileges that attaches to a Member of Parliament is the right to exemption from jury service. The immunity was confirmed by a resolution of the House of Commons in 1826, which stated that it is "amongst the most ancient and undoubted privileges of Parliament that no Member shall be withdrawn from his attendance on his duty in Parliament to attend any other court".[19] May's Parliamentary Practice has observed that, while it is unlikely that any house of Parliament would treat the summoning of a Member for jury service as a breach of its privileges, it could treat as a breach of its privileges "any refusal to excuse a Member... who is summoned as juror from attending or serving, or any attempt to punish [that Member] for not attending or for refusing to serve as a juror".[20]

4.19 The question of the application of this ancient immunity to Members of the Parliament of NSW has been the subject of some controversy.[21] This arises from the fact that the NSW Parliament is the only parliament in Australia which has not legislated to define its privileges, arguably leaving to it only those powers that are necessary "for the proper exercise of the functions it was intended to execute".[22] However, the weight of opinion appears to be in support of the continued existence of the immunity from jury service.[23]

4.20 The extent of the immunity is also uncertain. One commentator has suggested that Members of the House of Commons, if otherwise qualified to serve as jurors, were liable to serve when the Parliament was not sitting.[24] If the immunity is related to the privilege of freedom from arrest, it could arguably be said to apply until 40 days after a

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19. *Quoted in C J Boulton, Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament (Butterworths, 1989), 101.*
20. *C J Boulton, Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament (Butterworths, 1989), 101.*
21. *Parliament of NSW, Parliamentary Privilege, Report from the Joint Select Committee of the Legislative Council and Legislative Assembly (1985), 14-19. See also J Quick and R R Garran, The Annotated Constitution of the Australian Commonwealth (1901), 503-504.*
22. *Kielley v Carson (1842) 4 MooPC 63; 13 ER 255. But see K Roberts-Wray, Commonwealth and Colonial Law (Stevens and Sons, 1966), 383-387.*
23. *J R A Dowd, Parliamentary Privilege in New South Wales, Discussion Paper (Legislation and Policy Division, NSW Attorney General's Department, 1991), 12.*
24. *E Campbell, Parliamentary Privilege in Australia (Melbourne University Press, 1965), 72.*

prorogation or dissolution of the Parliament and for 40 days before the next appointed meeting.[25]

Statutory exemption

4.21 In NSW, a person is ineligible to serve as a juror if he or she is a Member of the Legislative Council or the Legislative Assembly.[26] *This is still the case in all other Australian jurisdictions.*[27] *Some jurisdictions also ban former Members of Parliament from jury service for certain periods of time, such as five or 10 years.*[28]

4.22 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".[29] *This was the case in England and Wales until recent amendments which removed the right of Members of Parliament to claim exemption as of right. Lord Justice Auld, in his 2001 review, did not consider Members of Parliament separately from the holders of other positions who were then able to claim exemption as of right in England and Wales. He noted that, while there may be good reason to excuse such people "where it is vital that they are available to perform their important duties over the period covered by the summons", he did not see any reason why their position alone should entitle them to be excused as of right.*[30]

4.23 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

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25. *C J Boulton, Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament (Butterworths, 1989), 101-102. The privilege is available to members of the Commonwealth Parliament for five days either side of a day on which the member is required to attend either the Parliament or one of its committees: Parliamentary Privileges Act 1987 (Cth) s 14.*
26. *Jury Act 1977 (NSW) Sch 2 item 5.*
27. *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 cl 2; 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.*
28. *Juries Act 1957 (WA) Sch 2 Part 1 cl 2; Juries Act 2000 (Vic) Sch 2 cl 1(i).*
29. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [148].*
30. *R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 150.*

branches of government.[31] In Victoria, ineligibility now applies to anyone who has been a Member of Parliament at any time within the preceding 10 years.[32]

4.24 The Law Reform Commission of Western Australia also 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 additionally concluded 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.[33]

Submissions

4.25 Some submissions considered that the continued ineligibility of Members of Parliament could no longer be justified.[34] One submission added that the direct participation as jurors in criminal trials could usefully enhance members' knowledge and appreciation of the workings of the justice system.[35]

4.26 Others referred to the doctrine of separation of powers as a reason for the continued ineligibility of Members of Parliament.[36] However, the doctrine of separation of powers does not, in our view, provide any logical basis for the exclusion of Members of Parliament because jurors serve in a private capacity. The doctrine has no basis historically, since the common law immunity derives from the Parliament's historical status as a court.

4.27 Two submissions, in supporting the continued ineligibility of Members of Parliament, suggested that some members in high profile cases that attract media attention could be subjected to intense pressure, to the detriment of their political careers and duties.[37] There was also a concern that their profile within the community might

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31. Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.154].
32. Juries Act 2000 (Vic) Sch 2 cl 1(i).
33. Law Reform Commission of Western Australia, Exemption from Jury Service, Report, Project No 71 (1980), [3.12].
34. NSW Bar Association, Submission, [21]; NSW Public Defender's Office, Submission, 5; M J Stocker, Submission, 6; NSW Jury Taskforce, Submission, 2.
35. NSW Public Defender's Office, Submission, 5; M J Stocker, Submission, 6.
36. Legal Aid Commission of NSW, Submission, 10; Redfern Legal Centre, Submission, 8; NSW Young Lawyers, Submission, 9.
37. Legal Aid Commission of NSW, Submission, 10; J Goldring, Submission, 3.

jeopardise their anonymity and personal safety if they were to serve. Such concerns, however, fail to take account of the prohibition on, and substantial penalties for, publishing, broadcasting or otherwise disclosing "any information which is likely to lead to the identification of a juror or former juror in a particular trial or inquest".[38] Moreover, they fail to recognise that there are other well-known members of the community who would be recognised if required to sit as jurors, who do not have any entitlement to exemption as of right or to ineligibility, and whose only opportunity to avoid jury duty is to seek to be excused for cause.

The Commission's conclusion

4.28 It appears to be the case that the modern enactments making Members of Parliament ineligible for jury service go further than the ancient immunity. The provisions, for example, that formerly applied in Victoria, and England and Wales, granting members the right to claim exemption, were consistent with the immunity.

4.29 On the assumption that the current provisions of the Jury Act 1977 (NSW), making Members of Parliament ineligible to serve, have not, by implication, repealed the common law immunity, the repeal of these provisions now would allow the common law immunity to take effect again.[39]

4.30 The case for the continued ineligibility of Members of Parliament as jurors is, in our view, not as strong as that for Ministers of the Crown (as members of the Executive Council). Barring any other grounds for ineligibility, or any right to be excused, they can always apply to be excused for cause, particularly if the trial is itself a high profile trial.[40] In individual cases where a Member of Parliament has made public pronouncements in relation to the criminal law, or in relation to a course of criminal activity, which may give rise to an apprehension of bias he or she could be stood aside, excused for cause or even challenged for cause.

4.31 Our preferred position is to recommend the repeal of the ineligibility that currently applies to Members of Parliament, although preserving it for those members who are Ministers of the Crown. However, we recognise that in so doing, the common law immunity from jury service that attaches to Members of Parliament may remain. The preservation of this immunity, and its extent, is more properly one for Parliament itself to determine. Accordingly we recommend that

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38. Jury Act 1977 (NSW) s 68(1).
39. Compare Interpretation Act 1987 (NSW) s 30(1)(a).
40. See also the "high public profile" excuse, Recommendation 33(l), Chapter 7.

Parliament should give consideration to the question of the preservation of the statutory ineligibility and common law immunity of its members in relation to jury service and the extent of that immunity.

RECOMMENDATION 12

Parliament should give consideration to the question of the extent and preservation of the statutory exclusion and common law immunity of its members in relation to jury service.

OFFICERS AND OTHER STAFF OF THE PARLIAMENT

4.32 In NSW, ineligibility applies to "officers and other staff of either or both of the Houses of Parliament".[41] It is the broadest exemption available in this context of all the Australian jurisdictions.

4.33 Most submissions considered that people in this category should no longer be ineligible to serve.[42] Two submissions considered that they should be ineligible to serve,[43] one of them citing the doctrine of separation of powers as a justification.[44]

4.34 We do not see sufficient reason for the continuation of this category of ineligibility. It includes staff members whose position is not dissimilar from that of the personal staff of ministers or of public servants, who are currently eligible to serve, as well as those whose responsibilities have nothing to do with the development of policy or legislation. It will still be possible for people within this category to seek to be excused when parliamentary duties necessitate their personal attendance, for example, during sittings. The ability to be excused for good cause would be particularly relevant to senior officers whose attendance is necessary for the proper functioning of the Parliament while in session, such as the Clerks of each House, the Usher of the Black Rod and the Serjeant-at-Arms.[45]

41. *Jury Act 1977 (NSW) Sch 2 item 6.*
42. *NSW Bar Association, Submission, [21]; NSW Jury Taskforce, Submission, 2; M J Stocker, Submission, 6; J Goldring, Submission, 3; NSW Public Defender's Office, Submission, 6; Redfern Legal Centre, Submission, 2.*
43. *Legal Aid Commission of NSW, Submission, 10.*
44. *NSW Young Lawyers, Submission, 10.*
45. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.155].*

RECOMMENDATION 13

Officers and other staff of either or both of the Houses of Parliament should be eligible for jury service.

LAWYERS

4.35 Lawyers are currently the subject of exclusion under several separate categories. Since there is an overlap, we shall deal with each category in this section, although we note that the general category concerned with Australian lawyers effectively excludes lawyers as a class, for life, whether or not they also fall into other categories of disqualification.

Australian lawyers

4.36 In NSW, "an Australian lawyer (whether or not an Australian legal practitioner)" is currently ineligible to serve as a juror.[46] *Although a somewhat imprecise definition,*[47] *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 practising certificate.*[48]

4.37 While Victoria has a similar provision to the one in NSW,[49] *in all other Australian jurisdictions the restriction is limited to practising lawyers.*[50]

4.38 A traditional justification for excluding lawyers from juries is that they are thought to possess "legal knowledge and experience" that could possibly result in them exercising an "undue influence" on other jurors, and even usurping the role of the judge.[51] *However, it has also*

46. *Jury Act 1977 (NSW) Sch 2 item 7.*
47. *As it is in the context of legal professional privilege: see NSW Law Reform Commission, Uniform Evidence Law, Report 112 (2006), [14.82]-[14.100].*
48. *See Legal Profession Act 2004 (NSW) s 5 and s 6.*
49. *Juries Act 2000 (Vic) Sch 2 cl 1(e). See Legal Profession Act 2004 (Vic) s 1.2.2 and s 1.2.3.*
50. *Juries Act 2003 (Tas) Sch 2 cl 3; Juries Act 1927 (SA) Sch 3 cl 2; 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. The NT includes articled clerks, and Victoria and the ACT include employees of practising lawyers. See Juries Act 2000 (Vic) Sch 2 cl 2(c).*
51. *See, eg, 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; Queensland, Parliamentary Debates (Hansard) Legislative Assembly, 16 May 1996, 1192;*

been pointed out that equally they may assist in helping fellow jurors to clarify the issues,[52] inter alia, because of their experience in analysing facts and marshalling evidence.

4.39 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".[53] He noted 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 them to dominate their deliberations".[54] In England and Wales, the provisions making law and justice professionals ineligible to serve have now been repealed,[55] although the right to seek to be excused or deferred has been preserved. 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".[56] Similarly to judicial officers, lawyers now commonly serve as jurors without any apparent difficulty.

4.40 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".[57] This is certainly not the case today. The practising profession in NSW is now very large and dispersed. Moreover, it is a profession that is characterised by widely divergent areas of practice and specialisation, some of which have no contact with the criminal law and where, for many, obtaining a qualification as a lawyer provides little more than a

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New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), [189].

52. *Law Reform Commission of Western Australia, Exemption from Jury Service, Report, Project No 71 (1980), [3.19].*
53. *R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 147. See also Queensland, Parliamentary Debates (Hansard) Legislative Assembly, 5 December 1996, 5026.*
54. *R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 147.*
55. *Criminal Justice Act 2003 (Eng).*
56. *England and Wales, Department for Constitutional Affairs, "Guidance for summoning officers when considering deferral and excusal applications" Item 18 «http://www.hmcourts- service.gov.uk/docs/guidance_for summoning officers_0405%20.doc» (accessed 20 October 2006).*
57. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.83].*

background to their employment in government service or in the corporate business world.

4.41 The contention that lawyers would overawe or control the jury is unsupported by experience elsewhere, ignores the obligation of jurors to decide cases in accordance with the directions of the trial judge, and fails to take account of the role of the jury, which is to find facts.[58] *Moreover, there seems to be no reason in principle or otherwise to exclude lawyers who do not have any professional contact with the administration of the criminal law.*

4.42 It is our view that this category is unjustifiably wide and that lawyers as a class should now be eligible to serve as jurors, subject to the exceptions noted below with respect to those public sector lawyers who are employed or engaged in the provision of legal services in criminal cases, or who hold certain defined offices central to the administration of the criminal justice system, and who currently fall, additionally, within the specific category of exclusion applicable to such people.

Crown Prosecutors, Public Defenders, Director or Deputy Directors of Public Prosecutions and Solicitors for Public Prosecutions

4.43 We accept that the case for maintaining the ineligibility of Crown Prosecutors, Public Defenders, Directors or Deputy Directors of Public Prosecutions and Solicitors for Public Prosecutions, is significantly stronger than that which applies to Australian lawyers as a class, by reason of their very close connection with the administration of the criminal justice system, both in relation to the prosecution of individual cases and the development of policy. We are satisfied that such ineligibility should continue. However, by reason of our recommendations in relation to the other group of lawyers which would fall within the class of Australian lawyers as a whole, we consider that it would be appropriate to add to this sub-group, those who hold the offices of Solicitor General, Crown Advocate and the Crown Solicitor. They are routinely expected to advise on matters concerning the criminal law, and on occasions to appear in the Court of Criminal Appeal, or in the High Court, in criminal appeals. Their connection with the criminal justice system is as intimate as that of the holders of the other specific offices mentioned.

4.44 Their continued ineligibility under the present law on a permanent basis[59] *is less obvious. There was, in fact, some support, in*

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58. See NSW Bar Association, Submission, [14].
59. Jury Act 1977 (NSW) Sch 2 item 10.

consultations, for lawyers within this group being eligible to serve as jurors upon retirement.[60] *One argument in favour of permitting service after retirement was that officers within this grouping have regularly been appointed as judges, with power to conduct judge alone trials, and there is no question of them having to wait out a qualifying period before commencing judicial duties.*[61]

4.45 In our view, it would be appropriate that the ineligibility of lawyers within this category should expire three years after they cease to hold a relevant office. This would represent a sufficient period of separation from direct involvement in the criminal law and it would be consistent with the period that we consider appropriate for retired judicial officers[62] *and law enforcement officers.*[63]

People employed or engaged in the public sector in the provision of legal services in criminal cases

4.46 Although, as we have noted, some submissions supported the removal of exemptions for all lawyers,[64] *some other submissions supported the continued ineligibility of those principally or substantially engaged in the provision of legal services in criminal cases, whether on behalf of the prosecution or defence.*[65]

4.47 The touchstone for ineligibility for those that fall within this sub-category is that they provide "legal services". Although consistent with the definition adopted in the Legal Profession Act 2004 (NSW), that expression means "work done or business transacted, in the ordinary course of legal practice",[66] *a question does arise as to whether those who are currently ineligible under this heading include paralegals and other employees who provide support services for public sector agencies engaged in the prosecution or defence of criminal cases.*

4.48 Clearly, this head of ineligibility applies to lawyers employed or engaged by the Director of Public Prosecutions, the Solicitor for Public Prosecutions, the Legal Aid Commission, and the Aboriginal Legal Service. The argument for their continued ineligibility is much the

60. *Consultation.*
61. *Consultation.*
62. *See para 4.12-4.14.*
63. *See para 4.72.*
64. *NSW Bar Association, Submission, [13]; NSW Public Defender's Office, Submission, 4; M J Stocker, Submission, 6; Redfern Legal Centre, Submission, 7; NSW Jury Taskforce, Submission, 1; Consultation; A Abadee, Consultation. See also J Goldring, Submission, 3.*
65. *Legal Aid Commission of NSW, Submission, 10; Office of the DPP (NSW), Submission; NSW Young Lawyers, Submission, 8.*
66. *Legal Profession Act 2004 (NSW) s 4.*

same as that for police officers. The prosecution or defence of criminal cases is their primary day-to-day concern and they are too intimately connected with the matters that are likely to come before the courts. Their presence on a jury would inevitably give rise to an appearance of bias if their office or position were known, and inevitably they would be subject to a challenge for cause.

4.49 Having regard to the manner in which these agencies carry out their functions, there is a case for extending the ineligibility to paralegals who provide support services for such agencies directly related to the prosecution or defence of criminal cases. The Legal Profession Act 2004 (NSW) s 7 does not appear to acknowledge specific categories of employee, and it may be necessary to deal with this group by way of a note to the schedule. Otherwise, there is a risk of a public perception of bias arising from their access to knowledge not otherwise available to the public, or from their identification with the prosecution or defence as the case may be.

4.50 The position is less compelling, however, for administrative and clerical staff, particularly those of the Office of the DPP, the Public Defender and the Legal Aid Commission, who are not directly involved in matters before the courts and who would not seem to be currently ineligible. In our view, there is no reason for their inclusion within the general category of persons ineligible on this ground, although they would have the capacity to seek to be excused for cause if they felt that the particular nature of their duties affected their impartiality.

4.51 We consider that the exclusion should apply to lawyers and paralegals within this group only so long as they are employed or engaged in the public sector in the relevant field. We do not see any need for a cooling-off period in their case, and note that, unlike the ineligibility attaching to senior officers last considered, the current legislation only provides for their ineligibility during the period of their engagement or employment.

Lawyers in private practice who are employed or engaged in the provision of legal services in criminal cases

4.52 Lawyers in private practice who, from time to time, or in some cases regularly, conduct criminal trials or appeals on behalf of defendants or on behalf of the Crown currently fall within the general exclusion of lawyers as a class. However, if that ground of ineligibility as a class is removed, a question arises whether they should, nevertheless, remain ineligible for reasons similar to those applicable to their counterparts in the public sector.

4.53 We see no reason why those who have a casual or occasional involvement in the defence or prosecution of criminal cases should be

excluded from service as jurors. If they have a potential problem with a particular case or client, they could be expected to act professionally and apply to be excused.

4.54 This leaves for consideration the question whether those with a substantial involvement in the practice of criminal law should be excluded from juries. We recognise that any test of ineligibility depending on a criterion of "substantial involvement in the practice of the criminal law" or some similar criterion, would potentially raise questions of degree. This could give rise to a doubt about their eligibility, and consequently about the regularity of the empanelment of the jury. These factors, if identified during or after a trial, could, under the current law, give rise to the discharge of the jury during the trial, or to a post verdict appeal against conviction on the basis that a juror was improperly empanelled.

4.55 In deciding on the exclusion of this group of lawyers, a number of points should be considered. Previously, one reason advanced for excluding defence lawyers from juries was that, because of particular police practices, such as verballing and the planting of exhibits, they were likely to be antagonistic towards the police to the point where they might routinely reject their evidence. However, modern methods of gathering evidence, including taped interviews with suspects, surveillance footage, telephone and listening device intercepts, and scientific analysis have made juries less reliant on the kinds of evidence given by police that attracted criticism in the past. In eliminating undesirable police practices, they have removed one of the chief grounds for lawyers' alleged antagonism towards the police.[67]

4.56 Additionally, a characterisation of lawyers in private practice as being unable to give an unbiased consideration to all of the evidence presented in a case unfairly stigmatises them and falsely assumes that they have less interest in maintaining law and order than other members of the community.

4.57 In any case, the practice of the criminal law in NSW is so structured that those who specialise or practice substantially in this field, are readily identifiable, and will be likely to self identify, so that no difficulty should arise if someone with an obvious connection with the accused or witnesses is summoned or presents for empanelment and does not apply to be excused. Otherwise, the case for the maintenance of an appearance of justice is less compelling than that which would apply to lawyers employed or engaged in the public sector in the provision of legal services in these cases.

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67. See M Cunneen, "Getting it right: Juries in criminal trials" (2007) 90 Reform 43, 43.

4.58 Accordingly, we do not recommend that any separate category of exclusion should apply to those who fall within this group of lawyers, or to their staff.

The Commission's conclusion

4.59 The approach outlined in the preceding discussion would accord with the general tenor of many submissions. They accepted that there was no reason why lawyers should be excluded as a class,[68] and that the continuing ineligibility of any particular category of lawyers should be justified by reason of some close connection with the criminal justice system that would make it undesirable, in the interests of maintaining an appearance of justice, that a member of that category should serve as a juror.

4.60 This would still leave it open for individual lawyers falling outside the excluded categories to be excused for good cause, if their practice, responsibilities or friendships were such that they could not bring (or appear to bring) an unbiased mind to the trial.[69]

4.61 We recognise, however, that the limitation to practising lawyers in some jurisdictions is seen by some as a "sensible compromise".[70] If adopted as the touchstone, it would exclude those who we have singled out for particular exclusion, although along with a much wider group of lawyers.

4.62 If the decision is made that Australian lawyers should continue to be ineligible, then the class of ineligible lawyers should in our view be confined (as a fall-back option) to those currently practising as such in NSW.[71] This was supported by some submissions.[72] As already

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68. *Legal Aid Commission of NSW, Submission, 10; NSW Bar Association, Submission, [13]; NSW Public Defender's Office, Submission, 4; M J Stocker, Submission, 6; Redfern Legal Centre, Submission, 7; NSW Jury Taskforce, Submission, 1; Criminal Justice Agencies Consultation; A Abadee, Consultation. See also J Goldring, Submission, 3.*
69. *One submission suggested that a personal friendship with the trial judge or one of the lawyers involved in the case should be a ground of exemption for "good cause": NSW Bar Association, Submission, [13].*
70. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.88].*
71. *That is, an Australian Lawyer in accordance with Legal Profession Act 2004 (NSW) s 6(a): NSW Bar Association, Submission, [15].*
72. *NSW Young Lawyers, Submission, 7; J Goldring, Submission, 3; Legal Aid Commission of NSW, Submission, 10.*

noted, this is effectively the case in all other Australian jurisdictions, except Victoria.[73]

RECOMMENDATION 14

As a class, Australian lawyers should be eligible for jury service, subject to the exceptions noted below.

RECOMMENDATION 15

Ineligibility should continue to apply to lawyers who currently hold office as a:
- Crown Prosecutor;
- Public Defender;
- Director or Deputy Director of Public Prosecutions;
- Solicitor for Public Prosecutions;
- Solicitor General;
- Crown Advocate; or
- Crown Solicitor.

The exclusion of lawyers within this category should expire three years after they cease to hold any such office.

RECOMMENDATION 16

Australian lawyers and paralegals employed or engaged in the public sector in the provision of legal services in criminal cases should continue to be excluded from serving as jurors while so engaged or employed.

PUBLIC SECTOR EMPLOYEES

4.63 As we have noted, the Act renders ineligible certain people who are currently "employed or engaged (except on a casual or voluntary basis) in the public sector in the fields of:

- *law enforcement and criminal investigation;*
- *provision of legal services in criminal cases;*
- *administration of justice; and*
- *penal administration.*

4.64 We have already dealt with the sub-category of lawyers employed or engaged in the public sector in the provision of legal services in

73. Juries Act 2003 (Tas) Sch 2 cl 3; Juries Act 1927 (SA) Sch 3 cl 2; 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. But see Juries Act 2000 (Vic) Sch 2 cl 1(e); and Legal Profession Act 2004 (Vic) s 1.2.2 and s 1.2.3.

criminal cases.[74] *We now deal with the remaining groups of public sector employees falling within this head of ineligibility. As the following discussion will show, this category of ineligibility suffers from overlap between the individual sub-categories. For example, those involved in the "provision of legal services in criminal cases" could also be regarded as being employed or engaged in "law enforcement". Additionally, there is a separate specific category of ineligibility reserved for a "police officer" even though a person sworn as a police officer would also fall within the sub-categories applicable to those employed or engaged in "law enforcement", as well as in "criminal investigation". This category also suffers from considerable definitional uncertainty which should, so far as possible, be rectified.*

Law enforcement and criminal investigation, and police officers

Current NSW provisions

4.65 As we have observed, the Act renders ineligible people who are currently "employed or engaged (except on a casual or voluntary basis) in the public sector in law enforcement [or] criminal investigation",[75] *as well as separately excluding those who fall within the specific category of "Police officer".*[76] *Together, these criteria would exclude those who are centrally involved in the investigation and prosecution of criminality, that is members of the core agencies, namely the NSW Police Force, the Australian Federal Police, the Australian Crime Commission, the NSW Crime Commission, the Police Integrity Commission, and the Independent Commission Against Corruption. For those who fall within the more general subcategories relating to "law enforcement" and "criminal investigation", the ineligibility continues for so long as they are employed or engaged in the relevant positions. However, those who have at any time been a "police officer" are currently ineligible on a permanent basis.*[77] *The existence of this distinction gives rise to a question as to the identification of those who fall within the more general subcategories.*

Other Australian provisions

4.66 Serving police officers are expressly ineligible in most Australian jurisdictions.[78] *However, the restriction on members of law enforcement*

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74. See para 4.46-4.51.
75. Jury Act 1977 (NSW) Sch 2 item 8.
76. Jury Act 1977 (NSW) Sch 2 item 10.
77. Jury Act 1977 (NSW) Sch 2 item 10.
78. 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; Juries Act 1927 (SA) Sch 3 cl 2; Juries Act 1967 (ACT) Sch 2 Part 2.1, Item 10.

or criminal investigation agencies other than police, and on retired police officers, goes further in NSW than most Australian jurisdictions. The other States have expressed the ineligibility or exemption by reference to "members of the Police Force"[79] or "Police Officers".[80] Victoria is the only other State to exclude retired officers permanently.[81] Tasmania excludes former police officers for 10 years,[82] and WA excludes them for five years.[83]

Past reviews

4.67 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".[84] 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:

> *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.[85]*

4.68 The Auld Review played down the risk that a police officer (or prosecutor) "would not approach the case with the same openness of mind as someone unconnected with the legal system" adding:

> *I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have. Take, for example shopkeepers or house-owners who may have been burgled, or car owners whose cars may have been vandalised, many government and other employees concerned in one way or another with public welfare*

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79. *Juries Act 2000 (Vic) Sch 2 cl 1(g); Juries Act 1927 (SA) Sch 3 cl 2; Juries Act 1963 (NT) Sch 7.*
80. *Juries Act 1957 (WA) Sch 2 Part 1 cl 2(h); Juries Act 2003 (Tas) Sch 2 cl 5; Jury Act 1995 (Qld) s 4(3)(g); Juries Act 1967 (ACT) Sch 2 Part 2.1 Item 10.*
81. *Juries Act 2000 (Vic) Sch 2 cl 1(g).*
82. *Juries Act 2003 (Tas) Sch 2 cl 5.*
83. *Juries Act 1957 (WA) Sch 2 Part 1 cl 2(h).*
84. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [103].*
85. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [110].*

> *and people with strong views on various controversial issues, such as legalisation of drugs or euthanasia.*[86]

Lord Justice Auld concluded that it would be for the judge in each case to be satisfied that the presence of "the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias" so as to be distinguished from "other members of the public who would normally be expected to have an interest in upholding the law".[87]

4.69 The New York Jury Project concluded that the exemption of police officers was not justified because of the "large number of cases that do not implicate the special training or presumed biases of ... police officers, on which they could sit without any problem at all".[88] *This is not the case in NSW, where the vast majority of jury trials are of criminal matters.*

Submissions

4.70 Some submissions supported the removal of ineligibility for people falling within this category,[89] *while many other submissions supported their continued exclusion.*[90] *Some of those who supported the continued exclusion of "police officers" considered that the ineligibility should extend only for a limited period after retirement,*[91] *for the reason that, while actual or perceived biases could apply equally to retired officers as they could to serving officers, they would diminish over time.*[92] *There was some lesser support in consultations for former police officers being eligible to serve immediately upon retirement.*[93]

The Commission's conclusion

4.71 It is our view that serving members of the core law enforcement agencies mentioned at the commencement of this section who are actually engaged in criminal investigation and law enforcement should

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86. *R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 147.*
87. *R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 147.*
88. *The Jury Project, Report to the Chief Judge of the State of New York (1994), 32.*
89. *NSW Bar Association, Submission, [18]; M J Stocker, Submission, 6; A Abadee, Consultation.*
90. *Office of the DPP (NSW), Submission; NSW Public Defender's Office, Submission, 5; Redfern Legal Centre, Submission, 7; J Goldring, Submission, 3; NSW Jury Taskforce, Submission, 1 (Police officers only); NSW Young Lawyers, Submission, 8; Commonwealth Director of Public Prosecutions, Submission, 2.*
91. *Two years: NSW Public Defender's Office, Submission, 5; Redfern Legal Centre, Submission, 7.*
92. *Redfern Legal Centre, Submission, 7.*
93. *Criminal Justice Agencies Consultation.*

continue to be ineligible. This follows from the fact that the vast majority of jury trials are criminal, and from the further fact that the primary job of these officers is the detection and charging of crime, so that it is likely that they would be aware of, or have access to, information concerning suspects that would not be available to private citizens and could not be adduced in evidence. In our view, it is important to maintain the community confidence in the impartiality and fairness of the jury system, which might be threatened if police or those centrally involved in criminal law enforcement were permitted to serve as jurors.

4.72 However, we do not consider that their ineligibility should be permanent. It is a fact that many members of the core law enforcement agencies, and particularly the NSW Police Force, hold such positions for relatively short periods,[94] and that career change is now very common. After a sufficient period, such people should be free of the attitudes, associations and access to information that could lead to actual or perceived bias. We recommend that in this case the period of ineligibility be one of three years from retirement.

4.73 We next note that the sub-categories "law enforcement" and "criminal investigation" are not defined, and that any imprecision as to their breadth could give rise to uncertainty and difficulty in the administration of the Jury Act. Similar definitional uncertainty arises in relation to the potential reach of the expression "employed or engaged" in these areas, for example, concerning whether they are confined to investigators or extend to support and administrative staff.

4.74 As we have observed, the case for ineligibility is persuasive in relation to those people whose functions are exclusively, or principally, involved in detecting and investigating criminality, and in initiating or conducting prosecutions in relation to matters that are generally regarded as criminal offences.[95] Less clear is the position of the staff of other agencies providing support or forensic services for regular law enforcement agencies, such as the Australian Government Analytical Laboratories,[96] the NSW Department of Forensic Medicine, the Division of Analytical Laboratories (including related agencies such as the Department of Forensic Science Criminalistics), CrimTrac and

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94. NSW Police, Annual Report 2005-2006, 19, 109, 110.

95. Members of the AFP and members and examiners of the Australian Crime Commission are exempted under the Commonwealth Act: Jury Exemption Act 1965 (Cth) Schedule; and Jury Exemption Regulations 1987 (Cth) Reg 5(2)(h).

96. Chemists with the Australian Government Analytical Laboratories are exempted under Jury Exemption Regulations 1987 (Cth) Reg 5(2)(c) when their duties include appearing in court as expert witnesses.

Austrac; or that of the staff of other regulatory or government bodies which, as part of their wider charter, have some involvement in detecting and investigating or referring criminal activity to other law enforcement agencies for investigation or prosecution. These bodies include, at a Federal level, inter alia, the security agencies, the Australian Taxation Office, the Australian Customs Service, the Australian Securities and Investments Commission, and the Australian Competition and Consumer Commission.[97]

4.75 At the State level, there are a number of agencies with responsibilities for the enforcement of regulatory provisions, and for the enforcement of specific areas of legislation which create offences punishable by fine or otherwise. Their employees can be involved, for example, in investigating and prosecuting breaches in relation to road and public transport, fisheries, national parks, waterways, local government, occupational health and safety, cruelty to animals, the environment, and so on. Some of the employees of these agencies or departments hold office as special constables,[98] *while some who formerly held such office now derive their investigative and arrest powers under specific legislation.*

4.76 Not all of the members of staff of these agencies are employed directly in law enforcement or investigations; and, for most of them, their areas of concern are unlikely to be prosecuted in jury trials. Where they have had professional contact in relation to a particular case, or where they may be required to give evidence in relation to support services provided for such a case, they could expect to be excused for cause. Accordingly, we do not recommend that ineligibility attach as a class to the employees of these other agencies which might fall peripherally within the category of law enforcement if construed widely.

4.77 For similar reasons, we also do not consider that clerical, administration and support staff of the core policing agencies earlier mentioned should be excluded from jury service. Such an approach would be consistent with the narrower criteria in other States and Territories which apply only to sworn officers.

4.78 For more abundant clarity, we consider that it would be appropriate to include a description of the agencies in respect of which this category of ineligibility should apply, either in the schedule itself or by regulation, in place of the current somewhat general but imprecise criterion based simply on the employment or engagement of

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97. The Jury Exemption Regulations 1987 (Cth) will exclude some of these agencies and some of these staff.

98. Appointed under the Police (Special Provisions) Act 1901 (NSW).

individuals in "law enforcement" or "criminal investigation". The current criterion for ineligibility related simply or generally to employment or engagement in the public sector in law enforcement or criminal investigation would then be redundant. We consider that it would be provident to make it clear by note that the exclusion does not extend to clerical, administrative or support staff of these agencies.

RECOMMENDATION 17

People who are currently employed or engaged (except on a casual or voluntary basis) in the NSW Police Force, the Australian Federal Police, the Australian Crime Commission, the NSW Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption in law enforcement or criminal investigation, other than clerical, administrative or support staff, should be excluded from jury service. The exclusion should extend for three years after the termination of the relevant position or office.

Administration of justice and penal administration

4.79 Currently, those employed or engaged in the public sector in the administration of justice or penal administration are ineligible to serve as jurors.[99] Although the expression "administration of justice" is potentially ambiguous, several other jurisdictions include provisions of similar breadth. Victoria, like NSW, renders ineligible a person who is "employed or engaged... in the public sector" in the "administration of justice or penal administration".[100] WA has provisions that essentially exempt Public Service staff and contractors engaged in assisting the Attorney General or Minister for Corrective Services to administer their respective Acts.[101] SA refers to people "employed in a department of the Government ... whose duties of office are connected with the administration of justice or the punishment of offenders".[102] Tasmania also refers to people whose "duties or activities" are connected with "the administration of justice or punishment of offenders" but does not expressly limit them to government employees. The NT provisions exempt public sector employees in "an Agency primarily responsible for law and the administration of justice, prisons and correctional services or the administration of courts".[103] Queensland, on the other hand,

99. Jury Act 1977 (NSW) Sch 2 item 8.
100. Juries Act 2000 (Vic) Sch 2 cl 1(f).
101. Jury Pools Regulations 1982 (WA) reg 10.
102. Juries Act 1927 (SA) Sch 3 cl 2.
103. Juries Act 1963 (NT) Sch 7.

specifically identifies only detention centre employees and corrective services officers.[104]

4.80 Some submissions supported the removal of ineligibility for people in this class,[105] *while several submissions supported the continued exclusion of such people.*[106] *Some of those who supported continued ineligibility considered that it should also extend for a limited period after retirement.*[107] *As presently formulated, it only applies as a ground of ineligibility while the relevant employment or engagement continues.*

Administration of justice

4.81 There is considerable uncertainty as to the precise extent of this category of ineligibility so far as it applies to those within the justice sector which, in our view, needs to be addressed. There is also some degree of overlap with the other criteria which can give rise to uncertainty in its application. These include a possible overlap with the sub-categories last considered, as well as with the sub-categories applicable to Crown Prosecutors, Public Defenders, Directors and Deputy Directors of Public Prosecutions, Solicitors for Public Prosecutions, and to those employed or engaged in the public sector in the provision of legal services in criminal cases.

4.82 First, there is a question whether the expression "administration of justice" should be interpreted in its widest sense, or confined to the administration of criminal justice. In particular, there is a question as to whether it extends to those who are employed or engaged by any or all of the several courts, commissions or tribunals which exist, or by the Judicial Commission of NSW, the Mental Health Review Tribunal, the Attorney General's Department (including Courts Services, for which Sheriff's Officers work, and the Criminal Law Review Division), the NSW Law Reform Commission, the Sentencing Council of NSW, Community Justice Centres, the Crown Solicitor's Office, the Bureau of Crime Statistics and Research, the Office of the Protective Commissioner, the Office of the Public Guardian, the Anti-Discrimination Board, Privacy NSW, the Victims Compensation Tribunal, Victims Services, the Office of the Legal Services

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104. Jury Act 1995 (Qld) s 4(3)(h)(i).

105. NSW Bar Association, Submission, [18]; M J Stocker, Submission, 6.

106. Office of the DPP (NSW), Submission, 1; NSW Public Defender's Office, Submission, 5; Redfern Legal Centre, Submission, 7; J Goldring, Submission, 3; Commonwealth Director of Public Prosecutions, Submission, 2; NSW Jury Taskforce, Submnission, 1 (Corrective Services officers only); NSW Young Lawyers, Submission, 8.

107. Two years: NSW Public Defender's Office, Submission, 5; Redfern Legal Centre, Submission, 7.

Commissioner, the Professional Standards Council, and several other similar agencies which could be considered as broadly falling within the justice portfolio.

4.83 Secondly, assuming this ground of ineligibility applies to all or some of these agencies and statutory appointees, then questions arise as to which staff members this category embraces, and whether it applies, for example, to secretarial, administrative and clerical staff, or only to those holding offices directly associated with the administration of justice in its most general sense. Alternatively, the ground may only apply to those who work for the courts and agencies such as the Criminal Law Review Division or Sentencing Council, which are most directly concerned with the administration of the criminal law.

4.84 The category of people employed or engaged in the public sector in the administration of justice would, however, require greater definition either in the Schedule or by regulation, if it were to remain as a category of exclusion. It would need to be confined to those whose positions or duties bring them into direct contact with the criminal law, such that their impartiality or the appearance of justice might be in question. Otherwise, the potential would remain for uncertainty in relation to the eligibility of employees of the several organisations mentioned, which could ultimately impact upon the regularity of a trial.

4.85 Our preferred view is that exclusion should not apply to people employed or engaged in the administration of justice in its wider sense, that is, save for those who are directly involved in the criminal justice system and who would be excluded by reason of the categories previously mentioned, including judicial officers, the holders of statutory offices, and lawyers engaged in the provision of legal services in the public sector. Others who might potentially have been caught by the current general classification should still be able to apply to be excused for cause when they consider that their current office might jeopardise their impartiality or the appearance of justice.

RECOMMENDATION 18

People employed or engaged in the public sector in the administration of justice should be eligible for jury service, save so far as they would be ineligible by reason of other grounds of ineligibility.

Penal administration

4.86 People employed or engaged in the public sector in penal administration stand in a different position, and we are of the view that there is a proper case for their continuing ineligibility, subject to some greater definition of the expression "penal administration". A

particular reason for the ineligibility of Corrective Services and Juvenile Justice officers, and of staff of those agencies, such as those who are employed in Corrections Health, is that, in the course of their employment, they regularly come into contact with people who have been remanded in custody pending trial or who have been convicted and sentenced to imprisonment after trial by a jury. This would present particular problems of personal safety within the correctional environment if they happened to serve on juries in trials involving such inmates.[108] *Similar risks could arise if it became known that they had served as jurors on trials of the associates of these inmates.*

4.87 Moreover, there is a risk that, through contact with these offenders, they would acquire specialised knowledge of their antecedents and character that would not be admissible in a criminal trial, and that could extend beyond the bare bones of their criminal histories. The perception of possible bias, the risk of identification, and the risk of personal harm arising from their continual close contact with people in custody collectively justify the continued exclusion of Corrective Services, Juvenile Justice officers and staff who have direct contact with offenders subject to the penal system. The perception of possible bias and the risk of identification could also apply to members of the Parole Authority, the Serious Offenders Review Council, the Mental Health Review Tribunal, and officers of the Probation and Parole Service and Justice Health.

4.88 Again, by reason of the ambiguity inherent in the expression "penal administration", and its possible application to support, clerical and other staff having no direct access to or communication with offenders subject to the penal system, for whom no reason for ineligibility attaches, it would be desirable more specifically to identify the ambit of this ground of ineligibility by regulation.

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108. Criminal Justice Agencies Consultation.

RECOMMENDATION 19

Corrective Services Officers and Juvenile Justice Officers should be excluded from jury service.

Employees, members and officers of the Department of Corrective Services, Parole Board, Serious Offenders Review Council, the Mental Health Review Tribunal, Probation and Parole Service and Justice Health, who have direct access to prisoners or information about prisoners, should be excluded from jury service.

OMBUDSMAN AND DEPUTY OMBUDSMAN

Current NSW provisions

4.89 The Ombudsman and Deputy Ombudsman are both listed as people who are currently ineligible to serve.[109] *As we observe later, the identification of these two office-holders does not reflect the current executive structure of the Office of the NSW Ombudsman and may require greater definition, either in the Act or by regulation, so as to reflect the executive structure of the Office at any given time. The current ineligibility does not extend to employees of the Office.*

4.90 The Ombudsman's Office relevantly exercises specific oversight functions in respect of police officers, correctional officers and Sheriff's officers. It may be called on:

- *to review the conduct of police officers investigating criminal matters (including those that are tried by jury);*
- *to investigate complaints from inmates in correctional centres; and*
- *to receive and investigate complaints about the Sheriff or a Sheriff's officer (including those relating to the administration of juries).*

4.91 Currently, the executive structure of the NSW Office comprises the Ombudsman, the Deputy Ombudsman, the Deputy Ombudsman (Community Services Division), the Assistant Ombudsman (General), the Assistant Ombudsman (Children and Young People), and the Assistant Ombudsman (Police).

109. Jury Act 1977 (NSW) Sch 2 item 9. This category was first inserted by Jury Regulation 1977 (NSW) cl 13.

Other Australian provisions

4.92 In Victoria, the Ombudsman, Deputy Ombudsman and employees of the Ombudsman are ineligible to serve.[110] It is not clear on what basis they were made ineligible, 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.[111] Since 2004, the Victorian Ombudsman also holds the position of Director, Police Integrity, and, through the Office of Police Integrity, has a direct law enforcement role.[112] The Victorian Parliamentary Law Reform Committee, in 1996, recommended the repeal of the exemption for the Ombudsman and his or her officers,[113] but that recommendation has not been accepted.

4.93 The NT similarly exempts the Ombudsman and employees in the Office of the Ombudsman.[114] In WA, the Parliamentary Commissioner for Administrative Investigations (the formal title of the WA Ombudsman) is also ineligible to serve as a juror. The Law Reform Commission of WA recommended that this officer be ineligible on the ground that he or she "can broadly be said to act as an agent of Parliament in investigating allegations of Government maladministration".[115]

Submissions

4.94 Some submissions questioned or challenged the continued exclusion of the Ombudsman and Deputy Ombudsman.[116] Others, however, considered that they should continue to be excluded.[117]

4.95 One submission suggested that "the personnel of supervisory bodies such as the Ombudsman ... are potentially engaged in another element of the justice system and may be called on to deal with matters that are also the subject of criminal law proceedings. However only

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110. Juries Act 2000 (Vic) Sch 2 cl 1(k) and (l).
111. Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.130].
112. Major Crime Legislation (Office of Police Integrity) Act 2004 (Vic).
113. Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.131].
114. Juries Act 1963 (NT) Sch 7.
115. Law Reform Commission of Western Australia, Exemption from Jury Service, Report, Project No 71 (1980), [3.13]
116. NSW Public Defender's Office, Submission, 6; M J Stocker, Submission, 7; NSW Bar Association, Submission, [21]; NSW Jury Task Force, Submission, 2.
117. NSW Young Lawyers, Submission, 10; Redfern Legal Centre, Submission, 8-9; B Barbour, Submission.

those staff with statutory appointments have the capacity to make binding determinations and therefore ineligibility should be extended only to statutory officers of such agencies".[118]

The Commission's conclusion

4.96 The Ombudsman and Assistant Ombudsman (Police) have a significant and direct role in responding to complaints concerning police, and in monitoring their compliance with relevant laws, including those relating to telecommunication interception, controlled operations, and so on, and they have direct access to many police records.

4.97 It is our view that the holders of the offices of Ombudsman and Assistant Ombudsman (Police) have a substantial involvement in activities closely connected with the criminal justice system such that their personal ineligibility should continue. Although those holding the remaining specific offices of Deputy or Assistant Ombudsmen do not have quite so direct a role in this area of the justice system, we consider that the positions are so closely allied that they should also be excluded from jury service.

4.98 The question then arises whether officers of the Ombudsman should also be excluded from jury service, as the NSW Ombudsman has argued in his submission to the Commission.[119] *The service on juries of officers of the Ombudsman potentially gives rise to perceptions of partiality or conflict of interest since they have been involved in investigating the exercise of functions by the police, correctional officers or officers of the Sheriff, or dealing with complaints about them. We, therefore, support the exclusion of such officers from juries. Given the breadth of functions of the Ombudsman's office, the justification for this exclusion would not extend to all officers of the Ombudsman. However, the difficulty of characterising the functions of individual officers, and the movement of officers within the Office, mean that it is impossible to restrict the exclusion to those officers who are performing particular functions at any one time. We are, therefore, of the view that the exclusion should apply to all officers of the Ombudsman, other than clerical, administrative or support staff.*

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118. Redfern Legal Centre, Submission, 8.
119. B Barbour, Submission.

RECOMMENDATION 20

The Ombudsman and Deputy Ombudsman should continue to be excluded from jury service. The exclusion should be extended to those holding divisional offices as Deputy or Assistant Ombudsmen, and to officers of the Ombudsman, other than clerical, administrative or support staff.

SPOUSES AND PARTNERS OF INELIGIBLE PEOPLE

4.99 The restriction on the spouses (including partners)[120] of some ineligible people serving as jurors was removed in NSW in 1996. That ineligibility is still in place in South Australia.[121] It also exists in the Northern Territory but is limited to the spouses and de facto partners of judges.[122]

4.100 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".[123] However, reviews have generally found no reason why a spouse or partner of a person rendered ineligible on account of his or her office or occupation should be ineligible for that reason alone.[124]

4.101 Several submissions rejected the idea that spouses or partners of ineligible people should again be made ineligible.[125] One submission noted the potentially limitless category of those who could come under some form of influence from their association with, for example,

120. *De facto partners were added in 1987: Jury (Amendment) Act 1987 (NSW) Sch 1[23].*
121. *See, eg, Juries Act 1927 (SA) Sch 3.*
122. *Juries Act 1963 (NT) Sch 7.*
123. *M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 37. See also United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [116].*
124. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [117]; Law Reform Commission of Western Australia, Exemption from Jury Service, Report, Project No 71 (1980), [3.29]; Tasmania, Department of Justice and Industrial Relations, Review of the Jury Act 1899, Issues Paper (Legislation, Strategic Policy and Information Resources Division, 1999), ch 2. However, 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: South Australia, Sheriff's Office, South Australian Jury Review (2002), 14.*
125. *Redfern Legal Centre, Submission, 8; NSW Jury Taskforce, Submission, 1; NSW Young Lawyers, Submission, 9; M J Stocker, Submission, 6; M J Stocker, Submission, 6; NSW Public Defender's Office, Submission, 5.*

prosecutors or police, including their parents, children, siblings, former spouses, best friends and so on.[126]

4.102 Two submissions considered that the spouses or partners of such people should be ineligible because they would be unable to bring an unbiased mind to the case before them[127] *or by reason of the risk of apprehension of bias.*[128]

4.103 Several law reform bodies have concluded that the question of spouses being excused should be dealt with on a case by case basis so as to cater for the individual case where a spouse or partner's status may cause difficulties.[129] *This could arise following a request to be excused for good cause, or by way of a challenge for cause. Some submissions agreed that this would be the best way to deal with such situations.*[130]

4.104 In our view, spouses, partners and other relatives of ineligible people should continue to be eligible to serve as jurors, subject to the possibility of being excused for good cause in particular cases.

RECOMMENDATION 21

Spouses and partners of those who are excluded from jury service should not be excluded from jury service.

CIVIL JURIES

4.105 Not all of the reasons for ineligibility listed above would be strictly applicable to jurors summoned for civil trials. For example, in the case of civil trials, there are fewer reasons for exempting from jury service those associated with the administration of law and justice, or with criminal investigations, and penal administration. The possible appearance of partiality or loss of confidence in the justice system, that could arise if people with criminal records were to serve as jurors in criminal cases, may not apply so readily in civil cases.

4.106 One approach that was considered in the Issues Paper was to create a narrower category of ineligibility for civil jury trials. This was addressed by three submissions which supported the creation of a different regime in the case of civil juries, providing for fewer categories

126. Redfern Legal Centre, Submission, 8.
127. J Goldring, Submission, 3.
128. N R Cowdery, Preliminary submission, 1.
129. Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.76]; Law Reform Commission of Western Australia, Exemption from Jury Service, Report, Project No 71 (1980), [3.30].
130. Redfern Legal Centre, Submission, 8; NSW Young Lawyers, Submission, 9.

of exclusion.[131] *However, the administrative difficulty involved in dealing separately with the tiny proportion of civil jury trials that are now likely to occur,*[132] *and the cost ineffectiveness of any such scheme, militates against creating a separate category of exclusion for such trials.*[133]

RECOMMENDATION 22

The regime for the exclusion of people from jury service for civil trials should be the same as that for criminal trials.

131. *NSW Bar Association, Submission, [20]; NSW Public Defender's Office, Submission, 3; NSW Young Lawyers, Submission, 4.*
132. *See para 1.19-1.20.*
133. *See J Goldring, Submission, 2; NSW Jury Task Force, Submission, 1.*

5. Other grounds of ineligibility

- Inability to read or understand English
- Sickness, infirmity or disability
- Commonwealth exemptions

5.1 This chapter considers the remaining grounds of ineligibility under the current Act.

INABILITY TO READ OR UNDERSTAND ENGLISH

5.2 In NSW, a person is ineligible if he or she is "unable to read or understand English",[1] a condition which is to be understood conjunctively, so that a person who can understand but not read English would be excluded.

5.3 In Victoria and Tasmania, ineligibility attaches to those who are "unable to communicate in or understand the English language adequately";[2] in Queensland, to those who are "not able to read or write the English language";[3] in WA, to those who do not "understand the English language";[4] and in SA, to anyone who has "insufficient command of the English language to enable him or her properly to carry out the duties of a juror".[5]

5.4 In some jurisdictions, on the other hand, ability in English is a ground of eligibility. For example, in New York, the ability to "understand and communicate in the English language" is listed as a ground of eligibility.[6]

5.5 There is obviously a need for some test to determine whether people have sufficient command of the English language properly to carry out their duties as jurors,[7] although, as the foregoing summary suggests, there are different views as to the appropriate requirement. It has been suggested that pretending to fail an English reading test could be an easy a way out for people seeking to avoid jury service.[8] Additionally, a reading requirement could exclude those who are illiterate or whose familiarity with the written word is confined to that of their native tongue, yet are able effectively to communicate in spoken English.

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1. *Jury Act 1977 (NSW) Sch 2 Item 11.*
2. *Juries Act 2003 (Tas) Sch 2 cl 10; Juries Act 2000 (Vic) Sch 2 cl 3(f).*
3. *Jury Act 1995 (Qld) s 4(3)(k).*
4. *Juries Act 1957 (WA) s 5(b)(iii).*
5. *Juries Act 1927 (SA) s 13(b).*
6. *New York, Judiciary Law (Consol 2007) § 510. See The Jury Project, Report to the Chief Judge of the State of New York (1994), 26-27.*
7. *It should be noted that one of the requirements for jury service, namely citizenship, requires only that a person should possess "a basic knowledge of the English language": see Australian Citizenship Act 1948 (Cth) s 13(1)(g); Australian Citizenship Act 2007 (Cth) s 21(2)(e).*
8. *Criminal Justice Agencies Consultation.*

5.6 Five submissions supported a continuing requirement that jurors must be able to read and understand English.[9] One submission proposed that the test should be framed in terms of an ability to read and understand English "without difficulty".[10] This raised the related question of whether a person's ability to read, understand and communicate in English can be overcome by "reasonable accommodation" of the kind identified in our report concerning deaf or blind jurors, for example, by the provision of interpreters.[11] We do not intend to pursue the question of providing interpreters in this Report.

5.7 At present, where a person self-identifies as being unable to read or understand English, the Sheriff has little option other than to exclude him or her as ineligible. Otherwise, their exclusion depends upon them being identified by Sheriff's officers during the empanelling process, and assessed as having insufficient understanding by way of a subjective impression. This may include asking the juror what television programs he or she watches or which newspapers or magazines they read. This was addressed by one submission, which suggested that the ultimate assessment of a juror's ability in English was best left to the presiding judge.[12] This is recognised in the current English statute which provides:

> *Where it appears to the appropriate officer, in the case of a person attending in pursuance of a summons under this Act, that on account of insufficient understanding of English there is doubt as to his capacity to act effectively as a juror, the person may be brought before the judge, who shall determine whether or not he should act as a juror and, if not, shall discharge the summons.[13]*

5.8 While we consider that the presiding judge should have the capacity to excuse a juror who is assessed to lack the necessary ability, it would not seem practical for that task to be confined to the judge. The Sheriff's officers should be able to detect and discharge those who are ineligible to serve on this ground,[14] although guidelines should be developed to facilitate and standardise the process.

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9. *Office of the DPP (NSW), Submission; J Goldring, Submission, 1; Jury Task Force, Submission, 1; NSW Young Lawyers, Submission, 3; G J Samuels, Submission. But see M J Stocker, Submission, 5; and Legal Aid Commission of NSW, Submission, 5; Aboriginal Legal Service, Submission, 6.*
10. *NSW Public Defender's Office, Submission, 3; NSW Young Lawyers, Submission, 3.*
11. *See Redfern Legal Centre, Submission, 5; J Goldring, Submission, 1; Legal Aid Commission of NSW, Submission, 5.*
12. *Redfern Legal Centre, Submission, 9.*
13. *Juries Act 1974 (Eng) s 10.*
14. *See NSW Jury Task Force, Submission, 1.*

5.9 Otherwise, we are of the view that an ability to read English should continue to be a requirement of qualification. This arises from the fact that, in most trials, jurors will be provided with written directions, and given access to portions of the transcript of evidence and, in many cases, required to view and read written documents. However, we believe that the test should be reworded to exclude those who are unable "sufficiently to read and communicate in English to enable them properly to carry out the duties of a juror". This would provide greater focus than the open-ended test which presently exists and which leaves undetermined the required degree of ability to read or to understand English. Moreover, the criterion of "understanding" English may fall short of an effective ability to communicate which would seem essential for the assessment of witnesses and participation in jury room discussions.

5.10 We consider it preferable for it to be stated as a precondition for qualification as a juror rather than as a ground of ineligibility so as to underline its importance.

RECOMMENDATION 23

To qualify for jury service a person must be sufficiently able to read and communicate in English to enable them properly to carry out the duties of a juror.

The Sheriff and the presiding judge should each have the ability to discharge people who are not sufficiently able to communicate in English.

Guidelines should be developed to facilitate and standardise the process of identifying those who are not sufficiently able to communicate in English.

SICKNESS, INFIRMITY OR DISABILITY

5.11 In NSW, sickness, infirmity or disability which renders a person unable to discharge the duties of a juror is currently an express ground of ineligibility[15] rather than a ground to be excused for cause. At present, no distinction is made between the case of a person 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 courthouses for jurors with physical disabilities, including the installation of elevators, the provision of room in the jury box for a wheelchair and the installation of hearing loops in courtrooms. The NSW Law Reform

15. Jury Act 1977 (NSW) Sch 2 item 12.

Commission has already considered the issue of assisting jurors with disabilities to serve in the case of jurors who are deaf or blind.[16]

5.12 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".[17] *Although this formulation has not been adopted in the current version of the Victorian statute, it would seem to encapsulate the essential nature of this reason for jurors to be excused, in that it places the focus on whether they could effectively or perhaps more correctly, "sufficiently" perform the required functions.*

5.13 Many submissions supported its adoption as a matter establishing a good cause to be excused determined on a case by case basis, and not as a ground of ineligibility, or exemption as of right.[18] *We consider this to be a superior approach to the present somewhat indeterminate test of ineligibility related to inability, "because of sickness, infirmity or disability, to discharge the duties of a juror". This is particularly so since any such criterion can involve a value judgment, for example, where the condition is transient or fluctuating, in circumstances where ineligibility which is not detected or accepted at the beginning of a trial could, at least under current law, require a jury to be discharged by reason of an irregularity in empanelment.*

5.14 If adopted as a ground to be excused for cause and framed in similar terms to those suggested by the Victorian Committee, it could accommodate allowing people with a disability to serve where the provision of reasonable accommodation or assistance would permit them to perform their functions "effectively" or "sufficiently". One submission to the Victorian Committee suggested that the idea of providing reasonable assistance should be included in the criterion for freeing people in this category from service, and this was supported by one submission.[19]

5.15 One submission, however, raised concerns about the difficulty, stress and embarrassment sometimes caused to people with intellectual

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16. *NSW Law Reform Commission, Blind or Deaf Jurors, Report 114 (2006).*
17. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [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).*
18. *NSW Jury Task Force, Submission, 2; NSW Young Lawyers, Submission, 14; Redfern Legal Centre, Submission, 10; NSW Bar Association, Submission, 7-8; NSW Public Defender's Office, Submission, 8. But see Office of the DPP (NSW), Submission; J Goldring, Submission, 4.*
19. *NSW Public Defender's Office, Submission, 8.*

disabilities who seek to raise this as a ground of ineligibility or as a basis to be excused where the problem is a temporary one.[20] *Particular attention was drawn to the experiences of those who make the application to be excused on the day of the trial when it may become necessary for them to be dealt with in open court.*[21] *We do not think that this presents any difficulty in the way of dealing with such cases on the basis of an excuse for good cause. In most instances, such an application can be dealt with on paper, supported by an appropriate medical certificate, either before the trial, or by the judge in chambers. Additionally, the Commission's recommendation that unsuccessful applicants should be able to seek a redetermination from a duty judge before the trial*[22] *may go some way towards alleviating this problem, as may adopting the practice of allowing applicants to hand up a short written statement to the judge, rather than having to speak about their illness or disability in open court.*[23] *Further, as later mentioned,*[24] *we see no reason why those with chronic illnesses, or permanent infirmity or disability, which can be objectively established on proper evidence, should not have the option of seeking to be excused permanently, and of being granted such an excuse.*

5.16 Accordingly, we consider that this ground does not sit well as one which should attract ineligibility. The preferable course is to treat it, on a case by case basis, as a potential ground for excuse for good cause, reserving to the authority that administers the Act the capacity to grant either a permanent excusal, or an excusal for a particular trial. Excuse for cause on the grounds of sickness, infirmity or disability is dealt with in Chapter 7.[25]

RECOMMENDATION 24

Sickness, infirmity or disability which renders a person unable to discharge the duties of a juror should no longer be a ground of exclusion, but should be considered as a ground of excusal for good cause.

COMMONWEALTH EXEMPTIONS

5.17 The Jury Exemption Act 1965 (Cth) has a very broad reach and exempts the following people from jury service: the Governor General, Justices of the High Court and other Courts established by the

20. Legal Aid Commission of NSW, Submission, 6, 14.
21. Legal Aid Commission of NSW, Submission, 6, 14.
22. See para 7.43-7.45.
23. See para 10.7.
24. See para 7.40-7.42.
25. See para 7.14-7.15 and Recommendation 33.

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, and Defence Force members and Reserves who are rendering continuous full-time service.[26] 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).[27] A more complete list of these exemptions is set out in Appendix C to this report.

5.18 The Navigation Act 1912 (Cth) also exempts Masters and seamen of all ships,[28] and a further exemption is given to operating crew under the Air Navigation Regulations 1947 (Cth), although this is confined to people summoned to serve as jurors under the laws of a Territory of the Commonwealth.[29]

5.19 It has been pointed out that where, under the military justice system, people are charged on indictment in the civilian courts, they would currently be deprived of the opportunity of having Defence personnel on the jury.

5.20 It is not easy to identify any particular reason why a special category of exemption should apply to many of the people currently given statutory exemption under Commonwealth legislation, where no such exemption or ineligibility applies to those who hold comparable positions within the States and Territories. We identified the lack of any justification for the ineligibility of these people in 1986,[30] when we also drew attention to the dubious constitutionality of the Commonwealth legislation.

5.21 Other reviews have commented on the broadness of the Commonwealth exemptions and have recommended that an approach be made to the Commonwealth government with a view to the repeal of many of them.[31] 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

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26. Jury Exemption Act 1965 (Cth) s 4 and Schedule.
27. Jury Exemption Regulations 1987 (Cth).
28. Navigation Act 1912 (Cth) s 147.
29. Air Navigation Regulations 1947 (Cth) reg 150.
30. New South Wales Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.23].
31. See Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.205]; Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), 5-6.

of offences under Commonwealth law and civil cases when the Commonwealth, or one of its instrumentalities, is a party.

5.22 Many submissions supported the repeal of most of the Commonwealth exemptions,[32] many of which appear to have a greater commitment to ensuring the continued availability of Commonwealth employees in their workplace than with ensuring the integrity of the justice system. We recognise that obvious exceptions from service would include the Governor General,[33] Federal Police,[34] Federal Court and Family Court Judges, Federal Magistrates and High Court Judges,[35] at least during the term of their relevant offices and an appropriate period after retirement. We note that one submission supported an amendment that would remove from the list of exemptions only those Commonwealth public servants who are not involved in the administration of justice, law enforcement or defence.[36]

5.23 Since the amendment of the Commonwealth legislation is a matter for the Commonwealth government, we do not consider it appropriate to make any specific recommendation beyond suggesting that the Commonwealth be encouraged to review the categories of exemption contained in its legislation, with a view to achieving greater uniformity with State and Territory legislation. The justification for it doing so lies in ensuring that the jury system operates in the best interests of the community at large, and in promoting the objective of securing a representative jury for those who become subject to the criminal justice system. That objective is not purely academic, since the Commonwealth agencies prosecute many significant criminal jury cases, particularly in the areas of drug law enforcement, terrorist activity and white collar crime. Moreover, there is a compelling case for Commonwealth Public Servants sharing, with their State and Territory counterparts, the civic responsibilities of jury service.

RECOMMENDATION 25

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32. NSW Bar Association, Submission, [22]; NSW Public Defender's Office, Submission, 6; J Goldring, Submission, 3; NSW Jury Task Force, Submission, 2; NSW Young Lawyers, Submission, 11; M J Stocker, Submission, 7; Criminal Justice Agencies Consultation; A Abadee, Consultation. See also Commonwealth Director of Public Prosecutions, Submission, 3.

33. NSW Bar Association, Submission, [22]; NSW Young Lawyers, Submission, 11.

34. NSW Public Defender's Office, Submission, 6; NSW Young Lawyers, Submission, 11.

35. NSW Bar Association, Submission, [22]; NSW Young Lawyers, Submission, 11.

36. Redfern Legal Centre, Submission, 9.

The Commonwealth should be encouraged to review the categories of exemption applicable to Commonwealth Public Servants and office-holders in order to confine them to those who have an integral and substantial connection with the administration of justice or who perform special or personal duties to the government.

6. Exemption as of right

- Occupational categories
- Other characteristics
- Excuse as of right for previous jury service

6.1 In NSW, people who are currently exempted from jury service as of right[1] fall into three broad categories:

- *those in certain specified occupational categories;*
- *those who have other personal characteristics that entitle them to claim exemption; and*
- *those who have undertaken previous jury service.*

6.2 Exemption as of right differs from ineligibility in that those who fall within the relevant categories are eligible for jury duty and may elect to remain on the jury roll and to serve as jurors if summoned. Those who wish to claim exemption as of right are currently required, when served with a notice of inclusion, to complete a questionnaire disclosing the ground for exemption.[2] If the Sheriff does not accept the application, then an appeal lies to the Local Court against that determination.[3] If a person fails, without reasonable excuse, to claim an exemption following service of a notice of inclusion, then the entitlement to exemption does not provide good cause for a subsequent request to the Sheriff or to the court to be excused.[4]

6.3 The Commission considers that, save in the case of those who have previously served as jurors, there should no longer be an entitlement to claim exemption as of right. The difficulty with its preservation lies in the fact that many will regard it as an invitation to be excused from jury service, which they will readily accept, without giving any consideration to the wider public interest involved in that form of service. Moreover, some studies reveal it to be a cause for resentment and diminution in confidence on the part of those who do serve as jurors and then question why other members of the community seem able to avoid that commitment.[5]

6.4 The continuation of the wide categories of potential exemption in fact denies the system of the service of many qualified and experienced people, and threatens both the representative nature of juries and the fairness of the trial. There was substantial support in the submissions and consultations for this conclusion.[6] It is also to be noted that

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1. *Jury Act 1977 (NSW) s 7 and Sch 3.*
2. *Jury Act 1977 (NSW) s 13.*
3. *Jury Act 1977 (NSW) s 15.*
4. *Jury Act 1977 (NSW) s 18A and s 38(2).*
5. *J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 34 and 72.*
6. *NSW Young Lawyers, Submission, 12; J Kane, Submission; Redfern Legal Centre, Submission, 9; G J Samuels, Submission, 2; M J Stocker, Submission, 7; NSW Bar Association, Submission, [23]; NSW Public*

exemption as of right no longer exists in Victoria, Tasmania, Queensland, SA, or in England and Wales.

6.5 It is recognised that this would involve a significant change for those who currently fall within the exemption as of right category, since any removal of that right would necessitate them serving unless, on a case by case basis, they can provide a good reason not to serve. This could lead to some increase in the work of the jury section of the Sheriff's Office in processing such applications,[7] although in most instances that could be done on paper, or reserved for a judge in cases where the merits of the request to be excused are not obvious.

6.6 Lord Justice Auld, who supported eliminating the categories for exemption, observed that any applications to be excused would have to be tested carefully according to "the individual circumstances" of each case "otherwise there could be a reversion to the present widespread excusal of such persons by reason only of their positions or occupations".[8] We agree with this conclusion.

OCCUPATIONAL CATEGORIES

6.7 A number of occupations and professions are entitled to be excused as of right. The categories have been reduced over time and those within some of the previously listed categories now need to apply to be excused for good cause. The following people may currently be exempted from jury service as of right:

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.[9]*

Defender's Office, Submission, 6; NSW Jury Taskforce, Submission, 2; NSW Office of the Director of Public Prosecutions (NSW), Submission; J Goldring, Submission, 3; A Abadee, Consultation.

7. *L Anamourlis, Preliminary consultation.*
8. *R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 151.*
9. *Jury Act 1977 (NSW) Sch 3.*

6.8 The 1994 Australian Institute of Judicial Administration review of jury management in NSW noted that the list of exemptions appeared "far too wide" and that some were "difficult to reconcile".[10]

6.9 The UK Departmental Committee on Jury Service recognised that the entitlement to be excused as of right extended to people who were "well fitted to be jurors". The Committee said:

> *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.*[11]

6.10 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 was considered appropriate for a person to be excused as of right, namely 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".*[12]

6.11 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".[13] *This and subsequent reviews have consistently questioned the assumptions underlying many of the*

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10. *M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 173.*
11. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [100].*
12. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [148].*
13. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [151].*

categories of those who are entitled to exemption as of right [14] and recommended a reduction in the categories.[15]

6.12 The Auld Review of the criminal courts of England and Wales, for example, 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".[16]

6.13 The New York jury project observed that many of the exemptions dated from an earlier time when jury service might have involved removing people who were considered essential to small, sometimes isolated, communities, such as doctors, clergy, school teachers and emergency services personnel who could not otherwise be replaced.[17] It is questionable whether such an observation has any relevance for conditions in NSW today, although the availability of an entitlement to seek to be excused for good cause would provide a sufficient remedy for those who may reside and work in poorly served regional communities, particularly where the trial is likely to be lengthy.

6.14 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".[18] Although it is impossible to undertake any statistical analysis of the percentage of people within each category who currently claim the right of exemption in NSW,[19] the subjective impression is that a high proportion of these people do so.[20] This would accord with the

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14. *See United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [98]; NSW, Report of the NSW Jury Task Force (1993), 23-25; Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), [2.5]-[2.11].*
15. *See M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 173; Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.149]; R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 149, 150.*
16. *R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 150.*
17. *The Jury Project, Report to the Chief Judge of the State of New York (1994), 32.*
18. *NSW, Report of the NSW Jury Task Force (1993), 25.*
19. *Since the Sheriff is unaware of the occupation of those who receive notices of inclusion unless a claim for exemption is made.*
20. *In a two week period (13 November 2006 – 29 November 2006), of the 57 people who claimed a right to exemption based on occupation at the notice of inclusion stage, eight were clergy, nine were members of a religious order, two*

expectation that most people will avoid any kind of duty that is tagged with a popular perception of being onerous. It also accords with the Victorian Parliamentary Law Reform Committee observation that the initial hopes of the Departmental Committee that people with the right to be exempted might nevertheless elect to serve, were not realised. The Victorian experience was that people "who have a right to be excused from jury service almost always exercise the right".[21] In that State, it was observed, in 1996, that the exercise of the right to be excused was the "main cause of under-representation within the jury system".[22]

6.15 As we noted at the outset, most of the submissions received considered this category of exemption. Many submissions supported the removal of the general category of exemption as of right from the Jury Act, subject to the availability of an opportunity for potential jurors to seek to be excused for good cause,[23] while one supported a lessening of the exemptions available.[24]

6.16 There is no convincing reason why exemptions should continue to be available based on occupational category alone, since this risks being regarded as elitist, results in the burden of jury service being borne disproportionately by those outside the existing exempt categories, and can have the effect of limiting the collective skill and experience of the jury. The granting of exempt status to particular "privileged" occupational groups may also impact upon the willingness of others in the general community to serve, since they may well resent having to bear the major burden of jury service,[25] or query why they should not receive equivalent treatment if they work in similar areas. For example, allied health professionals such as nurses, midwives, physiotherapists, optometrists and veterinary surgeons have no occupational exemption.

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were dentists, three were pharmacists, 21 were medical practitioners, two were mining managers; 12 were emergency services employees: information supplied by the NSW Sheriff's Office (8 December 2006).

21. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.146].*
22. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.147].*
23. *NSW Bar Association, Submission, [23], [28]; NSW Public Defender's Office, Submission, 6; Redfern Legal Centre, Submission, 9, 10; J Goldring, Submission, 3; NSW Jury Task Force, Submission, 2, 3; NSW Young Lawyers, Submission, 12; G J Samuels, Submission; M J Stocker, Submission, 5, 7.*
24. *NSW Office of the Director of Public Prosecutions, Submission.*
25. *Redfern Legal Centre, Submission, 9. See also The Jury Project, Report to the Chief Judge of the State of New York (1994), 33.*

6.17 Most professionals are able, as a matter of course, to arrange for their duties to be performed by locums or substitutes when they take various forms of leave.[26] Those whose duties must be performed by another, but who are not able to arrange such substitutes easily or conveniently, should be able to apply to be excused or granted a deferral on a case by case basis, as could those whose services are in particular demand at any given time.

6.18 In Victoria, the UK and many of the US States, the elimination or substantial narrowing of the existing categories of exemption and ineligibility has not caused difficulty. We next examine the individual categories of exemption as of right under the current NSW law.

Clergy and members of religious orders

6.19 Clergy and vowed members of any religious order may currently claim exemption as of right in NSW.[27] Only three other Australian jurisdictions have an express provision granting a right of exemption to clergy and religious.[28]

6.20 Preliminary submissions were received from churches supporting the retention of the right of exemption. The arguments for its retention related to the nature of pastoral duties, which brought the clergy and religious into contact with those who might be victims of crime or people charged with or convicted of crime, and their families, either through the confessional or in a pastoral support role.[29] They also related to the need for clergy to be available to officiate at funerals, weddings and the like during the working week, and to visit the poor and sick.[30] It was also suggested that an apprehension of bias may arise because some clergy and religious undertake "advocacy work for the less privileged and marginalised in society... as a necessary condition in service to the wider community".[31] Finally, it was suggested that some clergy may have a conscientious objection to jury service generally.[32]

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26. *Law Reform Commission of Western Australia, Exemption from Jury Service, Report, Project No 71 (1980), [3.39].*
27. *Jury Act 1977 (NSW) Sch 3 items 1 and 2.*
28. *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.*
29. *Churches of Christ in NSW, Preliminary submission at 1; Catholic Archdiocese of Sydney, Preliminary submission at 4.*
30. *Uniting Care NSW.ACT, Submission, 1.*
31. *Catholic Archdiocese of Sydney, Preliminary submission at 4.*
32. *Lutheran Church of Australia, Preliminary submission at 1.*

6.21 Most submissions supported the removal of the right to exemption for clergy and vowed members of any religious order.[33] A submission from the Diocese of Wangaratta, an Anglican diocese with parishes in both NSW and Victoria, expressed general satisfaction with the arrangements in Victoria whereby there is no general exemption but a discretionary power to excuse for good reason.[34] That power is defined as exercisable by reference to various matters, such as distance and inconvenience and, in particular, the circumstance that "the person is a practising member of a religious society or order the beliefs or principles of which are incompatible with jury service".[35]

6.22 We recognise that there are circumstances where clergy may need to be excused because of some direct knowledge or contact with those who become involved in the justice system, and where, particularly in small communities, it may not be possible for them to be replaced when performing jury duty. We also recognise that there may be groups such as closed orders or those whose religious faith may be inconsistent with them sitting in judgment on others. They can, however, be catered for, on a case by case basis, by applying to be excused for good cause, by reason of one or other of these factors. We are not persuaded by an argument that clergy or religious as a class cannot bring themselves to participate impartially and fairly in the role of juror, or that they risk being unduly judgmental, and we do not consider it appropriate for this category of exemption to continue as of right. The special case of those whose religious faith is inconsistent with jury service, or of those who may have some pastoral association with people involved in a particular trial, can be adequately dealt with by an application to be excused for cause.

Health professionals

6.23 People practising as pharmacists, dentists and medical practitioners are also entitled to claim an exemption as of right in NSW.[36] This accords with the recommendation of the Departmental Committee on Jury Service in England and Wales that practising medical practitioners, dentists and pharmaceutical chemists should be entitled to claim exemption because of their "special and personal

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33. NSW Office of the Director of Public Prosecutions, Submission; NSW Public Defender's Office, Submission, 7; NSW Jury Task Force, Submission, 2; J Goldring, Submission, 3; NSW Young Lawyers, Submission, 13; Redfern Legal Centre, Submission, 9; NSW Bar Association, Submission, [23]; G J Samuels, Submission; M J Stocker, Submission, 7.

34. The Anglican Church of Australia, Diocese of Wangaratta, Submission

35. Juries Act 2000 (Vic) s 8(3)(h).

36. Jury Act 1977 (NSW) Sch 3 items 3, 4, 5.

responsibilities... for the immediate relief of pain or suffering".[37] *The UK recommendations also included practising nurses, midwives and veterinary surgeons in this category.*[38] *Members of these additional groups are not given an exemption as of right in NSW, although nurses are currently listed in the Sheriff's guidelines as people who may be excused for "good cause".*[39]

6.24 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.[40]

6.25 The 1994 AIJA review recommended that the exemption of doctors and dentists should not be retained "without [an] explanation of duties".[41]

6.26 We see no reason to resile from our general view that people engaged in the above occupations should not be able to claim exemption as of right. The categories currently given that right of exemption fail to take into account the diversity of ways in which such professionals may now deliver services. Cases of genuine inconvenience or demonstrated need to be present at work or to be available to attend to patients for whom specialised services are required, or because of an absence of substitute services,[42] *can be dealt with on a case by case basis by way of an application to be excused. In most instances alternative arrangements can be made such as are already made for annual leave or leave to attend conferences.*

6.27 In each case, the inconvenience of a personal attendance in answer to a summons could be avoided if the jury administrator can deal with the application in writing, with a right of review if it is refused.

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37. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [148] and [149].*
38. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [150].*
39. *Sheriff's Office of NSW, Jury Act, 1977: Policy and Practice Guidelines (November 2005), [3.4.2].*
40. *Juries Act 1957 (WA) Sch 2 Part 2 cl 2.*
41. *M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 173.*
42. *For example, in the case of pharmacists.*

Mining managers and under-managers of mines

6.28 Mining managers and under-managers of mines[43] were first granted a right to exemption in 1918.[44] 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".[45] At that time, a manager or under-manager was required to exercise daily personal supervision of his or her mine.[46] 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.[47] Under-managers also have "full charge and control" in the absence of the mining manager or deputy manager.[48]

6.29 In WA, mining managers were removed from the list of those entitled to claim an exemption, following recommendations by the Law Reform Commission.[49]

6.30 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 cases where there are particular safety concerns, or current problems underground, could be dealt with by an application to be excused for good cause, on a case by case basis.

Emergency services

6.31 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" also have a right to be exempted from jury service.[50] Until recently, such people were ineligible for service,[51] rather than entitled to an exemption as of right, presumably on the ground that their jobs were considered essential to the well-being of the community in emergency situations. It seems odd that individuals within this category are now given the right

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43. *Jury Act 1977 (NSW) Sch 3 item 6.*
44. *Jury (Amendment) Act 1918 (NSW).*
45. *NSW, Parliamentary Debates (Hansard) Legislative Assembly, 1 October 1918, 1831.*
46. *Coal Mines Regulation Act 1912 (NSW) s 5(1). See also NSW, Parliamentary Debates (Hansard) Legislative Council, 26 November 1918, 3004.*
47. *Coal Mines Regulation Act 1982 (NSW) s 38.*
48. *Coal Mines Regulation Act 1982 (NSW) s 39.*
49. *Law Reform Commission of Western Australia, Exemption from Jury Service, Report, Project No 71 (1980), [3.43].*
50. *Jury Act 1977 (NSW) Sch 3 item 7.*
51. *Jury Act 1977 (NSW) Sch 2 items 13-15 (repealed).*

to determine for themselves how essential their job is, and whether they wish to serve.

6.32 We similarly consider that people engaged in the above occupations should not be able to claim a general exemption as of right. The category is currently too broad and fails to take into account the fact that many of the people listed above will not be permanently on call, but will rather be subject to rosters that take account of other forms of leave. Cases of genuine inconvenience or demonstrated need to be present at work can be dealt with on a case by case basis by way of an application to be excused, either for a particular case, or permanently in the most pressing of cases, or for a defined period. For example, Rural Fire Service employees may be justifiably excused during the bushfire season.

RECOMMENDATION 26

No person should be entitled to be excused from jury service as of right solely because of his or her occupation, profession or calling. He or she should be able to apply, on a case by case basis, to be excused for good cause.

OTHER CHARACTERISTICS

6.33 The following people may also currently claim exemption from jury service as of right:

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.*[52]

6.34 It is our view that there is no convincing reason why exemptions as of right should be available to people falling within these several categories as a class. A number of submissions supported the removal

52. Jury Act 1977 (NSW) Sch 3.

of the exemption as of right for people in these categories, subject to the availability of an opportunity to seek to be excused for good cause.[53]

People who are at least 70 years old

6.35 In NSW, people who are at least 70 years old have the right to claim an exemption.[54] *Until 1997, the age for a right to exemption was set at 65 years.*[55] *The NSW Law Reform Commission recommended a change in the age limit, in 1986, because of concerns about the serious under-representation of jurors aged 65 and over.*[56]

6.36 Exemptions based on age still represent a substantial proportion of the exemptions claimed in NSW.[57] *This has also been the case in other jurisdictions.*[58] *There is no uniformity in the way that age is approached so far as jury service is concerned. Some jurisdictions have seen an increase in the age limit for jury service where age has been a precondition to eligibility rather than a basis for obtaining an exemption, and in other jurisdictions service after the relevant age has been made optional.*

6.37 For example, in Tasmania in 2003, the age limit of 65 years was removed as a ground of ineligibility and substituted by a provision allowing those aged over 70 years to elect not to serve.[59] *In Queensland, where previously males aged between 65 and 70 years could opt out of jury service,*[60] *people aged over 70 years are now ineligible unless they elect to be eligible.*[61] *In Western Australia, people aged over 70 years are ineligible to serve, while those between 65 and 70 years may elect not to serve.*[62] *In the ACT, people aged over 60 years are eligible to serve*

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53. *NSW Bar Association, Submission, [23]; NSW Public Defender's Office, Submission, 8; Redfern Legal Centre, Submission, 10. See also J Goldring, Submission, 4; NSW Jury Task Force, Submission, 2-3.*
54. *Jury Act 1977 (NSW) Sch 3 item 8.*
55. *See Jury Amendment (Qualifications) Regulation 1996 (NSW).*
56. *NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.35]. See also M Wilkie, "Inside the Jury" in D Challinger, The Jury, Australian Institute of Criminology, Seminar: Proceedings No 11 (1986), 189.*
57. *L Anamourlis, Preliminary consultation.*
58. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.147].*
59. *Juries Act 2003 (Tas) s 11.*
60. *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).*
61. *Jury Act 1995 (Qld) s 4(3)(j) and (4).*
62. *Juries Act 1957 (WA) s 5(a)(ii), Sch 2 Part 2 cl 5.*

but are entitled to claim an exemption as of right.[63] *In Victoria, there is no exemption based on age, however, "advanced age" amounts to a good reason to be excused.*[64]

6.38 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;*[65]
- *avoidance of the administrative difficulties that will arise if a large number of elderly people are summoned and then seek to be excused;*[66]
- *avoidance of the "unfair" burdens on elderly people involved in seeking to be excused on a discretionary basis and of the distress potentially caused to them and their relatives;*[67]
- *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".*[68]

6.39 Reasons for not imposing a restriction or a right of exemption based on age or at least one that applies at the age of 70 years, include the fact that:

- *age bears little relation to the ability of a person to serve as a juror, especially if illness or disability rendering service difficult will support an application to be excused for cause;*[69]
- *excluding the elderly can make juries less representative of the community;*[70]
- *people in the older age group will generally be retired (and, therefore, available) and may come from those groups that have*

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63. *Juries Act 1967 (ACT) Sch 2 Part 2.2 item 7.*
64. *Juries Act 2000 (Vic) s 8(3)(i). See also para 7.41.*
65. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [68].*
66. *Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), 5; Queensland, Parliamentary Debates (Hansard) Legislative Assembly, 16 May 1996, 1192.*
67. *Queensland, Parliamentary Debates (Hansard) Legislative Assembly, 16 May 1996, 1192; Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.166].*
68. *United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [68].*
69. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.165].*
70. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.165].*

previously been the subject of ineligibility or the right to be exempted from jury service,[71] *but who could bring their particular skills and experience of life to the task.*

6.40 It has been noted that many people above the age of 70 years may well be capable of carrying out jury service and may be perfectly willing to do so.[72] *For example, retired judges have regularly served as acting judges in NSW up to the age of 75 years.*

6.41 The existence of a right of exemption, whether based on age or otherwise, is likely to encourage those to whom it applies to seek exemption. It may even mislead them into believing that they are unable to serve, or alternatively that they are discouraged by the authorities from doing so. Any such impression would seem to involve discrimination based on age, which some would regard as offensive and a disparagement of their capacity to provide a useful service.

6.42 Figures supplied by the Sheriff's Office indicate that there is a significant reduction in the number of jurors serving as they progress from age 60 years to 75 years. In the 2005-2006 financial year, 171 people aged 60 years served but only 11 people aged 75 years.

Age	Number	Age	Number
60	*171*	*68*	*93*
61	*147*	*69*	*74*
62	*140*	*70*	*50*
63	*134*	*71*	*26*
64	*120*	*72*	*25*
65	*111*	*73*	*17*
66	*106*	*74*	*12*
67	*99*	*75*	*11*

6.43 Some of the decline will be due to a decline in the population of people aged 60 years and over, as well as to the increased incidence of illness and infirmity within that population. However, the quite substantial drop between those aged 69 and those aged 70 and 71 must

71. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.165].*
72. *Queensland, Parliamentary Debates (Hansard) Legislative Assembly, 16 May 1996, 1192.*

be attributed, at least in part, to the existence of the right to claim an exemption.

6.44 Some submissions proposed retaining some age limit, suggesting that the 75 year limit for service as an acting judge provided a guide.[73] *However, other submissions supported a case by case assessment of people seeking to be excused on the ground of age.*[74]

6.45 We do not believe that it is appropriate to select the age of 70 years as an arbitrary point for exemption. We have an active aging population, and there are many people in the community aged more than 70 years who are able to serve as jurors. It would be more appropriate to allow elderly people to be excused for good cause, for example, on the grounds of illness or other incapacity, or the likely length of the trial, or personal discomfort, rather than relying on a presumptive right to exemption based on an arbitrary age alone. We see no reason why applications to be excused could not be dealt with sympathetically by the Sheriff or by a judge without any personal embarrassment to the potential juror.

6.46 Alternatively, if it is considered, on a pragmatic basis, that most people aged over 75 years would successfully apply to be excused from jury service, then as a fall back we recognise that this could be achieved by the adoption of a suitable guideline, which would facilitate excusal of those who do not wish to serve, while allowing those who are able to do so to exercise that right.

Pregnancy

6.47 The entitlement of pregnant women to be excused as of right[75] *was first introduced in NSW in 1977, when a woman's general entitlement to be excused as of right was removed.*[76]

6.48 The NSW Jury Task Force, in 1993, questioned why pregnant women "irrespective of the stage of the pregnancy" should have a right to be excused.[77] *The 1994 AIJA review recommended amendment or*

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73. J Goldring, Submission, 4; M J Stocker, Submission, 8, also proposed 75 years.

74. NSW Jury Task Force, Submission, 2; NSW Young Lawyers, Submission, 15, NSW Public Defender's Office, Submission, 8; NSW Bar Association, Submission, [24]; Redfern Legal Centre, Submission, 10.

75. Jury Act 1977 (NSW) Sch 3 item 9.

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

77. NSW, Report of the NSW Jury Task Force (1993), 23.

removal of the pregnancy exemption.[78] *The Victorian Parliamentary Law Reform Committee considered that most women in the early stages of pregnancy would be capable of serving,*[79] *and noted that anyone unable to perform jury service on account of pregnancy could apply to be excused on an individual basis.*[80] *In the ACT, pregnant women are entitled to apply to be excused on the grounds of "good cause".*[81]

6.49 It would appear that this category of exemption is too broad if applied on a class basis, since there are many people in the early or mid term stages of pregnancy who could sit as jurors without difficulty or discomfort. One submission suggested that pregnant women should continue to be entitled to exemption, on the basis that complications associated with the condition could interrupt trials and cause delays.[82] *However, those who have medical or other reasons to be excused could apply to be excused for cause, as could those in the later stages of pregnancy. This approach was supported by a number of submissions,*[83] *and it reflects the view which we adopt in relation to this current ground of exemption.*

Care, custody and control of school children under the age of 18 years

6.50 In NSW, an exemption as of right is 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 children".[84]

6.51 A large number of otherwise eligible people are effectively deleted from the NSW roll by reason of their exercise of this right to exemption, as are those who reside with, and have full-time care of, a person who is "sick, infirm or disabled".[85] *This is also the case in other*

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78. *M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 174.*
79. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.172]-[3.173]. See also NSW Office of the Director of Public Prosecutions, Preliminary submission, 4.*
80. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.172]-[3.173].*
81. *Juries Act 1967 (ACT) s 14(b). See also Recommendation 33 in Chapter 7.*
82. *NSW Young Lawyers, Submission, 15.*
83. *J Goldring, Submission, 4; NSW Public Defender's Office, Submission, 8; Redfern Legal Centre, Submission, 10. But see M J Stocker, Submission, 8; NSW Jury Taskforce, Submission, 2.*
84. *Jury Act 1977 (NSW) Sch 3 item 10.*
85. *See L Anamourlis, Preliminary consultation. See also M Wilkie, "Inside the Jury" in D Challinger, The Jury, Australian Institute of Criminology, Seminar: Proceedings No 11 (1986), 188; and NSW Law Reform Commission,*

jurisdictions.[86] The consequence is to exclude a large number of women from serving as jurors, particularly those in the 25-50 year age group, some of whom are employed in the workforce while still providing for the sole care, custody or control of their children.

6.52 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".[87]

6.53 Unlike NSW, most other jurisdictions that retain exemptions based on the need to care for children, or have it as a reason to be excused, make no reference to the age of the children. In WA, however, an age limit for the exercise of this ground is set so that it is only applicable where the children are aged under 14 years.[88]

6.54 Two submissions supported the continuing availability of carer obligations as a reason to be exempted or excused,[89] although one questioned whether such a reason for excuse should continue to apply to those having the care, custody or control of children up to the age of 18 years.[90] By the age of 18 years, many children have left school, while others under that age are left by working parents to care for themselves after school. In other cases, arrangements are made for their supervised care.

6.55 The need to care for young children should, in our view, be a matter to be assessed on a case by case basis in determining whether a juror should be excused for good cause, and only applicable where reasonable alternative arrangements cannot be made, or where a particular need is demonstrated for care of the child by the person having the responsibility for the child's care, custody or control. This position was supported by most other submissions.[91] Excusal from

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The Jury in a Criminal Trial: Empirical Studies, Research Report 1 (1986), [4.4].

86. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [3.147].*
87. *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).*
88. *Juries Act 1957 (WA) Sch 2 Part 2 cl 4.*
89. *J Goldring, Submission, 4.*
90. *NSW Young Lawyers, Submission, 15-16.*
91. *NSW Jury Task Force, Submission, 2; NSW Public Defender's Office, Submission, 8; Redfern Legal Centre, Submission, 10; NSW Bar Association,*

service on this ground could be dealt with on a case by case basis, which would almost permit deferral for a period of time so as to minimise any inconvenience attaching to the need for repeat applications.

Care of a person who is sick, infirm or disabled

6.56 In NSW, exemptions as of right are also available for people who reside with, and have full-time care of, a person who is "sick, infirm or disabled".[92] This right of exemption is not qualified by the additional provision attaching to those who have the care of children, namely that they be the sole carer.

6.57 In the case of most care obligations, alternative arrangements can be made if sufficient notice is given, although we recognise that, in some instances, the costs of engaging an alternative helper, or the risk of distress to the person receiving the care, or the special dependency or demands that attach to that relationship may be persuasive when determining an application to be excused.

6.58 One suggestion that could encourage such people to serve would be to allow jurors to claim any fees paid for substitute carers who were engaged during the period of the jury service.[93] We address that possibility, which also has relevance for those who have the responsibility for the care and control of children, later in this Report.[94]

6.59 Otherwise, our view is that the same considerations should apply to people in this position as to carers of children, that is, replacing the existing right of exemption, but allowing applications to be made, on a case by case basis, for excusal for good cause.

6.60 Alternatively, if a right to exemption is to be preserved for this group, then it should only be available to sole carers.

Geographical criteria

6.61 Currently, a person who resides more than 56 km from the place where he or she is required to serve as a juror is entitled to claim an exemption as of right.[95] The origin of the 56 km distance, which was first prescribed in 1977,[96] is unclear, although it can be noted that the

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Submission, [24]. NSW Young Lawyers, Submission, 15 preferred to retain the exemption as of right for carers of under school-aged children.

92. *Jury Act 1977 (NSW) Sch 3 item 11.*
93. *NSW Office of the Director of Public Prosecutions, Preliminary submission, 4.*
94. *See para 12.50-12.53.*
95. *Jury Act 1977 (NSW) Sch 3 item 12.*
96. *Jury Regulation 1977 (NSW) cl 14.*

distance from the Sydney CBD to the nearest part of the Blue Mountains National Park is approximately 56 km.[97] *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 who will have an interest in the proper working of the justice system, and who will normally conduct their business and shopping in those towns. In most cases, they will possess private transport, and the added burden of travel can be compensated by a suitable allowance.*

6.62 A number of submissions generally questioned the utility of the current right to claim exemption if a potential juror lives more than 56 km from the court house at which the trial will be held.[98] *This was particularly so in the case of regional areas, where the 56 km limit was considered to be quite impractical.*[99]

6.63 Several submissions supported a change to the current 56 km limit, provided there was an appropriate regime to excuse people for good cause[100] *where the need to travel between home and a courthouse would occasion excessive hardship, or where sufficient means of private or public transport were not available; and provided adequate travel*[101] *and accommodation allowances*[102] *were available.*

6.64 In our view, the 56 km radius is an inappropriate, arbitrary criterion for exemption as of right, or for the determination of an application to be excused, and should not be retained.

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97. *It should be noted that people living near the centre of Sydney are only required to serve in the South 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 a court in the South Sydney jury district.*
98. *NSW Bar Association, Submission, [25]-[27]; NSW Young Lawyers, Submission, 16, 20; Legal Aid Commission of NSW, Submission, 12.*
99. *NSW Bar Association, Submission, [25]; J Goldring, Submission, 4.*
100. *NSW Bar Association, Submission, [27]; Redfern Legal Centre, Submission, 10; NSW Jury Task Force, Submission, 3; NSW Young Lawyers, Submission, 16; NSW Public Defender's Office, Submission, 8.*
101. *NSW Bar Association, Submission, [27].*
102. *NSW Bar Association, Submission, [27]. See also M J Stocker, Submission, 8.*

6.65 We deal with the question of distance from the relevant courthouse further when addressing excuse for good cause[103] *and the system for the establishment of jury districts.*[104]

RECOMMENDATION 27

No person should be entitled to be exempted from jury service as of right because of personal characteristics or situations. They should, however, have the capacity to apply, on a case by case basis, to be excused for good cause.

EXCUSE AS OF RIGHT FOR PREVIOUS JURY SERVICE

6.66 The following people may currently be exempted from jury service as of right:

> ***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.*[105]

The category of people last mentioned are those who have served as jurors in a trial or inquest where the presiding judge or coroner has given a direction that they be exempted as of right for a specified period.

6.67 We consider that it would be appropriate to maintain the current exemption as of right for those who fall within this category. It would then be the only remaining category of exemption and it would be the one that does not require any exercise of judgment or discretion beyond that of the juror, who would have the choice of relying on it or making himself or herself available for further service.

6.68 We do not make any recommendation for the amendment of s 39 of the Jury Act 1977 (NSW). We regard this as providing for a significant symbolic gesture, recognising the fact that those who have served as jurors in inquests or trials which the presiding judge or coroner assessed were sufficiently lengthy, demanding or harrowing to

103. See Recommendation 33(d) in Chapter 7.
104. See para 8.5, 8.18, 8.20, 8.21, 8.45.
105. Jury Act 1977 (NSW) Sch 3.

justify a s 39 direction, have provided a valuable community service. It would remain open for such people to serve again within the relevant time period if they were willing to do so. We note that current administrative practice is to ask jurors at the end of the trial whether they want to be removed from the roll.[106] *We see no reason why a similar practice could not continue, which would be assisted if our recommendations for upgrading the computerised records of the Sheriff were to be adopted.*[107] *Such an upgrade would facilitate recording any entitlement to be exempted and the duration of that entitlement.*

6.69 Most submissions supported retaining this head of exemption,[108] *which also serves the purpose of sharing the burden of jury service on an equitable basis. This has some relevance for rural areas where, as a result of the smaller size of the potential jury pools, there is a risk of people being summoned more frequently than in metropolitan areas.*

6.70 While we recognise the fact that, if our recommendations are accepted, previous jury service as defined above would be the sole basis for exemption as of right, we also believe that it would be reasonable to extend this exemption to anyone employed by a small business (fewer than 25 employees) which has had another employee actually serve as a juror in NSW within the preceding 12 months.

RECOMMENDATION 28

Jury Act 1977 (NSW) s 39, which relates to the exemption as of right of certain people who have previously performed jury duty, should be retained.
The exemption should be extended to anyone employed by a small business (fewer than 25 employees) which has had another employee serve as a juror in NSW within the preceding 12 months.

106. L Anamourlis, Consultation.
107. See para 8.29.
108. Legal Aid Commission of NSW, Submission, 13; NSW Public Defender's Office, Submission, 9; Redfern Legal Centre, Submission, 10; NSW Jury Task Force, Submission, 3; NSW Young Lawyers, Submission, 16; M J Stocker, Submission, 8. One also suggested more generous provisions: J Goldring, Submission, 4.

7. Excuse for cause

- Current law
- Definition of good cause
- Deferral or allocation to a short trial
- Guidelines
- Excused for a fixed time or permanently
- Redeterminations

CURRENT LAW

7.1 In NSW, there are two provisions which give the Sheriff the power to excuse a person from attendance for jury service. First, the Sheriff may excuse a person from attendance for jury service for good cause, at any time before being summoned, because of "any matter of special importance or any matter of special urgency".[1] Secondly, the Sheriff (or Court or Coroner) may excuse a person who has been summoned for jury service for "good cause" for the whole or any part of the time that his or her attendance is required.[2]

7.2 The first provision must be taken as applying only to those people who have received a notice of inclusion, but who have not yet been summoned. It has been interpreted by the Sheriff as requiring the disclosure of a good cause to be excused, as well as circumstances amounting to "special importance" or "special urgency".

7.3 At present, "good cause" is not defined by statute, and there is no legislative guidance for determining what constitutes good cause.[3] The Sheriff has, however, developed guidelines for the assistance of that office, and the website of the Office of the Sheriff provides some limited guidance as to the procedure which those who seek to be excused must follow.

7.4 The Sheriff's guidelines attempt to distinguish between applications for excusal at the notice of inclusion stage and those made in response to a summons. However, there is a substantial degree of overlap between the criteria listed in the guidelines, for example, in the areas of education, machinery of government, and conduct of business.[4] We understand that, in practice, an application to be excused, which is made at the notice of inclusion stage, will not normally be granted if it can be dealt with later under the "good cause" provision after a summons has been issued. Hence, the category of members of particular religious bodies[5] is listed in the guidelines only as a ground of excusal for good cause once a summons has been issued,[6] even

1. *Jury Act 1977 (NSW) s 18A.*
2. *Jury Act 1977 (NSW) s 38.*
3. *See M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 41 and 175.*
4. *Sheriff's Office of NSW, Jury Act, 1977: Policy and Practice Guidelines (November 2005), [2.6.2], [2.6.5], [2.6.6], [3.4.2], [3.4.3], [3.4.5].*
5. *See para 7.30.*
6. *Sheriff's Office of NSW, Jury Act, 1977: Policy and Practice Guidelines (November 2005), [3.4.7].*

though it might be more appropriately listed as a ground for excusal at the notice of inclusion stage.

7.5 As previously noted, a person does not currently have good cause to be excused on the ground that he or she 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 sent out with the notice of inclusion.[7] *In practice, however, it is likely that any person who omitted to make that claim when receiving the notice of inclusion will be excused if the claim is made to a court after service of the summons.*

7.6 Commonly, applications to be excused are dealt with by the Office of the Sheriff on the paper in advance of a trial. Depending on the location of the courthouse, applications made on the day of the trial will be considered in the first instance by a Sheriff's officer or, if at the Downing Centre in Sydney, by an administrative officer. Where there is any doubt over the genuineness of the claim or its strength, the issue is normally reserved for the trial judge or for the coroner holding the inquest.

7.7 The Sheriff's internal guidelines for the exercise by his or her officers of the discretion to excuse recognise that there are many potential grounds for such an application. They include, for example, the fact that the potential juror has booked and paid for a holiday during the period of the trial, or is suffering a temporary illness, or has university or TAFE commitments or examinations, or cannot be replaced in his or her employment because of staff shortages or other exigencies of business.

7.8 While not bound by the guidelines, and generally not privy to them, since they have not been made available outside the office, judges and coroners routinely excuse jurors for similar reasons. They also excuse jurors when, following the preliminary information given to the jury panel as to the nature of the charge or action and the identities of those involved, members of the panel seek to be excused because of an inability to give impartial consideration to the case.[8]

7.9 The Sheriff may require that any request to be excused be supported by a statutory declaration annexing, for example, a medical certificate or travel itinerary, or a letter from an employer, while a judge or coroner can require the person seeking to be excused to give evidence on oath. In exercising their power to excuse jurors, judges rarely give attention to the restriction that relates to people who, after

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7. Jury Act 1977 (NSW) s 18A(3), s 38(2).
8. Jury Act 1977 (NSW) s 38(7)-(9).

receipt of the notice of inclusion, failed to claim, without reasonable excuse, their entitlement to exemption under the Act.[9] *This arises because they do not have the relevant information placed before them, and also because, faced with an application to be excused on the basis of a demonstrated right to exemption, by an obviously unwilling juror, they are likely to take the pragmatic course of letting that juror go. Otherwise, they can be almost certain that there will be a peremptory challenge, since the parties normally prefer that obviously unwilling jurors are not empanelled.*

7.10 The practice of judges dealing with applications for excusal varies. Some deal with the applications in chambers, in the absence of the parties, if the application is supported by a medical certificate or other documentation. Other judges only deal with the applications in court in the presence of the parties. Some require the applicant to be sworn or to make an affirmation while others allow the application to be made orally from the well of the court. It is recognised that the occasion of making the application in open court can be a deterrent or a cause of embarrassment, particularly if the reasons involve personal medical matters or require disclosure, for example in a sexual assault prosecution, that the potential juror had been the victim of such an assault. While a degree of flexibility is sensible, it seems desirable that, where an applicant wishes the relevant grounds to be dealt with discreetly, he or she should be permitted to reduce them to a document to be handed up to the judge. Generally, counsel do not become involved in the excusal process, and we see no reason for any alteration of that practice, or for their being involved in any way in the application, except as observers where the application is made in court.

7.11 In 2006, 39,688 potential jurors were excused for good cause before attending, and, of those who attended for jury service, a further 9,428 were excused by the Sheriff and 2,457 by a judge.[10]

7.12 Subject to the following recommendations, we generally support the continuance of a system whereby the Sheriff or the court can excuse a potential juror for good cause after he or she has received a summons. Such a system is particularly necessary if, as the result of our recommendations, the categories of ineligibility and entitlement to be exempted as of right are to be substantially reduced or eliminated.

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9. Jury Act 1977 (NSW) s 38(2).
10. See para 9.2.

Moreover, it has the advantage of flexibility. This position was supported by the majority of submissions.[11]

7.13 If our recommendations concerning the way in which jurors should be summoned directly from the electoral rolls, without the intermediate step of issuing a notice of inclusion are accepted, then the first of the existing powers of the Sheriff to excuse people from serving as jurors would be redundant. If not, then we question the value of maintaining separate tests for the application of the two provisions, having regard to their overlap.

RECOMMENDATION 29

The Sheriff and the court should be able to excuse people from jury service for "good cause" either permanently or for a set period.

RECOMMENDATION 30

The practice should be encouraged of allowing jurors who seek to be excused, in court, on grounds which might cause them embarrassment or which might relate to their personal health or circumstances, to reduce those grounds to a document to be handed up to the judge.

DEFINITION OF GOOD CAUSE

7.14 We consider it desirable for the Act to establish a general definition of "good cause" that would encompass situations where:

> *(a) service would cause undue hardship or serious inconvenience to an individual, to his or her family, or to the public;*
>
> *(b) some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror;*[12]
>
> *(c) a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror.*[13]

11. *NSW Bar Association, Submission, [28]; NSW Young Lawyers, Submission, 17; J Goldring, Submission, 5; Legal Aid Commission of NSW, Submission, 13-14; NSW Jury Taskforce, Submission, 3; NSW Public Defender's Office, Submission, 9; Redfern Legal Centre, Submission, 10.*
12. *See also para 5.11-5.16.*
13. *Based on NSW Bar Association, Submission, [29].*

7.15 This draws on a number of models, including the New York Jury Project, which proposed two grounds alone on which a potential juror could be excused for good cause, namely:

> *(a) the individual has a mental or physical condition that causes him or her to be incapable of performing the duties of a juror; or*
>
> *(b) the individual asks to be excused because his/her service would be a continuing hardship to the individual, his/her family, or the public.*[14]

RECOMMENDATION 31

"Good cause" should be defined to encompass situations where:
(a) service would cause undue hardship or serious inconvenience to an individual, to his or her family, or to the public;
(b) some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror; or
(c) a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror.

DEFERRAL OR ALLOCATION TO A SHORT TRIAL

7.16 Before excusing a potential juror, the Sheriff or court should, in our view, be able to consider allowing a deferral or allocation to a panel for a short trial.

7.17 Many submissions were generally supportive of a discretion to grant deferrals in some cases.[15] *However, some submissions, while considering it desirable in theory, warned that, in practice, the administrative difficulty in implementing the system would outweigh the benefits arising from giving people the opportunity to seek deferral to a more convenient time.*[16]

7.18 The New York Jury Project has 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

14. *The Jury Project, Report to the Chief Judge of the State of New York (1994), 34.*
15. *NSW Public Defender's Office, Submission, 10; J Goldring, Submission, 5; NSW Jury Task Force, Submission, 3; NSW Young Lawyers, Submission, 18; M J Stocker, Submission, 3, 9.*
16. *NSW Bar Association, Submission, [33]; Redfern Legal Centre, Submission, 11.*

appropriate.[17] Under the guidelines in place in England and Wales, the relevant officer is encouraged to grant a deferral in the first instance. These include Members of Parliament, who can be offered deferral to a time when parliamentary duties permit, as well as students and teachers or lecturers, who should be offered deferral to a period outside of term time. Those seeking to be excused on the grounds of work commitments can also be offered a deferral to a time which better accommodates work commitments unless an exemption is clearly necessary.[18]

7.19 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.[19]*

7.20 Several Australian jurisdictions allow a person to apply for deferral to another specified period.[20] In Victoria, for example, this is supported by a computer system that allows potential jurors to record their preferred periods for service. In SA, the Sheriff or judge 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.[21]

7.21 We recognise that there can be problems with managing a system whereby people are offered alternative times that are more suitable. The New York Jury Project observed that allowing multiple deferrals "does not foster public respect for the jury system".[22]

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17. *The Jury Project, Report to the Chief Judge of the State of New York (1994), 35.*
18. *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).*
19. *New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), [156].*
20. *Juries Act 2000 (Vic) s 7; Juries Act 2003 (Tas) s 8; Juries Act 1963 (NT) s 17A.*
21. *Juries Act 1927 (SA) s 16(4).*
22. *The Jury Project, Report to the Chief Judge of the State of New York (1994), 36.*

7.22 We consider it appropriate that potential jurors, if otherwise eligible to be excused, should be allowed one opportunity to defer and to nominate dates within the coming 12 months when they will be available (and for how long). Depending on the nature of the reason for being excused and for receiving a deferral, it may be possible to allocate a juror to a panel for short trials. We consider, however, that multiple deferrals should be discouraged by an appropriate exercise of discretion.

7.23 The system proposed would be one of deferral to a particular date or dates, rather than keeping a potential juror on call for later in the same week or fortnight. Allowing deferral to a fixed date or range of dates would not offend the principal of random selection, as the deferred jurors have already been randomly selected, they still stand to be selected from the jury pool to which they have been deferred, and there will generally be no means of predicting on which trial they will serve, if any.

RECOMMENDATION 32

Potential jurors, if otherwise eligible to be excused, should be allowed an opportunity to defer and to nominate dates within the coming 12 months when they will be available.
Multiple deferrals should be discouraged by an appropriate exercise of discretion.

GUIDELINES

7.24 A significant number of submissions opposed or questioned the creation of a statutory list of potential reasons for exercising the discretion to excuse for good cause, on the grounds that any such list would tend to give rise to a de facto right to claim an exemption, or would, at least, provide a template of potential excuses that could be abused by those who set out to avoid jury service.[23] *Some submissions preferred a statutory list of "good reasons" to encourage more consistent decisions,*[24] *while others simply emphasised the need to have a clear, well-publicised list that would introduce greater certainty and consistency.*[25]

23. *NSW Bar Association, Submission, [31]; NSW Jury Task Force, Submission, 3; A Abadee, Consultation. See also M J Stocker, Submission, 8-9; Legal Aid Commission of NSW, Submission, 14; and Consultation.*
24. *NSW Public Defender's Office, Submission, 9; NSW Young Lawyers, Submission, 17; Redfern Legal Centre, Submission, 11.*
25. *J Goldring, Submission, 5; M J Stocker, Submission, 8.*

7.25 In our view, it would be appropriate for guidelines to be prepared and published that could assist the Sheriff's exercise of discretion in excusing jurors for good cause, or in deferring the time at which those who seek to be excused might still be required to serve. In outlining the matters that may be appropriately included in the guidelines, the Commission has had regard to the guidelines that currently apply in other Australian jurisdictions.[26]

7.26 The guidelines should be published, but should not be included in the Jury Act, or so worded as to harden into de facto entitlements to exemption. Their application should follow the example in England and Wales and envisage deferral in the first instance, or allocation to a short trial where that might relieve the inconvenience or hardship which would otherwise be occasioned.

7.27 Most of the possible reasons to be excused which could be included in the guidelines are self-evident, although to some extent they have been examined earlier in this report in relation to the existing categories of ineligibility or exemption as of right.

RECOMMENDATON 33

Guidelines should be prepared and published to assist the Sheriff's exercise of discretion in excusing jurors for good cause or in deferring the time at which those who seek to be excused might still be required to serve.

The guidelines, which should also be made available to all judges, should take into account the following matters:

(a) the demonstration of illness, poor health or disability, which would make jury duty unreasonably uncomfortable or incompatible with the good health of the juror, although only on production of a medical certificate;
(b) the pregnancy of the juror where, in the particular circumstance, service has been shown on production of a medical certificate to be unreasonably uncomfortable, or incompatible with the good health of the juror;
(c) the existence of substantial or undue personal hardship (including financial) or undue inconvenience to an ongoing business or professional practice resulting from attendance for jury service;
(d) the fact that excessive time or excessive inconvenience would be involved in travelling to and from court;
(e) the occasioning of substantial inconvenience to the public (or a section of the public) or the functioning of government resulting from the person's attendance for jury service;

26. *See Juries Act 2003 (Tas) s 9(3); Juries Act 2000 (Vic) s 8(3); Jury Act 1995 (Qld) s 21(1); Juries Act 1967 (ACT) s 14, s 15; Juries Act 1957 (WA) Sch 3; Juries Act 1927 (SA) s 16(2). See also Jury Act 1977 (NSW) s 18A.*

(f) the existence of caregiving obligations for young children or people with a disability where:
(i) suitable alternative care is required and is shown not to be reasonably available; or
(ii) special circumstances exist in relation to the person in care that justify the carer being excused.
(g) the fact that the person is one of two or more partners from the same business partnership, or one of two or more employees in the same business establishment (being one with fewer than 25 staff members), who have been summoned to attend as jurors during the same period;
(h) the holding of objectively demonstrated religious or conscientious beliefs that would be incompatible with jury service;
(i) the existence of a particular pastoral or ongoing counselling relationship between a member of the clergy or health professional and the accused or a victim or their families, such that the juror might be unable to bring (or appear to be unable to bring) an unbiased mind to the case;
(j) the existence of a previous or current professional contact between the accused, a victim or a witness in a particular case, such that the juror might be unable to bring (or appear to be unable to bring) an unbiased mind to the case;
(k) the age of the person in circumstances where, on that account, jury service would be unduly onerous;
(l) the fact that the juror has a high public profile to the extent that his or her anonymity might be lost if required to serve, resulting in a possible risk to his or her personal safety;
(m) pre-existing conflicting commitments such as pre-booked travel or holidays, special events, such as weddings, funerals or graduations, or examinations, compulsory study courses, or practical exercises required of students;
(n) the fact that the person is a teacher or lecturer who is scheduled to supervise or assess students approaching examinations, or to supervise or process an assessment task, or if the service is to take place in the first two weeks of a term or semester;
(o) the fact that the person is a member of the staff of the NSW Ombudsman attached to the Corrections team or the Police and child protection team; and
(p) any other matter or circumstance of special or sufficient weight, importance or urgency.

7.28 Each of these grounds can be further particularised, or illustrated, by further examples. For example, guideline (c) could be taken to include those who fall within the following groups, some of which are currently set out in the Sheriff's Office guidelines in relation to employment:[27]

27. Sheriff's Office of NSW, Jury Act, 1977: Policy and Practice Guidelines (November 2005), [3.4.4].

- *sole traders or sole private contractors whose business would be prejudiced to the point of having to cease trading for an extended period;*
- *those who have the sole day-to-day supervision of an apprentice who would otherwise be stood down;*
- *those whose service would fall within a period when they are scheduled to undertake a special project, who cannot be replaced, and where this service would directly delay the project and lead to a significant loss or penalty to their employer;*
- *those within the first month of new employment who would be significantly disadvantaged in their induction; and*
- *those who have been unemployed but have job interviews or obligations to attend for Job Search during the period required.*

7.29 We next deal with three specific situations which were addressed in the submissions received as grounds appropriately giving rise to a juror being excused for good cause, and which we have included in the proposed guidelines.

Conscientious objection

7.30 Currently, conscientious objection to jury service is not a ground of exemption as of right in NSW. The Sheriff's guidelines do, however, 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[28] from jury service.[29] On occasions, members of other groupings, religious or otherwise, have applied to trial judges, and have been excused for this reason. The basis for such decisions is that, while their particular claim to objection might not withstand scrutiny, it is inevitable that they will be challenged if not excused, or alternatively that the judge does not wish to run the risk of having a hung jury as the result of the objecting juror refusing to participate in the verdict.

7.31 A few submissions supported conscientious objection being added as a ground for exemption as of right, in the event that such exemption was maintained.[30] One submission, however, suggested that such an exemption should be "worded in such a way that it is less likely to be used as a pretext for people who object simply to the inconvenience of

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28. When supported by a statutory declaration from a "marriage celebrant of the Brethren".

29. Sheriff's Office of NSW, Jury Act, 1977: Policy and Practice Guidelines (November 2005), [3.4.7].

30. Legal Aid Commission of NSW, Submission, 13.

performing jury service",[31] since it is easy to claim adherence to some faith or religious group or philosophy that embraces such a tenet, yet difficult to disprove the legitimacy of such a claim.

7.32 Some submissions rejected conscientious objection as an additional ground for exemption as of right, preferring it to remain a ground for excuse so long as it could be objectively substantiated.[32] One submission considered that there should be no provision for conscientious objection.[33]

7.33 Another submission suggested that people who seek to be excused on the ground of their conscientious beliefs should be prepared to pay a fine or perform some other form of community service, in recognition of the fact that otherwise they expect to receive the benefits and entitlements of community membership.[34] Although no submission expressly made the point, those who claim to be excused for this reason are effectively passing to others the burden of ensuring that the criminal justice system requiring trial by jury continues to operate, and would presumably expect it to continue to do so if they were themselves the victims of crime or charged with some criminal offence.

7.34 Making conscientious objection to jury service a ground for a person to be excused is consistent with the Victorian Parliamentary Law Reform Committee's recommendation. The Committee preferred that it be available as a ground for a person to be excused from service for cause, rather than as a ground of exemption as of right, since the need for a satisfactory demonstration of its existence would reduce the risk of it being abused by those who lack a genuinely-held belief.[35] We agree with this view. In particular, we consider it undesirable that people who genuinely hold such beliefs should be forced to serve with the consequent risk of them refusing to take part in the deliberations which are essential to the return of a verdict. The availability of majority verdicts in all cases other than those involving offences under Commonwealth laws does not completely address this concern. In many instances, a judge, informed after empanelment that a member of the jury has indicated an intention not to participate in the jury discussions or to participate in a verdict, would feel constrained to discharge the jury. Whether this occurs or not, the parties to the trial

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31. *Legal Aid Commission of NSW, Submission, 13.*
32. *NSW Public Defender's Officer, Submission, 9; Redfern Legal Centre, Submission, 10; NSW Jury Task Force, Submission, 3; NSW Young Lawyers, Submission, 16-17.*
33. *M J Stocker, Submission, 8.*
34. *J Goldring, Submission, 5.*
35. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996) at [3.195], [3.198]-[3.199].*

would, in any event, be denied the opportunity of having the full jury assess the case on its merits. Accordingly, we recognise that the demonstrated existence of a conscientious objection to jury service should be included in the guidelines as a ground to be excused for cause.

Small business and sole practitioners

7.35 The plight of small business owners, and of sole practitioners, has been raised formally from time to time,[36] and is frequently raised in support of an application to be excused for good cause by reason of the interruption to the running of the business or practice, and the risk of a possible loss of clients or of income.[37] Some submissions also raised the issue of the apparent unfairness of the current system to proprietors of small business, especially in light of the poor remuneration offered to jurors and the calls upon their time.[38]

7.36 We accept that, in appropriate cases, this can provide good cause for a juror to be excused or deferred upon sufficient proof of the likely adverse effect to the business or practice, and of the absence of suitable alternative arrangements. Additionally, there would be occasion for such a person to be excused if he or she works in a business or practice with fewer than 25 staff members and another member of the staff is serving as a juror at the same time, or has served as such during the preceding 12 months. Accordingly, we consider it appropriate for this to take its place in the guidelines.

Teachers and students

7.37 School teachers and lecturers at tertiary institutions are no longer exempt in NSW.[39] However, teachers and lecturers have generally been excused for good cause if they are scheduled to supervise or assess students approaching examinations, or if they are scheduled to supervise or process an HSC assessment task, or if the service is to take place in the first two weeks of a term or semester.[40]

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

37. See also para 6.70.

38. M J Stocker, Submission, 7; J Goldring, Submission, 4; NSW Young Lawyers, Submission, 12, 13; NSW Bar Association, Submission, 11.

39. School teachers were previously exempt under Jury Act 1912 (NSW) s 5(n).

40. Sheriff's Office of NSW, Jury Act, 1977: Policy and Practice Guidelines (November 2005), [3.45]. See also M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 42.

7.38 TAFE and university students also do not fall within any of the categories of ineligibility or exemption in NSW. However, the Sheriff's guidelines do 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, or when essential examinations, assessments or practical exercises are scheduled, and that the student would be seriously disadvantaged or delayed in completing his or her studies.[41]

7.39 We accept that such cases should continue to be assessed on an individual basis in the light of the nature and importance of the commitments of the teacher, lecturer or student. We do, however, note that in suitable cases the difficulty can be overcome by a deferral of service to a later more convenient time, or even an allocation to a short trial. A degree of flexibility would be important in these cases, as would encouragement of young people to perform jury service so as to redress the slight age imbalance in the number of those serving, and so as to expose them to an important aspect of the civic process involved in the justice system.

EXCUSED FOR A FIXED TIME OR PERMANENTLY

7.40 To avoid the need for repeat applications, we consider it appropriate for a power to be conferred on the Sheriff, with a right of appeal to the District Court, to excuse jurors who can demonstrate an ongoing cause to be excused, either permanently where that cause is shown to be permanent in nature, or for a limited period where it may not be of that degree.

7.41 Precedent for such an approach may be found, for example, in Victoria, where the Juries Commissioner may permanently excuse a person from jury service, whether or not that person has in fact been summoned for jury service. The Juries Commissioner must be satisfied that there is good reason for permanently excusing a person. "Good reason" includes, but is not limited to, continuing poor health, disability and advanced age.[42] *An applicant who is dissatisfied with the decision of the Juries Commissioner may appeal to the Supreme Court or County Court.*[43]

7.42 Tasmania makes substantially similar provision,[44] *except that "good reason" is limited to a person's continuing poor health or*

41. *Sheriff's Office of NSW, Jury Act, 1977: Policy and Practice Guidelines (November 2005), [3.4.5].*
42. *Juries Act 2000 (Vic) s 9.*
43. *Juries Act 2000 (Vic) s 10.*
44. *Juries Act 2003 (Tas) s 10, s 12.*

disability, or that "the beliefs or principles of the religious society or body of which the person is a practising member are incompatible with jury service".[45]

RECOMMENDATION 34

The Sheriff should have the power, with a right of appeal to the District Court, to excuse jurors who can demonstrate an ongoing cause to be excused, either permanently or for a limited period.

REDETERMINATIONS

7.43 At present, there is no express provision in NSW permitting an appeal to the court from a decision of the Sheriff (or equivalent officer) refusing to grant a claim for excusal for good cause.[46] *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, although many jurors feel reluctant to reapply once they have been refused, particularly if this has to occur in open court, because of the embarrassment involved.*

7.44 Submissions generally supported a right to a redetermination following the exercise of the Sheriff's discretion.[47] *We see merit in this course, and consider it appropriate to provide a means whereby an applicant, whose application to be excused or deferred has been refused by the Sheriff, to bring forward a further application to a judge of the court in which the proceedings are listed for trial, for redetermination on a day before the day of the trial. This would be an alternative to reserving it for the trial judge.*

7.45 We acknowledge that many potential jurors will continue to make their applications on the day of the trial. However, providing an avenue to seek a redetermination from a duty judge in advance of the date on the summons would provide greater certainty for those who, if their applications to be excused are not successful, may need to make alternative arrangements with respect to work, or other commitments.

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45. *Juries Act 2003 (Tas) s 10(3).*
46. *But see Juries Act 2000 (Vic) s 10; Juries Act 1974 (Eng) s 9A; Juries Act 1927 (SA) s 16(5).*
47. *NSW Bar Association, Submission, [32]; NSW Young Lawyers, Submission, 18; M J Stocker, Submission, 9. However, a number of submissions did not support an extra layer of appeal beyond redetermination by the trial judge on the day of the trial: NSW Jury Taskforce, Submission, 3; NSW Young Lawyers, Submission, 18; NSW Public Defender's Office, Submission, 9.*

It would also assist the Sheriff in assembling a sufficient panel for any pending trial.

RECOMMENDATION 35

A person whose application to be excused or deferred has been refused by the Sheriff should be able to bring forward a further application to a duty judge of the trial court for redetermination on a day before the date for the return of the summons.

8. Identifying potential jurors

- Current practice
- Problems with the current practice
- Proposals to establish a smart electoral roll
- A new approach

8.1 This chapter deals with the question of identifying eligible jurors for the purpose of summoning them for jury service. Traditionally, this question has been principally concerned with creating a jury roll and then removing those who are excluded for various reasons, such as occupational ineligibility or disqualification because of criminal history.

CURRENT PRACTICE

8.2 In NSW, the current practice is to include, on the jury rolls, the registered electors who are resident in the postcode areas for the electoral districts closest to the relevant courts.

Identification of jury districts

8.3 The Act states that each jury district is to comprise "such electoral districts or parts of electoral districts" as the Sheriff may determine "from time to time".[1] Each existing jury district has, therefore, been administratively determined by the Sheriff. The districts are not formally gazetted in NSW as they are required to be in other Australian jurisdictions.

8.4 The electoral districts and their boundaries are themselves determined from time to time when redistributions are made following enquiry by the Electoral District Commissioners.[2] However, the Sheriff has not carried out the exercise of determining new jury districts following electoral redistributions for more than 10 years.

8.5 Regulations have been passed that prevent overlap between existing jury districts so that each jury 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. The divisions between these jury districts have been set for administrative convenience. They were not fixed, for example, by reference to the 56 km distance criterion for the exemption[4] of those who might otherwise be called upon to serve at the Sydney District Court.

1. *Jury Act 1977 (NSW) s 9(2).*
2. *Under the Parliamentary Electorates and Elections Act 1912 (NSW) s 13.*
3. *Jury Regulation 2004 (NSW) cl 3(1)(a).*
4. *See para 6.61-6.65.*

Use of electoral rolls

8.6 The Sheriff obtains the names and addresses and dates of birth of people living within relevant electoral districts, obtaining snapshots, at regular intervals, from the electoral rolls held by the NSW Electoral Commission. The responsibility for establishing and managing the electoral rolls has to date rested with the Australian Electoral Commission on behalf of the State and Territory electoral commissions.

Creation of supplementary jury rolls

8.7 At least once every 12 months, the Sheriff selects at random, from the relevant electoral rolls, a number of people who are potentially available for inclusion in the jury roll for each jury district. The list of people so selected is referred to in the legislation as a "supplementary jury roll".[5] In order to determine the number of people to include on a supplementary jury roll, the Sheriff must estimate the number of people who may be required to serve from time to time. In doing so, the Sheriff must allow for people who are not qualified, or who are ineligible or who will duly claim exemption as of right from service,[6] or are likely to be excused.

8.8 The Sheriff sends a notice to each person whose name is included on the supplementary jury roll for each jury district, informing that person of the intention to include him or her on the roll, and describing the classes of people who are disqualified, ineligible or entitled to claim exemption as of right. The notice must contain a questionnaire to be completed by a respondent claiming disqualification, ineligibility or exemption from jury service and specifying the relevant basis for the claim.[7]

8.9 The Sheriff is under a duty to delete from the supplementary jury roll the names of people whom the Sheriff determines are disqualified, ineligible or who have successfully claimed exemption from serving as jurors.[8] 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.[9]

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5. *As referred to in Jury Act 1977 (NSW) s 12(4).*
6. *Jury Act 1977 (NSW) s 12.*
7. *Jury Act 1977 (NSW) s 13(1)(c).*
8. *Jury Act 1977 (NSW) s 14.*
9. *Jury Act 1977 (NSW) s 14(2), s 15.*

Finalising the jury roll

8.10 The current practice is that, after 28 days, the names of those who have not been removed from the supplementary jury roll are included on the roll for the jury district. These people 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.[10] The 15-month period means that, given the Sheriff's practice of creating a new supplementary roll at least every 12 months, there will be at least three months during which people from the previous supplementary roll are on the jury roll together with those from the current supplementary roll.

PROBLEMS WITH THE CURRENT PRACTICE

8.11 There are a number of problems that arise under the current system relating to both the use of the electoral roll and the current means of determining jury districts.

Use of the electoral roll

8.12 The use of the electoral roll as the sole source for identifying and locating those who are to receive a notice of inclusion on the jury roll, and subsequently a summons, raises a number of questions, particularly that of its accuracy over time.

8.13 The accuracy of the jury rolls currently depends on the fact, as contemplated by the statutes in most jurisdictions, that the Sheriff extracts data from the Electoral Commission on at least an annual basis. However, information from these "snapshots" can readily become out of date within this period as people change address or die. For example, it was reported to us that of the 4.3 million electors in NSW, approximately 500,000 change address in any one year.[11]

8.14 At present, there is no mechanism in place whereby the Sheriff can check the accuracy of the jury roll before sending out notices. The RTA database, for example, is only consulted when the State Debt Recovery Office is engaged to enforce a penalty for a juror's non-attendance.[12] The provisions in other Australian jurisdictions which potentially give the police a role in checking the eligibility of potential

10. *Jury Act 1977 (NSW) s 15A.*
11. *C Barry, Consultation.*
12. *L Anamourlis, Preliminary consultation; NSW, Jury Task Force, Preliminary submission at 3.*

jurors[13] *are inconsistent with the NSW provisions that ensure their anonymity, and are accordingly not employed.*

8.15 The continued use of "snapshots" of the electoral roll causes considerable wastage in time and money for the Sheriff's Office. This arises from the need to process the notices of inclusion and summonses for people who are no longer within the jury district and, for that reason, fail to respond, and from thereafter attempting to enforce what may incorrectly appear to be a deliberate non-compliance with the summons.

8.16 If the information available to the Sheriff and used in summoning jurors was updated on a more regular basis, it would increase the chance of members of more transient populations who have, at some stage, registered as electors, being accurately recorded in jury rolls, and as a consequence, becoming available to serve as jurors. It would also reduce the incidence of notices of inclusion and summons being incorrectly issued. There would also be savings because of a reduction in the number of notices and summons required and fewer investigations of cases where there was no response.

Jury districts

8.17 There are a number of additional problems caused by the way in which the current jury districts have been established and maintained.

8.18 First, the failure to revise the current jury districts means that there a currently a number of "black spots" within which potential jurors are effectively disenfranchised, for example, Liverpool, where jury trials are no longer held, and Katoomba, where jury trials are only held occasionally. People in these jury districts are never or seldom called, despite living within 56 km of other courthouses where jury trials are held. There are also black spots in many parts of rural NSW which are regarded as too remote from court towns or cities because they lie more than 56 km from a courthouse, with the consequence that the residents of these areas, would, if called, be able to invoke their right to be excused.

8.19 Secondly, there are substantial geographic overlaps in the regions between the various courts, such as along the eastern part of NSW between Kiama and Newcastle, or the regions around Bathurst, Orange and Parkes. The regulation that prevents addresses being within two jury districts means that some people who live within reasonable travelling distance of a busy court may never be called for

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13. Juries Act 1967 (ACT) s 24(4) and (5); Juries Act 1927 (SA) s 12(1a); Juries Act 2003 (Tas) s 23; Juries Act 2000 (Vic) s 26.

jury duty because they are included in the jury district for another nearby court that is less busy.

8.20 Thirdly, in regional areas, the current boundaries combined with the 56 km exemption have the effect of substantially reducing the available jury pool for some courthouses. It also imposes excessive obligations on residents who live close to those courts.

8.21 Finally, when people change their address to a location outside their current jury district, but still within the 56 km limit from a courthouse served by that district, the current practice is to remove them from the roll, at either the notice of inclusion or summons stage. However, many of those people would still be capable of serving as jurors at that courthouse.

PROPOSALS TO ESTABLISH A SMART ELECTORAL ROLL

8.22 The Electoral Commission for NSW has informed us of the possibility of developing a smart electoral roll that would provide a more complete and accurate register of electors.

8.23 Such a system would allow the Electoral Commission to access data from trusted agencies, such as the Registry of Births, Deaths and Marriages, Australia Post, the Board of Studies, the Roads and Traffic Authority and the Rental Bond Authority, to identify those who may be eligible to register as electors and thereby facilitate the Commission in encouraging them to register.

8.24 It could also provide the Electoral Commission with prompt information of any changes of address or deaths notified to the trusted agencies. This would have the clear advantage of maintaining a real time electoral roll, which would be considerably more accurate than that which can be produced under the current system, which depends upon individuals notifying the Australian Electoral Commission of any changes.

8.25 Any such system could be further enhanced by the use of readily available geographic information systems, so as to attach a geopositioning code to individual residential properties. Each property could then be given particular attributes, such as a relevant State electoral district and local government area which would then be applicable to resident electors at those addresses.

A NEW APPROACH

Using the smart electoral roll to establish jury service areas

8.26 We would fully support the adoption of a smart electoral roll, with the features mentioned, as a means of overcoming some of the problems identified in this report.

8.27 If adopted, the Sheriff's Office could have direct access to the electoral records, on a real time basis, in place of the current system of relying on a CD obtained from the Electoral Commission at intervals.

8.28 As already noted, each residential property entered on the roll could be given particular attributes. These could include eligibility for jury service at any courts within a specified area. A jury service area for each court, equivalent to the former "jury districts", could be identified by drawing its boundaries and then linking it to the relevant geopositioning code for each property within those boundaries. The Electoral Commission would be able to provide the Sheriff with the relevant details of all electors within the jury service areas so determined.

8.29 Such a system could also permit the Sheriff to access the electoral database and manipulate data in particular fields, while leaving the core of the database intact. These fields could contain additional relevant information, including information about exemptions by reason of previous jury service, ineligibility on the grounds of criminal convictions or otherwise, as well as permanent excusal or excusal for nominated periods (for example, because of absence overseas), and deferral.

8.30 Even greater accuracy of the electoral rolls could be achieved if the Sheriff were to report back to the Electoral Commission any previously unidentified or yet to be notified changes in relation to people who were summoned to attend for jury duty but were found to have moved or died.

8.31 The recommendations which we make in this Report concerning the enrolment and selection procedure assume that a smart electoral roll could be established in the near future. They also assume that the Sheriff will be able to have direct electronic access, on a real time basis, to the electoral rolls, regardless of whether a new system of updating and maintaining the rolls is adopted.

RECOMMENDATION 36

The Sheriff should be able to access and use a smart electoral roll, if it becomes available, for the purpose of establishing jury service areas and summoning jurors.

If no such system is developed, the Sheriff should be given direct real-time electronic access to the existing electoral rolls.

Cross-checking with other records

8.32 We consider that the Sheriff should have the ability to cross-check the information available from the electoral rolls with information from other trusted agencies. The cross-checking would achieve two purposes.

8.33 First, pending the possible establishment of a smart electoral roll, it would ameliorate some of the problems of ensuring the accuracy of information contained on the electoral rolls. For example, RTA and utility records could be used to check current addresses, and the registers of births, deaths and marriages could be checked for deaths and name changes.

8.34 Secondly, it would allow the Sheriff to check the National Criminal Register, or alternatively, NSW Police records, as well as Corrective Services and Juvenile Justice records, for grounds of ineligibility referable to contact with the criminal justice system or to current custodial status.[14]

Privacy concerns

8.35 One submission objected to the Sheriff having the power to undertake cross-checks of information with other databases on the grounds of privacy, since the information would be "extracted for a purpose substantially different from the purpose for which it was provided".[15] *The answer to any such concern is that, with current technology, cross-checking can be conditional upon maintaining appropriate standards of information security.*[16] *In any event, access by the Electoral Commission in the way previously mentioned, to information from other databases, is subject to an exception from statutory privacy requirements.*[17] *This in itself provides some additional support for the adoption of the smart electoral roll, since it would be the Electoral Commission that would undertake the cross-checks in relation to information concerning addresses, name changes and deaths supplied by electors. The compilation of records is the*

14. *See para 3.74-3.77.*
15. *Redfern Legal Centre, Submission, 5.*
16. *Aboriginal Legal Service, Submission, 6.*
17. *Parliamentary Electorates and Elections Act 1912 (NSW) s 31(4)-(6).*

responsibility of government agencies, undertaken for the better administration of the justice system, and it is difficult to see any infringement of privacy involved in the capacity for the Sheriff to make cross-checks in connection with the operation of the jury system.

Vetting by law enforcement and security agencies

8.36 The question of law enforcement agencies and security agencies having an opportunity to vet the list of potential jurors, so as to identify those with criminal histories or with suspected involvement in terrorist activities that might otherwise render them unsuitable or amenable to challenge for cause, has been raised for consideration.[18] *In Victoria, there was previously 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.*[19]

8.37 Although the possibility of juror vetting has some apparent attraction in the case of terrorist trials, where jurors might potentially be exposed to information of a classified or sensitive nature, we do not support conferring any right in law enforcement or security agencies to vet potential jurors. Such a procedure would:

- *offend against the objective of random selection;*
- *confer upon the prosecution a right that would not be available to the defence;*
- *involve a secret process that would not be open to challenge and that could have regard to inappropriate factors; and*
- *potentially open up the opportunity for some of the dilatory and complex jury empanelment procedures adopted by some jurisdictions in the United States.*[20]

8.38 In any event, considerable care is usually taken in terrorist trials to protect sources and not to tender evidence that is too sensitive to be used, without any apparent harm being occasioned to the integrity of those trials. Accordingly, we adhere to our 1986 recommendations[21] *not to introduce jury vetting, apart from allowing the Sheriff to access*

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18. *Compare the "not fit or proper to serve" proposals of the NSW Police: para 3.6.*
19. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [5.17]. But see Katsuno v The Queen (1999) 199 CLR 40.*
20. *See, eg, N J King, "The American Criminal Jury" in N Vidmar (ed), World Jury Systems (Oxford UP, 2000), 112-113 and S Landsman, "The Civil Jury in America" in N Vidmar (ed), World Jury Systems (Oxford UP, 2000), 389-392.*
21. *New South Wales Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.43]-[4.45].*

relevant records to ascertain whether a prospective juror is ineligible by reason of prior contact with the criminal law.

RECOMMENDATION 37

Pending the possible introduction of a smart electoral roll, the Sheriff should have the authority and capacity to cross-check data relating to a potential juror's residential address with records held by other government agencies.

The Sheriff should have the authority and capacity to cross-check data relating to a potential juror's criminal and custodial history and status with records held by other government agencies.

Otherwise, jury vetting should not be introduced in NSW.

A combined notification and summons procedure

8.39 If our recommendations are accepted in relation to the existing categories of people who are disqualified, ineligible or entitled to claim exemption as of right, there would be little purpose in continuing the existing procedure for establishing a supplementary jury roll and for sending out notices of inclusion.

8.40 The existing procedure should, in our view, be replaced. People living within the jury service area for the trial court whose names are contained on an electoral roll should be summoned directly from that roll. They should then be given an opportunity to make an application in relation to any remaining ground of ineligibility or exemption, or to be excused from the nominated sittings, or to be deferred, for cause. This approach was supported by the Sheriff, who regards the existing procedure as cumbersome and wasteful of resources.[22]

8.41 A person who receives a summons should also receive information about the nature and obligations of jury service. This information should be in major community languages so that those who are unable to read and communicate in English and are therefore not qualified to serve are able to inform the Sheriff accordingly.

Precedents for eliminating the notice of inclusion

8.42 There is already precedent for summoning jurors directly from the electoral rolls in NSW and in other jurisdictions, and for deferring any decision on a claim to be ineligible or excused until after the summons is served. In NSW, the Act no longer requires a jury roll to be

22. See also Redfern Legal Centre, Submission, 5. But see NSW Young Lawyers, Submission, 2.

established for every jury district. This means that, in districts where trials are held infrequently, for example, Katoomba, the jury roll is, in practice, established from the relevant electoral rolls whenever juries are required, at which time the summonses are also sent out.[23] *Applications to be excused and claims to disqualification, ineligibility, or exemption as of right are dealt with following responses to the notice of inclusion questionnaires sent out at the same time as the summonses.*[24]

8.43 In Queensland, the Principal Electoral Officer prepares jury rolls by listing all people aged between 18 and 70 years who live within a certain distance of the relevant court and who are on the electoral roll. Potential jurors are then summoned from this roll six weeks in advance of the court sittings for which jurors are required.[25] *In England and Wales, potential jurors are also summoned directly from the electoral rolls.*[26]

8.44 On the other hand, the Victorian system provides for a preliminary questionnaire to be sent to people whose names are on the electoral roll for the relevant jury district, advising that they will be summoned for service within a nominated 4-6 week time frame. This gives the recipients an opportunity to apply to be excused and also to apply for deferral to a more suitable time. About 30% of the recipients of the questionnaire are removed from the pool at this stage. The remaining people are then sent summonses for particular dates within the previously nominated 4-6 week period. They are again given the opportunity to apply to be excused and also to apply for deferral to a more suitable time. A further 30% of the people summoned are removed from the pool at this stage. The remaining people must attend for service on the day indicated in the summons.

Locating jurors for particular courts

8.45 The radius for a court's jury service area could vary according to location, for example, 40 km for metropolitan areas (including the areas served by the courts at Sydney, Parramatta, Campbelltown, Penrith, Newcastle and Wollongong) and 100 km (or more) for regional courts to take into account the arbitrariness of the current 56 km criterion for excusal, and its adverse effects in regional areas. It should be borne in mind that the use of a radius for a jury service area merely provides a convenient means for identifying prospective jurors. It does not in any way affect the right of jurors to apply to the Sheriff, or to the

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23. L Anamourlis, Consultation.
24. In accordance with Jury Act 1977 (NSW) s 26(2).
25. Jury Act 1995 (Qld) Part 4. See Queensland, Criminal Justice Commission, The Jury System in Criminal Trials in Queensland, Issues Paper (1991), 10.
26. Juries Act 1974 (Eng) s 2, s 3.

court, to be excused for cause where travel to and from the courthouse would impose undue difficulty or expense.[27]

8.46 We intend that this proposed new arrangement would involve jurors within a jury service area being summoned to serve at any one of the courts within the permitted radius of their place of residence. This is contrary to the existing arrangements, whereby a particular address can be in no more than one jury district.[28] *This would be subject to excusing them on the grounds that they have already been called, or are currently serving, as a juror at one of the other courts, and also to the right to be excused for previous service within a specified time.*

8.47 It should be noted that this new arrangement for identifying jury service areas will require consequential amendments to other provisions within the Jury Act that rely on the current definition of "jury district". For example: the provision which allows the Sheriff to require people on one jury panel who are not required at the court or inquest to which they have been summoned to attend at another court or inquest in the same jury district;[29] *and the special provisions relating to certain coronial inquiries in the Broken Hill Jury District.*[30]

RECOMMENDATION 38

Consequential amendments should be made to the provisions of the remaining provisions of the *Jury Act 1977* (NSW) that rely on the current definition of "jury district".

Abolition of appeals to a Local Court

8.48 One consequence of eliminating the notice of inclusion would remove the need for a process by which a person may appeal to a Local Court if he or she is dissatisfied with the Sheriff's determination not to delete his or her name.[31] *Evidence has been brought to the Commission of the inappropriate use of this avenue of appeal which has led to Magistrates removing people from the jury roll for reasons other than those falling within the prescribed grounds for disqualification, ineligibility and exemption as of right, or constituting a matter of "special importance" or of "special urgency". For example, people have been removed from the roll because of their ownership of a small business or because of their business commitments,*[32] *which are more*

27. See para 7.14 and Recommendation 33.
28. Jury Regulation 2004 (NSW) cl 3(1)(a).
29. Jury Act 1977 (NSW) s 51. See para 10.62.
30. Jury Act 1977 (NSW) s 4A.
31. Jury Act 1977 (NSW) s 14(2), s 15.
32. Information supplied by the NSW Sheriff's Office, 16 March 2007.

appropriately dealt with after service of a summons, on an application to be excused for cause.

8.49 The exercise of any discretion to review the Sheriff's decision is more appropriately left to the District Court or to a judge of the court to which the juror has been summoned.[33] *Moreover, the revised system which we consider appropriate would have the advantage of permitting a decision to be made closer to the time of trial, thereby allowing a more informed decision concerning the merits of any application to be excused or, alternatively, to be allocated to a short trial or to be deferred until some later date.*

8.50 While the processing of applications to be excused by reason of ineligibility or for good cause would still need to be carried out by the Sheriff after issue of the summons, in the first instance, this should not lead to any additional work by that office. On the contrary, it would replace the two separate procedures that are currently in place at the notice of inclusion stage and then at the service of the summons stage, by a single exercise following the service of the summons.

RECOMMENDATION 39

The current system of selection should be altered so that people living within a specified radius of the trial court should be summoned directly from the relevant electoral listings.

It should be possible to summon jurors to serve at any one of the courts within the permitted radius of their place of residence, subject to excusal on the grounds that they have already been called, or are currently serving, as a juror at one of the other courts, and also to the right to be excused for previous service at any court within the specified time.

33. See para 7.43-7.45.

9. Summoning and attendance

- Withdrawal of summons
- Sufficient notice of attendance
- Listing and cancellation of trials
- Attendance for more than one day before empanelment
- Compliance

9.1 Under the present system, once a person is summoned, he or she must attend at the nominated court on the day specified on the summons, unless he or she makes an earlier successful application to be excused[1] or unless advised by a telephone service the night before the appointed day that attendance is not required. Upon attendance at court, each prospective juror must provide identification (although not necessarily photo identification) proving that he or she is the person summoned. Each person is then given a juror identification number by which he or she will be referred to throughout the remaining proceedings, including the balloting process.[2] Each person is then given a further opportunity to seek to be excused, first by Sheriff's officers and then by the trial judge. Prospective jurors must then make themselves available, sometimes for several days, until advised that they are no longer required.

9.2 Some understanding of the numbers of people who might be called in NSW for jury service, and who may have to be processed at the summons and attendance stage, can be gained by reference to the following statistics provided by the Sheriff's Office, in relation to those who were summoned from the jury rolls and who eventually served as jurors during the 2006 calendar year.[3]

	Number removed	Percentage of those summoned	Number remaining
Jurors summoned			119,414
Excused prior to trial	39,688	33%	79,726
Advised not to attend	18,694	16%	61,032
Absent	13,417	11%	47,615
Excused on day (sheriff)	9,428	8%	38,187
Excused on day (judge)	2,457	2%	35,730
Not selected	26,411	22%	9,319
Served		8%	9,319

1. *See para 7.1-7.13.*
2. *Jury Act 1977 (NSW) s 29.*
3. *These statistics do not take into account the additional people who were given notices of inclusion, but excluded in the course of establishing the supplementary rolls.*

9.3 The following paragraphs examine some of the practices related to the summoning of jurors that can lead to problems which, if better managed, could make jury service less onerous. The recommendations, if adopted, will lead to costs savings, and improved efficiency.

WITHDRAWAL OF SUMMONS

9.4 Currently there is a two-stage process to determine juror eligibility or entitlement to exemption, first, after receipt of a notice of inclusion and then after receipt of a summons.

9.5 The Commission has recommended that summonses should be issued directly to eligible people living within a predetermined radius of a particular court, without notices of inclusion having been circulated beforehand to identify and remove those who are excluded from jury service.[4] An explanatory notice would be sent with the summons identifying the grounds of exclusion, and explaining the procedures to be followed by those who are excluded or who wish to be excused for cause. In order for this procedure to work effectively, there will need to be a provision that allows for the withdrawal of a summons on proof that a person is excluded according to specified criteria or that good cause exists to be excused.[5] Many of the applications could be dealt with on paper, and if made good, followed by a notice of withdrawal of the summons.

RECOMMENDATION 40

There should be provision for the withdrawal of a summons for jury service upon proof that a person is ineligible to serve or that good cause exists to be excused.

SUFFICIENT NOTICE OF ATTENDANCE

9.6 Currently, in NSW, jurors need only be given seven days notice of the date when they are required to attend, unless a judge of the court "otherwise orders".[6] The usual notice period is 4-5 weeks. This is sometimes followed up by a written notice advising of the cancellation of a summons if it is known, more than two weeks in advance, that a panel will not be required on the date specified in the summons. However, this is rare and usually only occurs in regional areas where

4. *See para 8.39-8.47.*
5. *Compare Juries Act 1967 (ACT) s 26A(1).*
6. *Jury Act 1977 (NSW) s 26(3).*

there may only be one trial listed on the date for return of the summons, and that trial has been cancelled or adjourned.[7]

9.7 A court may require a jury to be empanelled at much shorter notice when, for example, a trial judge wishes to recommence an aborted trial or where insufficient jurors report for duty in relation to a trial which is otherwise ready to proceed, albeit some days later. In these cases, where the Sheriff is unable to draw upon jurors who have been summoned to attend at another court in the same jury district, but are not required at that court,[8] *the Sheriff's officers can deliver the jury summonses in person, since it is no longer possible to select bystanders from the precincts of the court if it is found that there are insufficient jurors available to complete the empanelment.*[9] *There are instances of summonses being given at short notice of only two weeks or less.*

9.8 The issue of a summons with a short notice period was reported as giving rise to considerable inconvenience to business, the more so when final confirmation that a person is required to attend is given only within one or two days preceding the trial.[10] *This may lead unnecessarily to jurors seeking to be excused, who, if given more time, would have been able to make alternative arrangements that would have allowed them to serve.*

9.9 Submissions suggested various periods of notice for attendance.[11] *In our view, the period of notice for attendance pursuant to the summons should be at least four weeks, although we recognise that it will be necessary to preserve the possibility of the courts requiring summonses to be issued with a shorter period for attendance where occasion requires, and where jurors cannot be drawn from other courts within the same jury service area.*

RECOMMENDATION 41

The period of notice for attendance at a court for jury service pursuant to a summons should be no less than four weeks, unless a judge of the court otherwise orders.

7. *L Anamourlis, Consultation.*
8. *Jury Act 1977 (NSW) s 51(1)(c).*
9. *A pray a tales provision was contained in Jury Act 1912 (NSW) s 57(2). A similar provision was not included in the Jury Act 1977 (NSW).*
10. *Australian Business Ltd, Preliminary submission at 2. See also A Allan, Submission, 1.*
11. *Two weeks: Redfern Legal Centre, Submission, 12. Three weeks: NSW Young Lawyers, Submission, 20.*

LISTING AND CANCELLATION OF TRIALS

9.10 Obvious problems can arise for potential jurors where trials are listed, but are cancelled at the last minute or disposed of by way of a late guilty plea. Our attention was drawn in particular to the inconvenience caused to jurors when they are advised only the night before the nominated date for attendance that they are not required, even though they may have made alternative arrangements for absence from work or from their homes.[12]

9.11 No ready solution to this problem was offered, since it is inevitable that there will be cases listed for trial where a late plea is offered, or an adjournment granted because of the illness or unavailability of a witness, or the discovery of new evidence that requires investigation. The best that can be achieved is to encourage the courts to implement more intensive case management which might identify these events earlier and to maintain continual communication with the Sheriff's Office concerning their requirements. This could go some way to minimising the disruption and inconvenience to jurors resulting from late advice that their services are not needed. It might also alleviate the problem whereby jurors are summoned and then excused, but are then lost to the system for a period because of their consequential entitlement to an exemption.[13]

ATTENDANCE FOR MORE THAN ONE DAY BEFORE EMPANELMENT

9.12 An issue arose as to whether limits should be placed on the number of days that a potential juror is required to attend before empanelment. There appears to be no provision limiting the period of time which a person is required to attend or hold himself or herself available to attend in response to a jury summons,[14] *although in practice there is an expectation that most jurors will be allocated to a trial or released from their summons on the day of attendance. There is some evidence of jurors being released within four hours in order to*

12. *A Allen, Submission, 1.*
13. *See para 6.66-6.70.*
14. *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), 136.*

avoid the payment that must otherwise be made for their attendance,[15] where it becomes apparent that they will not be needed.[16]

9.13 The District and Supreme Courts advise the Sheriff, on a continuing basis, of their expected listings. They also warn in advance of any trials that are likely to be lengthy or where larger than usual panels are required. This generally occurs because of the probability of there being a large number of applications to be excused or because of the need to accommodate the potential exercise of a significant number of peremptory challenges, for example, where there are multiple defendants. With the assistance of this information, the Sheriff has to estimate the size of the jury panels required for any relevant day.

9.14 The current practice in the Sydney District Court is to have panels of jurors summoned on Monday for trials commencing on Monday or Tuesday and to have panels of jurors summoned on Wednesday for trials that commence on that day, meaning that, other than in special circumstances, no potential juror has to wait for more than two days before empanelment.[17]

9.15 This practice is not readily capable of adaptation for the Supreme Court because of the significantly reduced number of criminal cases listed in that court each week,[18] and the greater length of trials, which rarely occupy less than two weeks sitting time, and often last much longer. Its practice is to have panels summoned for dates that accord with the dates for which an individual trial or trials are listed to commence, normally on Mondays. Sometimes, those trials have to be held back because an earlier trial allocated to the nominated trial judge has run over time, or because of the need to determine some pre-trial issue or preliminary question. In these cases, the jury panel is kept on standby, although not normally for longer than a week.

9.16 Where the trial is likely to be particularly lengthy or controversial, it has, on occasions, been the practice, after empanelment of a jury, to hold the remainder of the panel on standby for up to another week. This is a safeguard against the possibility of the empanelled jury having to be discharged because of some problem emerging during the opening, or a late realisation by a juror that he or she may have a personal problem or some knowledge of the people involved in the trial. The power to appoint additional jurors, which we address in Chapter 10, should at least go some way to address such problems.

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15. See para 12.32.
16. L Anamourlis, Consultation.
17. K Shadbolt, Preliminary consultation.
18. Usually in the order of 5-7 trials.

9.17 It is accepted that attendance on more than one day without selection can be a great inconvenience for some potential jurors, particularly if they are advised that they are to regard themselves as on call for a nominated period. There is also a cost involved in paying jurors for attendance on days when they are not required.

9.18 The Victorian Parliamentary Law Reform Committee proposed the introduction of a "one trial or one day" system, with the aim of reducing the inconvenience experienced by people summoned for jury service.[19] Such a system is workable in Victoria because juries for both the Supreme Court and County Court in the Melbourne district are summoned to the same central location and the likely demand for juries is predicted through the Victorian Jury Commissioner's purpose-designed computer system. In NSW, the current practice in the District Court seems to provide a reasonable accommodation. However, such a system would not currently be workable in the Supreme Court in Sydney, having regard to the nature of its caseload, and the fact that its potential jurors are summoned to a separate location. In fact, the introduction of an inflexibly applied one trial or one day system, without a change to other practices and procedures currently in place, would be likely to result in more work for the Sheriff's Office, and inconvenience to a greater number of potential jurors than is presently the case. Any change in the other direction, for example, the adoption of the system in SA, requiring jurors to be available for one month, would also produce greater inconvenience than the current system.

9.19 We do not underestimate the difficulty which the Sheriff and the courts face in ensuring that sufficient jurors are present to allow trials to commence on the date for which they are listed, while avoiding the inconvenience to those who are summoned but not required, or who, alternatively, are required to remain on call for a period until they are either empanelled or released. Effective case management, and trial judges' awareness of the need to accommodate the convenience of potential jurors are important in resolving this problem.

COMPLIANCE

9.20 In 2006, of the 61,032 people who were required to attend for jury service, 13,417 (approximately 22%) failed to answer the summons.

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19. Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [5.12]. See also Tasmania, Department of Justice and Industrial Relations, Review of the Jury Act 1899, Issues Paper (Legislation, Strategic Policy and Information Resources Division, 1999), ch 5.

Penalties

9.21 The Jury Act allows a court to impose a penalty not exceeding 20 penalty units ($2,200) on anyone who fails to attend for jury service without reasonable excuse.[20] However, the Act also permits the Sheriff, in the first instance, to serve a notice on a person who fails to attend for jury service requiring the payment of 10 penalty units ($1,100)[21] which, if paid, will apply in full satisfaction of the potentially higher court-imposed penalty.

9.22 The current practice is for the Sheriff's Office to write to a person who fails to attend, requesting an explanation. At this stage, the person may provide a satisfactory reply, or may elect to pay the lower penalty ($1,100), or choose to have the matter heard before a Local Court. If the person does none of this, the Sheriff will issue a penalty notice.[22] A penalty notice for failure to attend attracts a fine of 15 penalty units ($1,650).[23]

9.23 Many of the 2,000 penalty notices that are issued for failure to attend in each year are withdrawn when it is found that the electoral roll did not correctly record the person's address. In the 2005/2006 financial year, only 165 penalty notices were eventually paid.

9.24 The Sheriff's Office tries to clarify any contentious issues before a matter goes to a Local Court and, if satisfied at that stage, it may allow the matter to be discontinued without penalty. Approximately 10 matters per month go before a Local Court, although not all result in convictions. For example, in the four years, October 2002-September 2006, 66 people were fined in the Local Courts for failure to attend for jury service, in amounts ranging from $25 to $2,000, with a median figure of $300. Charges were dismissed for a further 38 people, and one person was dismissed conditional upon entering into a good behaviour bond. Although each of the cases that went to court would need to be assessed on its own facts, in relation to the adequacy of the sentence, it would be undesirable if an impression was gained that the offence was not regarded by the courts as serious, or that jury service could be avoided by acceptance of a modest court-imposed fine, or penalty. This has particular relevance for long trials where there could well be a greater incentive to accept a penalty or fine than to serve and suffer a significant economic loss.

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20. Jury Act 1977 (NSW) s 63(1).

21. Jury Act 1977 (NSW) s 64(2)(a).

22. Jury Act 1977 (NSW) s 66. This has replaced an earlier system for summary disposal before a Magistrate: See M Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration Inc, 1994), 44.

23. Jury Act 1977 (NSW) s 66(2).

9.25 A question does arise whether fines or penalties of the order outlined above, particularly those imposed by the courts, actually achieve deterrence, or are regarded as an acceptable cost of avoiding jury service. It has been suggested that the number of people making penalty payments in response to the initial notice reduced after the penalty was increased, in 1999, from a prescribed sum of no more than two penalty units[24] to an amount equal to 10 penalty units ($1,100) where the matter was dealt with by the Sheriff.[25] It is not clear, at this stage, whether this and the subsequently increased penalty notice amount of 15 penalty units ($1,650) have resulted in increased compliance, or whether defaulting jurors prefer to take a chance of receiving a lesser fine in the Local Court.

9.26 One preliminary submission raised concerns that the option of paying a penalty of only $1,100 is not sufficient to deter those who are on a "reasonable income". However, it also suggested that stricter enforcement, or harsher penalties, might alienate the community and be "self-defeating".[26] Some submissions were satisfied with the current level of penalties and did not support any increase.[27] One submission suggested dealing more severely with people who do not obey a jury summons on three or more occasions, possibly by prosecution.[28]

9.27 The range of penalties for failure to attend in response to a jury summons varies across Australia. Penalties range from $500 in the NT[29] to $550 in the ACT,[30] $750 in Queensland,[31] $1,250 in SA,[32] $3,000 in Tasmania,[33] and $3,303.60 in Victoria, where the penalty is indexed on an annual basis.[34] Queensland, Tasmania and Victoria each allow for a sentence of imprisonment as an alternative, up to two months in the case of Queensland and up to three months in the case of Tasmania and Victoria. Western Australia simply provides that the court "may impose summarily such fines as the court thinks fit".[35] These jurisdictions all appear to rely on the penalty being imposed by a

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24. *Jury Regulation 1993 (NSW) cl 8.*
25. *L Anamourlis, Preliminary consultation. See Courts Legislation Amendment Act 1999 (NSW) Sch 3[10].*
26. *NSW Office of the Director of Public Prosecutions, Preliminary submission at 5.*
27. *NSW Young Lawyers, Submission, 22; NSW Public Defender's Office, Submission, 10.*
28. *J Goldring, Submission, 6.*
29. *Juries Act 1963 (NT) s 50.*
30. *Juries Act 1967 (ACT) s 41(1).*
31. *Jury Act 1995 (Qld) s 28(1).*
32. *Juries Act 1927 (SA) s 78(1).*
33. *Juries Act 2003 (Tas) s 27(4).*
34. *Juries Act 2000 (Vic) s 71(1).*
35. *Juries Act 1957 (WA) s 55(1).*

court. None of them would appear to have the NSW system of fines and penalty notices that apply at different points in the enforcement process.

9.28 It should be noted that Victoria does not currently seek to enforce the penalties for failure to attend and we understand that a similar reluctance to prosecute those who fail to comply with this obligation is shared by other States. Some of these jurisdictions rely on personal contact and follow up in the event that people do not attend for jury service on the basis that it is undesirable to force people to serve as jurors who are reluctant to do so, and that personal follow up may be more productive in altering this mindset.[36] Such an approach is not currently feasible in NSW given the level of inaccuracy in the current jury rolls, although it would be possible if the move was made to summon jurors from a real-time smart electoral roll.[37]

9.29 The relevant penalties were last adjusted in NSW in 1999.[38] Any increase is determined by statutory amendment rather than by annual indexation.[39] In our view, there is a need for an ongoing review of the adequacy of penalties for non-complying jurors, particularly if our recommendations designed to enhance the jury pool are adopted, as they will make eligible for jury duty a number of people in the professions, and other well-paid occupations, who are currently not required to serve. Some of these people may be prepared to pay a penalty rather than report for jury service or to take the chance of even paying a lesser fine if the matter is dealt with in the Local Court.

9.30 We recognise that there is a need to balance enforcement with the risk of alienating the community, or forcing uncooperative people to serve as jurors. However, it is also necessary to ensure that there is a rigorous investigation of the validity of excuses offered, followed by the prosecution of those who wilfully, or without reasonable excuse, fail to attend, and that fines or penalties imposed are properly enforced. As part of the balancing process, it would also be appropriate to take into account the increasing debt and sanctions currently applicable where the State Debt Recovery Office takes enforcement action. That enforcement regime, and alternatives in relation to the available sanctions, have been under consideration by the NSW Sentencing

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36. J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 66.

37. See para 8.26-8.31.

38. Courts Legislation Amendment Act 1999 (NSW) Sch 3[8].

39. Crimes (Sentencing Procedure) Act 1999 (NSW) s 17.

Council.[40] *The level of penalties applicable in relation to juror non-compliance would need to be considered in the event of there being a review across the board of the penalties imposed under the very many statutes that currently give rise to offences or regulatory breaches that attract penalties. We also consider that it is important to make it clear that non-compliance with a summons is regarded as a serious failure to perform an important civic duty and, as such, a serious offence. It is also important that there be a process of following up defaulters as part of an education strategy to encourage greater compliance.*

RECOMMENDATION 42

There should be an ongoing review of the adequacy of penalties for people who do not respond to summonses for jury service, and a comprehensive system for following up those who fail to comply with their obligations under the *Jury Act*.

40. *NSW Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices, Interim Report (2006).*

10. Empanelment

- Establishing a jury panel
- Challenge to empanelment
- Additional jurors
- Supplementing panels that have insufficient numbers

ESTABLISHING A JURY PANEL

10.1 Once the summonses have been issued, and any applications made in advance of the trial to be excused from service have been dealt with, the Sheriff returns a panel of the names of those summoned to attend, together with cards bearing the name of each person. Only those who are qualified and liable and who have not been duly excused may be included on the return.[1]

10.2 The Sheriff then allocates an identification number to each person and records the number next to the person's name on the return and on the person's card. The person is informed of his or her identification number when attending under the summons, and is thereafter to be addressed or referred to only by that identification number.[2]

10.3 Potential jurors are then given a further opportunity to seek to be excused from service. First, by application to an administrative officer at the Downing Centre or to a Sheriff's Officer elsewhere, and then to the trial judge.[3]

10.4 The jury is then selected from those present who remain on the panel by ballot in open court.[4] *At this stage, the parties to the proceeding are given an opportunity to challenge those who are selected.*[5] *Once the challenges are exhausted, 12 jurors are duly sworn. The question of additional or reserve jurors, which would bring the number of jurors above 12, is dealt with later in this chapter.*[6]

Disclosure before empanelment of information concerning the trial

10.5 In most cases,[7] *jurors will be unaware, until the day of the trial, of the identity of the accused or the nature of the case to be heard, and will have no opportunity before that day of seeking to be excused because of personal concerns in relation to the case. The possibility of jurors being affected by actual or ostensible bias arises from time to time as a result of the juror having some interest in the proceedings, or some relationship with the participants, or some prior experience as a victim of a similar crime to that before the court. The issue may arise*

1. *Jury Act 1977 (NSW) s 28.*
2. *Jury Act 1977 (NSW) s 29.*
3. *Jury Act 1977 (NSW) s 38. See also para 7.1-7.2, 9.1.*
4. *Jury Act 1977 (NSW) s 48-50.*
5. *Jury Act 1977 (NSW) Part 6. See para 10.12-10.20.*
6. *See para 10.43-10.61.*
7. *An exception can be the case of a trial in a regional centre where only one case may be listed and recorded in a published list.*

before the jury is empanelled or once the trial is under way, when a juror belatedly realises that some potential problem of a conflict of interest, or personal knowledge of the case or participants, may exist. In such a case, it often becomes necessary to discharge the jury and recommence the trial with a new jury. This is obviously undesirable as it is expensive, delays proceedings, and inconveniences the discharged jurors.

10.6 The current practice in NSW is for counsel to inform the panel of jurors in waiting, at the commencement of the trial, 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.[8] Commonly, the judge will provide additional advice as to the likely length of the trial and of the need for any jurors who have medical, financial or other issues that may prevent them from seeing out the trial to disclose that issue. The trial judge will then call upon the members of the jury panel to apply to be excused if they consider that they are not able to give impartial consideration to the case or have other as yet undisclosed problems in serving as a juror on that trial.

10.7 Where a juror makes that application, he or she is usually invited to state briefly the reason for the application, so as to avoid any abuse of the system. A similar procedure applies in proceedings before a coroner.[9] In almost every instance where a potential juror provides an apparently acceptable response to that call, he or she will be stood aside from the trial without further investigation, and either excused or asked to remain available, in case the balance of the panel is required for another trial. It is, however, a common experience that a juror faced with such a problem will not respond to the call and, as a result, later find themselves empanelled as a juror in that trial. The lack to response can be because of shyness or lack of attention to the preliminary directions or statements of counsel. Such concerns could be overcome to an extent by encouraging jurors to make their application by means of a short written explanation which may be passed to the trial judge. We understand that this is already the practice in some courts in NSW. Reasons given in writing might include such matters as the potential juror having been sexually abused as a minor, or that he or she was a victim in a recent armed robbery, or that the potential juror knows the background of one of the witnesses,[10] or that the additional information disclosed has raised some concern that had been previously overlooked.

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8. Jury Act 1977 (NSW) s 38(7) and (8).
9. Jury Act 1977 (NSW) s 38(9).
10. K Shadbolt, Consultation.

10.8 We generally support the retention of the current pre-trial disclosure procedure. We suggest that even greater attention should be given to informing members of the jury panel, in advance of their attendance in court, of the importance of this part of the jury selection process, and of their need to consider their personal situations very closely.

10.9 We also consider it desirable, particularly for long trials, to allow the panel to have some time to absorb the additional information and to give careful attention to their personal situation. The length of time allowed should be at the discretion of the trial judge, depending on the complexity, likely length of the trial, and the nature of the evidence followed. We understand that it is the practice of some judges in lengthy trials in NSW to allow prospective jurors the morning recess to give them some time to consider their position before empanelment. Even lengthier periods may be appropriate in some cases. For example, in the South Australian Snowtown murder trial,[11] the trial judge allowed the 300 panel members a full week to consider their position before empanelment proceeded. In suitable cases, any time allowed for this purpose could be used in determining any outstanding pre-trial legal issues.

Estimating the length of the trial

10.10 Another common problem that emerges in practice relates to those cases where, after empanelment, jurors realise that the likely length of the trial is such that it will clash with other unavoidable commitments or pre-arranged travel plans, or will cause them undue financial hardship. Although we address the last mentioned problem later, the frequency with which this problem arises calls for particular attention to be given to it by Sheriff's officers at the jury assembly stage, and again by the trial judge when the matter is called for trial in the presence of the jury panel.

10.11 This means that greater attention should be given to the establishment of an accurate time estimate during the case management process, and the provision of sufficient information to the Sheriff before the trial, and to the members of the jury panel. Otherwise, there will continue to be a need to discharge juries soon after the commencement of lengthy trials, with the obvious adverse consequences to the parties, to the discharged jurors, and to the court lists.

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11. R v Bunting (SA, Supreme Court, SCCRM-01–205).

CHALLENGE TO EMPANELMENT

10.12 There are several forms of challenge available to the parties to a trial. The parties may present a challenge for cause (in the interests of justice, and so on),[12] they can ask that a juror stand aside by consent (that is, where defence and prosecution both agree), and they can challenge the array. The trial judge may also discharge the jury, or terminate the selection process, if the panel is clearly unrepresentative.[13] The trial judge may also stand down a juror if he or she is unfit to serve, for example, on the basis of physical and mental infirmity, including conduct and appearance which raise a genuine concern as to that person's fitness to perform the task of a juror.[14] Each of these forms of challenge or setting aside a juror or panel is uncontroversial.

Peremptory challenge

10.13 Additionally, in NSW, both the defence and the prosecution can exercise the ancient right, during the empanelment process, to make a peremptory challenge to a juror. In this respect, NSW has allowed the prosecution the same right as the defence, although in previous times,[15] and in some other jurisdictions, the prosecution has instead had a right to stand aside potential jurors.[16] The difference is of some importance in that jurors who are stood aside remain available to be empanelled if, after the peremptory challenges have been exhausted, there are insufficient panel members available to complete the ballot.

10.14 In a criminal trial before a judge and jury in NSW, each accused has three peremptory challenges without restriction, while the Crown, or prosecution, has three peremptory challenges without restriction for each person prosecuted.[17] This means that, in a trial of two accused, the accused between them have six peremptory challenges, and the Crown also has six peremptory challenges. It also means that for that trial, excluding the possibility of additional challenges for cause, or the need to excuse individual jurors who show personal cause to be excused, a panel of at least 24 people is required in practice in order to empanel a jury of 12 people. For each additional accused, the size of the required panel must be increased by at least six more people. It may be necessary to have an even larger panel if the Crown and the

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12. See, eg, Juries Act 1974 (Eng) s 12 which allows challenge for cause.
13. The right of challenge to the array is preserved: Jury Act 1977 (NSW) s 47A.
14. R v Rawcliffe [1977] 1 NSWLR 219, 222.
15. Prior to the introduction of the Jury (Amendment) Act 1987 (NSW) Sch 1[5].
16. Jury Act 1977 (NSW) s 43.
17. Jury Act 1977 (NSW) s 42(1).

prosecution agree to increase the number of peremptory challenges, although the fact of any such agreement is not normally known until a case is called on for trial.

10.15 Where, in the limited circumstance now available, civil proceedings are heard by a judge and jury (normally a jury of four people, although this can be increased by order of the court to 12)[18] *each party to those proceedings has the number of peremptory challenges, without restriction, that is equal to half the number of jurors required to constitute the jury for that trial. In a two party trial, using a four person jury, that means that a panel of at least eight people is required.*

10.16 Chief Justice Barwick once described the right of challenge, and particularly the right of peremptory challenge as lying "at the very root of the jury system"[19] *as it then existed, and additionally observed that, if the right was denied to an accused, the subsequent proceedings could not "yield a lawful conviction".*[20] *The NSW Court of Criminal Appeal similarly said that the existence of this power was an "essential element of trial by jury",*[21] *although it was there recognised not to be immutable, since it has changed over the years,*[22] *for example, in relation to the number of challenges that are permitted.*[23]

10.17 The High Court has also noted its relevance in:

- *securing an impartial jury;*
- *allowing the accused to be comfortable with the way in which it has been constituted; and*
- *permitting a party to exercise a challenge in respect of a juror who has been unsuccessfully challenged for cause, and who, as a result, might be suspected of holding some resentment in relation to the party who made the unsuccessful challenge.*[24]

10.18 Although the right to a peremptory challenge has apparently been regarded, in Australia, as a fundamental or essential element of the system of trial by jury, that was not the position taken in England and Wales, where it was wholly abolished in 1988[25] *in response to the*

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18. *Jury Act 1977 (NSW) s 20.*
19. *Johns v The Queen (1979) 141 CLR 409, 418. See also Stephen J, 429.*
20. *Johns v The Queen (1979) 141 CLR 409, 419. See also Gibbs J, 420.*
21. *Ronen v The Queen [2004] NSWCCA 176, [41].*
22. *See Ng v The Queen (2003) 217 CLR 521, [53] (Kirby J).*
23. *Ronen v The Queen [2004] NSWCCA 176, [44]-[50].*
24. *Katsuno v The Queen (1999) 199 CLR 40, [51] (Gaudron, Gummow and Callinan JJ), [83] (Kirby J).*
25. *Criminal Justice Act 1988 (Eng) s 118(1).*

Roskill Report.[26] *However, the right to challenge for cause has been preserved.*[27]

10.19 In our earlier report, The Jury in a Criminal Trial,[28] *we gave consideration to the competing arguments in relation to the continuing relevance of the right to peremptory challenge. While supporting its retention, we recommended that the number of the challenges available to each defendant should be reduced from 20 in murder cases, and eight in other cases, to that which presently exists, with the Crown having the number of challenges that is equal to the sum of the challenges available to the defendants.*

10.20 The right to peremptory challenge can impact upon the process of juror selection in a number of negative ways. The Commission received a number of submissions concerning its continued existence,[29] *not all of which spoke in favour of it. However, its retention was generally supported in the consultations,*[30] *and it continues to be available in all other Australian States, where the availability to the parties of the names and occupations of the jurors, and in some cases the suburbs where they live, provides some limited information of relevance to its exercise. As a result, we do not propose to make any general recommendation concerning its retention. We do, however, draw attention to the issues surrounding its use and, in the light thereof, suggest that one minor amendment be introduced, and that its use be monitored with a view to its eventual abolition if it is assessed as not serving any legitimate purpose.*

Arguments against peremptory challenge

10.21 ***Potential cause of juror frustration and humiliation.*** *The reaction of a juror who takes the trouble to attend in response to a jury summons, only to be challenged, is likely to be that his or her day was wasted, particularly if that juror is released within four hours and does not receive any attendance allowance.*

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26. England and Wales, Fraud Trials Committee Report (HMSO, 1986), [7.38].

27. By the prosecutor: Juries Act 1825 (Eng) s 29; and by the defence: Juries Act 1974 (Eng) s 12(1).

28. NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.57]-[4.73].

29. NSW Office of the Director of Public Prosecutions, Submission; NSW Jury Taskforce, Submission, 4. Views critical of the system of peremptory challenged were expressed by Aboriginal Legal Service, Submission, 9; A Abadee, Consultation; see also V French, "Juries – A central pillar or an obstacle to a fair and timely criminal justice system?" (2007) 90 Reform 40, 41.

30. Criminal Justice Agencies Consultation.

10.22 For some jurors, the exercise of the challenge can be an occasion for potential offence and embarrassment since it can be seen as being a reflection on their integrity and impartiality, or an indication that they are, in some way, strange and unrepresentative of the general community.

10.23 As a result, it may leave people who were previously enthusiastic about serving, with an unfavourable impression of the system,[31] and a lack of willingness to comply with any subsequent jury notice or summons. That this is the case is supported by the reactions reported to staff of the Sheriff in NSW, and of the Juries Commissioner in Victoria. It can also be unsettling for those who are in fact empanelled, who may fear that the process of selection is being distorted or manipulated.

10.24 The fact that the right is exercised publicly, and in circumstances where the challenged juror is the focus of the attention of everyone present in court, and is standing in the jury box, can only add to the humiliation of the occasion. A procedure that could alleviate some of these problems has been adopted for the challenge of potential jurors in civil trials in Victoria, whereby the people called are recorded on a list and each party is then given the opportunity of crossing out the names or numbers of the people they wish to challenge. The remaining people are then empanelled as the jury.[32]

10.25 ***The arbitrary and subjective nature of the challenge.*** *In accordance with current NSW practice, and in order to preserve the anonymity of jurors, the parties know neither the names, residential addresses nor occupations of those people within the jury pool whose names are drawn at random during the empanelment procedure. They or their counsel have only the short time available between the time of the number of potential jurors being called, and the brief moment when that person is asked to stand for the purpose of the exercise of the challenge in order to determine whether to avail themselves of that right. In practice, the decision whether or not the defence will make a challenge rests with counsel, who rarely consult with the accused on the question.*

10.26 Except in those cases where a potential juror may be identifiable, as can be the case in regional towns, or is a person with a public profile, the right has to be exercised on appearance alone, and according to any number of theories held by counsel as to the desirable

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31. One submission noted the potential of the peremptory challenge process to render some people's experience of jury service "less than satisfactory": Legal Aid Commission of NSW, Submission, 2.

32. Juries Act 2000 (Vic) s 33.

composition of the jury for a particular kind of trial. None of these theories has been or can be objectively tested for its reliability.[33] *No reason is required, and a decision to challenge may be made by reference to age, gender, dress, physiognomy, and racial or ethnic background to the extent that such background can be detected from appearance alone.*

10.27 It has been observed that the removal, in NSW, of the ability of counsel to know the names, occupations and addresses of potential jurors may be an impediment to the proper exercise of the right to peremptory challenge.[34] *In SA, while jurors are identified by number only in open court, a list with each juror's name, suburb and occupation is made available to counsel prior to the exercise of the right to challenge.*

10.28 What is involved, in essence, is an arbitrary exercise dependent upon guesswork and dubious mythology as to those who might best respond to the case of the prosecution or defence, respectively.[35] *This is not necessarily conducive to securing a fair, impartial, or representative jury. It can, in fact, have the opposite effect, although, as we noted in our earlier Report, such value as the right does have lies in its participatory aspect, so far as it theoretically allows the defendant to have an involvement in the empanelment.*[36]

10.29 ***Wasted resources.*** *The availability of this right of challenge requires a larger jury pool to be assembled than would be the case if there was no such right. This adds to the overall cost of the jury system by reason of the additional processing needed, and by reason of the need to pay allowances to jurors who are ready to serve but who are ultimately challenged.*[37] *There is also a personal cost and inconvenience to those jurors who are challenged and released from their jury summons.*

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33. *See Katsuno v The Queen (1999) 199 CLR 40, 65 (Gaudron, Gummow and Callinan JJ).*
34. *J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 70.*
35. *See M Findlay, Jury Management in New South Wales, (Australian Institute of Judicial Administration Inc, 1994), 50-52; and R Broderick, "Why the peremptory challenge should be abolished" (1992) 65 Temple Law Review 369, 370-371.*
36. *NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.59]-[4.68]*
37. *That is, where they have attended for the requisite period attracting an allowance: Jury Regulation 2004 (NSW) Sch 1 scale A.*

10.30 ***The possibility of discrimination.*** *Absent prosecution guidelines,[38] the exercise of the right to a peremptory challenge allows the parties to remove people purely on age, gender, religious, racial, cultural, social, economic or similar grounds, which would be regarded as discriminatory in any other context. Of particular concern in this respect, at least anecdotally, has been the challenging of Indigenous jurors in cases where the defendant is Indigenous.[39]*

10.31 Allowing legal representatives to exercise an unfettered discretion to exclude a limited number of people from a jury, without explanation, and in circumstances that are not reviewable, may cause harm to the jury system in a number of ways. First, it leaves open the possibility that a jury may, on some occasions, appear to have been selected on a discriminatory basis, giving rise to a potential question as to whether the jury's decision in that case has been influenced by reason of some form of bias. This is regardless of whether the right to peremptory challenge is in fact exercised in a discriminatory fashion.

10.32 The exclusion, by peremptory challenge, of members of racial or other minorities, will not only impact upon the appearance of impartiality of juries, but it may also impact on the way that juries deliberate. It has been suggested that where a person from a minority group is being tried, the presence of a member of that group on the jury may force other jurors to abandon, at least overtly, arguments that depend upon prejudices about that group, and may lead to more thorough assessment of the evidence.[40]

10.33 While the DPP Guidelines (NSW) prevent challenges on the grounds of race, religion, gender, age, and marital status and on cultural, social or economic grounds,[41] the Commonwealth DPP, the NSW Bar Association and the NSW Law Society have not adopted any

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38. NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.73]-[4.75].

39. Aboriginal Legal Service, Submission, 9. See also "News: White Jury Discharged" (1981) 2 Aboriginal Law Bulletin 5 relating to the discharge of an all-white jury in a case before the District Court at Bourke.

40. See Note, "Judging the prosecution: why abolishing peremptory challenges limits the dangers of prosecutorial discretion" (2006) 119 Harvard Law Review 2121, 2131 and 2141; C J Nemeth and J A Goncola, "Influence and Persuasion in Small Groups" in S Shavitt and T C Brock (eds), Persuasion: Psychological Insights and Perspectives (Allyn and Bacon, 2003); C J Nemeth, "Minority dissent and its 'hidden' benefits" (2002) 2 New Review of Social Psychology 21; C J Nemeth, "The differential contributions of majority and minority influence" (1986) 93 Psychological Review 23.

41. The development of guidelines to govern the Crown's exercise of the right of peremptory challenge was recommended in our 1986 report: NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [4.78].

similar guidelines or ethical codes. In America, challenges on some discriminatory grounds, such as race or gender, are not permitted by the courts.[42]

10.34 ***Abuse by potential jurors.*** *There is also anecdotal evidence to the effect that jurors who wish to avoid jury service can adopt a ploy of dressing or behaving in a way that is likely to provoke a challenge. In the past, for example, it was accepted that the wearing of a Returned Services League badge, or of a business suit would almost certainly attract a defence challenge, that is, unless the accused was also a returned member of the Defence Forces or a businessperson. Under current conditions, more extreme behaviour and dress may be required to encourage a challenge, but the potential for it remains.*

10.35 ***Other forms of challenge meet the needs of justice.*** *Most, if not all, reasons for the availability of a peremptory challenge can be met by the other bases for challenge previously mentioned.*[43]

Arguments in favour of peremptory challenge

10.36 ***Alternatives not a sufficient answer.*** *One submission was received suggesting that alternatives such as challenges for cause and standing aside by consent are not as effective in excluding "unsuitable" people from juries, and that they "could be productive of unfair disadvantage to the prosecution in particular".*[44]

10.37 ***Involvement of the accused.*** *The benefit of the right of an accused to exercise a peremptory challenge is associated with the public affirmation that such a person can participate in the selection of his or her peers in the jury which will be required to make a determination of guilt or otherwise. So understood, it is assumed that the accused will have a greater confidence in the trial process, and an opportunity to object to those who might be perceived to be prejudiced or unlikely to bring an impartial mind to the case.*[45] *That assumption, however, rests upon the expectation, rarely realised, that the accused will in fact have an input into the decision to make a challenge, and that it is possible to determine prejudice from appearance alone within the short time available for that assessment.*

10.38 Various origins have been suggested for protecting that involvement of the accused, one of them being that the system of

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42. See the discussion in NSW Law Reform Commission, Blind or Deaf Jurors, Discussion Paper 46 (2004), [3.46]-[3.53].

43. See para 10.12.

44. NSW Office of the Director of Public Prosecutions, Submission.

45. NSW Criminal Justice Agencies Consultation. See also W R Cornish, The Jury (Allen Lane, The Penguin Press, 1968), 47.

peremptory challenge "is a survival from earlier conditions in which a litigant could be expected to have general knowledge of most jurors' reputations".[46] It can also be noted that the right of challenge of the defendant in criminal cases had its origin in a time when a defendant strictly had a right to be tried by one of the older methods of proof, by compurgation or ordeal. Then, his or her consent was required before he or she could be convicted by a jury. In the 14th century, the right to challenge appeared to be one balancing factor in a system where jury trials were weighted in favour of the Crown: the jury was selected by officers of the Crown; the defendant was not allowed to produce witnesses and was also not permitted the assistance of counsel.[47] None of those factors is applicable today, and the perceived benefit to the accused of the preservation of the right is less than obvious.

10.39 ***Securing a representative jury.*** *Under a system where the defendant has traditionally been allowed to challenge a limited number of people, it has also been argued that a benefit lies in conferring an equivalent right in the prosecution, so as to redress any apparent skewing of the representative balance of the jury resulting from the exercise of the defendant's right. This was the reason for replacing the right of the prosecution to stand aside jurors with a right of peremptory challenge.*

10.40 ***Corrective against a failure to grant a challenge for cause.*** *It has been suggested that the peremptory challenge promotes the administration of justice by providing an easy remedy against judicial error in refusing to grant a challenge for cause, by allowing for the removal of a potential juror who may harbour resentment as the result of such an unsuccessful challenge.[48]*

Alternatives to complete abolition of peremptory challenge

10.41 Some alternatives to complete abolition of the peremptory challenge have been identified, including:

- *not allowing trial counsel to agree to enlarge the permitted number of peremptory challenges;*
- *further reducing the number of peremptory challenges, for example, to one per party, so as to cater for the case of someone who*

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46. W R Cornish, The Jury (Allen Lane, The Penguin Press, 1968), 47.

47. W Holdsworth, A History of English Law (7th edition, Methuen & Co, 1956) Vol 1, 325-326.

48. L McCrimmon, "Challenging A Potential Juror For Cause: Resuscitation or Requiem?" (2000) 23 University of New South Wales Law Journal 127, 132; R v Sherratt [1991] 1 SCR 509, 532-533; Katsuno v The Queen (1999) 199 CLR 40, [83].

is manifestly unfitted to serve but who has not been excluded either in the lead up to empanelment or by the judge;

- *removing that right in civil jury trials since it is rarely, if ever, used; and*
- *removing the right in the case of special hearings involving defendants who have been found unfit to stand trial, where an election is made for jury trial (the default position being that such hearings are by judge alone).*

The Commission's view

10.42 In light of the general support which currently appears to exist for the retention of this right of challenge, we confine ourselves to the suggestion that the ability of trial counsel to agree to an extension of the statutory number of challenges should be subject to leave being given by the judge, pursuant to application made before the date fixed for trial. This would have the advantage of avoiding the need for the Sheriff to assemble an unnecessarily large panel against the contingency of counsel agreeing to enlarge the number of challenges. Otherwise, we consider that the continued availability of the right of peremptory challenge be kept under review to ensure that it does in fact advance the fairness of trial by jury, and does not in fact involve a distortion of the process.

RECOMMENDATION 43

The ability of trial counsel to agree to an extension of the statutory number of peremptory challenges should be subject to leave being given by the judge, pursuant to application made before the date fixed for trial.

RECOMMENDATION 44

The justification for the continued availability of the right to peremptory challenge should be kept under review.

ADDITIONAL JURORS

10.43 A matter that clearly impacts on the effectiveness of the jury selection system is the ability to empanel, in appropriate cases, more than 12 jurors to allow for a possible decrease in the number of jurors between empanelment and the time at which the jury retires to deliberate.[49] *Individual jurors may be discharged for cause at any time*

49. One of the recommendations in our 1986 Report envisaged that additional jurors would participate in the deliberations of the jury after retirement if the law were changed to accommodate majority verdicts: see NSW Law Reform

after empanelment.[50] Where this happens, the trial can continue with the remaining jurors provided that the membership of the jury does not fall below the minimum number specified in the legislation,[51] and provided that the court exercises its discretion in favour of continuing the trial.[52] The legislation empowers the judge to allow a criminal jury to reduce to 10 in number, or below 10 with the written agreement of the prosecution and defence, or to eight where the trial has been in progress for two months.[53] Even where the membership of the jury has not reached the statutory minimum, the court will exercise its discretion to abort the trial where the jury has ceased to be "an appropriate body of persons representative of the community in whose judgment confidence is imposed".[54]

10.44 Provision for the empanelment of more than 12 jurors reduces the risk that membership of the jury will fall below the statutory minimum number or that the court will exercise its discretion against the continuance of the trial before membership falls below the statutory minimum. It therefore goes some way to avoid a retrial, which would be the result of the discharge of the whole jury. A retrial would necessarily involve delay; additional costs, particularly to the prosecuting and Legal Aid authorities; potential hardship to witnesses who may be required to give evidence again; and unfairness to the accused, especially if bail has been refused and the accused is subsequently acquitted. There is also the risk of the loss of witnesses who are unavailable or unwilling to give their evidence again.

10.45 The problem of leakage of jury membership is likely to be most acute in long trials. Some jurors' circumstances may change in ways that were not expected at the outset of the trial.[55] Additionally, some jurors may simply find themselves, contrary to their own expectations, unable to cope with protracted proceedings, or with harrowing evidence

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Commission, The Jury in a Criminal Trial Report 48 (1986), [10.21] and Recommendation 83. Majority verdicts are now permissible where the accused is charged with an offence against State law (Jury Act 1977 (NSW) s 55F(2)), but not an offence against Commonwealth law, where unanimity is required: Jury Act 1977 (NSW) s 55F(4); Cheatle v The Queen (1993) 177 CLR 541. The Commission now sees no merit in pursuing the distinction drawn in Recommendations 82 and 83 of our 1986 Report.

50. *Jury Act 1977 (NSW) s 22 (discharge for illness where juror incapable of continuing to act or for any other reason), considered at para 11.5-11.7.*
51. *Jury Act 1977 (NSW) s 22.*
52. *Wu v The Queen (1999) 199 CLR 99; R v Brownlee (1997) 41 NSWLR 139 (CCA).*
53. *Jury Act 1977 (NSW) s 22.*
54. *R v Brownlee (1997) 41 NSWLR 139, 145 (Grove J). See also Wu v The Queen (1999) 199 CLR 99.*
55. *For example R v Ronen [2005] NSWSC 319.*

over such a period of time. Moreover, it is unlikely, in a major trial involving a high degree of public interest – for example, a terrorist trial – that the parties would agree in the first two months to reduce the jury below 10 members. Nor is it necessarily desirable that such a trial be determined by a jury comprised of fewer than 10 members, or the case that a trial judge would allow the trial to continue in those circumstances.[56]

10.46 To address these problems, we recommended in our 1986 Report that the Jury Act should be amended to give the trial judge power to empanel up to three additional jurors where the trial is estimated to take more than three months.[57] *The recommendation was not implemented. Meanwhile, trials have increased in length, particularly in the Supreme Court, where it is not uncommon for criminal trials to last a number of months, and, on occasion, longer than six months.*[58]

10.47 In all Australian jurisdictions other than NSW, the danger that the number of jurors in a particular trial might drop below an acceptable minimum number is met by allowing for the swearing of more than 12 jurors.[59] *There are two models.*[60] *First, the ACT, SA, Victoria and WA variously provide for the initial empanelment of up to between three and six "additional" jurors; if more than 12 jurors remain when the jury retires to deliberate, a ballot is conducted to reduce the jury to 12 members.*[61] *Secondly, Queensland, Tasmania and the NT variously provide for up to two or three "reserve" jurors who, if not used to replace a discharged juror, are themselves discharged once the jury commences its deliberations.*[62] *The essential difference between the two models is that whereas additional jurors are members of the*

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56. *For an example of an order to continue a trial with a jury of 10 some nine months after the jury had been empanelled, see R v Ronen [2005] NSWSC 320.*
57. *NSW Law Reform Commission, The Jury in a Criminal Trial Report 48 (1986), [10.21] and Recommendation 81.*
58. *M Ierace, Submission at 2. A trend towards lengthier trials is also discernible in the District Court where the average length of criminal trials finalised in 1996 was between 4 and 5 days, while, in 2006, it was 7.5 days: see District Court of New South Wales Annual Review 2006, 23.*
59. *For the background to, and description of, the various legislative regimes in Australia, see Ng v The Queen (2002) 5 VR 257, [17] (Winneke P, Batt and Eames JJA).*
60. *An example of each model has been held consistent with the requirement of "trial by jury" in s 80 of the Constitution (Cth): Ng v The Queen (2003) 217 CLR 521 (additional juror provisions in Victoria); Fittock v The Queen (2003) 217 CLR 508 (reserve juror provisions in NT).*
61. *Juries Act 2000 (Vic) s 23, s 48; Juries Act 1967 (ACT) s 31A; Juries Act 1957 (WA) s 18; Juries Act 1927 (SA) s 6A.*
62. *Jury Act 1995 (Qld) s 34; Juries Act 2003 (Tas) s 26; Juries Act 1963 (NT) s 37A.*

jury panel until they are discharged, reserve jurors do not form part of the jury, even though they are exposed to all the evidence, unless and until they replace a discharged juror.

10.48 The absence of any provision for additional or reserve jurors in NSW has recently given rise to some concern. The Commission has received a number of submissions on the topic,[63] which has also been the subject of consultations.[64] These submissions and consultations have argued strongly that the law should be changed to allow for the empanelment of additional jurors in lengthy trials. They have convinced us that the case for the empanelment of additional jurors in long trials in NSW is compelling. We, therefore, reaffirm the recommendation in our 1986 Report that provision should be made to empower judges to empanel up to three additional jurors where the trial is estimated to exceed three months in length. We also reaffirm our preference for the empanelment of additional, rather than reserve, jurors. Further, we recommend that, where additional jurors have been empanelled and more than 12 jurors remain when the jury is about to retire to consider its verdict, the additional jurors should be balloted out. In formulating these recommendations and reaffirming our earlier recommendations, we make the following observations.

10.49 First, as already pointed out, the costs of a retrial of an aborted lengthy trial are very substantial.[65] The savings generated by avoiding the need for a retrial, or more than one retrial if the problem were repeated, justify the extra costs of empanelling additional jurors. Those costs include not only the allowances payable, but also modifications to court buildings to enlarge existing jury boxes and jury rooms. As our recommendation is limited to trials that are estimated to last in excess of three months, the modifications could be confined to the specially constructed courts which have been designed for the kinds of multi-party or complex trials that are likely to last in excess of three months. On our understanding, these courts could easily be altered to accommodate the extra jurors.

10.50 Secondly, the limitation of our recommendation to trials that the court estimates are likely to last more than three months is designed to ensure that the use of additional jurors does not become routine in all cases. No other Australian jurisdiction restricts the power or discretion of the court in this way. For example, the legislation in SA allows the court to empanel additional jurors in a criminal trial "[i]f

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63. P McClellan, Submission; P Johnson, Submission; M Ierace, Submission; NSW Bar Association, Submission 2.

64. N R Cowdery, Consultation; D Bugg, Consultation; W Grant, Consultation; Chief Justice Martin, Consultation.

65. See para 10.44.

the court thinks there are good reasons for doing so".[66] *In some Australian jurisdictions, the practice of the courts appears to be to avail themselves of the ability to empanel additional or reserve jurors in cases where the trial is estimated to last more than four*[67] *or six weeks.*[68] *In other jurisdictions, extra jurors are "often"*[69] *empanelled even where the trial is estimated to last only two or three days.*[70] *In our view, this goes too far: it puts unnecessary pressure on the jury resources of the State. For example, it dilutes the pool of potential jurors by excusing the additional juror who is balloted out of the jury from further jury service for the specified period.*[71] *The problem of jury leakage in short trials is, in our view, sufficiently addressed by the court's discretion to continue a trial where a juror has been discharged.*

10.51 Thirdly, where the court has estimated that the trial will take longer than three months, the judge will need to determine how many additional jurors should be empanelled to attempt to ensure that, allowing for the likely leakage of jurors over the expected length of the trial, there will be at least 12 jurors ultimately called upon to retire and consider the verdict. The trial judge's determination is not, however, at large. Our recommendation sets at three the maximum number of additional jurors that the trial judge can empanel. This is in line with the legislation in the NT, Queensland, SA and Victoria. In contrast, the ACT allows for up to five additional jurors, while WA allows for up to six. At the other end of the scale, Tasmania only allows for up to two reserve jurors. The point of setting a limit is to achieve a balance between the objective of obviating retrials and avoiding putting too great a strain on the jury resources of the State. While setting the maximum number is ultimately a matter of judgment, we see no reason to depart from the number that accords with the legislation in the majority of other Australian jurisdictions.

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66. *Juries Act 1927 (SA) s 6A(1). See also Juries Act 1967 (ACT) s 31A(1); Juries Act 1963 (NT) s 37A(1); Jury Act 1995 (Qld) s 34(1); Juries Act 2003 (Tas) s 26(1); Juries Act 2000 (Vic) s 23; Juries Act 1957 (WA) s 18(2).*
67. *Australian Institute of Judicial Administration, Questionnaire Responses (May 2007) for Working with Juries Seminar (Melbourne, 15 June 2007), 65 (Victoria, response of Jury Commissioner's Office).*
68. *Australian Institute of Judicial Administration, Questionnaire Responses (May 2007) for Working with Juries Seminar (Melbourne, 15 June 2007), 65 (ACT, response of Sheriff).*
69. *Australian Institute of Judicial Administration, Questionnaire Responses (May 2007) for Working with Juries Seminar (Melbourne, 15 June 2007), 64 (Western Australia, response of Supreme Court).*
70. *Australian Institute of Judicial Administration, Questionnaire Responses (May 2007) for Working with Juries Seminar (Melbourne, 15 June 2007), 64 (Western Australia, response of District Court judge). Consider also response of Northern Territory Supreme Court ("likely to exceed four days"): at 63.*
71. *See para 6.66.*

10.52 Fourthly, the availability of a system of reserve or additional jurors has the advantage of providing some degree of encouragement for an unwilling juror to seek to be excused because of the knowledge that there is someone available to replace him or her, even though otherwise that person may have felt a moral obligation to continue to serve.

10.53 Fifthly, we reject the reserve juror option on the basis that, while such jurors are expected to participate fully as jurors in the trial up to the time of deliberation, they are identified as reserve jurors from the outset. They may, as a result, regard themselves as having second-class standing and, therefore, fail to give the matter their fullest attention. The option of using additional jurors does not share this problem and is clearly the preferred model. The experience of Western Australia, where the additional juror system replaced a reserve juror system by legislative amendment in 2003, would seem to confirm this.[72]

10.54 It remains true that the additional juror system carries the risk of considerable frustration and disappointment to those jurors who are balloted out. The dynamics of the remainder of the panel may also be disrupted. To address this risk, it is incumbent on the trial judge to give a full explanation of the system of additional jurors to the jury at the outset of the trial, so that all the members of the jury panel are aware of what may happen in respect of membership of the jury panel and of why it may happen.[73]

RECOMMENDATION 45

Provision should be made to empower the court to empanel up to three additional jurors where the judge estimates that the trial will take in excess of three months. If more than 12 jurors remain when the jury is about to retire to consider its verdict, the additional jurors should be balloted out

RECOMMENDATION 46

At the outset of the trial, the judge should fully inform the jury of the rationale, nature and operation of the additional jury system.

10.55 If Recommendation 45 is implemented, the following issues need to be addressed:

72. *Australian Institute of Judicial Administration, Questionnaire Responses (May 2007) for Working with Juries Seminar (Melbourne, 15 June 2007), 64 (Western Australia, response of District Court judge).*
73. *Chief Justice Martin, Consultation.*

- *the relationship between the additional jury system and s 19 of the Jury Act 1977 (NSW);*
- *the availability of peremptory challenges where it is proposed to empanel additional jurors;*
- *what should happen when the verdict given does not conclude the trial; and*
- *whether or not the foreperson or speaker of the jury should be included in the ballot.*

Section 19 of the Jury Act

10.56 Section 19 of the Jury Act 1977 (NSW) provides:

> *The jury in any criminal proceedings in the Supreme Court or the District Court is to consist of 12 persons returned and selected in accordance with this Act.*

The relationship between this section and s 22 of the Jury Act, which empowers the court to allow a jury that falls below 12 (but not below the numbers specified in the section) to continue, has given rise to difficulties of interpretation that are discussed in Chapter 11. To avoid similar difficulties arising in respect of the relationship between s 19 and any provision implementing Recommendation 45, we recommend that s 19 of the Jury Act 1977 (NSW) should be amended so that the requirement that a jury "consist of 12 persons returned and selected in accordance with [the] Act" expressly be made subject to the provision dealing with additional jurors.

RECOMMENDATION 47

The requirement that a jury "consist of 12 persons returned and selected in accordance with [the] Act" should expressly be made subject to the provision allowing for the empanelment of additional jurors.

Peremptory challenges

10.57 The legislation in other Australian jurisdictions does not take a uniform approach to the availability of peremptory challenges to additional or reserve jurors. The ACT, Queensland and Tasmania allow for additional challenges.[74] For example, Queensland allows its base eight peremptory challenges in criminal trials to be increased to nine if there are one or two reserve jurors, and to 10 if there are three

74. *Juries Act 1967 (ACT) s 31A(3) (a sliding scale); Jury Act 1995 (Qld) s 42(2); Juries Act 2003 (Tas) s 35(3) (one further challenge plus balance of six unused challenges).*

reserve jurors. On the other hand, the majority of other Australian jurisdictions (the NT, SA, Victoria and WA) do not permit further peremptory challenges to reserve or additional jurors.

10.58 While we appreciate that a greater base number of peremptory challenges is available in the Northern Territory,[75] Victoria[76] and Western Australia[77] than in New South Wales, we nevertheless favour the approach in the majority of Australian jurisdictions. As we have already indicated, we are concerned that, overall, peremptory challenges have a negative impact on juror selection.[78] We have recommended that the justification for the continued availability of peremptory challenges should be kept under review. If a need emerges for further peremptory challenges in cases where it is proposed to empanel additional jurors, it can be addressed in the course of such a review.

RECOMMENDATION 48

No provision should be made for further peremptory challenges where it is proposed to empanel additional jurors.

Where the verdict does not conclude the trial

10.59 A jury's verdict may not conclude the trial where it does not apply to all counts in the indictment or where it does not apply to all accused persons. For example, the trial judge may direct the jury to return a verdict of acquittal on one count before summing up the case in relation to the remaining counts.[79] It is also possible, though rare, that a jury may be instructed to retire to consider whether or not to return a verdict without hearing further evidence.[80] If, at the point of retirement in such cases, there are more than 12 jurors, a ballot will be held to exclude from the panel sufficient jurors to reduce the number to 12. In such cases, it is obviously desirable to retain the additional jurors until final retirement so as to reduce the risk of a discharge of the whole jury late in the trial with consequent waste of resources.

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75. *Juries Act 1963 (NT) s 44 (12 for capital offences, six for other offences).*
76. *Juries Act 2000 (Vic) s 39 (between four and six depending on the number of accused).*
77. *Criminal Procedure Act 2004 (WA) s 104(4) (each accused has five peremptory challenges).*
78. *See para 10.21-10.35, 10.42.*
79. *As occurred in the Snowtown murder trial (R v Bunting (South Australia, Supreme Court, SCCRM-01–205)) where an additional juror was excluded while a directed verdict was given by the other 12 jurors.*
80. *This is known as a "Prasad direction": see Prasad v The Queen (1979) 23 SASR 161.*

10.60 In our view, this is best achieved by making express provision to the effect that:

- *a fresh ballot must be conducted each time the jury is required to retire to consider its verdict;*[81]
- *if a criminal trial is not concluded after a verdict is given, the jurors selected in the ballot must rejoin the jury for the continuation of the trial;*[82]
- *where the jury retires for the last time, additional jurors who are balloted out may be discharged from further service as jurors for the trial.*[83]

Recommendation 49

Provision should be made to the effect that: (a) a fresh ballot must be conducted each time the jury is required to retire to consider its verdict; (b) if a criminal trial is not concluded after a verdict is given, the jurors selected in the ballot must rejoin the jury for the continuation of the trial; and (c) where the jury retires for the last time, additional jurors who are balloted out may be discharged from further service as jurors for the trial.

The position of the foreperson in the ballot

10.61 The legislation in South Australia[84] *and Victoria*[85] *provides that, where a member of the jury has been elected as its foreperson or speaker, that person is either to be excluded from the ballot or his or her selection in the ballot is to be disregarded. We agree with this approach. It avoids the need to elect a new foreperson or speaker, which could have a disruptive effect on the deliberations of the jury.*[86]

RECOMMENDATION 50

The foreperson or speaker of the jury should be excluded from, or disregarded in, the balloting out of additional jurors.

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81. *See Juries Act 2000 (Vic) s 48(4).*
82. *See Juries Act 2000 (Vic) s 48(3); Juries Act 1927 (SA) s 6A(3)(b) and (c).*
83. *See Juries Act 1927 (SA) s 6A(3)(a).*
84. *Juries Act 1927 (SA) s 6A(4).*
85. *Juries Act 2000 (Vic) s 48(2).*
86. *See South Australia, Parliamentary Debates (Hansard), House of Assembly, 27 June 2000, 1414 ("to prevent inconvenience") (Hon I F Evans). If provision were made for the election of an interim jury foreperson only until the time of formal deliberation, it may not be necessary to exclude that person from the ballot.*

SUPPLEMENTING PANELS THAT HAVE INSUFFICIENT NUMBERS

Supplementing with people summoned to other courts in the same jury district

10.62 The Jury Act 1977 (NSW) currently contains a provision which allows the Sheriff to supplement the panel for a particular trial or inquest for which there are insufficient prospective jurors from among those who have been summoned to attend another court or inquest in the same jury district.[87] *The provision was included when the practice of selecting bystanders in the precincts of the court*[88] *was abolished with the enactment of the Jury Act 1977 (NSW).*

10.63 It has been brought to our attention that some judges continue to be concerned whether the provision is adequate to overcome the requirement in s 19 of the Act that a jury must consist of 12 people "returned and selected in accordance with" the Act. The concern is that, for example, a juror who has been summoned (returned) to attend at the Sydney District Court cannot be regarded as having been summoned (returned) to attend at the Supreme Court sitting at Darlinghurst or in King Street, since they are courts of a different tier. If this is correct, then the practice which has commonly been followed by some Supreme Court judges of using jurors summoned to attend at the Sydney District Court, but not required in that court, would be irregular. It is the weight that has been given to literal compliance with the requirements of s 19 of the Jury Act 1977 (NSW) by the Court of Criminal Appeal in cases such as Petroulias, Brown and Tan, that has led to some reluctance by judges to allow the panel assembled for a trial in their court to be supplemented by jurors summoned for, but surplus to the needs of, a court of another tier in the same jury district. Although such reluctance is understandable in that it aims to ensure that a trial is not voided post verdict on the grounds of improper empanelment, it is undesirable in that it can result in:

- *trials being delayed with resultant hardship to victims, witnesses, and the accused;*
- *a waste of resources;*
- *frustration on the part of prospective jurors who have attended but are then not required; and*
- *the unavailability to the system of those people who have been summoned for a further 12 months.*[89]

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87. Jury Act 1977 (NSW) s 51(1)(c).
88. Referred to as pray-a-tales.
89. See para 6.66.

10.64 We consider the interpretation of the provision that results in this approach to be unduly restrictive and contrary to the apparent intention of Parliament. However, in order to alleviate any continuing concern about the use of the provision, and to prevent the resulting delay in the commencement of trials, we consider that the Act should be clarified, by way of a note to the relevant provisions, to ensure that s 51(1)(c) can have the effect intended.

RECOMMENDATION 51

The *Jury Act 1977* (NSW) should be clarified, by way of a note, to ensure that s 51(1)(c) will have the effect of allowing the Sheriff to supplement the panel for a particular trial or inquest for which there are insufficient prospective jurors from among those who have been summoned to attend a court of a different tier or an inquest, in the same jury district, including, for example, allowing jurors summoned to the Sydney District Court to serve in the Supreme Court sitting at Darlinghurst or at King Street, and vice versa.

Supplementing with people no longer required as jurors at another trial in the same court

10.65 We note that there is another provision in the Jury Act which permits supplementation of the panel for an individual trial.[90] That provision applies to people who were summoned to attend at a court, "who constituted the jury for a trial" in that court and who ceased to be required for that trial, yet were not "discharged from attending at the court in pursuance of the summons" (that is, released from the summons). It permits "juries for subsequent trials in that court" to be selected from among those persons.

10.66 It would seem that this provision would only apply to jurors who were empanelled for a trial in the District Court or Supreme Court, as the case may be, and released from that trial although not released from their summons, so as to allow them to be used for another trial in the same court. In other words, it would not seem to permit jurors who were summoned to attend the District Court, and empanelled for a trial in that Court, to be selected for a trial in the Supreme Court, or vice versa.

10.67 The section does not make any mention of the courts being in the same jury district, nor does it address the spirit of the exemption as of right which would normally arise by reason of the relevant jurors

90. Jury Act 1977 (NSW) s 53.

having attended court in response to a summons and having served as jurors.[91]

10.68 We do not make any recommendation but query whether the provision serves any good purpose in practice, particularly since it is usual for jurors to be discharged from their summons once they have completed the trial for which they were empanelled. Alternatively, if it is intended to supplement s 51(1)(c) in relation to jurors who have attended at a particular court (that is, the Supreme Court or District Court) so as to allow those people to be selected as jurors for another trial in the same court, we question whether it should be confined to those jurors who have been empanelled and not discharged or released from their summons. If so, the section could be suitably amended so as to apply additionally to people summoned to attend at that court but not released, whether or not they have been previously empanelled as a juror in a trial in that court.

91. Jury Act 1977 (NSW) Sch 3 item 13.

11. Discharging jurors for cause and irregularities in empanelment

- Irregular conduct or events after empanelment
- Irregularities in empanelment
- Appeals to the Court of Criminal Appeal
- Reporting irregularities

11.1 In this chapter, we principally consider two situations where jurors may be discharged. First, those where the juror has been discharged as the result of events or conduct that occur after empanelment and secondly, the discrete question of those where an irregularity in the empanelment of the juror has been discovered either before the verdict is delivered or after verdict.

IRREGULAR CONDUCT OR EVENTS AFTER EMPANELMENT

11.2 In some cases, the relevant conduct or events may affect only a single juror and require only that single juror's discharge. In such cases, the judge is empowered to order that the trial proceed before the jury constituted by the remaining jurors.[1]

11.3 In other cases, however, the conduct or events, even if initially affecting only one juror, may affect all of the jurors to the extent that they cannot perform their service satisfactorily. In such cases, the whole jury must be discharged.[2]

11.4 Questions of wasted resources arise where the discharge of one juror leads to the discharge of the whole panel. This is compounded when it occurs well into the trial, particularly in circumstances where it leads to significant hardship to the victims and other witnesses, for example, in the case of sexual assault trials. For this reason, we also address in this chapter the possible extension of the existing provisions permitting appeals against interlocutory judgments or orders so as to allow for an immediate review of any decisions by a trial judge either to grant or to refuse an application to discharge an individual juror and to continue with the remaining jurors, or to discharge the entire jury and to order a new trial.

Discharge of individual jurors and continuance of trial

11.5 At common law, if an empanelled juror died or was unable to continue, for example, because of illness, a fresh jury had to be sworn.[3] *This situation has been alleviated in NSW by a provision which has been interpreted as allowing the judge to order that a trial continue with fewer jurors (in certain circumstances down to a minimum of eight) where a juror has died, or where the judge has had to discharge a juror "as being through illness incapable of continuing to act or for*

1. *Jury Act 1977 (NSW) s 22.*
2. *See Wu v The Queen (1999) 199 CLR 99, 103.*
3. *H S G Halsbury, The Laws of England (Butterworth and Co, 1911) vol 18, [623].*

any other reason".[4] The ability of the judge to discharge a juror in NSW is not the subject of an express grant of power under the Jury Act, but it is implied by reason of the existence of the statutory power to order that the trial continue with a reduced number of jurors where a juror has been discharged.

Court's power to discharge jurors

11.6 As we have noted, other Australian jurisdictions give the courts an express power to discharge jurors. For example, the ACT simply states that the judge may excuse a juror from further attendance if he or she is satisfied that the juror should not continue to act as a juror "because of illness or other sufficient cause".[5] SA makes similar provision in the case of "ill health" or "a matter of special urgency or importance".[6] The NT allows the court, in its discretion, to discharge the jury or an individual juror if it is of the opinion that the juror "is not indifferent as between the Crown and the accused person" or should be discharged "by reason of any matter of urgency or importance".[7] In Queensland, the trial judge may, "without discharging the whole jury", discharge a juror if it appears to the judge that the juror should not act as a juror because the juror is either "not impartial" or for "other reasons". The judge may also discharge a juror if he or she considers the juror has become "incapable... of continuing to act as a juror" or the juror has become "unavailable, for reasons the judge considers adequate, to continue as a juror".[8] Tasmania and Victoria make similar provision, allowing the discharge of a juror if he or she appears to the court not to be impartial, or he or she "becomes incapable of continuing to act as a juror", becomes ill, or "it appears to the court that, for any other reason, the juror should not continue to act as a juror".[9] In Tasmania, a dead juror may also be discharged.[10] In WA, a juror can be discharged if the court is "satisfied that the juror should not be required or allowed to continue in the jury and if the discharge will leave at least 10 jurors remaining".[11]

11.7 In, NSW the power to discharge an individual juror is mentioned in the context of a section aimed principally at allowing a trial to continue in certain circumstances with fewer than 12 jurors.[12] We

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4. *Jury Act 1977 (NSW) s 22. A version of this provision was first introduced as Jury Act 1912 (NSW) s 27A by Crimes (Amendment) Act 1929 (NSW) s 19.*
5. *Juries Act 1967 (ACT) s 8(1).*
6. *Juries Act 1927 (SA) s 56(1).*
7. *Criminal Code (NT) s 373(1).*
8. *Jury Act 1995 (Qld) s 56(1).*
9. *Juries Act 2003 (Tas) s 40; Juries Act 2000 (Vic) s 44.*
10. *Juries Act 2003 (Tas) s 40(c).*
11. *Criminal Procedure Act 2004 (WA) s 115(2).*
12. *Jury Act 1977 (NSW) s 22.*

consider that, for greater certainty, there should be an express provision dealing with the discharge of a juror, broadly in line with the provisions in other Australian jurisdictions, but which also identifies more precisely the circumstances in which that power may be exercised.

Court's power to order that the trial continue

11.8 We note that the reference in the current provision to the continuation of a trial following the discharge of a juror "for any other reason" contemplates the existence of a very broad basis for the exercise of the implied power. It has been suggested that it may encompass more than simply the inability of a particular juror to continue, but may include the delay caused by some temporary condition affecting the ability of a juror to attend court, and the effect of the delay on the accused and others involved in the trial, including witnesses and other jurors, as well as on other trials waiting to proceed in the same court.[13] *The imprecision of any such implied power and the resulting uncertainty as to its ambit would, in our view, warrant some greater precision being incorporated in the formulation of an express power. We next note some illustrations of cases where the need to discharge a juror may arise which could be incorporated in any such formulation.*

Empanelled jurors who subsequently come within a category of exclusion

11.9 It is conceivable that, as a result of some change in circumstances after empanelment, a juror who was empanelled could come within one of the categories of exclusion, for example, as the result of being charged with a criminal offence and bailed or, less commonly, as the result of the juror changing his or her occupation to one of the occupational categories that would result in ineligibility.

11.10 Since the original empanelment was regular, we see no reason why such an event should not be dealt with similarly to the case of a juror who, by reason of death or illness, was unable to proceed. We consider that in such a circumstance the trial judge should have the ability to discharge the juror in question and continue with the remaining jurors, so long as the number of remaining jurors does not fall below the numbers specified in the Jury Act.

Jurors who are excused for individual personal cause after empanelment

11.11 Jurors have been discharged before the end of a trial, and the trial continued with the remaining jurors, for numerous reasons. These include death or illness, the emergence of serious financial disadvantage for a juror if required to continue to serve in a lengthy

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13. Wu v The Queen (1999) 199 CLR 99, 106 (Gleeson CJ and Hayne J). See also R v Reardon (2002) 186 FLR 1 (NSW CCA).

trial, pre-arranged holidays in the case of over-run trials,[14] or subsequently discovered familiarity with witnesses in the case.[15]

11.12 Although each of these reasons would provide a proper basis for a discharge of the individual affected juror, we recognise that a discretionary judgment will still be required of the trial judge whether to proceed in each instance with a reduced jury. The decision to proceed involves the risk, as the trial progresses, of further reductions in the number of jurors, and may reach the point where the trial may no longer be viable.

Inappropriate juror conduct

11.13 The kind of inappropriate conduct envisaged under this head includes a juror conducting his or her own investigations into a case, gathering material on the internet, conducting experiments, undertaking a private view of the crime scene, or refusing to participate in jury deliberations.

11.14 In NSW, there have been instances where the misconduct of individual jurors has been reported in relation to private views,[16] or in relation to private inquiries which those jurors made in order to obtain additional information about the accused on trial.[17] The problem which this causes is that the juror may have gained access to inadmissible material of relevance to that juror's assessment of the guilt of the accused, and additionally, would have deprived counsel of the opportunity of dealing with it.

11.15 If these activities came to light during the trial, and were reported to the judge, a question would arise as to whether that juror or the whole jury should be discharged. If the irregularity is not discovered until after the trial, this may well constitute grounds for a successful appeal leading to a retrial.

Potential or actual bias of a juror

11.16 If, after empanelment, circumstances emerge that may affect an individual juror's ability to give the case an impartial consideration, or if a juror belatedly discloses some such matter that should have been apparent from the outset, there is precedent for the judge to discharge that juror and to determine whether to continue the trial with the

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14. R v Hambery [1977] QB 924.

15. R v Derbas (1993) 66 A Crim R 327, 331.

16. For example, R v Skaf [2004] NSWCCA 37.

17. 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.

remaining members of the jury.[18] *Again, a discretionary judgment will be required, depending on how far into the trial the problem is discovered, whether the juror in question has passed on information or otherwise behaved in a way that might contaminate a verdict by the remainder of the jury, and whether the circumstances identified give rise to a risk of bias.*[19]

11.17 Sometimes, those circumstances may not come to light, since the disclosure will usually depend upon self-reporting by the juror in question or by way of a complaint from a third party. Examples may include a juror discovering that he or she know a prosecution witness; or a juror being seen in the court precincts talking to one of the witnesses in the case.

RECOMMENDATON 52

The court should be given an express power to discharge a juror without discharging the whole jury in circumstances where the court is satisfied that:

(a) the juror:
  (i) has come within a category of exclusion as a result of some change in circumstances after empanelment; or
  (ii) is, by reason of illness, unable to continue to serve as a juror; or
  (iii) displays a lack of impartiality; or
  (iv) refuses to take part in jury deliberations; or
  (v) has engaged in misconduct in relation to the trial; or
  (iv) should not be required to continue to serve for any other reason that the judge considers sufficient, and

(b) the interests of justice do not require that the whole jury be discharged,

and to order that the trial continue with the remaining jurors, so long as the number of remaining jurors meet the requirements of *Jury Act 1977* (NSW) s 22.

The court should also be given an express power to order that the trial continue in circumstances where one of the jurors has died.

Discharge of the whole jury

Adverse publicity

11.18 There have been numerous instances of judges discharging juries by reason of prejudicial media publicity mid-trial. In such cases, a discretionary judgment is required as to whether the problem can be cured by an appropriate direction to the jury, or whether the jury as a whole should be discharged, and an order made for a new trial.

18. See, eg, R v Czajkowski (2002) 137 A Crim R 111.
19. See, eg, R v McCormick (2007) NSWCCA 78.

11.19 In our 1986 report, we expressed concern that juries were being discharged for suspected rather than actual influence of prejudicial material arising from publicity occurring either pre-trial or mid-trial.[20] *A recent study on the effect of prejudicial publicity has suggested that counsel and trial judges may over estimate jurors' recall of prejudicial publicity.*[21] *While acknowledging that there will still be cases where discharge of a jury is necessary, the study has suggested that this might not be so in all cases, in light of the fact that much publicity on television or radio may not be noticed by jurors, and the fact that jurors will often treat media reports of proceedings with scepticism.*[22]

11.20 A recent Court of Criminal Appeal case has recognised that "jurors are able to exercise a critical judgment of what they see, read and hear in the media, and to put such material out of their minds" and that, in absence of evidence to the contrary, it should be assumed that juries "accept and faithfully apply the directions given to them by the trial judge".[23] *Nevertheless, the decision whether or not to discharge the jury for this reason can involve a difficult balancing exercise, on which the parties will commonly disagree, including questions of whether instructions to put something out of mind in some cases can ever be successful. If the wrong decision is made and the jury discharged, it can involve an unnecessary waste of time and resources. If the trial is continued, it can provide the basis for a successful appeal post verdict. For that reason, we address later in this chapter a possible solution which would allow the Court of Criminal Appeal to intervene by way of an interlocutory appeal.*[24]

Improperly admitted evidence or material wrongly made available to the jury

11.21 There have been instances of judges discharging juries where it is discovered that inadmissible evidence, or inappropriate material, has been made available to the jury. Three situations are considered here. First, where evidence which is later found to have been wrongly admitted is placed before the jury and then withdrawn. Secondly, where extraneous material accidentally comes before the jury (through no fault of its own) during the proceedings which amounts to an irregularity. Thirdly, where material comes before the jury improperly

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20. *NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [7.30].*
21. *M Chesterman, J Chan and S Hampton, Managing Prejudicial Publicity: An empirical study of criminal jury trials in New South Wales (Justice Research Centre, Law and Justice Foundation of NSW, 2001), [221].*
22. *M Chesterman, J Chan and S Hampton, Managing Prejudicial Publicity: An empirical study of criminal jury trials in New South Wales (Justice Research Centre, Law and Justice Foundation of NSW, 2001), [372], [572].*
23. *El Hassan v The Queen [2007] NSWCCA 148, [14].*
24. *See para 11.47-11.55.*

as the result of private research or fact-gathering by one or more of its members.

11.22 In the first and second types of case, the court must consider whether the irregularity, for example, the tender of evidence which is later withdrawn, or the inclusion within the exhibits given to the jury of documents which were never tendered as exhibits, gave rise to the risk of a substantial miscarriage of justice.[25] The courts have, on occasions, addressed these issues by asking whether the jury would have returned the same verdict if the irregularity had not occurred.[26] In cases where the irregularity is discovered during the course of the trial, the question then extends to a consideration of the nature and magnitude of the irregularity, as well as to an examination of the remedial steps that can be or were taken, including the delivery of a suitable jury direction.[27]

11.23 The third type of case, involving material brought before the jury by one or more of its members, for example, material researched from the internet, is also subject to the same test, namely, whether the availability of the irregularly obtained material would give rise to risk of a substantial miscarriage of justice. So, for example, it has been held that the presence of pages which were copied by a juror from a street directory and annotated by members of the jury did not have that effect.[28] However, in another case, where the results of an internet search made by a juror disclosed a previous murder charge against the accused, it was held the court could not be satisfied that the irregularity arising from the internet search had not affected the verdict resulting in a risk of a miscarriage of justice.[29] The results in such cases depend on individual facts. While a provision has been added to the Jury Act expressly prohibiting a juror from making enquiries "for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror",[30] there is no practical way of ensuring juror compliance with this provision.

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25. R v Adam (1999) 47 NSWLR 267, [55]-[81]. See Crofts v The Queen (1996) 186 CLR 427, 440-441.

26. See R v Lansdell (NSW CCA, 22 May 1995); R v Rudkowsky (NSW CCA, 15 December 1992). Query whether following the decision of Weiss v The Queen (2005) 224 CLR 300, this remains an appropriate test, or whether it would now be decided by reference to the broader test now applied where the proviso to Criminal Appeal Act 1912 (NSW) s 6 is invoked.

27. R v Lansdell (NSW CCA, 22 May 1995).

28. R v Olivier (NSW CCA, 15 September 1993).

29. R v K (2003) 59 NSWLR 431.

30. Jury Act 1977 (NSW) s 68C. See also R v K (2003) 59 NSWLR 431, [87].

11.24 Where one or other of the problems mentioned in this section emerges, it similarly involves a difficult weighing exercise on the part of the trial judge, in circumstances where the parties are likely to be in disagreement. The issue of whether a form of interlocutory appeal would be a way of dealing with this problem is considered later in this chapter.[31]

IRREGULARITIES IN EMPANELMENT

11.25 The Jury Act 1977 (NSW) makes express provision to save a jury verdict where otherwise, at common law, the empanelment of an ineligible or disqualified juror, or other irregularity in relation to the empanelment procedure, would have resulted in the trial being a nullity.

11.26 The provision states:

> *The verdict of a jury shall not be affected or invalidated by reason only:*
>
> *(a) that any member of the jury was disqualified from serving as a juror or ineligible to serve as a juror,*
>
> *(b) of any omission, error or irregularity with respect to any supplementary jury roll, jury roll, card or summons prepared or issued for the purposes of this Act,*
>
> *(c) that any juror was misnamed or misdescribed (where there is no question as to the juror's identity).*[32]

11.27 Questions have arisen recently as to the extent to which this provision might operate to allow a trial to proceed to a verdict, or to save a verdict where a disqualified or ineligible juror or a person who had not received a juror summons for the trial had been empanelled. This situation has been highlighted by the two cases which are discussed in the following paragraphs.

Attendance of a juror on the wrong day in answer to summons

11.28 The case of R v Brown involved a person who, though qualified to serve as a juror and in receipt of a jury summons, by mistake reported for service a day earlier than that appointed by the summons.[33] *The error was not noticed and the person was mistakenly empanelled. The error was, however, discovered in the course of proceedings. Both the prosecution and defence effectively elected to waive the irregularity on the basis that it would be cured by an*

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31. See para 11.47-11.55.
32. Jury Act 1977 (NSW) s 73.
33. R v Brown [2004] NSWCCA 324.

application of s 73 of the Jury Act 1977 (NSW). The juror was not discharged and the trial proceeded to a conclusion.

11.29 An appeal was, however, brought to the NSW Court of Criminal Appeal from the conviction that followed the jury verdict. That appeal was upheld on the basis that the trial was a nullity by reason of the failure to comply with the mandatory provisions of the Jury Act and, in particular, the requirement that the jury "consist of twelve persons returned and selected in accordance with the Act"[34] and the accompanying requirements concerning the selection and summoning of people who are to perform jury duty.[35] It was held that the verdict could not be saved by an application of s 73(b) of the Act, which was construed as confined to omissions, errors and irregularities in the preparation or issue of the relevant documents by the Sheriff.

11.30 This interpretation of s 73(b) is, arguably, too narrow. The appeal was argued on the basis of the permitted reach of that section, and the potentially antecedent question whether the improperly empanelled juror could have been discharged pursuant to the implied power arising under s 22 of the Act and an order made allowing the trial to continue with the remaining jurors, was not raised or considered by the court. Nor was consideration given to the question whether the case could possibly have been brought within the reach of s 73(a), it being assumed, apparently, that the expressions "disqualified" and "ineligible" should be construed to extend only to those who fell within the specified categories of disqualification or ineligibility contained in the Act.

11.31 It has been suggested that the Act should be amended to overcome such problems,[36] particularly as there has been another similar incident where, after verdict, it was discovered that one juror had been empanelled who had reported for service a month early.[37]

Empanelment of a disqualified or ineligible juror

11.32 A somewhat different problem emerged in the case of R v Petroulias.[38] In that case, it was discovered mid-trial that one juror who had been empanelled was disqualified from serving because he was the subject of an order disqualifying him from driving a motor vehicle.[39] On this occasion, the trial judge made an order under s 22(a)

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34. Jury Act 1977 (NSW) s 19.
35. Jury Act 1977 (NSW) s 25-29.
36. NSW, Jury Task Force, Preliminary submission at 3.
37. R v Tan [2007] NSWCCA 223.
38. Petroulias v The Queen [2007] NSWCCA 134.
39. See para 3.54-3.60.

of the Jury Act discharging the juror in question and a further order that the remaining 11 jurors be considered as remaining, for all purposes of the trial, to be properly constituted as the jury.

11.33 An appeal against the order of the trial judge was brought on behalf of the accused to the Court of Criminal Appeal.[40] The appeal was upheld by the majority on the basis that the trial process was flawed from the outset, since the jury did not comply with the explicit statutory requirement that it "consist of 12 persons returned and selected in accordance with [the] Act".[41] It was held that, in those circumstances, s 22 did not authorise the course that was taken, and that while the provisions of s 73(a) would have saved the trial had it resulted in a verdict, that section did not apply to preserve an unconcluded trial subject to the defect in question, that is, that the jury included a disqualified or ineligible person.

11.34 A question has arisen as to whether this potential problem, which applies equally to the case of disqualified or ineligible jurors, should also be addressed.

The Commission's conclusion

11.35 In considering the scenarios outlined above, there are three solutions potentially available. The first would allow the decisions in Brown and Petroulias to stand. The second would expressly allow the court, in its discretion, to discharge an irregularly empanelled juror in circumstances of the kind encountered in these cases. The court could order that the trial be continued with the remaining jurors,[42] so long as their number did not drop below the number permitted by the Jury Act. The third would save a verdict where, during the course of the trial, it was found that a juror was disqualified or ineligible or otherwise not entitled to be present, yet continued to serve and participated in the verdict.

11.36 In assessing the three options available, there are a number of considerations to be brought into account.

11.37 First, it may be dangerous to regularise proceedings whereby a person managed to become empanelled who had no entitlement to be present as part of the jury panel on the day of the return of the summons. To do so might facilitate the participation of someone impersonating another who had received a jury summons, or of

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40. Pursuant to Criminal Appeal Act 1912 (NSW) s 5F, following the grant of a certificate by the trial judge.
41. Simpson and Hoeben JJ, McClellan CJ at CL dissenting.
42. In accordance with Jury Act 1977 (NSW) s 22.

someone not on the electoral roll, or of someone whose motive was to disrupt the trial.

11.38 Secondly, to allow a trial to proceed safely to verdict with a reduced jury might be to countenance the repetition of an error of the kind seen in Brown, that could have been avoided had greater care been taken, prior to empanelment, to ensure that each panel member was properly entitled to be present pursuant to a summons for that day and eligible to serve as a juror.

11.39 Thirdly, instances of people serving who are disqualified or ineligible under the Act, or who have by mistake responded to a summons on the incorrect date, would be reduced if other recommendations in this Report are accepted, concerning:

- *the reduction or elimination of most of the categories of exclusion,[43] including a narrowing of the existing criteria for disqualification;[44]*
- *the adoption of adequate procedures for checking whether a potential juror falls into the category of those who are excluded by reason of their contact with the criminal justice system,[45] for checking juror identities, and for confirming that those who attend in response to a summons have attended on the correct date;*
- *the provision to jurors of sufficiently clear information as to the eligibility requirements both at the time of the service of the summons and upon arrival at the relevant court, in order to prevent them being empanelled through ignorance, or lack of relevant information, or change in circumstances between the time of receiving the relevant documentation and attendance in court.;[46] and*
- *the requirement that jurors produce a certificate from their employer prior to commencement of the trial[47] which, if the potential juror was a member of an excluded occupation, would alert his or her employer and, failing that, a Sheriff's officer, to the possibility that the juror ought to be excluded from jury service.*

11.40 These considerations must, however, be weighed against:

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43. See chapters 4 and 5.
44. See chapter 3.
45. See para 3.74-3.77.
46. See para 13.17-13.30.
47. See para 12.30.

- *the potential cost and inconvenience of a rehearing following a successful appeal, or of having to discharge the jury mid-trial and to order a new trial, especially in relation to the impact on victims and other witnesses, the loss of court time, and the extra burden on prosecution and legal aid budgets;*
- *the fact that in NSW trials are already allowed to continue with fewer jurors in certain circumstances, so long as the remaining number does not drop below the number permitted by the Act;*[48]
- *the circumstance that, if s 73(a) operates to save a verdict where it is discovered, post verdict, that a juror was ineligible or disqualified, it is difficult to see why a similar provision should not apply to the situation where the relevant juror was discovered mid-trial to be ineligible or disqualified, at least in circumstances where that juror is discharged and an order made for the trial to continue with the remaining jurors;*[49] *and*
- *the fact that the granting of a discretion in the trial judge either to discharge a juror in such circumstances and order that the trial continue with fewer jurors, or to discharge the whole jury and order a new trial, would sufficiently guard against circumstances where the empanelment of an ineligible or disqualified person or of a person without an appropriate summons might give rise to an appearance that justice is not being done.*

11.41 The circumstances where a judge might exercise the discretion last-mentioned to discharge the whole jury could include, for example, those where an ineligible serving police officer was empanelled who had knowledge of the accused's antecedents and had communicated that knowledge to the other jurors,[50] *or where the trial was likely to be lengthy and the error was discovered soon after the trial commenced, in circumstances where it might be imprudent to continue with a reduced jury because of the risk of other jurors being lost before verdict as a result of illness or other good cause.*

11.42 We do not consider it appropriate to adopt the third option that would allow a trial judge to permit a person who was discovered mid-trial to lack an entitlement to be empanelled as a juror, to continue to serve as a juror and to participate in the verdict, even if, as in Brown, the parties elected to waive the irregularity. The safer course, and the one that would better ensure the appearance of justice, would be to discharge that juror and continue the trial with the remaining jurors.

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48. Jury Act 1977 (NSW) s 22.

49. We consider the dissenting judgment of McClellan CJ at CL in Petroulias v The Queen [2007] NSWCCA 134, [41]–[43] persuasive in this respect.

50. Compare, improperly obtained evidence, para 11.21-11.24.

11.43 Similarly, we do not support the first option, since experience has shown that incidents have occurred where people who had no entitlement to be present have managed to be empanelled as jurors with the difficulties and waste of resources that would follow upon the need for a new trial. It cannot be said with any certainty, that even with the adoption of suitable precautions, similar problems would never recur.

11.44 On balance, we consider that the existence of a discretionary power of the kind identified, which would also preserve a power in suitable cases to discharge the whole jury, will generally guard against any of the concerns raised above. A court should have the power to allow a improperly empanelled juror to be discharged and for the trial to continue, where appropriate, with the remaining jurors.

RECOMMENDATION 53

The court should be given an express power to discharge a juror without discharging the whole jury and to order that the trial continue in circumstances where that juror has been improperly empanelled, which would include a discretion to discharge the whole jury where the interests of justice so require.

11.45 We would also recommend an amendment to s 19 of the Jury Act 1977 (NSW) so that the requirement that a jury "consist of 12 persons returned and selected in accordance with [the] Act" be made expressly subject to the provisions contained in s 22 of the Act allowing the trial judge to order that a trial continue with fewer jurors in the event of the death or discharge of one or more jurors.

RECOMMENDATION 54

The requirement that a jury "consist of 12 persons returned and selected in accordance with [the] Act" be made expressly subject to provisions allowing the court to order that a trial continue with fewer jurors in the event of the death or discharge of one or more jurors.

11.46 We also recommend amending s 73(a) of the Jury Act 1977 (NSW) to extend its saving operation to include the case of a person who was empanelled as a juror, by error, where the irregularity in empanelment was not discovered and cured by the discharge of that juror during the trial. In order to guard against the possibility of juror personation, however, we consider that the respective s 73 saving provisions should be subject to a provision similar to that in England and Wales. Thiswould not protect a verdict against "any objection... on

the ground of personation"[51] when it is discovered that someone, who was empanelled as a juror and had deliberated and participated in the verdict, impersonated a person who had received a jury summons, and was not discharged prior to verdict. We consider this desirable in order to preserve the appearance of justice and to discourage any attempt by those who might deliberately seek to interfere with a trial by impersonating a person properly summoned to serve.

RECOMMENDATION 55

Section 73(a) of the *Jury Act 1977* (NSW) should be amended to extend its operation to any person who was otherwise empanelled by error where the error was not discovered during the trial and cured by the discharge of that person as a juror.

The saving provisions of s 73 should be amended so as to exclude the case of juror personation.

APPEALS TO THE COURT OF CRIMINAL APPEAL

11.47 There are cases where a judge will need to consider an application to discharge a juror for reasons personal to that juror, and to allow a case to proceed with the balance of the jury. An application to discharge the whole jury may also arise where there has been some prejudicial publicity or other adverse event, or the discovery of previously undisclosed material evidence in circumstances where a Basha inquiry[52] would be insufficient to protect the interests of the defence. There is a risk that any decision made in response to any such application will be held to have been erroneous in an appeal against conviction brought after verdict or, alternatively, that it will be an overreaction to the relevant event, leading to an unnecessary discharge of a juror or the jury as a whole.

11.48 In many instances, decisions of this kind involve difficult discretionary and value judgments which, if found to be wrong, can have far-reaching effects in relation to delays, waste of resources, additional costs, and trauma to those involved in the trial.

11.49 Section 5F of the Criminal Appeal Act 1912 (NSW), which makes provision for interlocutory appeals in criminal proceedings, has been identified as potentially providing a useful mechanism for the review of such decisions mid-trial. It was the vehicle used in the Petroulias case where a decision to discharge one juror and to allow the

51. Juries Act 1974 (Eng) s 18(3).
52. R v Basha (1989) 39 A Crim R 337.

trial to proceed with the remaining jurors was successfully challenged by the defence.

11.50 However, there are a number of problems with the provision as it is currently framed in applying it to the situations under consideration. First, it applies only to judgments or orders that are interlocutory. An order discharging the whole jury would take effect as a final judgment and would, therefore, not be susceptible to appeal under s 5F. Secondly, it applies only to judgments or orders. This means that a mere indication from the judge that he or she is contemplating the discharge of the whole jury, or the discharge of an individual juror and the continuance of the trial, could not be subject to an appeal under s 5F until the order or judgment has been handed down.[53]

11.51 Thirdly, while the prosecution can bring an appeal under s 5F from an interlocutory order as of right,[54] *the defence can only bring an appeal if the Court of Criminal Appeal grants leave or the trial judge "certifies that the judgment or order is a proper one for determination on appeal".*[55] *The circumstances in which the defence can effectively bring an appeal under s 5F have been constrained by decisions of the Court of Criminal Appeal.*[56] *If the defence is unable to obtain either a grant of leave or a certificate, then it is true that its rights are preserved for the purposes of a post conviction appeal since the section provides that "the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related".*[57] *However, this may necessitate considerable delay before the question is determined on a final appeal, with adverse consequences in terms of wasted resources, costs and trauma to those involved.*

11.52 Although one such decision was reviewed in Petroulias following the grant of a certificate by the trial judge,[58] *it has been suggested that this avenue of potential appeal should be placed on a more secure footing,*[59] *and expanded to embrace the circumstances where a trial judge has reached a decision to discharge the whole jury.*

11.53 In our view s 5F should permit the review of decisions made mid-trial concerning the discharge or non-discharge of an individual

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53. See R v Cheng (1999) 48 NSWLR 616, 622.
54. Criminal Appeal Act 1912 (NSW) s 5F(2).
55. Criminal Appeal Act 1912 (NSW) s 5F(3).
56. See, eg, R v Ho (NSW CCA, 18 July 1994); R v Natoli [2005] NSW CCA 292; R v Kocer [2006] NSWCCA 328.
57. Criminal Appeal Act 1912 (NSW) s 5F(6).
58. Under Criminal Appeal Act 1912 (NSW) s 5F(3).
59. J J Spigelman, Consultation.

juror or the whole jury, so as to avoid the risk of trials being unnecessarily aborted prior to verdict, or of convictions being quashed post verdict. We recognise that not every such instance should give rise to a right of appeal, and the jurisdiction would need to be exercised sparingly, and confined, for example, to lengthy trials such as Petroulias, where the consequences of the order could have significant consequences for the parties. In very many cases, particularly those where the order related to an application for the discharge of a single juror, and the continuation of the trial with the remaining jurors, and in some cases where it related to the discharge of the whole jury, there would in fact be no dispute in relation to the order, and no need for any review.

11.54 For the purpose of allowing the review to proceed, and to avoid the problems of declaratory relief, it would seem necessary that the trial judge make the relevant order with reasons, but then, if satisfied that the parties wish to contest the order, and that it is an appropriate case, stay its operation pending appeal to the Court of Criminal Appeal under s 5F.

11.55 We recognise that this would involve a brief interruption to the trial, with the jury being required effectively to stand by until the decision is reviewed. We have, however, been informed that the Court of Criminal Appeal could deal with such questions within a matter of days, particularly as the issue would be a narrow one that would be apparent from the trial transcript, including the reasons given by the trial judge.[60]

RECOMMENDATION 56

Consideration should be given to amending s 5F of the *Criminal Appeal Act 1912* (NSW) to include an express provision for the review by the Court of Criminal Appeal of any order made by the trial judge following an application for the discharge of a juror and for the continuation of the trial with a reduced number of jurors or for the discharge of the jury as a whole.

REPORTING IRREGULARITIES

11.56 If irregularities of the kind outlined earlier in this chapter become known to the remainder of the jury, they may, out of ignorance or otherwise, fail to report the matter to the trial judge or Sheriff. On other occasions, the existence of a relevant aspect of bias, or other

60. *We note, eg, that in R v Cheng (1999) 48 NSWLR 616, the CCA disposed of a s 5F appeal within three days of the decision of the trial judge, while the jury was not discharged pending the decision.*

impediment to the ability of a juror to serve may not be apparent to the remainder of the jury and only be discovered after the jury has returned its verdict. In any of these events, the remedy will normally be one of appeal, which may or may not succeed, depending on the seriousness of the complaint and whether it was likely to have led to a miscarriage of justice.[61]

11.57 The Queensland Jury Act has a specific 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.[62]

11.58 Where the relevant information comes to light during the trial, then clearly the preferable course is for it to be referred to the trial judge. If not, then an acceptable alternative would see it disclosed to the Attorney General, Director of Public Prosecutions or Sheriff, who should then be authorised to bring it to the attention of the trial judge and, where appropriate, to the Court of Criminal Appeal.

11.59 There would be benefit, in our view, in adopting a legislative provision akin to that contained in the Queensland Act that confers an express power in an individual juror to report any concerns of the kind identified to the judge during the trial, or if not reported at that stage, then to the Attorney General, Director of Public Prosecutions or Sheriff and to empower these officers to disclose the information so reported to the trial judge or the Court of Criminal Appeal.

11.60 Such a provision could also be used to allow jurors to identify fellow jurors who do not have the requisite ability in English and who may not have been detected in the empanelment process, or who are not prepared to participate in the deliberations of the jury.

RECOMMENDATION 57

During the trial, a juror should be expressly authorised to report to the trial judge any suspicion which he or she 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 concerning any other question relating to the capacity or willingness of that juror to perform his or her functions according to law, or, if not reported at that stage, then to the Attorney General, Director of Public Prosecutions or Sheriff.

61. *R v Skaf [2004] NSWCCA 37.*
62. *Jury Act 1995 (Qld) s 70(8).*

12. Allowances

- Daily allowance
- Travelling allowance
- Refreshment allowance
- Other reimbursements

12.1 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".[1] Such payments may include, where relevant, an attendance fee, a travelling allowance, and a refreshment allowance.[2]

12.2 The adequacy of these fees and allowances (hereafter referred to as "allowances") has been identified as having a direct and significant relationship to the willingness of some people to serve as jurors. It has been argued generally that improvements in the levels of allowances provided for jury service would encourage more people to participate in the system and reduce the number of applications to be excused or the exercise of the existing entitlements to exemption as of right.[3] Juries would therefore be more representative of the community than they are at present, particularly in the case of long trials. Clearly, there are self-employed people, proprietors of small businesses, or independent contractors, who cannot afford to be away from work for any lengthy period,[4] not only because of the temporary loss of income, but also because of the longer term destructive effects of their absence on the viability of their businesses or practices. The position of piece workers and of casual employees, particularly those who undertake seasonal or day work, and who have no regular employment or single employers, can also be seriously affected by the requirement that they perform jury service. People within these categories will often seek to be excused for that reason, and such applications are generally given a sympathetic hearing. If the application is refused, it is almost inevitable that there will be a peremptory challenge, since no party wishes to see a juror empanelled who is likely to be disgruntled or impatient with the rate of progress of the trial. The parties also do not wish to face the risk of a later discharge of the jury when it becomes apparent that the financial difficulties of that juror, occasioned by reason of serving on the jury, have become such that he or she has to be discharged.

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1. *Jury Act 1977 (NSW) s 72(1).*
2. *Jury Regulation 2004 (NSW) cl 5(1).*
3. *See, eg, Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [6.21]; T Dick, "Crime doesn't pay, but then neither does jury duty" Sydney Morning Herald (28 September 2006), 2.*
4. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [6.25]; T Dick, "Crime doesn't pay, but then neither does jury duty" Sydney Morning Herald (28 September 2006), 2.*

DAILY ALLOWANCE

12.3 There are numerous models for providing a daily allowance to jurors. NSW offers a prescribed rate (varying according to length of trial), which is subject to adjustment for any salary received by the juror during the period of service. Some jurisdictions offer a prescribed rate regardless of financial loss or whether the juror continues to receive a salary. One jurisdiction offers a flat rate that must be supplemented by the juror's employer. Some other jurisdictions recompense jurors for actual financial loss within certain prescribed limits.

12.4 Numerous reviews have commented on the general inadequacy of juror compensation in other jurisdictions, usually recommending that rates be set at a more realistic level.[5]

New South Wales

12.5 In NSW, the daily attendance allowance varies according to the length of the trial as follows:[6]

Attendance fee Day of attendance	Fee per day $
1st day:	
(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	42.90
(c) if a person attends for more than 4 hours on that day (whether or not the person is selected for jury service)	86.20

5. *See Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [6.22]; South Australia, Sheriff's Office, South Australian Jury Review (2002), 18; Tasmania, Department of Justice and Industrial Relations, Review of the Jury Act 1899, Issues Paper (Legislation, Strategic Policy and Information Resources Division, 1999), ch 4; United Kingdom, Home Office, Report of the Departmental Committee on Jury Service, Cmnd 2627 (1965), [294]-[296]; England and Wales, Royal Commission on Criminal Justice, Report (1993), 132; J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, vii, 73, 120-121, 124, 131 and 136.*
6. *Jury Regulation 2004 (NSW) Sch 1 Scale A.*

2nd–5th days:	86.20
6th–10th days:	100.10
11th and subsequent days:	116.80
Despite the attendance fee specified above for each day or part of a day that a person is in attendance for jury service, if the person 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) and:	
(a) that wage or salary is equal to or greater than the attendance fee specified above	Nil
(b) that wage or salary is less than the attendance fee specified above	the difference between the attendance fee and the person's wage or salary

12.6 The payments are made to all jurors at the same relevant rate irrespective of their employment status, so that retirees, pensioners and the unemployed receive the same allowance as those who are in employment but who are not paid by their employers during jury service. However, the attendance allowance is treated as income for both taxation and social security purposes. It is paid in full to those who are in receipt of unemployment and other benefits, it being left to them to declare the allowance in any returns required by the relevant agencies, resulting potentially in a reduction of the benefits to which they would otherwise have been entitled. It is also possible that employed jurors will lose superannuation contributions and opportunities for salary sacrifice in situations where their employers do not pay them during jury service. The losses occasioned in such circumstances could be substantial, and could have particular significance under current superannuation arrangements for those who are required to serve in lengthy trials.

Continuation of salary of employed jurors

12.7 In literal compliance with the Jury Act and Regulations, employees whose employers continue to pay their full salary during the period of the jury service are not entitled to receive any attendance allowances if their salary is equal to or exceeds the prescribed attendance fee. As a consequence, such employers cannot recoup the amount of the allowance from their employees. The current practice,

however, assumes that an employer who elects to continue paying an employee during jury service can approach the matter by paying the difference between the usual wage or salary and the attendance allowance, leaving it to the juror to claim that attendance allowance from the Sheriff.[7] *This approach accords with a common provision, which has been present in NSW for a number of years, in awards, and enterprise agreements, which require an employer to make up the difference between the attendance allowance and the juror's normal wage.*[8] *As is mentioned later, the continued existence of such provisions, and of any obligation by employers to continue to provide make-up pay, may be impacted upon by the Commonwealth Work Choices legislation.*[9]

12.8 The current practice of the Sheriff's office is not to pay an attendance allowance to jurors who are State government employees who are entitled to special leave on full pay during jury service,[10] *or to those whose private sector employers are known to continue paying a full wage or salary for the duration of jury service. This is consistent with the recommendation of the NSW Law Reform Commission in 1986 that jurors whose employers continued to pay them full wages during jury service should not be advantaged over those whose employers did not pay them,*[11] *and with the recommendations of the NSW Jury Task Force in 1993 to the effect that any person paid a full wage or salary by his or her employer while serving as a juror should not receive an additional allowance.*[12]

12.9 This system depends upon the honesty of employees in reporting to the Sheriff by statutory declaration whether they have received any reimbursement from their employer for the period of the jury service, and in reporting to their employer whether they have received an allowance from the Sheriff.[13] *The occurrence and extent of "double*

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7. *See also Jury Regulation 2004 (NSW) cl 5(2).*
8. *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).*
9. *See para 14.20-14.28.*
10. *Public Sector Employment and Management (General) Regulation 1996 (NSW) cl 94.*
11. *NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [6.41].*
12. *NSW, Report of the NSW Jury Task Force (1993), 41.*
13. *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)*

dipping" is not clear. However, it does appear to be the case that there is no effective system for its detection.

Level of payment

12.10 In 1978, the attendance allowance for the first five days of a trial was in line with the average weekly minimum wage.[14] The NSW Jury Task Force in 1993 was unanimously of the view that attendance allowances were "inadequate" and needed to be increased.[15] Payment for actual loss of earnings was considered and rejected as too administratively costly.[16] An additional concern was identified in that the provision of a greater level of compensation to some jurors, but not to others, could give rise to an appearance of unfairness, or suggest that the contribution of the first group of jurors was valued more highly than that of the other group or groups.[17] The Task Force, however, concluded that the allowances should be set at the 1985 levels (which had been based on the 1982 average weekly minimum wage with the addition of the National Wage Increase of 8.5%), and further adjusted for subsequent movements in the CPI (75% only).[18] In 1995, the scale of juror attendance allowances was increased to the amount recommended by the Jury Taskforce, but without allowance for further CPI movements in the intervening year.[19] Since that date, the amounts have been increased by regulation on an annual basis in accordance with CPI increases, so that, in the period ending 30 June 2007, they were 26% greater than they were in 1995. On the other hand, it should also be noted that, in August 1995, the maximum payment of $450 per week, after 10 days, represented approximately 66% of average weekly earnings[20] but, in February 2007, the then maximum payment of $568.50 per week, represented only approximately 51% of average weekly earnings.[21] There have recently been calls to increase the

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cl 18; Speedo Australia Certified Agreement 2003 (IRC3/5005; EA03/204) cl 5.6(b).

14. *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), 38.*
15. *NSW, Report of the NSW Jury Task Force (1993), 39.*
16. *NSW, Report of the NSW Jury Task Force (1993), 41.*
17. *See New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), [485].*
18. *NSW, Report of the NSW Jury Task Force (1993), 39-40.*
19. *Jury Act 1977 - Regulation 1995 No 43 (NSW) cl 2(b).*
20. *That is, full-time adult ordinary time earnings.*
21. *Australian Bureau of Statistics, Average Weekly Earnings (6302.0, February 2007).*

allowances substantially, since the current maximum payment is well below the average full-time adult weekly earnings.[22]

12.11 It has been reported that jurors in a recent five-month trial in NSW requested an additional week's allowance because of the effect on their health and well-being.[23] *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.*[24]

12.12 Many submissions contended that the attendance allowances currently provided are inadequate.[25] *Some submissions supported paying average weekly earnings,*[26] *at least for trials of five days or more,*[27] *or some proportion of average weekly earnings on a sliding scale, depending upon length of trial.*[28] *One submission supported a system whereby no juror would be out of pocket as the result undertaking jury service.*[29] *Another submission suggested that the allowance should represent at least the median wage for the relevant jury district,*[30] *although without identifying how this could be conveniently determined and adjusted.*

Unconditional prescribed rate

12.13 Some jurisdictions provide for the payment of an allowance that varies according to the duration of the trial, but that is not otherwise dependent upon financial loss or any other condition. The allowances are paid in addition to any salary received by jurors during the course of the trial. For example, in the ACT, jurors are paid $40 for

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22. *S Marsden, "Low pay levels for jurors 'unacceptable', NSW barristers say" AAP General News Wire (20 October 2006), 1. The average full-time adult ordinary time earnings for NSW are currently $1,111.00: Australian Bureau of Statistics, Average Weekly Earnings (6302.0, February 2007).*
23. *S Marsden, "Low pay levels for jurors 'unacceptable', NSW barristers say" AAP General News Wire (20 October 2006), 1; NSW Bar Association, "Jurors shouldn't suffer for doing their duty" (Media Release, 20 October 2006).*
24. *G Jacobsen, "Juror cries poor and halts trial" Sydney Morning Herald (29 November 2006), 1.*
25. *NSW Bar Association, Submission, [37]; Law Society of NSW, Submission; NSW Public Defender's Office, Submission, 11; Redfern Legal Centre, Submission, 14; J Goldring, Submission, 6; Law Society of NSW, Submission, 1; NSW Young Lawyers, Submission, 23-24; M J Stocker, Submission, 3, 10.*
26. *NSW Public Defender's Office, Submission, 11.*
27. *NSW Bar Association, Submission, [37].*
28. *J Goldring, Submission, 6.*
29. *NSW Young Lawyers, Submission, 23-24.*
30. *Redfern Legal Centre, Submission, 15.*

attendance for less than four hours; $70 per day for the first four days, $80 for each day from day five to day 10; $95 for each day from day 11 to day 20; and $120 for each day after day 20.[31] *In Queensland, jurors are entitled to $97 for each day or part day for the first 20 days and an additional $32 per day for each day thereafter.*[32]

Mandatory payment by employers

12.14 In Victoria, the Juries Act specifically provides that employees who have been summoned as jurors, and who have attended court, are entitled to be reimbursed by their employers an amount equal to the difference between the amount of compensation for jury service and the amount that they could "reasonably expect to have received" in respect of their ordinary hours of work had they not been summoned for jury service.[33] *This places Victoria's relatively small daily allowance of $36 for 1-5 days*[34] *in context, at least in relation to employed jurors.*

12.15 No other State provides an equivalent statutory protection, although State government employees in NSW, and those whose awards, enterprise agreements or workplace agreements so provide, are placed in a similar position.[35] *The Victorian provision does not address the problem of those who provide services to business entities on a contract basis, which we understand to be an increasingly common practice, or of those who are self-employed or proprietors of their own businesses.*

12.16 Recent amendments to Commonwealth workplace legislation have potentially changed the general position so that provisions requiring employers to compensate their employees for the loss of pay arising from jury service (that is, the usual wage for the period less any jury attendance allowances) are no longer core provisions.[36] *It has been suggested that these amendments may lead to an increase in the number of people seeking to avoid jury service.*[37]

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31. *Juries Fees Regulation 1968 (ACT) Sch 1 item 2.*
32. *Jury Regulation 1997 (Qld) Sch 2 Item 1.*
33. *Juries Act 2000 (Vic) s 52(2).*
34. *Juries (Fees, Remuneration and Allowances) Regulations 2001 (Vic) reg 6(1)(a).*
35. *Public Sector Employment and Management (General) Regulation 1996 (NSW) cl 94; and 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.*
36. *See Workplace Relations Act 1996 (Cth) s 527(2)(f).*
37. *See Law Society of NSW, "Jury out on IR reforms" (Media release, 30 June 2005).*

12.17 The Victorian approach, which involves making employers bear a substantial part of the costs of jury service, has been questioned. Some consider that employers ought not to have to bear the burden of what is essentially a function performed by their employees for the benefit of the justice system, the costs of which should be more properly borne by the State.[38] In this respect, some submissions received by the Commission noted that some employers have had to bear the costs of hiring additional staff, or of paying overtime to existing staff members, to cover periods when their employees are absent on jury service, and that to this additional extent they are disadvantaged by the system.[39] Another raised the more general possibility of providing compensation to employers who continue paying employees while they are performing jury service,[40] although without specifically identifying the extent thereof.

Financial loss models

12.18 In England and Wales and in some Australian jurisdictions, jurors can claim a financial loss allowance, up to a prescribed maximum sum per day, depending on the length of the trial.

12.19 For example, in WA, where a basic attendance allowance of $10 to $20 per day applies, depending upon the length of the trial, a juror can claim an amount of up to $240 per day for lost income.[41] This amounts to $1,200 per week, that is more than twice the maximum allowance payable in NSW to those who serve in trials lasting more than 10 days. In SA, a juror suffering monetary loss of more than $20 per day can recover an allowance of up to $125 per day.[42]

12.20 In England and Wales, regulations may be enacted to permit an additional payment to be made for financial loss occasioned by a juror:

> *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.[43]*

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38. *See, eg, Commerce Queensland, Policy Issue - Queensland Government's Review of Jury Service Up For Comment (2003), 2; New Zealand, Law Commission, Juries in Criminal Trials, Report 69 (2001), [484].*
39. *Australian Business Ltd, Preliminary submission, 2; M J Stocker, Submission, 10.*
40. *NSW, Jury Task Force, Preliminary submission, 4.*
41. *Juries (Allowances to Jurors) Regulations (WA) cl 2.*
42. *Juries (Remuneration for Jury Service) Regulations 2002 (SA) Sch item 1(1).*
43. *Juries Act 1974 (Eng) s 19(1)(b).*

12.21 The Lord Chancellor has determined the maximum financial loss allowance that can be claimed per day in accordance with this provision depending on the length of the trial, currently £58.38 per day for the first 10 days, and £116.78 per day thereafter (until the 200th day).[44] *In order to facilitate the processing of claims for financial loss, prospective jurors are sent a "certificate of loss of earning or benefit" when their jury summons is confirmed. If a juror will not be paid his or her usual earnings during jury service, and wishes to make a claim for loss of income, then the employer must complete the certificate identifying whether or not he or she will continue to pay the employee while undertaking jury service and, if not, to indicate the daily net loss of earnings. The juror must then bring the completed certificate to court when he or she attends in answer to the summons.*[45] *People who are self-employed must provide the court with evidence, usually from their accountant, of the extent of their financial loss arising from jury service.*

The Commission's conclusions

12.22 We agree with the submissions that the current daily allowances are insufficient, and should be addressed, so as to reduce the financial hardship occasioned to jurors, and to remove the barrier to jury service that this entails. We also consider that careful attention should be given, on a continuing basis, to maintaining a proper balance between the obligations of the State and of employers in relation to the continuation of the salary or wages of jurors, or its make-up, while providing jury service. To some extent, this may depend upon the ultimate impact of the Federal Work Choices legislation[46] *and, in particular, whether some exception will be recognised in relation to the general incidents of jury service. Additionally, it depends on whether similar provisions to those appearing in current State awards or enterprise agreements are retained when they are renegotiated or are included in new workplace agreements.*

12.23 We recognise that to require the State to reimburse employers for any make-up pay which employers provide could involve a significant increase in the cost of the jury system. We are inclined to the view that the provision of make-up pay should be regarded as part of the civic contribution of employers, which would in any event be

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44. Her Majesty's Courts Service, Allowances RFC-793 (07/06). The amounts in Australian dollars, as at 26 June 2007, were approximately $138 and $275 respectively per day.

45. England and Wales, Her Majesty's Courts Service, Allowances, RFC-793 (07/06).

46. See para 14.20-14.28.

partially addressed by an increase across the board in the daily allowance paid to jurors.

12.24 In our view, the submissions in favour of increasing the daily allowance have merit. Unless jurors are guaranteed a reasonable attendance allowance, there will be little incentive for them to serve, and jurors whose earnings exceed the allowance, particularly where they have significant ongoing commitments such as home mortgages or other personal or business borrowings, are likely to be excused from service. For those who are dependent on shift allowances or overtime to meet these commitments, the problems arising from jury service can be even more acute. Unless addressed, this could have the consequences of depriving the system of the services of some who might be best qualified to serve, and of jeopardising the objective of ensuring the availability of representative juries. The barrier to service is likely to be strongest for long and complex trials.

12.25 However, we recognise that an increase in the daily allowance will not completely address the position of all people who are called upon to serve. To a certain extent, it is inevitable that jury service will have an uneven impact on different classes of people, some of whom may suffer financially more than others, while some groups, such as students, pensioners, and the unemployed, may do better by serving on a jury than they otherwise would.

12.26 The Commission therefore proposes a financial loss model whereby jurors would be entitled to a moderately increased basic daily allowance which could then be supplemented by a capped amount to provide a measure of compensation for the additional loss of earnings or income incurred as a result of jury service. The capped amount, which could be available to compensate jurors for financial loss suffered over and above the basic level should, in our view, be set at a more realistic level closer to average weekly earnings.

12.27 We do not consider it appropriate to recommend an increase in specific monetary terms in the daily allowance, or to recommend a specific sum for a cap. This is a matter for the Government to determine. We do, however, consider it appropriate that a differential remain depending on the number of days served, to reflect the greater inconvenience and likely financial loss suffered by those who serve as jurors in longer trials.

12.28 The increased basic sum should be available to all jurors, and should be sufficient to recognise the time and contribution of those who do not strictly suffer any financial loss as a result of jury service, such as, for example, students, people undertaking home duties, retired people and those on pensions, including both government-sourced

pensions and allocated pensions drawn from accrued superannuation entitlements.

12.29 While the model suggested would still give rise to some inequality in the burdens of service, it would tend to reduce the adverse financial consequences for most jurors, while at the same time still permitting those who can demonstrate excessive financial hardship, which could not be adequately addressed by our proposal, to apply to be excused for good cause. This model would also have an advantage over providing a significant increase in the allowances across the board, in that the capped additional allowance would be confined to those who can demonstrate an actual financial loss, thereby limiting the overall additional cost that would be occasioned to the system.

12.30 The adoption of the procedure in England and Wales of requiring jurors to produce a "certificate of loss of earning or benefit" before they are paid an allowance for financial loss would provide a useful protection against any possibility of "double-dipping".

12.31 We note in passing that it is now possible, in England and Wales, for professionals and those holding executive positions to obtain specific cover under loss of income policies for any loss occasioned by the requirement to attend to jury duty. We are unaware whether similar cover might be available or could be negotiated by way of an endorsement under policies issued in Australia. We do not make any specific recommendation, beyond recognising that those in the highest income brackets may have a means through such a policy of limiting any loss of income suffered as a result of jury service.

RECOMMENDATION 58

Jurors should be entitled to a basic daily allowance which can be supplemented by a capped amount to provide a measure of compensation for any loss of earnings or income as a result of jury service. A review should be undertaken with a view to increasing the daily allowance and establishing a capped additional amount which would be available by way of compensation for those who suffer such a financial loss.

The payment of any allowance for loss of earnings or income should depend upon the production of a certificate of loss of earning or income.

People who attend but are not empanelled

12.32 The current four hour precondition for payment of an allowance has the effect of penalising the very many jurors who attend in response to a summons but are immediately released or released prior to 1:00 pm. Most of these people will have effectively lost that day and possibly half-a-day's pay. Whether that is so or not, they could be justifiably annoyed by being sent away without payment, despite being inconvenienced. That this is the case is supported by the high level of dissatisfaction expressed by such people to Sheriff's officers when they are informed that they are released but will not be paid for this attendance. It would, in our view, be reasonable for such people to receive a part allowance.

RECOMMENDATION 59

People who attend for jury service in response to a summons, but are released in less than four hours, should receive a part allowance.

Payment for days when jurors are not required to sit

12.33 At present, the practice of the courts concerning the payment of jurors for days when they are not required to be present in court varies between judges, some of whom write to the Sheriff recommending that payment be made, while others neglect or decline to do so. We think that the position should be regularised to require the daily attendance allowance to be paid to jurors in such circumstances, save where they have been paid by their employers. This would reflect the fact that they are required to hold themselves ready to attend court during the trial at inconvenience to themselves and to their employers.

RECOMMENDATION 60

Jurors should be paid the daily attendance allowance for days during a trial when they are not required to be present in court but only when they have not been paid by their employers for those days.

TRAVELLING ALLOWANCE

12.34 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 on the jury roll, and the court or inquest attended, the person is entitled to be paid at the rate of 28.90 cents per kilometre with:*
>
> *(a) a minimum payment of $4.00 each way (being a minimum payment for 14 kilometres each way), and*
>
> *(b) a maximum payment of $28.90 each way (being a maximum payment for 100 kilometres each way),*
>
> *whether or not public transport is used.*[47]

The allowance is calculated according to the distance recorded on the Sheriff's jury computer system between a juror's postcode area and the courthouse at which he or she is called to serve.

12.35 In 1995, the travelling allowance was based on the "specified journey rate" set by the Public Employment Office under 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".[48] *The travelling allowance has been adjusted on an annual basis to reflect changes in the CPI since 1995, at the same time that the jurors' attendance allowances are increased.*

12.36 The increase in automotive fuel prices in the period December 1997 to July 2006 is in the order of 84%,[49] *a substantially larger increase than the 27% increase in the travel allowance over the same period,*[50] *while rail and bus fares have increased over the same period*

47. *Jury Regulation 2004 (NSW) Sch 1 Scale B.*
48. *NSW, Report of the NSW Jury Task Force (1993), 42.*
49. *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).*
50. *Calculated from the travelling allowance quoted in Jury Amendment (Attendance Fees) Regulation 1997 (NSW) Sch 1.*

by about 40% in the case of Sydney buses,[51] and between 38% and 60% in the case of CityRail services, depending upon distance travelled.[52]

12.37 To the extent that jurors use a motor vehicle in order to travel the whole, or part of the way, to court, the mileage rate, as at July 2006, would have had to have been in the order of 40.6 cents per kilometre in order to reflect those changes in the price of fuel outlined above, a matter of some significance for jurors living in country areas which lack public transport. For many city residents, the costs of travel by private motor vehicle would also be increased by motorway or bridge tolls, or by car parking fees, none of which seem to have been taken into account.

12.38 Even for those who travel by public transport within the Sydney metropolitan region, the calculation of an allowance on a mileage basis often does not reflect the actual costs of a return ticket, particularly for those who may have to use more than one form of transport.

12.39 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 their actual costs in using such transport. The previous system was considered inefficient because people had to present their train and bus tickets to the 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.[53] However, unless that system is capable of calculating allowances which approximate the real and current costs of travel, then there is a risk of some jurors suffering an unnecessary and unreasonable personal cost as a result of their service.

12.40 In England and Wales, different rates have been set for different forms of transport and different circumstances. For example, a juror travelling by public transport can claim the cost of the ticket (2nd class return, if travelling by train). The Lord Chancellor has set separate prescribed rates per mile for travel by bicycle, motorcycles, and cars. A higher rate is available for motorcycles and cars if the court accepts that no alternative public transport is available. Jurors may also be

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51. *Based on the fare prices for single trip fares for 1 or 2 sections and 10-15 sections: Transport Administration (State Transit Authority – Fares) Amendment Order 1997 (NSW) Sch 1[1]; Transport Administration (State Transit Authority—Fares) Order 2004 (NSW) Sch 1.*
52. *For journeys up to 25km: Independent Pricing and Regulatory Tribunal of NSW, Public Transport Fares from 29 June 1997: CityRail and STA buses and ferries, 17; CityRail, Passenger Fares and Coaching Rates Handbook (effective from: 2 July 2006), 3-2.*
53. *NSW, Report of the NSW Jury Task Force (1993) at 42.*

reimbursed for parking fees and taxi fares if they have obtained the court's permission beforehand.[54]

12.41 In South Australia, the travel allowance is now 60 cents per kilometre, with a minimum payment of $7.20 and no maximum specified.[55]

12.42 While there is merit in the simplicity of a system based on accepted government rates, which would provide a reasonable accommodation for most jurors, we consider that the Sheriff should have a discretion to pay a supplementary allowance to those jurors who can establish, by production of appropriate records, that their actual costs of travel are in excess of the base rates determined by the automated system.

RECOMMENDATION 61

The travel allowance should be increased to reflect the costs of travel.
The Sheriff should have a discretion to pay a supplementary allowance to those jurors who can establish, by production of appropriate records, that their actual and reasonable costs of travel are in excess of the base rates determined by the automated system.

REFRESHMENT ALLOWANCE

12.43 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 $6.30.*[56]

12.44 As a general practice, in criminal trials, jurors are not released at lunchtime and the Sheriff arranges for the provision of any necessary meals. The refreshment allowance is made available to any juror who does not partake of the food provided. It is unlikely that this allowance has any relevance for the willingness of people to serve, assuming that the meals are adequate, although we have received some submissions to the effect that the heated meals at some courts are very far from satisfactory, with many jurors resorting to taking their own provisions into the jury room without any form of reimbursement.[57]

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54. *England and Wales, Her Majesty's Courts Service, Allowances, RFC-793 (07/06).*
55. *Juries (Remuneration for Jury Service) Regulations 2002 (SA) Sch, item 3.*
56. *Jury Regulation 2004 (NSW) Sch 1 Scale C.*
57. *Confidential, Consultation; J Mendelssohn, "The Law: The Trials of a Jury" «www.newmatilda.com» (14 March 2007).*

12.45 The refreshment allowance was included in the regulation as the result of the Jury Taskforce's 1993 recommendation that "jurors not be locked up at lunchtime in the absence of special circumstances" and that they should be allowed to make their own arrangements for meals.[58] The recommendation has not been implemented because of a general belief that jurors may become compromised by inadvertently talking to the parties in the immediate surroundings of the court and that some jurors may not be relied upon to return on time for the afternoon sitting.

12.46 Victoria, while not offering a refreshment allowance, allows jurors to leave the precincts during the luncheon adjournment and to make their own arrangements for meals. This arrangement has apparently presented few problems. A negligible number of jurors have been compromised by accidentally speaking to parties or witnesses in the case. In some instances, if thought necessary, departures from the court precinct have been staggered, and some judges have even issued express instructions that jurors are to go in one direction for lunch and the parties to the proceedings are to go in another direction.[59]

12.47 Subject to the observations made in the following chapter in relation to the need to introduce some improvements in the jury facilities,[60] we do not suggest any alteration to the current provision, assuming that the meals provided to jurors are adequate, and that the allowance is updated so as to allow the acquisition of a reasonable meal in place of that provided by the Sheriff. Otherwise, we consider that it should remain within the discretion of the trial judge to determine whether jurors should be allowed to leave the court during the luncheon adjournment, particularly in those locations where the jury quarters continue to be cramped and less than optimal.

OTHER REIMBURSEMENTS

12.48 In England and Wales, as we have noted, a different approach has been taken to reimbursing people who have suffered financial loss as a result of jury service.

12.49 The Lord Chancellor has determined the maximum financial loss allowance that can be claimed per day in accordance with this provision, depending on the length of the trial. This sum is available to meet any financial loss attributable to jury service, including not only loss of earnings or benefits, but also fees paid to carers or child minders, or other payments which a juror has made solely because of

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58. NSW, Report of the NSW Jury Task Force (1993), 44.
59. R Monteleone, Consultation.
60. See para 13.2-13.5.

jury service, subject to the production of receipts or other supporting documentation.[61] *We are attracted by this approach, although we recognise that there would need to be a reasonable ceiling established, and that its adoption would depend upon there being some increment to the Sheriff's budget. We have already addressed the question of compensation for the additional loss of earnings,*[62] *and now consider some of the other heads of loss which could justify some measure of compensation.*

Substitute care and other out-of-pocket expenses

12.50 Some submissions raised the possibility of jurors being reimbursed for any fees which they pay for substitute care where that is rendered necessary by jury service.[63] *In New Zealand, jurors are entitled to claim for the actual and reasonable costs of childcare incurred because of attendance for jury service.*[64]

12.51 We are of the view that consideration should be given to the provision of reasonable minder and childcare expenses, subject to a cap of the kind mentioned, where they are incurred by reason of jury duty and where alternative expense-free arrangements are not reasonably available. This would have the advantage of potentially expanding the available jury pool, by allowing those to serve who currently seek an exemption as of right by reason of carer obligations, or who would seek to be excused for cause if our recommendations are accepted. We recognise, however, that the provision of such expenses on a general basis would need to be subject to the relevant budget capacity, and that its provision would necessarily be weighed against the countervailing benefits of potentially widening the jury pool to include those who would otherwise be excused because of personal hardship.

12.52 Some jurors may incur additional out-of-pocket expenses beyond travel and substitute care expenses in order to render jury service, for example where they may need to find accommodation in rural towns rather than face the cost or inconvenience of travelling. While there may not be many people in this category, we see no reason why a discretion should not exist for the Sheriff to pay these expenses where they are reasonably incurred.

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61. *England and Wales, Her Majesty's Courts Service, Allowances, RFC-793 (07/06).*
62. *See para 12.22-12.31.*
63. *NSW Public Defender's Office, Submission, 8; NSW Young Lawyers, Submission, 24; Redfern Legal Centre, Submission, 15. See also NSW Office of the Director of Public Prosecutions, Preliminary submission at 4.*
64. *Jury Rules 1990 (NZ) r 28(6).*

12.53 At the least, we consider that it would be desirable to follow the Queensland precedent of permitting the payment of special compensation for financial loss due to jury service in a trial lasting longer than a defined period,[65] although again subject to the establishment of a reasonable ceiling.

RECOMMENDATION 62

Consideration should be given to allowing jurors to recover reasonable minder and childcare expenses that are incurred by reason of jury duty.

The Sheriff should be granted the discretion to pay additional out-of-pocket expenses incurred by reason of jury duty where such expenses are reasonably incurred.

Locums or temporary replacements and incidental losses

12.54 A question also arises as to whether there should be a provision for the reimbursement of an employer for any expenses incurred over and above the maintenance of the salary of an employee who provides jury service, for example, in relation to the costs of hiring additional staff or of paying overtime to existing staff members to cover periods when that employee is absent on jury service, or for losses occasioned by the absence of the employees on jury duty. It has been suggested that, to the extent to which they incur such expenses, such employers are effectively subsidising the system,[66] and one submission argued for the payment of amounts to cover substitute staff or locums.[67]

12.55 Although there is some attraction in making provision of this kind, we do not favour its introduction. First, we see no reason why the fact of substantial financial hardship to an employer arising from a properly demonstrated need to hire additional staff because an employee has been summoned for jury duty or arising otherwise by reason of the absence of key employees should not be taken into account on an application by that juror to be excused for good cause. This is particularly so where the period of service is likely to be lengthy. Secondly, employers and those who run small businesses or private practices are commonly faced with the need to bring in locums or replacement staff, by reason of factors other than jury duty such as illness and holidays.

65. *In Queensland, 30 days: Jury Act 1995 (Qld) s 64(2).*
66. *Australian Business Ltd, Preliminary submission, 2.*
67. *Redfern Legal Centre, Submission, 15.*

12.56 We do not see any justification for treating jury duty as other than a normal workplace event, whether the juror be an employee, or a person in private practice, or a principal of a small business. A preferable solution would be that which we discussed earlier, namely, extending the exemption arising in relation to previous jury service so as to embrace any employee of a small business where an employee of that business has rendered jury service within the preceding 12 months.[68] *This would go some of the way towards addressing the inconvenience or cost occasioned to employers.*

68. See para 6.70.

13. Conditions of service

- Juror accommodation and jury management
- Jury communication, information and education
- Insurance for injuries received or property damage arising in the course of service

JUROR ACCOMMODATION AND JURY MANAGEMENT

13.1 While NSW has moved a long way from the days when jurors were denied provisions and, in effect, starved into a verdict,[1] a question remains as to what impact the poor management of juries and the inadequate provision of accommodation and facilities has upon the verdict.[2] Ideally, juries in NSW should be managed and provided with adequate accommodation and facilities in such a way as to allow them to reach a verdict with as little inconvenience as possible in the circumstances.

Physical accommodation and facilities

13.2 Juror accommodation, particularly in the older courthouses, both before empanelling and during deliberations has been generally assessed as sub-standard.[3] This appears to be a trend in jury reviews across all jurisdictions.[4] 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. This practice has, on occasions, necessitated the shepherding of jurors through public streets, in the company of Sheriff's officers, back to the courthouse. Additionally, many jury rooms are very small, with only limited privacy for toilet facilities or for open-air exercise within the court perimeter.

13.3 Several reviews have emphasised the desirability of greater sensitivity to the needs of jurors, not only in terms of physical accommodation, but also in terms of the extent of communication with jurors and the general efficiency of the system.[5] A number of

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1. *See R v Leard (1870) 9 SCR 131.*
2. *See, eg, C C Doyle and C C Doyle, "Wretches hang that jury-men may dine" (2007) 28 The Justice System Journal 219.*
3. *NSW, Report of the NSW Jury Task Force (1993), 26-36; Legal Aid Commission of NSW, Submission, 15; NSW, Public Defender's Office, Submission, 10; CRS Australia, Workplace Assessment Report (prepared for the NSW Bar Association, 24 May 2007). See also NSW Jury Task Force, Submission, 3-4; Redfern Legal Centre, Submission, 13; J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 99-104, 130.*
4. *Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996), [6.26]-[6.30].*
5. *Supreme Court of Queensland, Litigation Reform Commission, Reform of the Jury System in Queensland, Report of the Criminal Procedure Division (1993), 77-80; NSW, Report of the NSW Jury Task Force (1993), 12-14;*

submissions were received expressing the same sentiment,[6] and one submission suggested that there should be a statutory right conferred which would guarantee jurors reasonable amenities and refreshments.[7]

13.4 Others have also commented unfavourably on the food provided to jurors while serving.[8] This situation is compounded by the fact that jurors are generally not permitted to leave the court precincts during the luncheon adjournment, a practice which does not apply in other jurisdictions (for example, Victoria) and by the inadequacy of provision for self-catering in most jury rooms in NSW.[9]

13.5 It would be impractical, and unduly expensive, for substantial improvement to be made to the physical facilities reserved for jurors in many of the existing courthouses in NSW, which comprise a mixture of heritage buildings, recently converted buildings originally designed for other uses, and new purpose-built courthouses. However, the provision of comfortable facilities should be built into the planning of future courthouses and of renovations to existing buildings, both in relation to assembly and waiting rooms, and also in relation to the courtrooms and jury deliberation rooms. Such facilities should comply with occupational health and safety standards and provision should be made to accommodate jurors with disabilities.[10]

Trial interruptions

13.6 Better case management is required to avoid jurors being kept waiting during trials while legal issues are addressed, a matter which has regularly been noted as a cause for complaint in reviews, jury surveys, and in submissions to this review.[11] This can be achieved by

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R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 218-219.

6. *Legal Aid Commission of NSW, Submission, 15; Redfern Legal Centre, Submission, 13; NSW Young Lawyers, Submission, 22.*
7. *NSW Bar Association, Submission, [37].*
8. *Confidential, Consultation; J Mendelssohn, "The Law: The Trials of a Jury" «www.newmatilda.com» (14 March 2007); J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 91.*
9. *J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 103.*
10. *See R Harper, "Workplace Assessment Report" (24 May 2007) commissioned by the NSW Bar Association.*
11. *NSW Law Reform Commission, The Jury in a Criminal Trial: Empirical Studies, Research Report 1 (1986), [6.45]; New Zealand, Law Commission,*

judges taking steps to set aside certain periods of the day for submissions, during which jurors can be excused, or receiving those submissions outside normal court hours. This can also be achieved by exercise of the power under the Criminal Procedure Act 1986 (NSW) to make any orders for the purposes of the trial before a jury is empanelled. Additionally, where such interruptions are unavoidable, judges should endeavour to minimise the irritation occasioned, by ensuring that jurors are kept informed of the reasons for any delay to the proceedings.

Access to telecommunication devices

13.7 The provision of business facilities, such as facsimile machines and computer terminals, which could be used during breaks in the sittings, has been suggested as a means of reducing the inconvenience of jury service for those who could usefully employ those breaks for work purposes.[12] *There could also be some relaxation of the current practice of discouraging jurors from bringing mobile telephones to court. The provision of facilities that might permit internet access during sitting hours is potentially problematic since it might encourage jurors to conduct research in relation to the trial in which they are involved. On the other hand, any juror could, if so minded, undertake similar research on a private terminal out of hours. Whether effected through the court facility or some other facility, such a search would have been conducted contrary to the standard directions which are given, and would invite prosecution for an offence under the Act*[13] *as the result of reporting by another juror.*[14]

13.8 One submission supported allowing regulated access to land-line telephones, while barring mobile telephones because of their current capacity for photography and internet access.[15]

13.9 Another submission supported allowing access to the internet, adding "jurors would use this to stay in touch with work, hobbies,

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Juries in Criminal Trials Part Two: A summary of the research findings, Preliminary Paper 37 (1999) Vol 2, [4.4]-[4.7]; Confidential consultation; NSW Public Defender's Office, Submission, 10; J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 75, 79.

12. *See R E Auld, Review of the Criminal Courts of England and Wales (HMSO, 2001), 223.*
13. *Jury Act 1977 (NSW) s 68C.*
14. *See para 11.56-11.60.*
15. *Legal Aid Commission of NSW, Submission, 15.*

family and friends in preference to using it find out some information about the trial".[16]

13.10 The Commission has decided not to make any recommendation in this regard, although it notes that:

- *it should be assumed jurors will generally follow instructions concerning the extent to which they can or cannot use their mobile telephones or any computer terminal which might be provided by a court;*
- *in trials of more than one day, jurors who elected to ignore these instructions could not be prevented from accessing the internet overnight;*[17] *and*
- *jurors will inevitably be required to turn their mobile telephones off during actual proceedings.*

JURY COMMUNICATION, INFORMATION AND EDUCATION

13.11 Two matters arise for consideration. The first concerns the general public perception of what is involved in jury service. The lack of promotion of the virtues of such service, and its importance to the justice system, has led to an incorrect and unfavourable understanding of what is involved. The second concerns the provision of more precise information to those who receive a jury summons, to enable them to have a better understanding of their rights and of what might be expected of them.

13.12 In our view, there is substantial room for improvement in each of these areas, although it would be dependent upon the existence of a discrete section of the Sheriff's office, or of an agency similar to the Office of the Juries Commissioner in Victoria having the expertise and administrative support necessary to manage juries in NSW.

Challenging popular perceptions

13.13 Some submissions drew attention to the need to counter popular, unfavourable, perceptions concerning the nature of jury service.[18] *One in particular considered that some people will seek to be excused from service because of exaggerated and unnecessary fears of*

16. *Redfern Legal Centre, Submission, 13.*
17. *Although it may be technologically possible to examine a juror's computer post trial to detect any breach of the law, if reasonable cause for suspicion existed.*
18. *J Goldring, Submission, 7; Redfern Legal Centre, Submission, 11; Legal Aid Commission of NSW, Submission, 18.*

lengthy trials and of being "locked up", which have been generated by media coverage of notorious cases, while others are likely to have been influenced by reports detailing complaints by former jurors of their "inconvenient, uncomfortable, boring and demeaning experiences".[19] *One submission also highlighted the need to educate employers as to their responsibilities,*[20] *a matter of some importance since any reluctance on their part to allow employees to serve is only likely to foster a jaundiced view among those employees concerning jury service.*

13.14 Those who have made a study of the jury system have routinely reported on the general ignorance and limited understanding of the public of its operation and significance,[21] *or of the benefits of ensuring that the community is broadly represented in the criminal justice system.*

13.15 One submission, in fact, drew attention to the benefits of encouraging greater civic education on the responsibilities of jurors and on the importance of the jury system.[22]

13.16 We consider that material should be provided that will promote a better-informed general awareness of the operation of the jury system, and of the rights and obligations of those who might become involved, including information that might assist in dispelling some of the concerns or myths that exist. The provision of suitable information on a web site, and the inclusion of a specific segment dealing with the role of juries, and of the obligations attaching thereto, in school legal studies courses would assist, as might the inclusion of this topic in public seminars during occasions such as Law Week.

Pre-trial information

Written information

13.17 Written information is provided to potential jurors at three stages before a trial commences; first, when they receive the notice of inclusion stage, secondly, when they receive a summons, and, finally, when they attend court in answer to the summons.

13.18 Potential jurors first receive a notice of inclusion that advises them that they will be included on a jury roll. This notice currently provides no explanation of jury service and does not highlight its

19. *Redfern Legal Centre, Submission, 11.*
20. *J Goldring, Submission, 7.*
21. *See, eg, New Zealand Law Commission, Juries in Criminal Trials Part 2: A Summary of the Research Findings, Preliminary Paper 37 (1999) Volume 2, [2.3]; NSW Law Reform Commission, The Jury in a Criminal Trial: Empirical Studies, Research Report 1 (1986), [6.2]-[6.4].*
22. *Legal Aid Commission of NSW, Submission, 17-18.*

importance for the functioning of the legal system in NSW, but rather details the ways in which potential jurors can apply to be removed from the jury roll or to be excused from attendance. In 1986, this Commission recommended that the jury inclusion notice contain "a brief explanation of the nature of jury service and the role of the jury in the legal process".[23]

13.19 When a potential juror receives a summons to attend court on a particular day, a "Jury Summons Brochure" is included, which answers some of the concerns commonly expressed by potential jurors. The information is, however, poorly arranged and contains an amount of unnecessary information, for example, an explanation of the difference between criminal and civil matters. Like the notice of inclusion, it does not highlight the importance of jury service to the functioning of the legal system in NSW.

13.20 Neither the brochure nor the jury summons itself refer to the Jury Duty website,[24] *which includes a useful and well-arranged "frequent questions" section. This section, among other things, provides helpful explanations of notices of inclusion and summonses. The website also contains information in relation to the allowances that are payable, along with some brief advice as to the role and responsibilities of jurors. The difficulty with reliance upon it, as a source of information, is that, absent some mention of its existence in the notice of inclusion, the jury pamphlet or summons, it is unlikely that potential jurors will access it. Additionally, there is a concern that many of those summoned for service may not have access to a computer or the skills needed to find this website.*

13.21 This compares unfavourably with the practice in England and Wales, where a detailed handbook is distributed with the summons and comprehensive, court-specific on line guides to jury service are identified and made available.[25] *In Victoria, the notice of selection includes a two-page summary explaining jury service and also provides a two-page information sheet for employers of prospective jurors.*

13.22 The jury handbook in NSW is handed to jurors on the day of the trial. One submission suggested that the provision of information to

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23. NSW Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), 73.

24. See, «http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/jury_index».

25. England and Wales, Criminal Justice System, "Welcome to the Juror Virtual Walkthrough" «http://www.cjsonline.gov.uk/juror/walkthrough/index.html» (as at 2 May 2007).

people while they wait to be empanelled may be too late to be effective.[26] *We recognise that this is likely to be so, particularly when a large panel is assembled on the morning of the trial, when there may only be a limited amount of time available for the absorption of meaningful advice, and where many of those present will be nervous about the possibility of being empanelled and, as a consequence, somewhat inattentive or unreceptive to information. Another disadvantage of the late supply of this material is that it denies potential jurors the opportunity of ascertaining whether their concerns about service will or will not be addressed, which in turn might have the effect of increasing the proportion of those who seek to be excused. An earlier supply of information could overcome or minimise this problem.*

13.23 We note that the Victorian Juries Commissioner's Office, in conjunction with the Victoria Law Foundation, has produced a detailed and informative handbook on jury service.[27] *It is far more comprehensive than the pamphlet provided to jurors in NSW.*[28] *Topics dealt with in this handbook includes the importance of juries to the legal system, issues surrounding being summoned, including time, payment and employment, what will happen to jurors when they arrive at court, who's who in the courtroom, how jurors must carry out their task, what happens in the trial, and what will happen after the trial.*[29]

13.24 One submission raised the issue of developing appropriate information on jury service that is accessible to people with limited literacy levels. Although this was said in the context of Indigenous people, it applies equally to any groups who have had limited educational opportunities,[30] *or who have limited knowledge of the justice system. We would support the development and use of a handbook with a general explanation, in plain English, of the duties and rights of jurors and of the nature of jury service. This handbook could provide answers to common questions in line with the website material, although without venturing into the directions which would be expected to be given later by the trial judge.*

13.25 Another submission also suggested that additional preliminary information should be given to prepare jurors for the time when they are given preliminary details in the court room by counsel and the

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26. Legal Aid Commission of NSW, Submission, 17.
27. Victoria, Juries Commissioner's Office, Juror's Handbook (Victoria Law Foundation, 2005 edition).
28. Attorney General's Department of NSW, A Guide for Jurors: Welcome to Jury Service (2007).
29. Victoria, Juries Commissioner's Office, Juror's Handbook (Victoria Law Foundation, 2005 edition).
30. Aboriginal Legal Service, Submission, 6.

judge concerning the case and are asked to identify any reasons why they might not be able to consider the case impartially, noting that:

> *there are indications that, in the stress of being empanelled some jurors facing potential conflict situations may not fully appreciate the warning required to be given under section 38(7)(b) of the Act.*[31]

13.26 Another submission suggested that the information provided to potential jurors should prepare them for the possibility that they may ultimately not be empanelled,[32] *so as to defuse the embarrassment, humiliation and distress that may arise if they are challenged, or the feeling that their time has been wasted if the trial does not proceed or if they do not make the ballot.*

Video

13.27 To a significant extent, the current disclosure of relevant information depends upon the single showing of a relatively brief video to those who respond to their jury summons, while they are awaiting possible empanelment. It does not seem to be an optimal method of providing information to a group of people who are unfamiliar with the environment in which they find themselves and who may well be stressed and inattentive. Moreover, it appears to us that, while the video currently shown to jurors, which was produced in 2000, goes some of the way to showing what might be expected in court, and in the jury room, it is not particularly informative. It tends to place too much attention on peripheral matters such as the arrival of jurors at court and the apparent desire of one "potential juror" to be excused.

Telephone confirmation

13.28 At present, in NSW, potential jurors who have been summoned are required to call a number after 5 pm on the nearest working day before the day set down for attendance to ensure that their panel is still required on that day, and to receive further instructions, if necessary. The summons, in advising of the requirement to obtain telephone confirmation states: "failure to obtain the necessary information could result in the imposition of a fine".

13.29 This situation compares unfavourably with that in Victoria where, in addition to the provision of a 1800 number to call on the night before the trial, an on line checking facility is also available. The online checking facility also mitigates the risk of the telephone lines going down. Victoria and SA also provide information to prospective jurors in advance of the day of attendance by way of text messages to their mobile telephones.

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31. Legal Aid Commission of NSW, Submission, 18.
32. Legal Aid Commission of NSW, Submission, 18.

The Commission's conclusion

13.30 There is a need to improve the timeliness, quality and extent of the information provided specifically to those who receive notices of inclusion and jury summonses, and also the media used to convey the information. This may be achieved by such actions as reviewing the adequacy of the 2000 video which is currently shown to jurors, preparing a more comprehensive handbook along the lines of the Victorian model, making better use of on line services and text messaging services, and ensuring that adequate information is provided about jury service well in advance of attendance by prospective jurors.

RECOMMENDATION 63

Better and more comprehensive information should be provided to prospective jurors in advance of the date they have been summoned to attend.

Post-trial information

Debriefing

13.31 In NSW, few, if any, judges attempt to debrief jurors at the conclusion of the trial in a way that is sufficiently designed to express appreciation for their contribution, and to respond to any concerns that they may have arising from their service and future obligations. One Justice of the Supreme Court of Victoria (Justice Teague) has developed a model for such debriefing which has received a favourable response from jurors and would be worth replicating, without delving into the reasons behind the verdict or the content of the jury's deliberations.

RECOMMENDATION 64

Judges should consider adopting strategies for debriefing jurors at the conclusion of the trial, so as to recognise their contribution and identify any concerns they may have arising from their jury service, although without venturing into the content of their deliberations.

Counselling

13.32 The Sheriff's Office established a Jurors' Support Program in 2001 to provide professional support and/or counselling for jurors needing it after discharge. The program was established as an acknowledgment of the distress or trauma that can be caused to jurors, not only arising from the matters tried, but also arising from such causes as frustration with the legal system or even the dynamics of the jury deliberations.[33]

13.33 Jurors are advised of the availability of the service at the end of the trial. First, a statement is read out by a court officer, and then a pamphlet is made available. Approximately 100 people access the program each year.[34] *A recent juror satisfaction survey shows that the majority of jurors were unaware of the existence of the program.*[35]

RECOMMENDATION 65

The Juror Support Program should continue to be available to jurors after they are discharged.

INSURANCE FOR INJURIES RECEIVED OR PROPERTY DAMAGE ARISING IN THE COURSE OF SERVICE

13.34 In Victoria, provision is made for the payment of compensation for any injuries or loss due to property damage occasioned to a juror in the course of jury service, or while travelling to and from the court as if the juror was a worker subject to the provisions of the Accident Compensation Act 1985 (Vic).[36] *One submission was received supporting the introduction of a similar scheme in NSW that would*

33. *See, generally, M Knox, The Secrets of the Jury Room (Random House, 2005), 301-306.*
34. *L Anamourlis, "The juror support program in NSW" (2007) 90 Reform 38.*
35. *J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published, 139.*
36. *Juries Act 2000 (Vic) Part 8.*

confer benefits in line with those provided under the NSW WorkCover legislation.[37] *We understand that a discretion currently exists to allow payment of small sums to jurors out of the Treasury Managed Fund, although it is not often invoked. In general, we consider it undesirable that jurors should be forced to rely on a common law action of negligence to recover compensation for any injuries or loss suffered as the result of inadequate security or defective premises or other circumstances that might ground such a claim. In 1986, we recommended the amendment of the Jury Act 1977 (NSW) to provide compensation for jurors injured at court, or on their journey to and from court, on the same basis as that applicable to injured employees, and drew attention to the extent of support provided by the submissions we had received.*[38]

13.35 We consider that a scheme should be formally established which could provide for the payment of compensation for injuries received or loss incurred by reason of property damage in the course of attending for jury service. Such a scheme could be based on workers' compensation legislation, or the compensation schemes applicable to injured bushfire, emergency and rescue service workers.[39] *At the least, the provision of compensation out of the Treasury Managed Fund should be formalised, its existence made known to jurors, and steps taken to ensure that it provides fair and equitable compensation.*

RECOMMENDATION 66

Consideration should be given to the establishment of an appropriate scheme whereby compensation is paid for any injuries or loss due to property damage occasioned to a juror in the course of jury service, or while travelling to and from the court for the purpose of such service.

37. *See NSW Bar Association, Submission, [37].*
38. *New South Wales Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Report 48 (1986), [6.45].*
39. *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987 (NSW).*

14. Jury service and employment

- Protection of employment
- Types of employment protected
- Hindering or harassing jurors
- Penalties
- Interaction with Commonwealth laws

PROTECTION OF EMPLOYMENT

14.1 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,[1] or threaten any of the above actions.[2] Actions and threats of action of this kind constitute offences, and each carries a separate penalty of 20 penalty units ($2,200) where an employer is convicted of such an offence. The court may order the employer to pay a specified sum to the employee by way of the salary or wages lost, and to reinstate that employee in his or her old or similar position.[3] Failure to give effect to an order for reinstatement also constitutes an offence, which carries an additional penalty of 20 penalty units. The onus is placed on the employer to show that the reason for the dismissal, other detriment or threat was not actuated because of the juror's service.[4]

14.2 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.[5] 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.[6]

14.3 The provision was not introduced in response to any particular incident. Rather, it was intended to overcome the problems associated with citing an employer for contempt of court for interfering with the administration of justice.[7]

14.4 Notwithstanding these provisions, there are still occasions when people complain that their employers have raised the possibility of

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1. *Jury Act 1977 (NSW) s 69(1).*
2. *Jury Act 1977 (NSW) s 69(2).*
3. *Jury Act 1977 (NSW) s 69(3).*
4. *Jury Act 1977 (NSW) s 69(2) and s 69(8). See also Juries Act 1967 (ACT) s 44AA(2).*
5. *Jury (Amendment) Act 1947 (NSW) s 5(mm) inserting s 84B into the Jury Act 1912 (NSW).*
6. *Industrial Arbitration Act 1940 (NSW) s 95. See NSW, Parliamentary Debates (Hansard) Legislative Council, Hon R R Downing, Second Reading Speech, 25 November 1947, 1413.*
7. *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, 1124.*

terminating their employment, or of otherwise jeopardising their position, particularly when they may be involved in a lengthy jury trial. Some report that they have been placed under express or implicit pressure by such employers to endeavour to be excused from service. Others report that they have served, but have later discovered that they have missed important career opportunities as a result of their service.[8] *There has also been at least one very recent media report of a juror being dismissed in NSW as a result of prolonged jury service.*[9] *To some extent, this may be due to a general ignorance on the part of employers in relation to these provisions, which could be overcome if a handbook, provided to potential jurors with the jury summons, was accompanied by a document addressed to their employer, setting out in plain English the relevant prohibitions and available penalties, and at the same time dealing with matters such as make-up pay.*

14.5 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 highly unlikely that there has only been one such instance over this period. It is understood that the Sheriff's Office deals informally with some instances of threatened dismissals of employees who undertake jury service in preference to prosecution, while, in other cases, judicial intervention has been sufficient to remove any threat of dismissal or demotion.

14.6 The absence of additional cases is more likely to be due to the fact that it is very difficult to detect such conduct, since many jurors would be reluctant to report their employer. They would probably prefer to pursue an application to be excused on personal grounds, if threatened with dismissal or loss of promotional opportunity, particularly if their service will result independently in a reduction of their effective weekly income. They may themselves be unaware in any event of their specific statutory right to protection.

TYPES OF EMPLOYMENT PROTECTED

Full-time or part-time employees

14.7 We consider it important to retain the existing provisions preventing termination of employment, prejudicial alteration of position, or threat thereof, including the powers of the court to order

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8. See, eg, "Jury duty a service out of line with modern life", Sydney Morning Herald (29 September 2006), 14 (letter to the editor).

9. C Merritt, "It's time to hurry up" Weekend Australian (SA 1st edition) (14 October 2006), 3.

reinstatement and reimbursement of any lost salary or wages.[10] *This clearly should apply to both full-time and permanent part-time employees. We address the situation of casual employees later in this chapter.*

14.8 In our view, this protection has greater value, by reason of its specificity and special evidentiary onus, than reliance on the traditional industrial remedies for wrongful dismissal, which were identified in one submission as being available,[11] *at least in relation to those employees or workers who can still have recourse to such remedies under State laws.*[12]

RECOMMENDATION 67

The employment protection provisions for jurors should apply to both full-time and permanent part-time employees.

Independent contractors

14.9 We also consider that it would be appropriate to extend a similar protection to independent contractors who, in substance, are providing services on an ongoing basis, in recognition of the increasing trend within many industries, or areas of commercial activity, to move from traditional employment to service contracts. In such cases, the engaging party might elect either to terminate the services of the independent contractor, or to act otherwise to his or her detriment, where he or she is required to perform jury service. As the law currently stands, the Jury Act would not provide any relief and the contractor may have, at best, and dependent on the terms of the contract, a questionable cause of action for breach of that contract. By way of analogy, the Defence Reserve Service (Protection) Act 2001 (Cth), protects Defence Reserve personnel from discrimination in relation to the engagement, or continuation of contracts of service to third parties, if they provide those services in the course of their civilian life.[13]

10. *Jury Act 1977 (NSW) s 69.*
11. *Legal Aid Commission of NSW, Submission, 16.*
12. *For the Commonwealth position, see below, para 14.20-14.28.*
13. *Defence Reserve Service (Protection) Act 2001 (Cth) Part 4 Div 5 and Part 11.*

RECOMMENDATION 68

Where an independent contractor provides services on a continuing basis equivalent to employment, it should be an offence to terminate the contract for services, or to otherwise prejudice that contractor, where that contractor is required to perform jury service.

Temporary, casual and seasonal workers

14.10 One submission suggested that similar protection should be extended to temporary or casual employees.[14] *It is uncertain whether the current statutory protection was intended to apply to any juror holding a position of casual or seasonal employment at the time when he or she was required to attend for jury service. The section is arguably wide enough to apply to such a situation, and to protect that employee from the loss of the benefits that would have accrued, at least during the term of any current arrangement for casual or seasonal employment. The provisions concerning reinstatement are less easy to apply. Having regard to the very many different forms of casual employment that exist, including regularity of engagement, and hours worked, there would be merit in clarifying the position in relation to those who fall within this category, particularly for those who have long-standing casual work opportunities. Alternatively, where the requirement to attend for jury duty would prevent someone undertaking casual employment, suitable compensation should be available.*

Leave

14.11 Complaints about employers requiring jurors to use up their annual leave entitlements during their period of jury service come to the attention of the Sheriff's Office from time to time. The current practice of that office is to caution 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.

14.12 It is not known to what extent employers currently 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 this.[15] *While the extent of the problem is unclear, in order to avoid the*

14. *See Redfern Legal Centre, Submission, 14.*
15. *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), [488]. Express terms in some NSW awards*

uncertainty and possible occasion for friction between an employer and employee, we consider that it would be prudent to amend s 69 of the Jury Act 1977 (NSW) to make it clear that requiring an employee to use annual leave or other leave entitlements while serving as a juror amounts to a prejudicial alteration of his or her position.

RECOMMENDATION 69

The Jury Act should be amended to state that requiring employees to use annual or other leave entitlements, in order to serve on a jury, amounts to prejudice under the provisions that protect a juror's employment during jury service.

Work outside sitting times

14.13 The problem has also been raised of employers requiring jurors to work at times when they are not required for jury service, either after sitting hours, or during those times when they are not required to be present at court, for example, during legal argument. This might be required by an employer as a condition of having their current salary or wage maintained.[16] Many submissions considered it undesirable that jurors be required to work shifts in addition to performing jury service, in order to make up for lost time.[17] Practices of this kind are said to have had a negative effect on jurors who have become physically exhausted by the end of a trial of several weeks.[18]

14.14 It has been suggested that a provision should be added to the Jury Act forbidding employers from requiring that jurors report for work during the times when they are not required for jury service or that they make up for lost time by working at night.[19] Our attention has been drawn to the fact that, under some Federal award provisions, which formerly applied to workers in Victoria, employees on afternoon

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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.

16. *The Sheriff's Office is aware of at least one case where an employee was required to work his normal hours at the end of jury duty each day: NSW Jury Task Force, Submission, 4.*
17. *NSW Public Defender's Office, Submission, 11; J Goldring, Submission, 6; NSW Jury Task Force, Submission, J Della Bosca, Submission, 9; NSW Young Lawyers, Submission, 22-23; L Thomas, Submission, 3 (Ministerial correspondence).*
18. *K Shadbolt, Consultation; L Thomas, Submission, 3 (Ministerial correspondence).*
19. *K Shadbolt, Consultation.*

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.[20] *We see merit in the adoption of provisions of this kind as they could reduce the need for jurors to seek to be excused where they are affected by demands from employers of the kind mentioned.*

14.15 We accept that it may be reasonable to expect jurors to report for work, during normal working hours, on any day when they are excused from sitting, subject to any particular concerns that the court might entertain that they could use that opportunity to discuss the case with others. We do not, however, consider it reasonable or justifiable for employers to require jurors to work outside court sitting times in order to make up for the time lost while serving. We consider that the Act should be amended to prevent any such requirement being made.

RECOMMENDATION 70

Employers should be prohibited from requiring employees to work on days on which they actually attend for jury service; and from requiring jurors to work outside sitting times in order to make up for time lost while serving as jurors.

HINDERING OR HARASSING JURORS

14.16 In the course of our consultations, suggestions were made concerning the amendment of the Jury Act so as to include within its provisions specific offences relating to the hindering, intimidating, harassing, or corruptly influencing jurors. We are satisfied that any such conduct is the subject of specific and adequate provisions in the Crimes Act 1900 (NSW)[21] *and that no further provision is required.*

PENALTIES

14.17 Several submission argued that the existing penalties do not adequately address the seriousness of a breach of these provisions, and are such that some employers might prefer to take the risk of being prosecuted and of paying a penalty which would be substantially less than the costs to their business of losing or replacing an employee during a lengthy jury trial. We agree with these submissions and consider that the penalties should be significantly increased.

14.18 We note that in several other jurisdictions the amount of the fines or penalties for comparable offences is higher than those available

20. See, eg, Pastrycooks (Victoria) Award 1999 (AW792620CRV) cl 27.
21. Crimes Act 1900 (NSW) s 321-326.

in NSW and, in some State or Territories, there is the possibility of a sentence of imprisonment being passed upon an employer who is in breach. In the ACT, for example, a fine of up to 50 penalty units ($5,500) can be imposed and/or imprisonment for six months.[22] In the NT, a fine of $5,000 or imprisonment for 12 months may be imposed[23] and in Queensland, up to one year imprisonment.[24] Victoria and Tasmania impose a separate penalty for corporations, so that natural people may be fined up to 120 penalty units ($12,000) or imprisoned for up to 12 months, and corporations may be fined up to 600 penalty units ($60,000).[25] A number of submissions supported increasing the penalties,[26] some suggesting that they be in line with those in the ACT,[27] or even greater.[28] One submission pointed out that the penalty was inadequate for many large corporations as it was currently the same as that imposed on an individual who fails to attend jury duty.[29]

14.19 In our view, it would be appropriate to increase penalties for employers breaching each of the above provisions to 50 penalty units ($5,500) and/or imprisonment for up to 12 months, and to make these penalties applicable both to the employer and to any person acting on behalf of the employer who is responsible for the breach, as well as to those directors and employees of a corporation who, under the current law, might be similarly liable to prosecution for the relevant conduct.[30] We also consider that a penalty of 200 penalty units ($22,000) should be applicable to corporations which are found guilty of infringing the relevant provisions. Such a level of penalty, if enacted, would embody the legislative view, based on community standards, of the seriousness of the corporation's criminal conduct.[31]

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22. *Juries Act 1967 (ACT) s 44AA.*
23. *Juries Act 1963 (NT) s 52.*
24. *Jury Act 1995 (Qld) s 69.*
25. *Juries Act 2003 (Tas) s 56(1); Juries Act 2000 (Vic) s 76(1).*
26. *NSW Jury Task Force, Submission, 4.*
27. *NSW Public Defender's Office, Submission, 11; NSW Young Lawyers, Submission, 22.*
28. *J Goldring, Submission, 6.*
29. *NSW Jury Task Force, Submission, 4.*
30. *Jury Act 1977 (NSW) s 70.*
31. *NSW Law Reform Commission, Sentencing: Corporate Offenders, Report 102 (2003), [6.14].*

RECOMMENDATION 71

The penalties applying to offences relating to the termination of employment, prejudicial alteration of position, or threat thereof, to jurors should be increased to 50 penalty units and/or imprisonment for up to 12 months for natural persons, and 200 penalty units for corporations.

The penalties should be applicable both to the employer, and to any person acting on behalf of the employer who is responsible for the breach, as well as to those directors and employees of a corporation who, under the current law, might be similarly liable to prosecution for the relevant conduct.

INTERACTION WITH COMMONWEALTH LAWS

14.20 One submission from the (then) Minister for Industrial Relations, John Della Bosca MLC, expressed concern that jurors will possibly be disadvantaged as a result of the introduction of the Work Choices amendments to the Workplace Relations Act 1996 (Cth)[32] *and its impact on the federal industrial relations system. If these concerns eventuate as the new system takes effect, they may make jury service significantly less attractive to employees who are subject to that industrial system, and who do not have all of the protections that were previously available under Commonwealth laws, but which are still available to those who can take advantage of State industrial laws. Concerns to similar effect were expressed in a number of other submissions.*[33]

14.21 In order to appreciate the nature of the problem, it is necessary to make some additional reference to certain legislative provisions and to the way that the Work Choices amendments have effected, or are capable of effecting, a change in the relationship between employers and employees.

14.22 The Workplace Relations Act applies to the Commonwealth and Commonwealth authorities, to employers who are trading or financial corporations formed within the limits of the Commonwealth, and to certain other employers. It has the effect of bringing the employment relationship between those employers and their employees, which was previously covered by the several industrial instruments that were available, into the Federal jurisdiction. This occurred because the applicable State awards were converted, on commencement of the Commonwealth Act, into the transitional arrangement known as

32. *Workplace Relations Amendment (Work Choices) Act 2005 (Cth).*
33. *NSW Public Defender's Office, Submission, 11; Legal Aid Commission of NSW, Submission, 16; NSW Young Lawyers, Submission, 22; J Goldring, Submission, 7; A Allan, Submission, 1; M J Stocker, Submission, 9.*

"notional agreements preserving State awards" ("NAPSAs"). These NAPSAs are due to expire after three years, on 27 March 2009, although the terms and conditions of employment for which they provide can be changed prior to that date if the parties negotiate a new Workplace Agreement, or if they become subject to "award rationalisation" by the Industrial Relations Commission. This process is applicable to NAPSAs and to federal awards.

14.23 When a new Workplace Agreement is negotiated, an employer is required to include certain "preserved award terms" from the relevant NAPSA or federal award or include a clause expressly to change or exclude the operation of any such conditions. Preserved award terms include terms about "jury service".[34] *However, it is not clear whether any "preserved term" relating to jury service would extend beyond provisions that simply deal with the right to attend court to perform jury service or would extend to provisions that deal with "top up" pay.*[35] *As already noted, most awards include provisions dealing with "top up" pay for jury service.*[36]

14.24 If top up pay clauses are no longer considered as allowable or necessary conditions, then there is, potentially, a considerable disincentive for most wage earners to serve as jurors. It is no answer that top up pay is considered to be a matter regulated or preserved by State legislation since only Victoria has such a provision in its Juries Act. In any case, even if jury service provisions, including top up pay clauses, do survive the introduction of the Work Choices amendments, they are still open to negotiation in future bargaining rounds.

14.25 Next, as we have observed, s 69 of the Jury Act 1977 (NSW) was designed to protect employees who serve on juries, from being dismissed, or injured in their employment, or having their position prejudicially altered, by reason of being summoned to serve as a juror, and from being threatened with any of the above. Pursuant to s 16(3)(l) of the Workplace Relations Act, "attendance for service on a jury" remains a matter for State law. Questions arise, however, as to the ambit of this provision, and in particular whether it would preserve the operation of provisions such as s 69 of the Jury Act 1977 (NSW), or any provision in a State Act that required an employer to top up the pay of an employee summoned for jury duty. Construed narrowly,it might be confined to the simple obligation of employers to allow their employees to attend for jury duty when summoned.[37]

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34. Workplace Relations Act 1996 (Cth) s 527(2)(f).
35. J Della Bosca, Submission, 11.
36. See para 12.7.
37. See J Della Bosca, Submission, 13.

14.26 Finally, as a result of the commencement of the Work Choices amendments, employees who previously had a right of recourse to the unfair dismissal proceedings in the NSW Industrial Commission[38] and who are now subject to the Federal system, and are dismissed, are excluded from bringing any action for harsh, unjust or unreasonable dismissal[39] if their employer employed 100 employees or fewer.[40] While unlawful termination proceedings are open to all employees, they are based on a variety of grounds (including discrimination), none of which seemingly relate to jury service.[41]

14.27 The net result is that many employees coming within the Federal regime may lose the benefit of some of the existing protections which have been given to jurors in relation to their employment and that, over time, top up provisions in awards, enterprise agreements and Workplace Agreements may disappear. If so, they will be disadvantaged in comparison with employees of unincorporated employers, or of any other employers that remain within the State system; and a barrier to their service as a juror may well arise. Even for the group that remains within the State system, it is possible that the disappearance of the relevant protections that applied to those subject to the Federal system will provide an impetus for State awards and enterprise agreements to follow suit when the time for renegotiation arises.

14.28 We note that our recommendations relating to jurors' daily allowances will alleviate some of the financial burden imposed on jurors and their employers, and potentially make it easier to negotiate the inclusion of jury service and top up pay provisions in future agreements. However, we consider that the State government should engage in discussions with the Commonwealth to identify and resolve any anomalies or uncertainties relating to jury service provisions arising by reason of the current Commonwealth employment laws.

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38. Industrial Relations Act 1996 (NSW) Chapter 2 Part 6.

39. Arguably, terminating the employment of an employee who performs a legal obligation to the State, such as jury service, would be seen as harsh, unjust or unreasonable.

40. Workplace Relations Act 1996 (Cth) s 643(10).

41. See Workplace Relations Act 1996 (Cth) s 635-679.

RECOMMENDATION 72

The NSW government should enter discussion with the Commonwealth to identify and resolve any anomalies or uncertainties relating to jury service provisions arising by reason of Commonwealth employment laws.

15. Management of the jury system

- Juror satisfaction and community confidence
- The role of the Sheriff's Office

15.1 The purpose of the recommendations made in the preceding chapters has been to make the system of jury selection and management more efficient and responsive to the needs of jurors and of the courts, to enhance juror satisfaction, and to reinforce community confidence in the jury system, by addressing the issue of representativeness.

15.2 In this chapter, we examine the way in which the Sheriff's Office currently manages the system, and the means by which administrative change could be made to assist in the implementation of our recommendations.

JUROR SATISFACTION AND COMMUNITY CONFIDENCE

15.3 Recent research[1] confirms that juror satisfaction and confidence in the criminal justice system are strongly correlated with actual exposure to that system, particularly if the exposure occurred as a result of serving as a juror in a criminal trial. That research has identified potential barriers to service, such as: the quantum of the allowances payable and any financial burdens suffered by a juror, particularly in the case of lengthy trials; the lack of accurate information of a kind which could allay common myths and misconceptions in relation to the onerous nature of jury duty; employment security concerns; and the existence of child care responsibilities for which provision is not usually available.

15.4 It has also identified the significance of the adequacy and comfort of the jury facilities and amenities, such as the assembly rooms, the jury rooms and jury boxes, the absence or presence of access to natural light, the quality of the acoustics and electronic or visual aids provided in the court rooms, as well as the sufficiency of the services provided, including, for example, the meals or meal allowance, the extent to which alternatives are available for self-catering, including microwave ovens, refrigerators and the like, the existence or non existence of computer terminals or televisions, or access to outdoor spaces during lengthy waits for the court to reassemble, and the extent to which jurors are kept informed of the reasons for any delays or interruptions to the trial.[2] Similarly identified as of importance for juror satisfaction has

1. *R Matthews, L Hancock, D Briggs, Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts, Home Office Online Report 05/04 (2004); J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (Draft) Report to the Criminology Research Council (2007) not yet published.*
2. *J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in*

been the way in which jurors are treated by jury administrators and court staff.

15.5 These studies also showed that jurors reacted positively to the social aspects of serving as a juror. Such aspects are likely to be overlooked unless one has had the actual experience of being involved in a jury trial. These were said to include:

- *the opportunity to socialise and develop new friendships;*
- *the exposure to the human drama of a trial;*
- *visiting the crime scene;*
- *acquiring knowledge about the workings of the criminal justice system, interesting areas of scientific or forensic evidence, and the realities of life in other sections of the social strata; and*
- *being involved in the process of delivering justice and performing an important civic duty.*[3]

15.6 As we have observed, a matter of crucial significance that emerges from these studies is the strong positive correlation between satisfaction with the experience of jury service and confidence in the jury system. The significance of this factor was summed up in the following paragraphs from recent studies in Australia and the UK:

> *Improving juror satisfaction is a matter with implications beyond the comfort of individual jurors; it accords juries due respect and dignity, demonstrates recognition for the important role that jurors perform in the criminal justice system, and may also contribute to improved confidence in the criminal justice system.*[4]
>
> *Ultimately, the significance of the jury system is not limited to findings of guilt or innocence, the weighing of evidence, or even the deliberations in the jury room. There is another important, but largely neglected, dimension of the experience, which may have important implications for social cohesion and notions of citizenship. The degree of satisfaction, which those who participate in jury service realise, is directly connected to the court*

Australia, Report to the Criminology Research Council (2007) not yet published, ch 6.

3. *J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, Report to the Criminology Research Council (2007) not yet published, 75, 76, 79.*
4. *J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, Report to the Criminology Research Council (2007) not yet published, vi.*

process, but may also have implications that go far beyond this arena.[5]

15.7 Many of the matters identified in these studies[6] *as potential ways of improving juror satisfaction and increasing confidence in the criminal justice system are capable of being addressed by jury administrators. They include, for example, the provision of relevant and informative advice to potential jurors, the considerate and respectful management of individual jurors, the provision of adequate facilities, the development of community-based education programs, the streamlining of jury summons procedures, and ensuring employers are not only encouraged to co-operate in freeing their staff for jury service, but are kept informed of their obligations, for example, by the issue of employer information sheets.*[7]

15.8 Moreover, jury administrators are best placed to conduct evaluations of the experience of those who have served as jurors and as a result are able to identify and address possible areas of concern, and to provide assistance to those jurors who may have found the experience overly confronting or distressing. They would also be in a position to give the jurors closure by keeping them informed of the sentencing process that follows their verdict.

15.9 It is for this reason that we next examine in a general way the current administrative arrangements for jury management in NSW and Victoria, and suggest that there be a separate review of the way in which this should best be delivered.

THE ROLE OF THE SHERIFF'S OFFICE

Current arrangements in NSW

15.10 The jury system in NSW is currently managed by staff attached to the Office of the Sheriff, in consultation with the courts. Some of the services for the supply of jurors are provided from the Downing Centre Office of the Sheriff in Sydney, while others are provided from the Office of the Sheriff located at courthouses within the wider metropolitan and/or country regions.

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5. *R Matthews, L Hancock, D Briggs, Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts, Home Office Online Report 05/04 (2004), 15.*
6. *And also in the illuminating account of one individual's experience of jury service in NSW: M Knox, Secrets of the Jury Room (Random House Australia, 2005).*
7. *R Matthews, L Hancock, D Briggs, Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts, Home Office Online Report 05/04 (2004).*

15.11 The functions and powers vested in the Sheriff and his or her staff are derived pursuant to the Sheriff Act 2005 (NSW) which provides that "the Sheriff has and may exercise such functions as are conferred or imposed on the Sheriff by or under this or any other Act or law".[8]

Staffing

15.12 The Sheriff's Office is an agency in the NSW Attorney General's Department that comes within the Court Services Division. It is staffed by uniformed Sheriffs Officers, clerical officers, court officers, and staff of the Administrative Unit.

15.13 The Office has a wide variety of roles, not all of which are related to jury service. For example, the Sheriff and the Sheriff's Officers have also been given law enforcement responsibilities for the service of process, the enforcement of writs, warrants and orders, including property seizure orders under the Fines Act, the auction of seized goods, the provision of security for court complexes and judicial officers, and, in some locations, the provision of officers to assist the running of the courts.

15.14 Currently, the Office consists of an Administrative Unit located at the Downing Centre, the Sheriff's Operations Centre also located at the Downing Centre, and 52 Sheriff's Office Centres located throughout the State, each of which is allocated to one of six regions, three being based in the Sydney metropolitan area, and three being based outside it.

15.15 The Administrative Unit includes the Jury Division, which is responsible for the preparation of jury rolls for the 73 jury districts in the State, issuing notices of inclusion on each jury roll and summoning people from the jury roll to undertake jury duty. The Administrative Unit deals with applications to be excused from duty for the Supreme Court sitting at Darlinghurst and King Street and for the Sydney District Court that are received before the day appointed in each summons. It is also tasked with responsibilities for the provision of finance and support services for the Office as a whole, the provision and support of information technology, the training and organisational development of staff, and the maintenance of instructions for all areas of the Office's operations.

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8. Sheriff Act 2005 (NSW) s 4. See, eg Civil Procedure Act 2005 (NSW) Part 8; Coroners Act 1980 (NSW) s 37; Court Security Act 2005 (NSW) s 21; District Court Act 1973 (NSW) s 25; Fines Act 1996 (NSW) s 72-76A, s 80A, s 89B; Housing Act 2001 (NSW) s 27; Industrial Relations Commission Rules 1996 (NSW) cl 238; Land Acquisition (Just Terms Compensation) Act 1991 (NSW) s 35; Uniform Civil Procedures Rules 2005 (NSW) r 11.15, r 39.4.

15.16 Staff of the Sheriff's Office, including uniformed officers, are variously responsible for the working of the jury system from the issue of summonses until the conclusion of each jury trial, including the payment of allowances. The involvement of Sheriff's Office staff varies depending upon the court served. Outside of the central Sydney courts, staff of the Sheriff's Office share the duty of managing juries with their other general duties in relation to the service of process, enforcement of court orders, and so on, to the point where, at some courts, all this other work has to stop, at least while juries are empanelled.

15.17 At the District Court in the Downing Centre in Sydney, as already noted, the Sheriff's administrative staff, a Jury Room Co-ordinator and clerk, are responsible for processing jurors when they first attend and for dealing with any initial applications to be excused. Court officers assist with the assembly and selection of jurors, and are responsible for the welfare and supervision of jurors once empanelled. The court officers, who may include casual and temporary staff, are employed by the Sheriff and report to the Jury Room Co-ordinator.

15.18 At the Supreme Court in Sydney and all regional courthouses, uniformed Sheriff's Officers process jurors when they first attend and deal with initial applications to be excused. In the Supreme Court in Sydney (criminal jurisdiction) and all District Courts outside of the Downing Centre, court officers employed by the Sheriff are responsible for the welfare and supervision of jurors once empanelled. These court officers report to the Officer-in-Charge at the particular courthouse, who is a uniformed Sheriff's Officer. In the Supreme Court in Sydney (civil jurisdiction), the court officers who are responsible for the welfare and supervision of jurors once empanelled are employed by the Supreme Court Registry and report to an officer of the Supreme Court.

15.19 Sheriff's Officers undergo 12 weeks of training before appointment. Court officers, on the other hand, are often part-time, temporary or casual employees and have not undergone any particular training in relation to jury management.

15.20 Concerns were expressed to us in our consultations as to the overall adequacy of training in relation to jury management, and the suggestion was made that more comprehensive instruction should be given, and guidelines additional to the existing documents (which deal only with juror excusal) developed, to ensure consistency of the system across the State. We have been informed that, at present, the need to leave the management of jury operations (beyond the establishment of the rolls and issue of summonses) to regional centres leads to different practices and approaches being adopted by the local staff who are entrusted with the task of managing the applications for excusal, the empanelment of jurors, the supervision of the jury once empanelled, the

provision of meals and security, and arranging for the payment of the relevant allowances.

15.21 Although the provision of facilities for jurors at the various courthouses, such as the jury rooms and jury boxes, is more directly the responsibility of the courts, the arrangements for the initial assembly of jurors and other matters relating to their supervision, support and payment remain the responsibility of the Office of the Sheriff and that Office can have a direct influence on the extent to which individual jurors find their service satisfactory or not.

Use of technology

15.22 We were informed during the course of our consultations that one of the chief administrative impediments to implementing an effective system is the antiquated computer system currently in use. Problems with that system relate to such matters as the inability to extract useful statistical reports on the operation of the jury system, to alter the parameters for jury districts, or to integrate other government systems for the purpose of identifying disqualified or ineligible jurors. This system compares unfavourably with that in Victoria, where an application has been specifically developed for the Office of the Jury Commissioner. If our recommendations are to be implemented, particularly those concerning the possible use of a smart electoral roll, then it would be important to update the NSW system, so as to provide a more efficient management tool.

15.23 We note that the policy and practice guidelines of the Office contemplate the storage of decisions made by its officers in relation to the discretionary excusal of jurors for the purpose of supporting an internal management audit. Such a function could be supported by a revised computer program, which could also record judicially decided excusals, thereby providing a comprehensive analysis of the extent to which jurors are excused and the reasons for the decisions.

Communication

15.24 A consistent theme of our consultations was that a thorough revision of all documentation and processes is required to ensure that people are encouraged to undertake jury service, rather than left with the impression that it is an irksome matter, best avoided. An important matter to be addressed in this respect is the provision of adequate material to inform jurors of their rights and the obligations of jury service, and at the same time to promote the important community functions and benefits connected with that form of service.

Jury Task Force

15.25 The Sheriff has the benefit of receiving the advice, from time to time, of the Jury Task Force, a committee including representatives of the Attorney General's Department, the Office of the Sheriff, the courts

and the legal profession. It is able to respond to specific problems and to suggest legislative change. In the past, it has conducted far-reaching reviews.[9] As such, it is a valuable source of informed advice which should be involved in the consideration of the implementation of our recommendations.

Victorian model

15.26 In Victoria, the Juries Act 2000 (Vic) provides for the appointment of a Juries Commissioner and for Deputy Juries Commissioners to assist the Commissioner.[10] The Office of the Juries Commissioner is a stand-alone office, reporting administratively to the Supreme Court. The office is based in the sole jury assembly room for the Melbourne district within the purpose-built County Court building (across the road from the Supreme Court). The office is autonomous, and is dedicated to the administration of the jury system, and, therefore, does not have to deal with the many other competing responsibilities that attach to the Office of the Sheriff in NSW.

15.27 The Juries Commissioner adopts a hands-on role, dealing directly with the courts and often personally explaining to potential jurors in the assembly room in Melbourne the workings of the system, and the obligations and entitlements of jury service.

15.28 This direct contact, and the dedicated computer system, allows for a close monitoring of the system that can identify and lead to the correction of any anomalies or difficulties. Moreover, the standard questionnaire and attached documents which require completion by any person claiming ineligibility or disqualification or seeking to be excused or to have their service deferred, are very user-friendly and superior to the documents currently forwarded to jurors in NSW. Our attention has been drawn to a number of deficiencies in these documents and in the orientation video.[11]

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9. For example, NSW, Report of the NSW Jury Task Force (1993).

10. Juries Act 2000 (Vic) s 60-64.

11. For example, it is apparent that some of the documents contain spelling errors of a kind which do no engender confidence and do not contain sufficient explanatory statements. The notice of inclusion is misleading in so far as it advises the recipient that he or she has been "selected for jury duty" for a nominated period, the format for providing an answer in relation to the schedules concerned with disqualification, ineligibility and exemption as of right, differs between each category and also within each category; while the video is relatively uninformative about the trial process, and gives undue prominence to matters relevant to one part of the excusal process: J Goodman-Delahunty, N Brewer, J Clough, J Horan, J Ogloff, and D Tait, Practices, Policies and Procedures that Influence Juror Satisfaction in Australia,

15.29 Deputy Juries Commissioners, mostly Court Registrars, have been appointed for each jury district in Victoria and are responsible for the delivery of jury services outside the Melbourne district. Juries officers are directly reportable to the Juries Commissioner, but authority has been delegated to the Deputies. Previously, the Deputy Sheriff in each district was responsible for the management of juries. This meant there were no consistent practices because there was no hierarchy of control. The Juries Commissioner now provides assistance and direction to the districts outside Melbourne to allow them to manage juries more effectively and in a consistent manner across the State.

Commission's conclusion

15.30 We are strongly of the view that the Sheriff's Office should have a positive role at all stages of jury service of promoting jury service as a worthwhile and valuable contribution to the community generally and the criminal justice system in particular. It should be an objective of the Sheriff's Office to ensure the elimination of features that potentially disenfranchise or discourage service by those who are summoned, and additionally to promote best practice in the provision of jury services. The performance of that objective we regard as important for the enhancement of juror satisfaction and for the reinforcement of the community's confidence in the criminal justice system.

15.31 The ability of the Sheriff's Office to manage the jury system in the most cost effective and efficient way would, in our view, be considerably enhanced by forming a separate division within that office with functions similar to the Victorian Juries Commissioner's Office.

15.32 The creation of such a division would provide an opportunity for an overall review of the Office's practices, the documentation provided to jurors and the orientation video, leading to the adoption of uniform best practice across the State. This could also assist in providing a more appropriate basis for regional management at selected key centres. In order to enhance the experience of jury duty, we envisage that such a division would regularly evaluate their services – for example, by surveying jurors – and be responsive to juror feedback.

15.33 We have been impressed by the careful and detailed management regime adopted by the Victorian Jury Commissioner's

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(Draft) Report to the Criminology Research Council (2007) not yet published, 43-45, 58-59.

Office, whose duties are confined to the management of the jury system. We would expect benefits similar to those experienced in Victoria if that model was adopted as an alternative to the creation of a dedicated division within the NSW Sheriff's Office.

15.34 We recognise that before either of these changes could occur, a detailed cost benefit analysis would be required, which would be worthy of a separate review by government, with the assistance of the Jury Task Force.

RECOMMENDATION 73

A review should be established to examine the formation of a separate division within the Sheriff's Office dedicated to the management of the jury system in NSW, or to the establishment of a separate jury commissioner's office, with the responsibility for the provision of jury services throughout NSW.

RECOMMENDATION 74

The review should include a re-examination of all of the information provided to jurors, including the orientation video.

16. Costs and benefits

- Changes to enrolment and summoning
- Changes to empanelment procedures
- Changes to remuneration of jurors
- Changes to information delivery and technology
- The Commission's conclusion

16.1 In this chapter, we summarise the costs and benefits which we expect to follow from our recommendations. In doing so, we have not attempted to put any exact figures on the likely savings or additional costs because we do not have the necessary data.

CHANGES TO ENROLMENT AND SUMMONING

16.2 Costs savings to the procedure for enrolment and summoning will be achieved by:

- *jurors being summoned directly from the relevant electoral rolls;*[1]
- *the use of 'smart' electoral rolls and cross-checking of data with other 'trusted agencies'*[2]*. This will reduce the number of summonses posted to incorrect addresses. The ability to cross-check with databases that record criminal history*[3] *will reduce the number of summonses that are sent out to people who are disqualified by reason of criminal history.*

16.3 These changes, together with the elimination of many of the current grounds of ineligibility and of exemption as of right, will ultimately reduce the number of summonses that need to be sent out to obtain an adequate panel of potential jurors for any particular trial.

16.4 The cost involved in processing applications to be excused after summons may initially increase, if our recommendations result in an increased number of applications to be excused or to defer jury service at that stage. However, there are not likely to be more applications to be excused than are currently received at both the notice of inclusion and summons stages. This is because people will no longer need to apply to be excused at the summons stage, having previously been unsuccessful at the notice of inclusion stage.

16.5 In the longer term, the Commission believes the development of more comprehensive and appropriate guidelines, along with the creation of greater clarification concerning those who fall within the various categories of exclusions, will introduce greater certainty to the system, and ultimately reduce the number of applications to be excluded or otherwise excused for cause.

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1. *See para 8.39-8.50.*
2. *See para 8.26-8.38.*
3. *See para 8.34.*

CHANGES TO EMPANELMENT PROCEDURES

16.6 The costs involved in delaying trials and summoning further jurors where a panel has an inadequate number of potential jurors will be reduced by courts being permitted to empanel jurors who have been summoned to other courts in the same area.[4]

16.7 The costs involved in aborting trials and conducting retrials will be reduced by our recommendations that seek to:

- *reduce the number of people who are ineligible for jury service;*[5]
- *save juries where there has been an irregularity in empanelment;*[6]
- *allow for the empanelment of additional jurors;*[7] *and*
- *allow the Sheriff to cross-check with criminal record databases.*[8]

CHANGES TO REMUNERATION OF JURORS

16.8 The costs involved in paying jurors will be increased by our recommendation that a part allowance should be made available for those who attend for less than four hours[9] *and by any increases in the attendance allowance and travel allowance that result from our recommendations, as well as by the proposed capped compensation for additional financial losses and for additional out-of-pocket expenses.*[10] *However, some reduction in costs may be possible as a result of our recommendation to require a certificate of loss of earnings or income*[11] *that may prevent double dipping and will also ensure that only those who have actually suffered a loss of income as a result of jury service are adequately compensated. We recognise that any enhancement of the allowance payable to jurors will require the provision of additional resources. However, in the Commission's view, public confidence in the jury system will be enhanced because jurors will have increased satisfaction and juries will be more representative. Increasing the remuneration of jurors should also lead to a reduction in the number of people seeking to be excused, and consequently in the number of summonses that will need to be issued and served.*

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4. *See para 10.62-10.64.*
5. *See chapters 4 and 5.*
6. *See para 11.25-11.46.*
7. *See para 10.43.-10.61.*
8. *See para 8.34.*
9. *See para 12.32.*
10. *See para 12.22-12.31.*
11. *See para 12.30.*

CHANGES TO INFORMATION DELIVERY AND TECHNOLOGY

16.9 The costs involved in communicating with jurors and potential jurors may increase initially as new methods of communication are developed and old methods of communication are revised.[12] However, recurring costs may decrease as less costly and more efficient methods of communication are adopted.

16.10 There will be a substantial one-off cost in developing an appropriate computer system that can aid the management of jury service, and in reviewing and updating the orientation video and other information provided to jurors. In the longer term, however, improved management of the jury system through upgraded information technology systems, and encouraging service through community education[13] will result in jurors being better prepared for service which should lead to a reduction in the number of jurors seeking to be excused.

THE COMMISSION'S CONCLUSION

16.11 We consider that the improvements outlined above will enhance the efficiency of the jury system. The resulting savings, particularly those related to the drawing of jurors directly from the electoral rolls, as well as those related to the improved empanelment procedures, will help to limit the extent of any overall increase in the costs of the system attributable to other recommendations.

16.12 The critical fact remains that juror satisfaction with the conditions of service is of paramount importance for the goals of securing representative juries, and of maintaining confidence in the system of trial by jury. While budgetary constraints must be respected, juries play an integral role in the justice system and must be appropriately funded.

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12. See para 13.30.
13. See para 13.13-13.16.

Appendices

- Appendix A: Submissions
- Appendix B: Consultations
- Appendix C: Commonwealth exemptions

Appendix A: Submissions

Law Society of NSW, 20 February 2007

Legal Aid Commission of NSW, February 2007

NSW Bar Association, Submission, 23 February 2007; Submission 2, 3 September 2007

Office of the Director of Public Prosecutions (NSW), 26 February 2007

NSW Public Defender's Office, 13 February 2007

Redfern Legal Centre, 26 March 2007

Aboriginal Legal Service (NSW/ACT) Ltd,

NSW Jury Task Force, 2 March 2007

Andrew Allen, 12 February 2007

Paul Bacon, Submission 1, 11 January 2007, Submission 2, 1 February 2007

Judge John Goldring, 29 January 2007

Jennie Kane, 21 February 2007

Law Society of NSW, 20 February 2007

Mark Ierace, Senior Public Defender, 24 August 2007

Hon Justice Peter Johnson, 22 August 2007

Hon Justice Peter McClellan, Chief Judge at Common Law, 23 August 2007

Appendix B: Consultations

Lyn Anamourlis, NSW Sheriff's Office, 9 March 2007

Alan Abadee, 9 March 2007

NSW Criminal Justice Agencies, 13 March 2007

Representatives of the NSW and Commonwealth Directors of Public Prosecutions, 2 April 2007

Colin Barry, NSW Electoral Commissioner, 12 April 2007

Paul Strickland and Merilyn Yemm, Electoral Enrolment Branch, Victorian Electoral Commission, 13 April 2007

Rudy Monteleone, Victorian Juries Commissioner, 13 April 2007

Confidential Consultation, by telephone, 23 April 2007

Damian Bugg, Commonwealth Director of Public Prosecutions, 13 August 2007

N R Cowdery, NSW Director of Public Prosecutions, 13 August 2007

W Grant, Executive Officer, the Legal Aid Commission of NSW, 17 August 2007

Hon Justice Martin, Chief Justice of the Northern Territory, 23 August 2007

Appendix C: Commonwealth exemptions

In addition to those listed in the Schedule of the Jury Exemption Act 1965 (Cth), which are noted in par 5.17 of this report, the following are exempt from jury service in Federal courts, the courts of a specified Territory and the courts of the States by the Jury Exemption Regulations 1987 (Cth):

4 Exemption of certain Commonwealth employees

A person holding, or for the time being performing the duties of, an employment as a Commonwealth employee in respect of which the rate of salary equals or exceeds the rate of salary for the time being payable to an officer of the Australian Public Service occupying an office classified as Senior Executive Band 3

5 Exemptions relating to administration of justice

- *An officer or employee of:*
  (i) a Department; or
  (ii) the Office of Parliamentary Counsel; or
  (iii) the Office of the Director of Public Prosecutions;
  being an officer or employee whose duties involve the provision of legal professional services

- *An officer or employee of:*
  (i) the High Court of Australia; or
  (ii) the Federal Court of Australia; or
  (iii) the Family Court of Australia; or
  (iv) the Federal Magistrates Court

- *A person employed as a chemist in the Australian Government Analytical Laboratories, being a person whose duties include appearing as an expert witness in court proceedings*

- *A member within the meaning of the Australian Federal Police Act 1979 and a person employed under section 24 of that Act*

- *The Chief Executive Officer within the meaning of the Australian Crime Commission Act 2002 and an examiner or a member of the staff of the Australian Crime Commission within the meaning of that Act*

- *A person not otherwise referred to in this subregulation for the time being employed by:*
  (ii) the Australian Police Staff College; or
  (iii) the National Police Research Unit

- *A member, or a member of the staff, of the Administrative Appeals Tribunal*

- *A member, or a member of the staff, of the National Native Title Tribunal*

- *A staff member, within the meaning of the Australian Securities Commission Act 1989, being a staff member whose duties involve:*
  (i) providing legal professional services; or
  (ii) investigating matters

6 Exemptions relating to public need

- *A veterinary officer or other person employed in the Department of Primary Industries and Energy whose duties relate to the planning, co-ordination and monitoring of measures to limit the importation of exotic diseases into, or outbreak of exotic diseases in, Australia*

7 Exemptions relating to public administration

- *The Official Secretary to the Governor-General*

- *A person performing duties as Secretary to*
  (i) a Royal Commission; or
  (ii) a Committee of Inquiry established under an Act

- *A person holding, or for the time being performing the duties of, one of the following positions in relation to a Minister of State:*
  (i) Principal Private Secretary
  (ii) Principal Adviser;
  (iii) Senior Private Secretary;
  (iv) Senior Adviser;
  (v) Private Secretary;
  (vi) Adviser;
  (vii) Press Secretary

- *The Industrial Registrar, and any Deputy Industrial Registrar, within the meaning of subsection 62 (2) of the Workplace Relations Act 1996*

- *A person holding, or for the time being performing the duties of, one of the following offices in the Department of the Senate:*
  (i) Clerk of the Senate;
  (ii) Deputy Clerk of the Senate;
  (iii) Clerk-Assistant (Table);

(iv) Clerk-Assistant (Procedure);
(v) Clerk-Assistant (Management);
(vi) Clerk-Assistant (Committees);
(vii) Usher of the Black Rod;
(viii) Principal Parliamentary Officer, Table Office;
(ix) Secretary to a committee established by the Senate, or jointly by the Senate and the House of Representatives, including a committee established by an Act

- *A person holding, or for the time being performing the duties of, one of the following offices in the Department of the House of Representatives:*
  (i) Clerk of the House of Representatives;
  (ii) Deputy Clerk of the House of Representatives;
  (iii) First Clerk Assistant;
  (iv) Clerk Assistant (Procedure);
  (v) Assistant Secretary (Committees);
  (vi) Clerk Assistant (Table);
  (vii) Assistant Secretary (Corporate Services);
  (viii) Serjeant-at-Arms;
  (ix) Director (Programming), Table Office;
  (x) Director (Legislation and Records), Table Office;
  (xi) Secretary to a committee established by the House of Representatives, or jointly by the House of Representatives and the Senate, including a committee established by an Act

- *A person holding, or for the time being performing the duties of, one of the following positions in the Department of Defence:*
  (i) Deputy Director, Defence Signals Directorate;
  (ii) Director-General, Alliance Policy and Management;
  (iii) Deputy Chief of Facility, Joint Defence Facility, Pine Gap;
  (iv) Australian Chief of Security, Joint Defence Facility, Pine Gap;
  (v) Engineer Class 3, Joint Defence Facility, Pine Gap

- *A person holding, or for the time being performing the duties of, the position of Parliamentary Liaison Officer in the Department of the Prime Minister and Cabinet*

Tables

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Commonwealth

Australian Capital Territory

New South Wales

Northern Territory

Criminal Code

Juries Act 1963

Queensland

Jury Act 1929

Jury Act 1995

South Australia

Tasmania

Victoria

Western Australia

New Zealand

United Kingdom

United States

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