NSW Law Reform Commission

REPORT 42 (1984) - COMMUNITY LAW REFORM PROGRAM: SIXTH REPORT - CONSCIENTIOUS OBJECTION TO JURY SERVICE

Table of Contents

Terms of Reference and Participants

New South Wales
Law Reform Commission

The Honorable T.W. Sheahan, B.A., LLB., M.P.,

Attorney General for New South Wales.

COMMUNITY LAW REFORM PROGRAM

Attached to this document is the Report of this Commission pursuant to the reference dated 17 February 1984, a copy of which is fully set out on page v. of the Report

Professor Ronald Sackville

(Chairman)

Russell Scott

(Deputy Chairman)

Deirdre O'Connor

(Commissioner)

Professor Colin Phegan

(Commissioner)

17 December 1984.

Terms of Reference

To inquire into and report on the following matters:

> Whether the grounds of exemption from jury service under the Jury Act, 1977 should be extended to include conscientious objection to such service and, if so, how such conscientious objection should be recognised.
>
> Any incidental matter.

D.P. Landa

Attorney General and

Minister of Justice

17 February 1984

New South Wales Law Reform Commission

The Law Reform Commission is constituted by the Law Reform Commission Act 1967. The Commissioners are:

Chairman:	Professor Ronald Sackville
Deputy Chairman:	Mr. Russell Scott
Full-time Commissioners:	Paul Byrne Miss Deirdre O'Connor Professor Colin Phegan
Part- time Commissioners:	Mr. Julian Disney Her Hon. Judge Jane Mathews Ms. Marcia Neave The Hon. Justice Peter Nygh The Hon. Justice Adrian Roden The Hon. Justice Andrew Rogers Ms. Philippa Smith Mr. H.D. Sperling, Q.C.

Members of the research staff are:

Research Director:

Mr. Mark Richardson

Legal Officers:

Ms. Maxine Cuttler

Ms. Roslyn Robertson

Ms. Fiona Tito

Ms. Judith Walker

Ms. Meredith Wilkie

The Secretary of the Commission is Mr. Peter Lemon and its offices are at 16th Level, Goodsell Building, 8-12 Chifley Square, Sydney, N.S.W. 2000 (telephone: (02) 238-7213).

Participants

Commission Members:

For the purpose of the reference the Chairman in accordance with section 12A of the Law Reform Commission Act 1967, created a Division comprising the following members of the Commission:

Professor Ronald Sackville (Chairman)

Mr. Russell Scott (Deputy Chairman)

Miss Deirdre O'Connor (in charge of this reference) Professor Colin Phegan

Secretary:

Mr. Peter Lemon

Research:

Ms. Meredith Wilkie

Writing:

Miss Deirdre O'Connor

Ms. Meredith Wilkie

Typing:

Mrs. Margaret Edenborough

Word Processing:

Ms. Lorna Clarke

Ms. Kerry Gill

REPORT 42 (1984) - COMMUNITY LAW REFORM PROGRAM: SIXTH REPORT - CONSCIENTIOUS OBJECTION TO JURY SERVICE

1. Community Law Reform Program and this Reference

1.1 This is the Sixth Report in the Community Law Reform Program. The Program was established by the then Attorney General, the Hon F.J. Walker, Q.C., M.P., by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter included the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s.10 of the Law Reform Commission Act, 1967.

1.2 In May 1983 the Commission received a letter from a member of the community who objects to serving on a jury for reasons of conscience. She complained about the procedures involved in being excused from jury service on the ground of her conscientious beliefs, stating that they demeaned her beliefs. She suggested that the conscientious beliefs of each individual should be respected by the law.

1.3 The Commission undertook preliminary research on the matters raised by our correspondent as part of the Community Law Reform Program. We examined the law and practice with respect to juries in New South Wales as well as in other Australian States, New Zealand and the United Kingdom. As a result of these preliminary investigations and discussions with the Sheriff of New South Wales, Mr. G.F. Hanson, we discovered that the matter raised by our correspondent poses problems for a significant number of people. In particular, the Christadelphian community in New South Wales has, in recent years, repeatedly asked the State Government for exemption from jury service. On each occasion the Attorney General has replied to petitions by noting the right of all people summoned to perform jury service to seek to be excused by the presiding judge. In successive submissions Christadelphian committees have stated that the existing procedures cause them a degree of disruption and distress. We describe these procedures in the following Chapter.

1.4 Following our preliminary examination we formed the tentative view that current procedures in New South Wales for considering the claims of conscientious objectors to jury service to be exempt from that service are inadequate. The preliminary examination suggested two main policy questions. Should the Jury Act, 1977 make explicit provision for the exemption of conscientious objectors to jury service? If so, what procedures should be used to deal with applications for such exemption? We advised the Attorney General of our views and he formally made a reference to the Commission on 17 February 1984. The reference requires the Commission to inquire and report on the following:

1. Whether the grounds of exemption from jury service under the Jury Act 1977 should be extended to include conscientious objection to such service and, if so, how such conscientious objection should be recognised.

2. Any incidental matter.

1.5 The Commission invited a number of organisations and individuals to make submissions to us on this reference. Although the time available was short, the response was high and submissions were thoughtful and very helpful. A list of those who made submissions is included as the Appendix. We have also been assisted by the Sheriffs of each Australian State, of the Northern Territory and of New Zealand, by the Electoral Commissioner of New South Wales, and by the Deputy Industrial Registrar of New South Wales.

1.6 We are aware that a number of inquiries into the jury system have been conducted in the United Kingdom Canada and elsewhere in Australia. Between 1963-1965, the United Kingdom Departmental Committee on jury Service, chaired by Lord Morris, extensively reviewed the use of juries, the qualifications for jury service, the administrative machinery and the provisions made for jurors at court.[1] The United Kingdom Criminal Law Revision Committee has produced two related reports. The first, in 1964, examined jurors in the context of criminal procedure.[2] The second concerned the secrecy of the jury room.[3] The Law Reform Commission of

Manitoba, Canada, reviewed the jury system as part of its report on the administration of justice in 1975.[4] This was followed by the report on juries by the Law Reform Commission of Saskatchewan in 1979.[5] In 1980 the Law Reform Commission of Canada produced a working paper on the jury in criminal trials[6] and reported on the subject in 1982.[7] In Australia, two States have examined their jury systems in recent years. The South Australian Criminal Law and Penal Methods Reform Committee considered some issues with respect to juries in its 1975 report on procedure and evidence.[8] The Law Reform Commission of Western Australia specifically examined exemption from jury service during 1978-1980.[9] Although few of these reports deal specifically with the issue of conscientious objection to jury service, we have found them of considerable assistance.[10]

FOOTNOTES

1. *Report of the Departmental Committee on Jury Service (U.K., 1965).*

2. Criminal Law Revision Committee, *Criminal Procedure (Jurors) (U.K., 1964).*

3. Criminal Law Revision Committee, *Secrecy of the Jury Room (U.K., 1968).*

4. Law Reform Commission of Manitoba. *Report on Administration of Justice in Manitoba: Part II: A Review of the Jury System* (Report No. 19, *1975).*

5. Law Reform Commission of Saskatchewan *Proposals for Reform of the Jury Act (1979).*

6. Law Reform Commission of Canada, *The Jury in Criminal Trials* (Working Paper *27, 1980).*

7. Law Reform Commission of Canada, *The Jury* (Report *16, 1982).*

8. Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (Third Report *1975).*

9. Law Reform Commission of Western Australia, *Exemption from Jury Service* (Working Paper, 1978 and Report, 1980).

10. Two of the reports deal with objection on religious grounds: see note 5. p.7 and note 6, p.43. Two deal with the broader concept of conscientious belief on religious and non-religious grounds: s

2. Jury Service in New South Wales

I. INTRODUCTION

2.1 In the Jury Act, 1977, New South Wales has a code regulating the selection of jurors in both civil and criminal cases. Jury legislation has a long history which we describe in paragraphs 2.2-2.7. In relation to the composition of juries, this historical development has been directed towards widening the classes of people liable to serve on juries with the object of making juries more representative of the whole community. However, the 1977 Act still recognises that some members of the community should either be excluded or excused from such service. We describe the grounds of exclusion in paragraphs 2.11-2.14. We also examine the current position of a conscientious objector to jury service under the Jury Act (paragraphs 2.18-2.19).

II. A BRIEF HISTORY OF JURIES AND THEIR SELECTION IN NEW SOUTH WALES

2.2 The jury, as an important institution in the administration of justice, has developed over a long period. Even before the Norman Conquest of England in 1066, the genesis of the present jury may be identified in the practice of the Carolingian kings of the French empire to gather together the people of a locality to affirm the ancient royal rights in that locality.[1] This practice was adapted by the Normans in England.[2] From 1166 juries were used to present suspected wrongdoers for trial but took no part in the trial process.[3] Trial by one's peers was first introduced by the Magna Carta in 1215,[4] but benefited only direct tenants of the King, such as barons, who were entitled to be tried by their feudal peers rather than by the Kings Justices.[5] The procedure was expanded after Pope Innocent III forbade trial by ordeal, also in 1215.[6] English judges began to rely instead on informed neighbours of an accused person; people who would be expected to know the facts.[7] Gradually, However, the jury developed into a body of free and propertied men who were required to find the facts by weighing only the evidence presented to them. Knowledge of the facts or of a party became a ground for excluding a person from a particular jury.

2.3 There is some doubt whether the right to trial by jury was imported into Australia by the first British settlers.[8] It has been suggested that the right was not relevant to a convict settlement.[9] The free settlers persistently petitioned the Governor and the United Kingdom administration for the granting of this right but, apart from the use of juries by coroners, it was not until the 1820's that anything similar to jury trial was available in the Colony. In 1828 the Constitution Act provided that civil trials would be heard by a judge with two assessors unless, on the application of a party, the court ordered the trial to be held before a jury.[10] The jury in a criminal trial was to be constituted by seven commissioned army or navy officers.[11]

2.4 In 1832 legislation first provided for the qualification of jurors, for exemption and for disqualification It was provided that 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. Jurors were liable to a penalty for non-attendance.[12] The Act further provided for criminal trials by 12 civilians in a limited range of cases.[13] Military juries were finally abolished altogether in 1839 and it was provided that all criminal issues of fact would be tried by a jury of 12.[14] 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.[15] The law on juries and jurors was consolidated in 1847, incorporating the liability of all men over 21 with property of prescribed value to serve on common juries, and retaining the special jury lists of justices of the peace, bank directors, city councillors and people of the degree of esquire or higher.[16]

2.5 The Jury Act, 1901 adopted the adult propertied male qualification for jury service,[17] disqualifying unnaturalised men resident in New South Wales for less than seven years and those convicted of named serious crimes.[18] The Act listed those qualified and liable who could claim an exemption.[19] People entitled to the exemption included practising barristers and solicitors, stipendiary magistrates, gaolers, military and naval officers on full pay, certain employees of "banking establishments", people aged over 60, people incapacitated by

disease or infirmity from discharging the duty of a juror, and certain clergymen, priests and ministers of religion. 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.[20] Civil issues of fact and assessments of damages were still to be tried by special juries of four,[21] unless either party applied for a jury of 12.[22] A unanimous verdict was required in criminal trials,[23] while the verdict of three quarters of the panel was acceptable in a civil case after six hours deliberation[24] The police were responsible for compiling jury rolls at the direction of the Sheriff.

2.6 These provisions were repeated in the Jury Act, 1912 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 on their application and the property qualification was abolished.[25] At the same time the special jury was abolished.[26] In 1968 it became obligatory for women to be included on the jury roll, but a woman was entitled to discontinue her liability to serve by notice to the officer responsible for the rolls.[27]

2.7 In the parliamentary debate on the Jury Act of 1977, the then Attorney General the Hon F.J. Walker, Q.C., M.P., stated that because of an outmoded selection system and the proliferation of persons who may claim exemption from jury service, the stage has been reached where the jury rolls now in use are not truly representative of the ordinary citizen.[28]

The primary aim of the 1977 Act was to ensure

> ... that jury service, so far as is practicable, will be shared equally by all adult members of the community.[29]

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 some classes of people previously entitled to claim exemption from jury service were eliminated. For example, bank officers and most State public servants are now liable to serve.

III. CURRENT USE OF JURIES IN NEW SOUTH WALES

2.8 Civil juries are still constituted by four people unless, on the application of a party, the court orders that the jury is to consist of 12 people.[30] juries are generally used to try claims of defamation, malicious prosecution, civil fraud, false imprisonment and seduction.[31] In other civil actions, except cases of personal injury caused by motor vehicles, the court may order a jury trial at the request of either party.[32] In cases where damages are claimed for personal injury caused by the use of a motor vehicle, it is now rare for a jury trial to be ordered.[33] Criminal juries are always constituted by 12 people, and are used only in serious matters tried at first instance in the Supreme Court or the District Court.[34] In 1974 section 476 of the Crimes Act 1900 was repealed and a new section was inserted. The effect of this change was to allow a greater range of criminal cases to be dealt with summarily by a magistrate. This resulted in a reduction in the number of trials in which juries are used since they are not used in Courts of Petty Sessions. Moreover, the superior courts are empowered to try even serious matters without a jury upon the application of the accused person.[35] Juries are also used in inquests by coroners where they are constituted by six people.[36] A majority verdict can be accepted in a civil trial where the jury are unable to agree after four hours consideration.[37] Unanimous verdicts are still necessary in criminal cases and inquests.[38]

2.9 Although juries are used in a declining range of cases, both civil and criminal, the extent of their use indicates that they are of high significance in the administration of justice in this State. Reflecting this significance, amendments to juries legislation during this century have progressively extended the range of people from whom juries may be chosen. During the parliamentary debate on the 1977 Act it was said:

> The Government considers that as a distinct element in the process of law, the concept of juries drawn from the community at large is a most important fundamental; and because of this the net has been spread as widely as possible.[39]

IV. LIABILITY TO PERFORM JURY SERVICE

2.10 The 1977 Act imposes liability for jury service upon "every person who is enrolled as an elector for the Legislative Assembly of New South Wales.[40] Electors are said to be both "qualified" and "liable" to perform this civic duty.[41] The special provisions for women have been removed and women and men are now equally qualified and liable, with the exception that pregnant women may claim an exemption from service.[42]

2.11 Of those who are otherwise qualified and liable to serve, certain classes are disqualified or ineligible for service by reason of some additional characteristic. Schedule 1 to the Jury Act, 1977 lists people who are disqualified from serving on juries. A person convicted, in New South Wales or elsewhere, of treason, or of an offence carrying a penalty of life imprisonment or a term of imprisonment exceeding two years, is disqualified for life. A person who has served any shorter prison sentence or been detained for an offence in a juvenile institution is disqualified for ten years from the expiration of the period of detention And a person convicted of an offence punishable by a period of imprisonment less than two years, placed on probation or bound over by recognizance to keep the peace, or disqualified from driving for more than six months, is disqualified from serving on a jury for five years. The Attorney General suggested that the justification for disqualifying these offenders was that "people who have come into conflict with the law, particularly those who have served gaol sentences, could bear some ill will towards the Crown and so increase the probability of disagreement in criminal proceedings."[43] It was considered that the only practical way of gauging the seriousness of an offence was to consider the actual penalty imposed by the Court.[44]

2.12 Schedule 2 to the Act lists people ineligible to serve on a jury.

> In the main they... consist of persons whose professional or expert duties are so important to the community and so exacting that they ought not to be permitted to serve. Also to be ineligible will be persons whose presence on juries would, in view of their close association with the administration of law and justice, be inconsistent with the concept of juries as a distinct element in the process of law, drawn from the community at large. Also to be in this category are persons who are unable to read or understand the English language.[45]

Thus judges and their spouses, barristers and solicitors, magistrates and their spouses, members of the police force and their spouses, employees of the Attorney General's Department and the Corrective Services Department, among others, are ineligible. Emergency personnel in fire brigades, ambulance services and the like are also ineligible. And, as well as people unable to read or understand English, people unable because of illness or infirmity to discharge the duty of a juror are ineligible.

2.13 A person notified by the Sheriff of inclusion on a draft jury roll must advise the Sheriff within 14 days if he or she is disqualified or ineligible to serve.[46] Failure to do so is an offence carrying a penalty of $500.[47] An application for an exemption from service (the grounds for which are dealt with in the following paragraph) must similarly be made within 14 days of the Sheriff s notification of inclusion on a draft jury roll.[48] The making of a false representation for the purpose of evading jury service is also an offence carrying a penalty of $500.[49]

2.14 Schedule 3 to the Jury Act 1977 lists people who may claim exemption from jury service. Before 1977 some of the classes in this list were prohibited from serving. However, the view was taken that certain people, previously ineligible because of their profession or occupation should be eligible but entitled to claim exemption.[50] Other reasons for exemption are age, distance from the court house, family responsibility and previous lengthy service. The Act provides that the following are entitled as of right to be exempted from serving as jurors.[51]

1. Clergymen in holy orders, ministers of religion having established congregations and vowed members of any religious order.

2. Dentists registered under the Dentists Act, 1934, and actually practising.

3. Legally qualified medical practitioners, actually practising.

4. A person of or above the age of 65 years.

5. Pregnant women.

6. A person having the care, custody and control of children under the age of 18 years other than children who have ceased to attend school) but not including more than one person having the care, custody and control of the same children.

7. A person residing with, and having the full-time care of, a person who is aged or in ill-health.

8. A person notified of his inclusion on the draft jury roll for a jury district who is on the existing jury roll for that jury district or for any other jury district.

9. A person who is entitled to be exempted under section 39 on account of previous lengthy jury service.

10. A person who resides more than the prescribed distance from the place at which he is required to serve.

11. Members and secretaries of all statutory corporations, boards and authorities.

12. Pharmacists registered under the Pharmacy Act, 1964, and actually practising.

13. Mining managers and under-managers of mines.

14. Members of a permanent rescue corps established under section 14(1) of the Mines Rescue Act, 1925.

15. Former members of the Police Force.

16. A person who holds the office of -

(a) Manager, Maintenance;

(b) Assistant Manager, Maintenance; or

(c) Operating Trouble Officer,

in the Mechanical Branch of the State Rail Authority of New South Wales.

17. A person who holds the office of -

(a)superintendent or assistant superintendent of; or

(b) instructor at,

a central rescue station under the Mines Rescue Act, 1925.

2.15 Failure to claim an exemption at the time of receiving a notification of inclusion on a draft jury roll can mean that the person will be required to serve. The Act provides that the Sheriff and the judge should refuse to excuse a person claiming exemption at a later stage (for example, when summoned to attend for service), unless that person had a reasonable excuse for failing to claim the exemption at the proper time.[52] The provisions of the Act are designed to ensure that the Sheriff knows with reasonable certainty the number of jurors who will be available on any particular day, so that the demands of the courts for jurors will be adequately supplied. The penalties described in paragraph 2.13, and the possibility that those who would otherwise be entitled to an exemption will be required to serve if the exemption is not sought at the proper time, further this aim. However, the provision making Commonwealth public servants ineligible to serve on juries [53] causes significant problems in this regard. These people frequently do not advise the Sheriff of their status and, because they are exempted by a federal

Act,[54] the Sheriff cannot penalise them for this failure. Yet the Sheriff may not know in advance that a proportion of those summoned are Commonwealth public servants.

2.16 As stated in paragraphs 2.13 and 2.14, a person whose name is included on a draft jury roll must advise the Sheriff if he or she is disqualified or ineligible to serve, and may, if within one of the classes set out in Schedule 3, claim to be exempt as of right. The effect of a successful notification or application is that the persons name is omitted from the final jury roll for the district in which he or she resides. This roll will supply jurors for the district for three years. The person may be selected for a later draft jury roll and, if so, will be required to notify the Sheriff again of his or her disqualification ineligibility or claim for exemption if it is still applicable. However, the Sheriff may refuse to accept that a person is disqualified or ineligible, or to grant the exemption claimed.[55] A determination not to delete a persons name from the jury roll must be communicated to that person [56] and he or she may appeal to a Court of Petty Session.[57] The magistrate's decision is final and conclusive and must be put into effect by the Sheriff.[58] During the period a jury roll is in force a person whose name is listed may become disqualified, ineligible or able to claim an exemption as of right in such a case the Sheriff is empowered to delete that person's name from the existing jury roll.[59]

V. DISCRETIONARY EXCUSAL

2.17 Any person whose name is included on an existing jury roll may apply to be excused from service. The Sheriff may excuse a person summoned for jury service who applies at any time before the day on which his or her attendance is required if he finds "good cause".[60] Generally such an application is made by letter or in person after the person has been summoned to attend for service at a particular court on a particular day. The Jury Act does not define "good cause" but the Sheriff considers that several circumstances are covered by that expression including temporary and unavoidable absence from the jury district temporary illness, or probable serious detriment to a sole business.[61] The Sheriff has power to require an application for excusal to be verified by statutory declaration.[62] If the Sheriff refuses the application the applicant must attend at the specified court on the specified day and may renew the application to the judge or coroner. The judge also considers whether the applicant has "good cause" to be excused and may require the application to be made on oath.[63] Such applications are dealt with before the commencement of the empanelling of jurors for the trial. Frequently the judge is called on to consider applications to be excused which have not previously been considered by the Sheriff. Matters which arise on the day of the trial, such as sudden illness in the family or other business or domestic crisis, may be the subject of these applications in open court. If an application to be excused, made either to the Sheriff or to the judge, is successful, the result is that the applicant need not attend further at the court on that occasion. The applicant's name, however, remains on the jury roll and he or she may expect a further summons after an interval of about ten months to a year. Jurors in the city of Sydney are required to attend for service on an average of three occasions during the three year life of a jury roll.

VI. CONSCIENTIOUS OBJECTORS

2.18 People with a conscientious objection based on religious or other grounds, to performing jury service, are neither disqualified nor ineligible under the legislation for that service. Neither can they, on that ground alone, claim an exemption as of right because they do not appear as a class in Schedule 3 of the Jury Act 1977. (A possible exception to this statement is mentioned in paragraphs 2.20-2.2l.) The Sheriff has advised that people with a conscientious objection to jury service may apply to be excused from service upon receiving a summons to attend. However, he does not consider that his discretion to excuse for "good cause" authorises him to excuse people claiming to have a conscientious objection.[64]

2.19 Currently, therefore, everyone applying to the Sheriff to be excused from jury service on the basis of a conscientious objection is refused.[65] If a person chooses to pursue the application it may be repeated to the judge on the day of the trial for which he or she has been summoned. It would seem that the practice of judges in hearing and determining such applications may not be uniform. In the letter raising this issue as a topic for law reform, the writer complained that the judge in her case had excused her without hearing her application either informally or on oath. He did, however, hear other applications to be excused made on oath She felt that the particular judge's attitude denigrated her beliefs. Other judges require applicants to be examined on oath and ask questions designed to test their sincerity. One submission stated that some judges have excused conscientious objectors from jury service but required them to remain in court for the duration of the trial.[66] We understand that

the practice of judges is to excuse conscientious objectors if only for the reason that they are unlikely, because unwilling, to prove satisfactory as jurors and might even refuse to join in a verdict No case has been brought to our attention in the course of this reference of a judge refusing to excuse a conscientious objector. It is likely that a conscientious objector, not excused by a judge, would in any event be challenged by one of the parties. At present, however, conscientious objectors cannot predict the attitude which will be shown to them in the courtroom, whatever their beliefs.

VII. CHRISTADELPHIANS

2.20 Members of the Christadelphian sect are opposed on religious grounds to performing certain civic duties including voting, serving in the military forces, performing jury duty and joining industrial unions. In 1978 a Christadelphian successfully appealed to a magistrate against the Sheriff s refusal to grant him an exemption as of right. The magistrate held that the applicant was a vowed member of a religious order and thus entitled to have his name removed from the draft jury roll.[67] This decision was not followed in a case in 1980 decided by a Stipendiary Magistrate in Wagga Wagga. The magistrate stated:

> I believe that the words "vowed members of any religious order" must be construed ejusdem generis with "Clergymen in Holy Orders, Ministers of religion", in other words that the exemption would apply to those persons who are concerned with the religious life or closely associated thereto.[68]

The applicant in that case was a member of the Plymouth (or Exclusive) Brethren and he was held not to come within the term "vowed members of any religious order", simply by virtue of that membership. The magistrate stated:

> I believe that the paragraph is inserted with deliberateness and is really aimed at closed religious orders.[69]

2.21 In view of this decision, which the Sheriff has accepted as properly interpreting the phrase in question,[70] we consider that no religious objector would be able to rely on clause 1 of Schedule 3 in seeking to be exempted from inclusion on a jury roll. The experience of Christadelphians as related by the Secretary of the Australian Christadelphian Committee is that neither the Sheriff nor any magistrate now accepts their claims for exemption.[71] Further, as the Sheriff does not excuse Christadelphians for "good cause", they, like all other conscientious objectors, must make their applications to the presiding judge when they are called for service. For reasons given in Chapter 5, we consider that the current procedures for conscientious objectors are unsatisfactory and require revision.

VIII. SUMMARY

2.22 The current procedure in New South Wales for people having a conscientious objection to jury service is as follows.

> They may not claim an exemption as of right unless they also come within clause 1 of Schedule 3 of the Jury Act 1977. Their names will be included on the relevant jury roll in spite of their objections. While they have a right of appeal to a magistrate if the Sheriff refuses the exemption application an appeal is unlikely to succeed because of the judicial interpretation of clause 1 of Schedule 3 described above.
>
> Conscientious objectors may, alternatively, seek to be excused from service on each occasion they are called for service while on the roll. The Sheriff is empowered to exercise his discretion to excuse a prospective juror for-good cause". The present Sheriff, however, has determined that this power does not authorise him to determine an application for excusal on the ground of conscientious objection. Thus the objector must apply to the presiding judge. The judge also may excuse a conscientious objector for "good cause-, and we believe that most judges would do so. However, whether or not a particular applicant will be excused cannot be predicted with certainty.

FOOTNOTES

1. Department of Justice of Queensland, *Consider Your Verdict* (1973), p.4.

2. *Id.,* p.5.

3. *Id.,* p.6.

4. W. Blackstone, *Commentaries on the Laws of England,* Book IV (15th edition, 1809), p.348.

5. A Dickey, “The Jury and Trial by One’s Peers" (1973-74) 11 *University of Western Australia Law Review* 205, at p.207.

6. P. Devlin, *Trial by Jury* (1956), p.9.

7. *Id.,* pp.9-10.

8. J.M. Bennett, “The Establishment of Jury Trial in New South Wales” (1959-61) 3 *Sydney Law Review* 463; P, *v. Valentine* (1871) 10 S.C.R 133; *Myersonv. Smith’s Weekly Publishing Co. Ltd.* (1924) 41 W.N. (N.S.W.) 58; and *Miller and Co. v. Wilson* (1932) 32 S.R. (N.SW.) 466, at p.475, per Harvey J.

9. See J.M. Bennett, note 8, p.463.

10. 9 Geo. IV, C83, s.8.

11. *Id*., s.5.

12. 2 Wil. IV, No.3.

13. Id., s.40.

14. 3 Vic. No.11. s.2.

15. 8 Vic. No.4, s. I.

16. 11 Vic. No.20.

17. Jury Act 1901. s. 3.

18. Id., s.4.

19. Id., s.5.

20. 1d., s.28(1).

21. Id., s.30.

22. Id., s.3 1.

23. Id., s.67.

24. Id., s.68.

25. Jury (Amendment) Act, 1947, ss.2, 3.

26. Id., s.4.

27. Administration of Justice Act, 1968, s.10.

28. New South Wales Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4475, per Mr. F.J Walker.

29. Id., 22 February 1977, p.4254, per Mr. F.J. Walker.

30. Jury Act, 1977, s.20.

31. Supreme Court Act, 1970, s.88.

32. Id., s.87.

33. See Law Reform (Miscellaneous Provisions) Act 1965: Administration of Justice Act 1968.

34. Jury Act 1977, s.19.

35. Crimes Act 1900, ss.475A-475 B.

36. Jury Act 1977, s.50.

37. Id., s.57.

38. Id., ss.56, 59.

39. New South Wales Parliamentary Debates, Legislative Council, 8 March 1977, p.4818, per Mr. D.P. Landa.

40. Jury Act 1977, s.5.

41. Ibid.

42. Id., schedule 3, cl.5.

43. New South Wales Parliamentary Debates, Legislative Assembly, 24 February 1977, pp.4478-79, per Mr. F.J. Walker.

44. *Id.,* p.4477.

45. *Id.,* p.4478.

46. Jury Act, 1977, s.13(1).

47. *Id.,* s.61.

48. *Id.,* s.13(1).

49. *Id.,* s.62.

50. Among those whose status changed were clergymen, priests and other ministers of religion medical practitioners, pharmacists, dentists and mining managers.

51. Jury Act 1977, s.7 and schedule 3.

52. *Id.,* s.38(2).

53. *Id.,* schedule 2, cl.16.

54. Jury Exemption Act 1965 (Cth.), s4; Jury Exemption Regulations 1970 (Cth.), c114-6.

55. Jury Act, 1977, s. 14.

56. *Id.,* s.14(2).

57. *Id.,* s.15(1).

58. *Id.,* s. 15 (3).

59. *Id.,* s.18(1),(3).

60. *Id.,* s.38(1)(a).

61. P.R. Weems, “A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California” (1984) *10 Sydney Law Review* 330, at p.335.

62. Jury Act 1977, s.38(4).

63. *Id.,* s. 3 8 (1) (b), (5).

64. Letter from Mr. G.F. Hanson, Sheriff, New South Wales, to Mr. T.W. Haines, Under Secretary of Justice, New South Wales, dated 7 February 1984.

65. *Ibid.*

66. Submission 9.

67. Letter from Mr. F.J. Walker, then Attorney General, New South Wales, to Mr. S.L Dando, Secretary, New South Wales Christadelphian Committee, undated, attached to Submission 6; and see New South Wales Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984), para.4.37.

68. *Appeal of John Roderick Lindquist,* 1 February 1980, Wagga Wagga Court of Petty Sessions, (1980-1982) *The Review* 2105, at p.2106, per B. Eland, S.M.

69. *Id.,* at p.2107.

70. Letter from Mr. F.J. Walker, then Attorney General, New South Wales, to Mr. S.L Dando, Secretary, New South Wales Christadelphian Committee, undated, attached to Submission 6.

71. Submission 9.

3. Conscientious Objection in Legislation

I. INTRODUCTION

3.1 Australian governments have often stressed the importance in a democratic system of respect for individual conscience. In doing so they support a view which is common to all democratic societies. In *United States v. Macintosh,* for example, the Supreme Court of the United States said that "in the forum of conscience, duty to a moral power higher than the State has always been maintained."'[1] When the 1977 amendments to the Conciliation and Arbitration Act 1904 were introduced, the Hon. A.A. Street Minister for Employment and Industrial Relations, commenting on the new exemption from union membership provisions, stated:

> The Government regards the protection of individual rights as fundamental and inalienable.[2]

Almost 25 years earlier, during the debate on similar amendments to the National Service Act 1951, the Hon. H.E. Holt, Minister for Labour and National Service and Minister for Immigration stated:

> ... although the measure does not affect a great many people as a British community we pride ourselves on the fact that we respect the conscientious beliefs of others.[3]

More recently, when requesting a reference on the National Service Amendment Bill 1983 (which would expand the exemption for a conscientious objector) for the Senate Standing Committee on Constitutional and Legal Affairs, Senator the Hon M.C. Tate, chairperson of the Standing Committee, stated that

> ... as legislators we ought to be reinforcing the individual conscience - an activity which culturally marks us as a free society where the common good cannot be relentlessly pursued by means which destroy the individuals personality.[4]

3.2 Legislation can be identified which, in accordance with these principles, imposes civic duties on citizens generally, or on a class of citizens, but recognises that some members of the community or of the class will hold conscientious beliefs which may make the performance of such duties repugnant. This legislation discussed below, generally provides that people who establish that they sincerely hold a conscientious belief which precludes the action required may apply to be exempt from the duty.

3.3 Some legislation has addressed religious objections exclusively. This reflects a view that a distinction can properly be drawn between a conscientious belief based on a religious doctrine and a conscientious belief not so based. However, the decided cases have affirmed that the term "conscience" of itself is not to be restricted by the ambit of "religion".[5] Nor is the term "religion"' to be defined restrictively. The Chief Justice of the High Court of Australia warned in the J*ehovah's Witness Case*[6] that "each person chooses the content of his own religion" and "[i]t is not for a court upon some *a* priori basis, to disqualify certain beliefs as incapable of being religious in character".[7] We first describe legislation which deals exclusively with religious conscientious objection and then legislation providing an exemption on the more general ground of conscientious objection.

II. RELIGIOUS EXEMPTION

3.4 The New South Wales and Federal electoral statutes both recognise that voting on a Saturday may offend some religions. Accordingly, each provides for electors to apply for a postal vote on the ground that they are unable, because of their membership of a religious order or their religious beliefs, to attend at a polling booth on polling day or during the greater part of polling day.[8]

3.5 The State electoral legislation was amended in 1928 to make voting at State elections compulsory. At the same time the concerns of those with a religious objection to voting was recognised. The amendment created the offence of failing to vote without a valid and sufficient reason[9] and specifically provided that one example of such

a reason would be “an honest belief on the part of an elector that abstention from voting is part of his religious duty.”[10] (Such a belief, however, does not excuse a failure to enrol.[11]) The procedure for making known the objection is to state it on the notice advising of the failure to vote which will be sent by the New South Wales Electoral Commissioner.[12] It is the Electoral Commissioner who must be satisfied that the reason stated is a valid and sufficient one.[13] The Act does not purport to confine the term “valid and sufficient reason” to religious objections and an objection on non-religious conscientious grounds might be included. The Electoral Commissioner, in fact has received advice to this effect from the State Crown Solicitor, who also noted that it can be a difficult matter to distinguish conscientious beliefs of a religious character from those not having that character.[14] As a matter of practice the Electoral Commissioner does not excuse non-religious conscientious objectors.

3.6 When voting at local government elections was made compulsory in 1947, the provisions of the Parliamentary Electorates and Elections Act 1912 were adapted and inserted in the Local Government Act 1919. That Act now provides that one valid and sufficient reason for failing to vote at a local government election is that the person honestly believes that abstention from voting is part of his or her religious duty.[15]

3.7 The Commonwealth Electoral Act 1918 does not specifically excuse conscientious objectors from voting at federal elections. In 1983 the Act was amended to provide that an elector who fails to vote may be excused if he or she shows cause why proceedings should not be instituted against him or her for failing to vote without a valid and sufficient reason.[16] Arguably, conscientious objection on religious or other grounds would be a valid and sufficient reason. Prior to the 1983 amendment the practice was to excuse only those objecting on religious grounds.[17]

3.8 The Prevention of Cruelty to Animals Act, 1979 recognises religious practices by creating a defence based on certain religious rites to what would otherwise be offences under that Act. In 1928 a religious exemption was added to the Prevention of Cruelty to Animals Act, 1901 in the following terms:

> Nothing in this Act shall render unlawful
>
> > (a) the slaughtering of any animal in any manner which may be necessary to comply with the requirements of the Jewish or other religion;[18]

The new Prevention of Cruelty to Animals Act 1979 permits slaughtering according to Jewish religious law to be set up as a defence to a charge under the Act.[19] The defence could be extended by regulations to other religions, but no such regulations have yet been promulgated.

3.9 We should point out that there are examples of legislation which in certain circumstances, override a person’s religious convictions. An example is emergency medical treatment. Medical treatment or procedures applied without the patients consent cart as a general rule, be the subject of a suit for trespass or battery.[20] Usually a parent must consent if treatment is to be given to a child.[21] A 1983 amendment to the Medical Practitioners Act 1938 [22] provides that a parents refusal to give consent to medical treatment may be overridden if two medical practitioners are of the opinion that the child is in imminent danger of dying and that the treatment is necessary to save the child s life.[23] It has been suggested that this provision could, for example, override the objections of a Jehovah’s Witness to a blood transfusion or of a Christian Scientist to any form of medical treatment.[24]

III. EXEMPTION ON THE GROUND OF CONSCIENTIOUS BELIEF GENERALLY

3.10 In 1951 the New South Wales Industrial Arbitration Act, 1940 was amended to provide that people holding a conscientious objection to union membership on religious grounds could be exempted from membership.[25] In 1953, for the first time in New South Wales, legislation was passed to provide for absolute preference to unionists in industries covered by an award or industrial agreement, and tor compulsory unionism.[26] At that time a new section was introduced which provided that a person objecting on the grounds of conscientious belief to being a member of a union and who satisfied the Industrial Registrar of New South Wales that the objection was genuine could obtain a certificate of exemption from union membership.[27] The term “conscientious belief” was not limited to religious grounds but was defined to include “any conscientious belief whether the grounds thereof are or are not of a religious character and whether the belief is or is not part of the doctrine of any religion.”[28] The new

preference provision was subjected to a challenge in the High Court[29] and, before the challenge was determined, the legislation was amended to provide that the industrial tribunal, on an application by a union would insert preference clauses in the relevant award. The 1953 provisions concerning conscientious objection were incorporated into the new section.[30] A similar definition was incorporated into the Commonwealth Conciliation and Arbitration Act 1904 when provision was made for the granting of exemption certificates to non-unionists having a conscientious objection to union membership.[31] This exemption was modelled on the provision in the New South Wales Act.[32]

3.11 The National Service Act 1951 exempted "persons whose conscientious beliefs do not allow them to engage in any form of naval, military or air force service" from liability to perform national service.[33] The appeal provisions were strengthened in 1953.[34] The amendment also clarified the meaning of "conscientious beliefs":

> ... a conscientious belief is a conscientious belief whether the ground of the belief is or is not of a religious character and whether the belief is or is not part of the doctrines of a religion.[35]

The Defence Act 1903, which provides for compulsory service in the defence force in time of war for all adult males to age 60, does not exempt conscientious objectors as such.[36] Among a short list of exemptions are "ministers of religion", "members of a religious order", and people training to become such a minister or member."[37]

IV. JURY SERVICE

3.12 The only Australian juries legislation to recognise the interests of conscientious objectors explicitly is the South Australian Juries Act 1927. When that Act was amended in 1965 to extend the qualification for service to everyone enrolled as an elector for the House of Assembly (omitting the former property qualification) and to make women liable to serve on juries, statutory recognition was given to the existing practice of excusing jurors who had a conscientious objection to jury service."[38] The Sheriff of South Australia, like the presiding judge, is empowered, if he thinks fit to excuse any person from attendance on the basis of " ill-health, conscientious objection, or any other reasonable cause".[39] The objection must be verified by statutory declaration.[40] The Sheriff of South Australia has informed us that "conscience" applications have related mainly to religious beliefs against judging others. He could recall only one such application on other than religious grounds during the preceding five years.[41]

> I refused the application and placed the juror, at his request, before a judge to enable my decision to be reviewed. The judge also refused the application and the juror performed jury service.[42]

In contrast those with a religious objection are generally automatically excused by the Sheriff on the basis of their statutory declaration The Sheriff stated that less than 0.5 per cent of people summoned for jury service apply to be excused on the ground of conscientious belief and that the provision has not been subject to abuse by people seeking to avoid jury service.[43]

3.13 In Victoria, although there is no explicit provision in the legislation for excusal on the ground of conscientious belief, excusal on this ground is available in practice. The Sheriff of Victoria has power to excuse a person for reasons of special urgency or importance among others.[44] The Sheriff has advised us that, in his view, conscientious objection to jury service, on religious grounds or otherwise, is of sufficient importance to warrant excusal.[45] The Sheriff requires the application to be supported by an oath affidavit, statutory declaration or otherwise in writing.[46] and is empowered to excuse a successful applicant for the whole or any part of the period of a current jury list.[47] if the Sheriff refuses an application, the applicant may appeal to the presiding judge.[48] Alternatively, he or she may make an initial application to that judge, but only if there was good reason for failing to apply to the Sheriff.[49] The judge may likewise excuse the applicant if satisfied by proof on oath, affidavit, statutory declaration or otherwise in writing that he or she ought to be excused "by reason of any illness or incapacity or any other matter of special urgency or importance".[50] The Sheriff of Victoria has advised us that he knows of no occasion on which an application by a conscientious objector to be excused has been refused. The need for an appeal to the presiding judge has not arisen.[51]

3.14 In Western Australia the Sheriff may issue a certificate of permanent exemption to any person who establishes that he or she is permanently disabled, permanently disqualified or exempt because of age, or has been convicted of a crime or misdemeanour and has not received a free pardon.[52] Alternatively, a person may be excused from attendance on a particular occasion. The summoning officer may of his or her own motion and "on such evidence as he deems sufficient" excuse from attendance any person who has been summoned as a juror.[53] No guidelines are provided in the Western Australian Juries Act 1957 for the exercise of this discretion. The Sheriff of Western Australia has advised us that applications to be excused on the ground of conscience are normally granted.[54] While most such applications are for religious reasons, no distinction is drawn between objectors for religious reasons and others. The Sheriff added that judges in Western Australia prefer that summoning officers deal with all applications for excusal from jury service.[55]

3.15 The Sheriff of the Northern Territory has no power to determine applications to be excused. Such applications, supported by a statutory declaration, must be directed to a Master of the court or to the presiding judge. The Northern Territory Juries Act 1962 empowers the judge or Master to excuse people by reason of "ill-health or any matter of special urgency or importance".[56] The Sheriff has advised us that applications to be excused which are based on the ground of conscientious belief are usually granted and that no distinction is drawn between objectors on religious grounds and other conscientious objectors.[57] The Sheriff of the Australian Capital Territory has a concurrent power with the presiding judge to excuse a juror from attendance by reason of circumstances of sufficient importance or urgency.[58]

3.16 The Sheriff of Queensland is empowered to excuse a person from attendance as a juror by reason of, among other things, "good cause".[59] The Acting Sheriff has advised us that he is not aware of any application for excusal on the ground of conscientious objection in recent years.[60] He did not address the question whether he, or a presiding judge,[61] would accept the ground as being a "good cause" if it were to be raised.

3.17 In Tasmania, the Registrar has a general power to excuse a person on "reasonable grounds" being shown.[62] However, the Registrar of that State believes that he has no power under that general provision to excuse people from serving as jurors on the ground of conscientious belief.[63] He considers that the term "reasonable grounds" does not include that ground.[64] An application on this ground must therefore, be made to the presiding judge. The Registrar has advised us that these applications rarely succeed.[65] In his view, to allow such applications would open the door to a flood of frivolous claims.[66]

3.18 Summoning officers in the United Kingdom may excuse prospective jurors for "good reason".[67] If a summoning officer refuses to excuse such a person, he or she may appeal to the presiding judge before whom he or she is summoned to appear as a juror.[68] A 1973 Practice Direction establishes that conscientious objectors may be excused from serving.

> A juror should be excused if he is personally concerned in the facts of the particular case, or closely concerned with a party to the proceedings or with a prospective witness. He may also be excused at the discretion of the judge on grounds of personal hardship or conscientious objection to jury service ...[69]

Suggestions that conscientious objectors should be entitled to claim an excusal or exemption as of right were rejected by the Departmental Committee on jury Service in its 1965 Report.

> ... we cannot think that excusal as of right would be an appropriate way of dealing with this problem. In our view such persons should apply for excusal in the normal way, and we have no doubt that summoning officers and courts will deal with their applications sympathetically.[70]

3.19 In New Zealand, as in South Australia, specific provision is made for conscientious objectors. The New Zealand juries Act 1981 provides that certain classes of people shall be disqualified from serving as jurors or simply "shall not serve".[71] There is no list equivalent to Schedule 3 of the New South Wales Jury Act setting out those who may claim an exemption as of right. Instead, the New Zealand Act provides for two separate classes of excusal by the Registrar. With respect to the first class, the Registrar may excuse a person who would suffer undue hardship or serious inconvenience because of the nature of his or her occupation or because of personal circumstances such as family commitments and state of health, if required to serve. Alternatively, the hardship or

inconvenience may be shown to affect some other person or the general public.[72] In contrast a second class is entitled to be excused on a particular occasion upon making a written application supported by such further evidence as the Registrar may require.[73] This class includes practising members of religious sects or orders which hold jury service to be incompatible with their tenets.[74] The Registrar has advised us that he determines applications from religious objectors solely on the basis of the letter of application and does not require further particulars or seek to interview any applicant. He is confident that the tone and substance of the letter sufficiently indicates its genuineness. Of some 120 people summoned to attend at courts each week in the Wellington district, an average of one per week is a religious objector, usually a member of the Exclusive Brethren, the Jehovah's Witnesses or other sect They are invariably excused from serving by the Registrar.[75] If the Registrar should decline an application the applicant may appeal to the presiding judge.[76] The judge, apart from reconsidering the Registrars decision has a discretion to excuse on the wider ground of "conscience, whether or not of a religious character."[77] The Registrar has advised us that a presiding judge rarely has to deal with a non-religious objector.[78] In contrast to the South Australian provision, then, the New Zealand Juries Act establishes a different excusal procedure for religious conscientious objectors from that applicable to non-religious conscientious objectors. We have been unable to discover the reasons for creating this distinction.

3.20 This review of legislation and practice shows that while there is a general acceptance of the importance of recognising conscientious beliefs in order to exempt an objector from jury service and other civic duties, there is no uniform treatment of the issue in legislation. In some cases the exemption is confined to religious objections; in others it extends to more general moral objections. It is provided for specifically in some legislation and implicitly in other legislation There is, as well, no common method prescribed by the legislation to test conscientious objectors. In. some legislation it is made the task of administrators like the Sheriff, the Industrial Registrar and the Electoral Commissioner; elsewhere, it is made the task of a judge or magistrate. In some cases both administrators and judges have a role in the prescribed procedure.

FOOTNOTES

1. *United States v. Macintosh* (1931) 283 U.S. 605, at p.633, per Hughes C.J.

2. Commonwealth Parliamentary Debates, House of Representatives, 31 March 1977, p.837.

3. *Id.,* 18 March 1953, p.1296.

4. Commonwealth Parliamentary Debates. Senate, 31 May 1983, p.1024.

5. See *The Queen v. The District Court of the Northern District of the State of Queensland and Others; ex parte Thompson* (1968) 118 C.L.R. 488, at p.498, per McTiernan J.

6. *Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth* (194 3) 67 C. L.R. 116.

7. *Id.,* at p. 124, per Latham C.J.

8. Parliamentary Electorates and Elections Act, 1912, s.1 14A(E) (e); Commonwealth Electoral Act 1918 (Cth.), s.184(1)(h).

9. Parliamentary Electorates and Elections Act, 1912, s.120F(a).

10. *Ibid.*

11. *Id.,* s.34.

12. *Id.,* s.120C(1).

13. *Id.,* s.120D(3).

14. Advice from State Crown Solicitor, New South Wales to Electoral Commissioner, New South Wales, dated 15 June 1962, attached as an annexure to letter from Mr. A.L Barnett, Electoral Commissioner, New South Wales, to New South Wales Law Reform Commission, dated 19 March 1984.

15. Local Government An 1912, s.74 F(a).

16. Commonwealth Electoral Act 1918 (Cth), s.128A.

17. Telephone communication with Mr. Sirulis, Deputy Electoral Commissioner, Commonwealth. 19 November 1984.

18. Prevention of Cruelty to Animals Act 1901, s.7A.

19. Prevention of Cruelty to Animals Act 1979, s.24(c) (i).

20. *Murray v. McMurchy* [1949]2 D.L.R 442.

21. Minors (Property and Contracts) Act 1970, s.49(1).

22. Medical Practitioners (Emergency Medical Treatment) Amendment Act, 1983.

23. Medical Practitioners Act 1938, s.49B.

24. New South Wales Anti- Discrimination Board, *Discrimination and Religious Conviction* (1984), paras.4.69,4.81.

25. Industrial Arbitration Act 1940, s.20(2), as inserted by Industrial Arbitration (Amendment) Act 1951, s4(a)(iv).

26. Industrial Arbitration Act 1940, s.12913, as inserted by Industrial Arbitration (Amendment) Act 1953, s.6.

27. Industrial Arbitration Act, 1940, s.129B(11)(b).

28. *Id.,* s.129B(11)(a).

29. New South Wales Parliamentary Debates, Legislative Assembly, 18 November 1959, p.2126, per Mr. A. Landa

30. *Id.,* p. 2127

31. Conciliation and Arbitration Act 1904 (Cth), s.47.

32. Re *Application of Jacques Aper under* S.144A (1978) 35 F.L.R. 388 at p.392.

33. National Service Act 1951 (Cth), s.29(1)(b). The power to require registration for national service has not been used since 1972.

34. National Service Act 1951 (Cth), s.29A, as inserted by National Service Act 1953 (Cth), s.3.

35. National Service Act 1951 (Cth), s.29A (5).

36. Defence Act 1903 (Cth), s.59.

37. *Id.,* s.61A(1)

38. South Australian Parliamentary Debates, House of Assembly, 1 July 1965, p,660, per Mr. D.A. Dunstan.

39. Juries Act 1927-1984 (S.A.), s.16(1).

40. *Ibid.*

41. Letter form Mr J A Carr, Sheriff, South Australia, to New South Wales Law Reform Commission, dated 11 January 1984.

42. *Ibid.*

43. *Ibid.*

44. Juries Act 1967 (Vic.) s. 13(1)(a).

45. Letter from Mr J.W. Mulvey, Sheriff, Victoria, to New South Wales Law Reform Commission, dated 4 January 1984.

46. Juries Act 1967 (Vic.), s.13(1).

47. *Ibid.*

48. *Id.,* s.13(2)(a).

49. *Ibid.*

50. *Id.,* s.12(2)(a).

51. See note 45.

52. Juries Act 1957 (W.A.), s.34A(2).

53. *Id.,* s.27(1).

54. Letter from Mr D.L Nicholls, Sheriff, Western Australia, to New South Wales Law Reform Commission, dated 30 December 1983.

55. *Ibid.*

56. Juries Act 1962(N.T), s.16(1): and see s.18A.

57. Letter from Mr. R. Hocking, Deputy Sheriff, Northern Territory, to New South Wales Law Reform Commission, dated 26 June 1984.

58. Juries Ordinance 1967 (ACT), s.14(d).

59. Jury Act 1929 (Qld.), s.26(1) (f)

60. Letter from Mr. E.F. Green, Acting Sheriff, Queensland, to New South Wales Law Reform Commission dated 30 December 1983.

61. Jury Act 1929 (Qld.), s.26(4).

62. Jury Act 1899 (Tas.), s.7B(1).

63. Letter from Mr J. Dale, Registrar, Tasmania, to New South Wales Law Reform Commission, dated 6 January 1984.

64. *Ibid.*

65. *Ibid.*

66. *Ibid.*

67. Juries Act 1974 (U.K.), s.9(2).

68. *Id.,* s.9(3),(4).

69. See [1973] 1 All E.R. 240, per Lord Widgery C.J.

70. *Report of the Departmental Committee on Jury Service* (U.K., 1965), para.153.

71. Juries Act 1981 (N.Z.), ss.7-8.

72. *Id.,* s.15(1).

73. *Id.,* s. 15 (3).

74. *Id.,* s. 15 (2).

75. Telephone communication with Mr. W. L'Estrange, Sheriff, High Court of New Zealand, June 1984.

76. Juries Act 1981 (N.Z.), s.15(4).

77. *Id.,* s.16(c).

78. See note 75.

4. Defining and Testing a Conscientious Belief

I. INTRODUCTION

4.1 As we have seen some Australian statutes imposing civic duties, including the duty to join an industrial union, the duty to vote at state and local government elections, the duty to perform military service and, in one case, the duty to perform jury service, provide that people holding conscientious beliefs opposing the performance of those duties may apply to be exempt from so doing. We have also seen that included in this legislation are procedures for testing the sincerity or genuineness of a conscientious belief to determine whether or not to grant the exemption claimed. All public authorities required to make such decisions can seek guidance from a number of decided Australian cases, particularly those brought before the courts during the Vietnam War under the Commonwealth National Service Act 1951. In the process of interpreting statutory provisions, these cases define the content of a conscientious belief and establish the principles upon which sincerity or genuineness may be tested.

II. THE CONTENT OF A CONSCIENTIOUS BELIEF

4.2 Australian courts have defined a conscientious belief as a belief based on a seriously and deeply-held moral conviction whether or not part of a religious doctrine or creed.[1] The cases refer to a compelling moral conviction,[2] and stress its durable, though not unchangeable, quality.[3] In an unreported decision, the Chief Justice of Western Australia aptly summarised the concept when he said:

> ... a conscientious belief is an individual's inward conviction of what is morally right or morally wrong, and it is a conviction that is genuinely reached and held after some process of thinking about the subject. It represents a conclusion that is uninfluenced by any consideration of personal advantage or disadvantage either to oneself or others, and perhaps when put to the test should be ordinarily combined with a willingness to act according to the particular conviction reached although this may involve personal discomfort or suffering or material loss.[4]

This statement has twice been approved by the High Court of Australia[5] Both High Court cases concerned conscientious objectors to compulsory military service during the Vietnam War, as did the case of Wright[6] in the Supreme Court of New South Wales where it was said:

> To determine whether an applicant holds beliefs of [the relevant kind under the National Service exemption provision], it is relevant to have regard to the nature, depth and durability of the beliefs said to be held and, in particular, to ascertain whether they are a matter of conviction or of mere intellectual persuasion... It is not enough to demonstrate that an applicant is persuaded of the correctness of the views of others and believes those views to be correct; it must be shown that there is a deep-seated conviction that those views are right and that the conviction represents something more than persuasion and in a general sense operates to influence the actions of the applicant.[7]

These statements were approved by the Federal Court of Australia in 1978 in a case involving a person who had a conscientious objection to membership of a registered trade union In this case[8] the Federal Court stated:

> ... the fact that the section had its origin ... in provisions requiring the existence of a conscientious belief founded in religious grounds indicates the depth of conviction which is required. It involves an innate conviction of what is morally right and morally wrong.[9]

There is, then no dispute in the Australian case law as to what, in principle, constitutes a conscientious belief. The more difficult questions which acceptance of this principle raise are how such a belief is demonstrated and who should test it.

III. TESTING A CONSCIENTIOUS BELIEF

4.3 In Australia various courts, tribunals and administrative officials have, over a substantial period, been required to test conscientious beliefs in the context of applications for exemption from civic duties imposed by legislation. The courts, in explaining this testing process, have been consistent in stating that the sole task of any person required to test a conscientious belief is to determine the genuineness of the particular applicant's conviction and not to consider the reasonableness, wisdom or correctness of its content.[10] For example, the Chief Justice of Tasmania, in an early compulsory national service case, stated:

> The only question I have to determine is whether the appellant does in fact conscientiously object to service.... And if I find that he does then my own view of the cogency or otherwise of the reasons upon which he holds the objection becomes immaterial, since it is of the essence of freedom of conscience that a man may hold to his conscientious conviction irrespective of whether a judge or any other person thinks that he ought. Nor do I think that I should be too ready to impugn the bona fides of his objection because of some inconsistency in the views which he puts forward, or of evidence of instances of divergence between his behaviour and his principles, since the compatibility of such phenomena with sincerity is unfortunately a commonplace of human experience. Of course, these things may in some cases point to the fact that the applicant is an imposter .... but their import in each is to be determined in the light of the circumstances and the Court's idea of the character of the applicant.[11]

This statement has been expressly approved by the Supreme Court of South Australia,[12] and a similar approach has been taken by a judge of the Queensland District Court:

> I am aware that logic is not necessarily the criterion indicating the sincerity of a belief claimed to be entertained. I am aware that it is possible for an expressed belief to be regarded by most other persons as fanatical, illogical and ridiculous, and that this could be beside the point whether or not the belief was sincerely held.[13]

4.4 The person testing such a belief would therefore generally be seeking evidence that the applicant held the objection as a moral conviction. Such evidence might be directed to things done in the past by the applicant to further the moral view he or she asserts in its particular context, or it might be directed to the applicant's demonstrated concern with moral issues generally. The decided cases are clear in saying that there is no fixed requirement of a particular kind of evidence necessary to establish a genuine conscientious objection in every situation. How a genuine conscientious belief is tested is perhaps best demonstrated by examining the practice of a number of administrative officials in carrying out their duties under particular legislation.

IV. THE PRINCIPLES APPLIED

4.5 One administrative officer who is required to consider applications for exemption on the ground of conscientious belief is the Industrial Registrar of New South Wales. He applies the accepted definition of conscience developed by the courts in decided cases and takes the view that in granting an exemption application under his particular legislation he must be satisfied that:

> first the applicant is genuine and honestly and in good faith holds the view claimed;
>
> secondly, the beliefs held are in fact part of a conscientious belief, and are not just mere intellectual persuasions; and
>
> thirdly, the conscientious belief in fact goes to the principle of industrial unionism, and thus joining any industrial union of employees and not just a particular union or unions.[14]

Once so satisfied, the Registrar "is not concerned with the truth or reasonableness of the belief, and accepts applications based on the widest concept of conscience".[15]

4.6 The procedure for dealing with applications for exemption from union membership in the New South Wales Industrial Registry is as follows.[16] Applications for exemption are submitted on a prescribed form, which invites an applicant to support the application with reasons. Applications are automatically referred to the Industrial

Registrar, or his Deputy, who decides most cases solely on the information provided by the applicant on the form. The bulk of applications processed without further inquiry are based on religious grounds. This reflects the fact that the majority of all applications for this exemption are based on religious grounds. When an application form does not contain sufficient information to satisfy the Registrar that the conviction asserted is genuine, a formal hearing is held. The union from which the applicant wishes to be exempt is advised and may be present The hearing before the Registrar usually involves both the Registrar and the representative of the union putting questions to the applicant who may also make a statement independently of questioning. In practice, applicants are rarely represented and rarely call witnesses. The purpose of the hearing is to provide the Registrar with the information he needs to apply the criteria listed in paragraph 4.5 above. The majority of applications, whether based on religious or on non-religious grounds, which have proceeded to a hearing, are successful. There is no evidence that non-religious objectors are less likely to succeed than religious objectors. We are informed that the number of non-religious objectors to union membership is very small and that the Industrial Registrar does not experience particular difficulty in dealing with their applications.

4.7 The Sheriffs of South Australia, Victoria and Western Australia also deal with conscientious objectors as part of their administrative duties. They, too, apply the principles established by the Australian cases in considering applications to be excused from jury service. The Sheriff of South Australia has advised us that he would approve an application based on religious beliefs which is made as prescribed, namely, by statutory declaration "unless some other matter caused me to seek further information."[17] He observed that this would be very rare.[18] The Sheriff of Western Australia has stated that:

> It is normal practice to excuse a person from jury service on the grounds of conscience if the summoning officer is satisfied the application is genuine.[19]

Applicants to be excused complete a statutory declaration "giving an explanation of their conscientious beliefs".[20]

4.8 These examples illustrate that the principles established by the Australian cases as to the definition of "conscientious belief" and as to the means of testing the sincerity or genuineness of such a belief are readily applied by administrators in the course of determining applications for exemption from certain civic duties. In three Australian States, Sheriffs determine applications for exemption or excusal from jury service and it is our view that the Sheriff of New South Wales could, without difficulty, also determine similar kinds of applications.

FOOTNOTES

1. *The Queen v. The District Court of the Northern District of the State of Queensland and Others: ex parte Thompson* (1968) 118 C.L.R., 488, at p.498, per McTiernan J.

2. *Grondal v. Minister of State for Labour and National Service,* 11 September 1953, Supreme Court of Western Australia, per Dwyer C.J.; *The Queen v. The District Court of the State of Queensland and Others: ex parte Thompson* (1968) 118 C.L.R. 488, at p.497, per McTiernan J.; *Re Application of Jacques Aper under S.144A* (1978) 35 F.LR. 388, at p.406; and *Wright v. Minister for Labour and National Service (1969) 14* F.L.R. 91.

3. *The Queen v. The District Court of the Northern District of the State of Queensland and Others; ex parte Thompson* (1968) 118 C.L.R., 488, at p.492, per Barwick C.J.; *Wright v. Minister for Labour and National Service* (1969) 14 F.L.R. 91.

4. *Grondal v. Minister of State for Labour and National Service,* 11 September 1953, Supreme Court of Western Australia, per Dwyer C.J.

5. *R v. The District Court of the Metropolitan District Holden at Sydney and Others; ex parte White* (1966) 116 C.L.R., 644, at pp.660-661 L per Windeyer J.; *The Queen v. The District Court of the Northern District of the State of Queensland and Others; ex parte Thompson* (1968) 118 C.L.R., 488, at p.497, per McTiernan J.

6. *Wright v. Minister for Labour and National Service* (1969) 14 F.L.R. 91.

7. *Id.,* at *p.99,* per Mason J.A.

8. *Re Application of Jacques Aper under S.144A* (1978) 35 F.L.R. 388.

9. *Id.,* at *p.406,* per Sweeney, Evatt and St John JJ.

10. *In re J.D.A.T Walker, 29* May *1942,* Supreme Court of Tasmania, per Morris C.J.; *King v. Minister of State for Labour and National Service* [1953] S.A. S.R. 199, at p.206, per Ross J.; *Aitken v. Minister of State for Labour and National Service* (1965) 1 D.C.R. 164; *In re Appeals from Registrar under Industrial Arbitration Act,* 1940-1953, s.129B(11) [1954] I.R. (N.S.W.) 71, at p.81; and *Collett v. Minister for Labour and National Service* (1966) 9 F.L.R. 221, per Andrews D.C.J.

11. *In re J.D.A.T. Walker, 29* May *1942,* Supreme Court of Tasmania, per Morris C.J.

12. *King v. Minister of State for Labour and National Service* [1953] S.A.S.R. 199, at p.206, per Ross J.

13. *Collett v. Minister for Labour and National Service* (1966) 9 F.L.R. 221, per Andrews D.C.J.

14. Letter from Mr. G.K Robertson, Deputy Industrial Registrar, New South Wales, to New South Wales Law Reform Commission, dated *29* March 1984.

15. *Ibid.*

16. *Ibid.*

17. Letter from Mr. J.A. Carr, Sheriff, South Australia, to New South Wales Law Reform Commission, dated 11 January *1984.*

18. *Ibid.*

19. Letter from Mr. D.L Nicholls, Sheriff, Western Australia, to New South Wales Law Reform Commission, dated 30 December 1983.

20. *Ibid.*

5. Recommendations

I. INTRODUCTION

5.1 Our reference raises two issues for determination. The first is whether there should be explicit provision in the Jury Act, 1977 for exemption from service on a jury where a potential juror objects to such service on the ground of conscientious belief. The second is, if explicit provision for such exemption should be made, what procedure should be adopted to deal with applications for exemption? We have seen that respect for individual conscientious beliefs is an accepted principle in Australian law in a number of contexts. The approach to conscientious objection to jury service has not, however, been uniform among the Australian States.

5.2 In making our recommendations we have been guided by our concern that the administration of justice in New South Wales should specifically acknowledge the conscientious beliefs of those asked to participate in jury service. Where conscientious objection to jury service is concerned, we consider that this aim cannot be achieved unless explicit recognition of this objection as a valid ground of exemption from service is made in the Jury Act 1977 and a uniform procedure is adopted to deal with each case as it arises. The current procedure has been unsatisfactory for many religious groups, in particular Christadelphians who have attempted for a number of years to have their right to follow the dictates of their consciences recognised and uniform procedures for exemption from jury service introduced. The current method of dealing with this issue has led to unevenness of treatment and a degree of inconvenience and embarrassment. Our recommendations are aimed at eliminating such unsatisfactory features.

II. EXPLICIT PROVISION FOR CONSCIENTIOUS OBJECTORS

5.3 The failure to provide explicitly for the excusal of conscientious objectors before they arrive at the courtroom can be criticised on grounds of principle as well as administrative efficiency.

5.4 The majority of submissions we received favoured an explicit recognition of conscientious objection as a ground for exemption in the Jury Act 1977.[1] The Religious Society of Friends (Quakers) simply made the more general statement that no one should be forced to do anything against his or her conscience."[2] Those who opposed it did so for one of two reasons: either because they thought the existing practice in dealing with conscientious objectors was satisfactory and no change was warranted;[3] or because they considered, as a matter of principle, that citizens who accept the benefits of their community have a basic obligation to participate in the legal processes of that community.[4] The latter view would reject the recognition of conscience as a ground of exemption at all and insist that conscientious objectors perform this civic duty in spite of their beliefs.

5.5 We accept the significance of the argument on which this latter submission was based, namely that it is important for citizens to be involved in the administration of justice. A jury represents, in a special way, the "conscience" of the community; more readily reflecting its changing values and standards than do the legal precedents which bind judicial decision-making. However, to recognise the importance of wide community participation on juries does not in our view, prevent the recognition of freedom of conscience as an equally important feature of a democratic society.

5.6 It is fundamental to such a society that people should not be compelled to act against their consciences in the performance of civic duties except in matters of overriding importance or urgency such as a national emergency. We accept that jury duty is an important duty, and that the judicial system has a real interest in ensuring that jurors are drawn from the broadest possible range of citizens. However, we do not consider that these factors outweigh the need to respect the conscientious beliefs of citizens. The existing exemptions from jury service recognise that there may be grounds which justify, overriding the general obligation to serve on juries. We are persuaded that the citizen's claim to freedom of conscience raises an important principle deserving the same kind of recognition.

5.7 In practice, those involved in the administration of justice are wary of placing on juries people who find jury service to be repugnant to their beliefs. Such jurors could create “hung” juries or lead to excessive delay in reaching decisions. Conscientious objectors who make their objections known to the court are usually excused from serving. In the light of current practice, to exempt such people as of right would make little difference to the composition of juries in New South Wales.

5.8 Further, we consider that explicit exemption of conscientious objectors should include all conscientious objectors whatever the basis of their beliefs. We received two submissions from religious congregations appearing to favour the creation of exemption from jury service as of right only for those whose religious beliefs preclude service.[5] Other religious groups took a broader view.[6] In its recent Report on *Discrimination and Religious Conviction,*[7] the New South Wales Anti-Discrimination Board recommended that

> ... the religious exemption provision in Schedule 3 of the Jury Act *1977* should be amended in order to provide for two distinct kinds of exemption:
>
> (a) those full-time ministers of religion or members of religious orders who have pastoral responsibilities, and
>
> (b) those whose religious belief or membership of a religious order precludes them from sitting on a jury.[8]

The Board did not address the general question of conscientious objection since its report was concerned only with discrimination on the ground of religious conviction.

5.9 The Saskatchewan and Canadian Law Reform Commissions in 1979 and 1980 respectively, recommended, without giving reasons, that exemption from jury service should extend only to those with objections based on religious grounds.[9] The reasons for making this distinction may have been the possible administrative difficulties in testing non-religious conscientious objectors and the potential for a flood of applications for exemption on this ground. We would not be persuaded by these reasons. We prefer the view of the Supreme Court of the United States in *Shapiro v. Thompson*[10] that:

> A distinction between religious and non-religious objectors would arguably be reasonable if an exemption for non-religious objectors would be more difficult to administer. It would have to be shown, however, either that non-religious applicants are far more likely to be fraudulent, or that it is more difficult to detect a fraudulent non-religious applicant Neither of these propositions would seem to be justified; the latter in particular falls because a non-religious objector, like the religious objector whose church does not take a position .... must show concrete evidence of his opposition, usually in the form of past conduct or study. The administrative difficulty that would result solely from a flood of claims could not in any case justify an otherwise arbitrary distinction between religion and non-religion.[11]

This type of reasoning appears to have influenced the Law Reform Commission of Manitoba to recommend the extension of exemptions from jury service to those with non-religious conscientious objections.[12]

5.10 The Industrial Registrar of New South Wales is satisfied that he is able to apply the criteria of conscientious belief in a non-religious context without problems and there is no evidence in the advice received from Sheriffs of other States that there has ever been a flood of applications for exemption on this ground, whether there is an exemption as of right or at the discretion of the Sheriff.[13] There appears to be no persuasive reason to restrict exemption to objectors on religious grounds. We consider that to do so would unjustifiably discriminate against those with sincere moral convictions which are unrelated to religious tenets.

III. PROCEDURE FOR EXEMPTION

5.11 We have considered two options for amendment of the Jury Act, 1977 to provide for the excusal or exemption of those who object to serving on juries for reason of conscience:

> adding conscientious objection as a further ground for claiming an exemption as of right; or

defining the term “good cause” to make it clear that the Sheriff has power to determine applications to be excused based on conscientious belief.

We favour the first alternative. The excusal provision is designed specifically to deal with temporary or emergency circumstances preventing service on a jury on a particular occasion. As such it is inappropriate for the purpose of excusing conscientious objectors generally. However, a conscientious objector might wish to make use of this provision when a conscientious belief is reached between two occasions of jury service. This would be a rare case. For most objectors the holding of a conscientious belief will be a durable matter, unlikely to change during the three year life of a jury roll.

5.12 Provision for claiming an exemption as of right before the jury roll is finalised gives the Sheriff a degree of certainty as to the numbers on the roll and promotes administrative efficiency. This is preferable to a situation in which a proportion of jurors summoned may seek to be excused very shortly before they are required. Also, if on each occasion a conscientious objector was called during the life of each roll the Sheriff was required by legislation to conduct the same inquiry, this would not only be administratively inefficient but could greatly inconvenience the conscientious objector. At present a judge is required to deal with this issue each time a conscientious objector is called. The Law Society of New South Wales submitted to us that this is satisfactory.[14] We do not agree. To require multiple visits to the court house by conscientious objectors is not only inconvenient but, considering that under current practice they are almost invariably excused, also unnecessarily harsh. We consider that such a procedure does not enhance the administration of justice or add to the esteem in which the jury is held.

5.13 We think that it is appropriate that all conscientious objectors should be exempted from jury service as of right. If conscientious objectors were eligible to claim exemption as of right, they would be required, on receipt of notification of inclusion on a draft jury roll, to advise the Sheriff of that fact within 14 days. The Sheriff would have a discretion to accept or refuse the application.

5.14 The Sheriff of New South Wales has expressed a preference not to decide applications on the ground of conscientious belief himself. He believes, as does the Law Society of New South Wales, that the judge in open court is the appropriate person to determine such applications.[15] We consider that the experience of the Industrial Registrar of New South Wales in determining similar applications demonstrates that an administrative officer is competent to consider the matter. This is particularly so as Australian case law provides excellent guidance on the principles which should be applied. We note also that both the Sheriffs of Victoria and Western Australia, without specific legislative provisions, take responsibility for considering applications to be excused on the ground of conscientious belief. Both are confident that they make proper decisions and that the availability of the exemption is not abused by prospective jurors. The Sheriff of South Australia also determines applications on the ground of conscientious objection, pursuant to the South Australian Juries Act 1927, with the confidence of judges in that State. We are, therefore, of the view that the Sheriff of New South Wales is the appropriate officer to deal, in the first instance, with applications for exemption on the ground of conscientious belief.

5.15 We see no reason to follow the New Zealand approach which, while allowing exemption on broad grounds, establishes different procedures for religious and non-religious objectors. In our view it is undesirable to differentiate between classes of conscientious objectors. Both groups can be accommodated without difficulty within the existing procedures applicable to people who may claim exemption as of right.

5.16 If conscientious objectors were included in Schedule 3 of the Jury Act 1977, an application for exemption would be made on the form accompanying the Sheriffs notification of inclusion on a draft jury roll. The Sheriff may require it to be verified by statutory declaration.[16] If the Sheriff should refuse such an application the applicant would be entitled to appeal to a Court of Petty Sessions.[17] This procedure was acceptable to the majority of those who made submissions to us on the issue.[18] As in the case of all others who may claim exemption as of right, a claim for exemption on the ground of conscientious belief would have to be made each time a person was included on a draft jury roll. We do not consider it appropriate that permanent or lifetime exemption should be offered to conscientious objectors. This would put them in a privileged category compared with others who are exempt as of right. The current procedure would not generally require a conscientious objector to do more than apply for exemption and, in appropriate cases, swear a statutory declaration each time he or she is included on a draft roll. We consider that the necessity for a further application in such circumstances would allow for changes in belief over a period of time.

5.17 We anticipate that if our recommendation is implemented, the majority of genuine conscientious objectors will be successful in applying to the Sheriff to be exempt as of right and to have their names removed from a draft jury roll. It is possible that as a practical matter, the Sheriff will deal more easily with religious objections than with conscientious objections for other reasons because people who establish membership of a religious sect known to hold jury service as contrary to its tenets, may more readily be fitted within established criteria than those who cannot or do not do so. We do not agree that the Sheriff will be unable fully and properly to consider the claims of conscientious objectors on non-religious grounds, even though the problems of evidence may be greater in such cases. However, if an application to the Sheriff to be exempt as of right is unsuccessful, our recommendation would ensure that the applicant has a right of appeal to a Court of Petty Sessions. We consider that, in the application of the current procedures over a period of time, a body of law will be developed to assist the Sheriff in testing claims of conscientious objection. His task should become progressively easier as criteria are considered and explained by magistrates applying the already considerable Australian case law on this subject to this particular context.

5.18 Conscientious objectors who become entitled to claim exemption as of right will be subject to other relevant provisions of the Jury Act, 1977. For example, under the current legislation if a person entitled to claim exemption as of right within 14 days fails to do so, his or her name is placed on the final jury roll. Upon receipt of a summons to attend on a particular occasion, he or she may apply to be excused on that occasion. This will not be granted unless he or she had a reasonable excuse for failing to claim the exemption as of right at the proper time.[19] An example of a reasonable excuse would be conversion to a religious faith which precludes jury service as contrary to its tenets during a period of inclusion on a jury roll. Where the Sheriff refuses to entertain an application for excusal in such a case the applicant may raise the matter with the presiding judge[20] again explaining his or her failure to apply for exemption at the proper time. To support such an application to either the Sheriff or a judge a conscientious objector may be required to swear a statutory declaration or to be examined on oath.[21] We consider that it is appropriate that this provision should apply to conscientious objectors. It is directed towards administrative efficiency and certainty in the jury rolls. We have explained in Chapter 2 that the Sheriff has expressed concern at the considerable numbers of Commonwealth public servants who fail to notify the Sheriff of their ineligibility for service and thus create administrative inconvenience.[22] We do not wish to add to the Sheriff s difficulties. We note that should a person fail without reasonable excuse to make the appropriate application there will still be, in appropriate cases, a residual discretion in the judge to excuse him or her from service.

IV. THE ROLE OF JUDICIAL DISCRETION

5.19 In addition to their power under the Jury Act, 1977 to excuse people from jury service for “good cause”, judges have an inherent power to excuse prospective jurors where there are adequate grounds for doing so.[23] This power is not dependent upon application being made by a juror because it is not specifically directed to the empanelling of jurors but is a much broader power concerned with the judge’s obligation to secure a fair trial. For example, in *Duffus v. Collins*[24] one of the jurors had discussed the case with a solicitor for one of the parties. Mr. Justice McClemens explained the judge's inherent power as follows:

> The judge has the responsibility for the proper conduct of the trial and his function is to see that cases are disposed of, having regard to the rights of the litigants, without delay. In those cases where the Jury Act covers the field he is under a mandatory obligation to comply with its terms strictly, but where the field is not covered he has a duty to exercise his judicial discretion for the purpose of ensuring the proper conduct of the trial, and involved in that is an inherent power to excuse from attendance jurymen where there is adequate ground to do so.[25]

5.20 We realise that if the Jury Act, 1977 is amended according to our recommendation it will create a legislative code under which conscientious objections will be considered. However, this will not fetter the general discretion of the presiding judge to secure a fair trial. If the presiding judge were to take the view in a particular case that to permit the conscientious objector to serve might impede or prejudice the conduct of the trial, we consider that he or she would have a power to excuse or dismiss the objector, which would be separate from, and in addition to, the power to excuse under the Jury Act. For example, our recommendation would not require a judge to allow a person who claims to be a conscientious objector to serve in circumstances where a “hung” jury is likely to eventuate, even if the judge were not able to excuse such a person within the terms of the Jury Act The administration of justice requires that this general discretion should continue to operate in conjunction with the legislative provisions.

V. RECOMMENDATIONS

5.21 We recommend that conscientious objection to jury service should be recognised as a ground of exemption as of right from such service pursuant to section 7 of the Jury Act, 1977. Accordingly, we recommend that Schedule 3 to the Act should be amended to include the following:

> A person who objects on the grounds of conscientious belief to serving on a jury whether the grounds of that belief are or are not of a religious character and whether that belief is or is not part of the doctrine of any religion.

We have adopted the definition in the Industrial Arbitration Act 1940,[26] which has proved satisfactory in that context and which is, in our view, a suitable model for the Jury Act 1977.

FOOTNOTES

1. Submissions 1, 4, 6, 7 and 9.

2. Submission 2.

3. Submission 8.

4. Submission 5.

5. Submissions 1, 4.

6. Submissions 2, 6.

7. New South Wales Anti- Discrimination Board, *Discrimination and Religious Conviction* (1984).

8. *Id.,* para.4.48.

9. Law Reform Commission of Canada, *The Jury in Criminal Trials* (Working Paper 27, 1980), p.43; Law Reform Commission of Saskatchewan, *Proposals for Reform of the Jury Act* (1979), p.7.

10. (1969) 394 U.S. 618.

11. *Id.,* at p.633.

12. Law Reform Commission of Manitoba, *The Administration of Justice in Manitoba: Part 11: A Review of the Jury System* (Report No. 19, 1975), p.24.

13. Letters from Mr. G.K. Robertson, Deputy Industrial Registrar, New South Wales, to New South Wales Law Reform Commission, dated 29 March 1984; Mr. D.L Nicholls, Sheriff, Western Australia, to New South Wales Law Reform Corn mission, dated 30 December 1983; Mr. J.W. Mulvey, Sheriff, Victoria, to New South Wales Law Reform Commission, dated 4 January 1984; and Mr. J.A. Carr, Sheriff, South Australia, to New South Wales Law Reform Commission, dated 11 January 1984.

14. Submission 8.

15. Letter from Mr. G.F. Hansom Sheriff. New South Wales, to Mr. T.W. Haines, Under Secretary of Justice, New South Wales, dated 7 February 1984.

16. Jury Act 1977, s.13(2).

17. *Id., s. 15.*

18. Submissions 3, 4, 6 and 9.

19. Jury Act, 1977, s.38(2).

20. *Id.,* s. 3 8 (1) (b).

21. *Id.,* s.38(4),(5).

22. See para.2.15.

23. *Duffus v. Collins* (1966) 83 W.N. (Pt.1) (N.SW.) 399, at p.402, per McClemens J.

24. (1966) 83 W.N. (Pt 1) (N.S.W.) 399.

25. *Id.,* at p.402, per McClemens J.

26. Section 129B(11)(a).

Appendix: Submissions

1. Church of Jesus Christ of Latter-Day Saints.
2. Religious Society of Friends (Quakers) in Australia Inc.

3. Professor Peter Singer, Monash University.

4. Watch Tower Bible and Tract Society (Jehovah's Witnesses).

5. Bishop John Reid, Anglican Church Diocese of Sydney.

6. Australian Christadelphian Committee.

7. New South Wales Society of Labor Lawyers.

8. Law Society of New South Wales.

9. Andrew Powell, Australian Christadelphian Committee.

Table of Statutes

Prevention of Cruelty to Animals Act 1901	3.8
Prevention of Cruelty to Animals Act, 1979	3.8
Supreme Court Act 1970	2.8

Australian Capital Territory

Juries Ordinance 1967	3.15
Juries Act 1957	3.14

Northern Territory

Juries Act 1962	3.15

Queensland

Jury Act 1929	3.16

South Australia

Juries Act 1927	3.12, 5.14

Tasmania

Jury Act 1899	3.17

Victoria

Juries Act 1967	3.13

Western Australia

Juries Act 1957	3.14

United Kingdom

9 Geo.IV, c.83 (1828)	2.3
2 Wil. IV, No.3 (1832)	2.4
3 Vic. No.11 (1839)	2.4
8 Vic. No.4 (1844)	2.4
11 Vic. No.20 (1847)	2.4
Juries Act 1974	3.18

New Zealand

Juries Act 1981	3.19

Table of Cases