

# Chapter One

## **Jury Trials in Western Australia**

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# History of the jury trial

## ORIGINS OF THE ENGLISH JURY

Following the Norman Conquest of England, the Frankish practice of inquisitions (involving sworn witnesses summoned by a judge) was combined with the existing Anglo-Saxon county court and it is in this combination that the origins of the English jury can be found.<sup>1</sup> The county court involved a six-monthly meeting of all the free men of the shire to adjudicate on civil and administrative issues that affected the freeholders of the shire.<sup>2</sup> At the consent of the parties to a dispute, a group of 12 men – literally neighbours – would be summoned to answer a question of fact from their own knowledge of the dispute. These men were selected to act as witnesses to the truth:<sup>3</sup> should any one of their number perjure themselves and give ‘false judgment’, their property was seized and the witness was placed in prison.<sup>4</sup>

The transition of the jury from a means of ‘proof’ to a form of ‘trial’ occurred largely in the criminal sphere, though trial by jury for serious criminal matters was unknown until at least a century after the Norman Conquest. Until that time, an accused would be subject to trial by combat, ordeal<sup>5</sup> or compurgation.<sup>6</sup> For a period, trial by jury was seen as a means of extracting information ‘rather than as a way to protect the liberty of the subject’ and few accused given the choice would seek it.<sup>7</sup> But by the mid-15th century the nature of the jury as first-hand witnesses of the truth had changed. Although the

jury remained constituted by 12 men summoned from the district, they were required to be without knowledge of the dispute in question and to exercise judgment on evidence presented under oath.<sup>8</sup>

Developments in the Tudor period saw the role of the jury firmly established as a tribunal that would pronounce upon the facts in dispute before the law was applied.<sup>9</sup> Further important developments occurred in the latter half of the 17th century. It was at this time that juries were first clearly declared to be independent and free of the external pressure that was notoriously placed upon them to assist in the determination of a ‘correct’ verdict.<sup>10</sup> The critical effect of this in the development of the English common law of juries was that the jury ‘began to be seen as a means of protecting the accused’s liberty’.<sup>11</sup> This was confirmed by the English Bill of Rights of 1688, with juries gaining the power to reject the Crown’s allegation and dismiss the charge.<sup>12</sup>

## INTRODUCTION OF JURY TRIALS INTO AUSTRALIA

Although well established in England, the concept of the jury trial did not attend the settlement of New South Wales. Because New South Wales was a convict colony, the constitution of a jury of disinterested free men was impossible. It was not until 1807 that the Governor was confident that ‘eligible citizens for jury service were available in sufficient numbers’.<sup>13</sup> Nonetheless,

1. Harding A, *A Social History of English Law* (London: Penguin Books, 1966) 27.
2. Proffatt J, *A Treatise on Trial by Jury* (New York: WS Hein Publishing, 1986) 20.
3. Ibid 21.
4. Ibid 38.
5. Trial by ordeal was by water or fire and guilt or innocence was judged by supposed intervention by God. Trial by water involved submersion in water where an accused would be acquitted if he or she survived submersion (later this changed so that survival became evidence of guilt). Trial by fire involved the accused walking on hot ploughshares or holding a hot poker. An accused would be acquitted if he or she was unhurt or, in some circumstances, if the accused’s wounds had healed within three days.
6. Trial by compurgation involved each disputant petitioning neighbours as witnesses to the truth of his case. VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 3, [1.36]–[1.38]; Vodanovich IM, *The Criminal Jury Trial in Western Australia* (Perth: University of Western Australia, PhD thesis, 1989) 13; Proffatt J, *A Treatise on Trial by Jury* (New York: WS Hein Publishing, 1986) 16.
7. VPLRC, *ibid* [1.37].

8. Ibid [1.48].
9. Baker JH, *An Introduction to English Legal History* (Bath: Butterworths, 4th ed, 2002) 82.
10. *Bushell’s Case* (1670) Vaughan 135. In this case a jury trying two men accused by the Crown of being guilty of preaching to an unlawful assembly refused to convict, despite having been fined and locked up without food for two nights. Vaughan CJ held that a jury was not bound to follow the direction of the court and emphasised the importance of jurors being free from punishment and uninfluenced by external pressure: VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 3, [1.39].
11. VPLRC, *ibid*.
12. Vodanovich IM, *The Criminal Jury Trial in Western Australia* (PhD Thesis, The University of Western Australia, 1989) 14. By the 18th century a further ground for obtaining a new trial was allowed, by showing that the trial judge had erred in his direction to the jury in ruling on the admissibility of material evidence: Baker JH, *An Introduction to English Legal History* (Bath: Butterworths, 4th ed, 2002) 85.
13. Bennett JM, *The Establishment of Jury Trial in New South Wales* (1961) 13 *Sydney Law Review* 463, 464.

inquisitorial tribunals of military officers, sitting (in various forms)<sup>14</sup> with a deputy judge advocate, continued to determine serious criminal matters until 1832.

The Act of 1832<sup>15</sup> provided for trials of criminal matters in which a member or officer of the government had an interest to be heard before a civilian jury of 12 men.<sup>16</sup> Eligibility for jury service followed the rules and practices of the English courts, so that only male residents aged between 21 and 60 who had real estate producing a prescribed annual income or a personal estate of a certain amount were competent to serve as jurors. They were paid a daily allowance, plus travelling fee.<sup>17</sup> Certain persons—such as justices of the peace, merchants and bank directors—were eligible to serve as ‘special jurors’ and were paid a higher rate.<sup>18</sup> All jurors were liable to be penalised for non-attendance.

In 1839 legislation was passed allowing for criminal issues of fact to be determined by a civilian jury of 12 more generally.<sup>19</sup> This development was further consolidated by provision for a right to jury trial in adjudications of crimes and misdemeanours legislated in the *Juries Act 1847* (NSW).<sup>20</sup> Speaking of the importance of jury trial in relation to criminal matters in Australia, Deane J has said that:

In the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government.<sup>21</sup>

## WESTERN AUSTRALIA’S ADOPTION OF TRIAL BY JURY

Western Australia was settled as a free colony in 1829. Convicts were only transported to the colony from 1850 to 1868, and even then in limited numbers relative to

14. One such form was posited in the New South Wales Act of 1823, which provided for a judge and jury of seven commissioned officers, nominated by the Governor, to try criminal issues before the Supreme Court.
15. 2 Wil IV No 3.
16. To attain a non-military jury at trial, an accused had to show that the Governor or a member of the Executive Council was the person against whom the offence was alleged to have been committed, or had a personal interest in the result of the prosecution, or that the ‘personal interest or reputation of any officer’ stationed in the Colony would be affected by the result of the prosecution.
17. Bennett JM, ‘The Establishment of Jury Trial in New South Wales’ (1961) 13 *Sydney Law Review* 463, 474
18. *Ibid.*
19. 3 Vic No 11. Bennett notes that it was by this Act that ‘military juries were at last abolished’: *ibid* 476.
20. 11 Vic No 20. See also Bennett, *ibid* 482.
21. *Kingswell v R* (1985) 159 CLR 264, 298.

other parts of Australia. Despite an Act having been passed in the United Kingdom to establish the Swan River colony,<sup>22</sup> Lieutenant Governor Stirling arrived in Western Australia with a set of instructions but without a formal commission.<sup>23</sup> Nonetheless, soon after arriving Stirling issued a proclamation declaring that British statute law and common law would apply to the new colony and within months he had appointed eight free settlers as justices of the peace to adjudicate upon criminal matters within the colony.<sup>24</sup> These justices, including one legally trained chairman, staffed the first criminal court of the colony, modelled on the English Court of Quarter Sessions.<sup>25</sup> Juries were introduced into the colony at the first sitting of the court in July 1830 under rules drawn up by the justices.<sup>26</sup> As Enid Russell has observed, Western Australia therefore holds the indubitable honour of having ‘the first true [civilian] jury to sit in Australia’.<sup>27</sup>

In 1832 the newly established Legislative Council of the colony enacted legislation continuing the criminal Court of Quarter Sessions, establishing a civil court and providing for the regulation of criminal and civil juries.<sup>28</sup> Under the latter Act, all males aged between 21 and 60 years who owned real estate to the value of £50 or personal estate of at least £100 were liable for jury service. Court officials, civil servants, clergymen, legal practitioners, medical men, aliens, criminals and justices of the peace were excluded from service. There was no mention of women in the legislation.

22. Government of Western Australia Act of 1829, 10 Geo IV, c.22.
23. Russell E, *A History of the Law in Western Australia and Its Development from 1829 to 1979* (Perth: University of Western Australia Press, 1980) 8–9.
24. These justices also adjudicated upon civil matters in the colony until the establishment of the Civil Court of Western Australia in 1832.
25. Hands TL, ‘The Legal System of Western Australia’ in Kritzer HM (ed), *Legal Systems of the World: A political, social and historical encyclopaedia* (California: ABC-CLIO, 2002) vol 4, 1776.
26. The rules provided that only persons entitled to grants of land could act as jurors and that exemptions should be the same as those in the most recent Imperial Jury Act (6 Geo IV, c 50 of 1825). The rules provided that no person was to be compelled to serve more than once each year. It appears that, although the rules were silent on the subject of payment for jurors, a practice developed of payment of seven shillings per juror per day.
27. Russell E, *A History of the Law in Western Australia and Its Development from 1829 to 1979* (Perth: University of Western Australia Press, 1980) 15.
28. Court of Quarter Sessions Act 1832, 2 Wil IV No 4 b and c 217; Court of Civil Judicature Act 1832, Wil IV No 1 b and c 210; *Juries and Office of Sheriff Act 1832* 2 Wil IV No 3. These courts operated until the creation of the current Supreme Court in 1861.

## The Jury Act 1898

In 1898 a Jury Act was passed by the Parliament of Western Australia to consolidate the existing law of Western Australia relating to juries. It dealt with liability and qualification to serve, exemption from service, method of selection and various procedural matters. Men between the ages of 21 years and 60 years residing within the colony who owned real estate or personal estate of a specified value were qualified and liable to serve as common jurors.<sup>29</sup> As with the 1832 New South Wales Act, men who held certain positions<sup>30</sup> or those who had real or personal estate of a significantly higher value were qualified and liable to sit as either common jurors or special jurors, the latter attracting a higher daily sitting fee.<sup>31</sup>

Men who were not 'natural-born subjects or naturalised subjects of Her Majesty', or who had been 'convicted of any treason or felony, or of any crime that is infamous' were, unless they had been pardoned, disqualified from jury service.<sup>32</sup> Among those exempted from jury service were Members of Parliament, ministers of religion, practising lawyers and their clerks, medical practitioners, town clerks, schoolmasters, journalists, bank managers, chemists and druggists, and public servants.<sup>33</sup> Some minor amendments were made in 1937 extending exemptions as of right to commercial pilots, navigators, radio operators and certain crew members of aircraft.<sup>34</sup>

While Aboriginal Western Australian men were technically British subjects, the absence of any recognition of native title at that time meant that the property qualification would inevitably have prevented them from serving.<sup>35</sup> Indeed, nothing in the parliamentary debates suggests that service on juries by Aboriginal people was contemplated by legislators at that time.<sup>36</sup>

29. *Jury Act 1898* (WA) s 5.

30. Such as justices of the peace, bank directors and merchants 'not keeping a general retail shop': *Jury Act 1898* (WA) s 6.

31. *Jury Act 1898* (WA) s 36. Special or 'expert' juries were open to be ordered by Judge or Commissioner of the Supreme Court 'where any civil issue is to be tried by jury ... upon the application of any person party to the issue desiring that the trial shall be by a special jury': s 26. 'Special juries' were abolished by the *Juries Act 1957* (WA), save for certain coronial juries. The amendment followed the Morris Committee report in England which questioned whether special juries could actually guarantee special skills or improve on the work of common juries: AF Dickey, *The Jury and Trial by One's Peers* (1974) 11 *University of Western Australia Law Review* 205, 217–18.

32. *Jury Act 1898* (WA) s 7.

33. *Jury Act 1898* (WA) s 8.

34. Act No 10 of 1937, amending the *Jury Act 1898* (WA) s 8.

35. Israel M, 'Ethnic Bias in Jury Selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 41.

36. See eg, the Second Reading Speech for the Bill: Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 July 1898, 294–299 (Hon. RW Pennefather, Attorney General).

## Women

There is no mention of women being eligible to serve as jurors in the 1898 Act and, although there was debate on the matter in latter years, the views of many members of Parliament of the time were that women were temperamentally unsuited to jury duty.<sup>37</sup> For example, in 1924 one member of the Legislative Assembly commented:

To my mind women are far too illogical to sit on a jury. They are apt to judge rather by intuition than by reasoning out the evidence placed before them ... I doubt whether they are quite competent to carefully reason out the pros and cons put before them ... numbers of women judge a man by his face.<sup>38</sup>

This was apparently the case even in light of women's eligibility to be appointed justices of the peace from 1919 and to be elected as Members of Parliament from 1920. As this Commission commented in its 1980 report on jury service exemption, the *Women's Legal Status Act 1923* (WA), which provided in s 2 that 'a person shall not be disqualified by sex from the exercise of any public function ... any law or usage to the contrary notwithstanding', appears not to have been considered in this regard.<sup>39</sup>

Sonia Walker has noted that, as late as 1953 concerns were expressed about the 'emotional damage' that would be caused to women by deliberating on offences of a sexual nature.<sup>40</sup> Moreover, it was thought that women hearing such cases would be 'so embarrassed' that their 'observations and judgment would be clouded', which would 'make the situation [in the jury room] extremely difficult'.<sup>41</sup> In any event, the property qualification placed upon jurors would almost certainly have disqualified most women from serving as jurors during the early 20th century. Those whom it did not disqualify would necessarily be of a 'certain class' and concerns were raised as to whether this would affect the representative nature of the jury sample.<sup>42</sup>

37. For an examination of the history of women and jury service in Western Australia, see Walker S, 'Battle-Axes and Sticky-Beaks: Women and jury service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law*.

38. Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 September 1924, 627 (Mr Teesdale, Member for Roebourne).

39. LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 13, n 2.

40. Walker S, 'Battle-Axes and Sticky-Beaks: Women and jury service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law* [8].

41. Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 1953, 1060–1061 (Mr Nulsen, Member for Ayre and Minister for Justice).

42. Walker S, 'Battle-Axes and Sticky-Beaks: Women and jury service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law* [23].

## The *Juries Act 1957*

It was not until the enactment of the *Juries Act 1957* that women were made eligible to serve as jurors; but that same Act gave women an absolute right to be excused from jury service. The Select Committee of the Legislative Council (which reported in 1956) recommended that women should be obliged to serve in the same way as men, subject only to 'whatever maternal duties they may have'.<sup>43</sup> However, the government of the day chose not to accept that recommendation. The only reason to be found on record for this rejection is 'simply that nature provides differently for men and women, and it is necessary for the latter to be able to judge for themselves whether they feel fit to serve at a given time or not'.<sup>44</sup>

The 1957 Act also had the significant reforming effect of extending liability for jury service to a much wider range of the state's population by removing any kind of requirement for the holding of property.<sup>45</sup> Further, it made the electoral roll the basis for the means of selection for jury service, instead of a list compiled by the police through its identification of those with property qualifications. One consequence of altering the method of selection was that Aboriginal people became legally unqualified (as opposed to being precluded, in a practical sense by reason of being unlikely to hold any property) to serve on juries. That was because Aboriginal people did not become entitled to vote in Western Australia until 1962. It was not until 1983, when voting was made compulsory for Aboriginal people, that they became, in a realistic sense, qualified and liable to serve as jurors for the first time.<sup>46</sup> However, as discussed in Chapter Two, a range of cultural and social circumstances have operated to reduce the frequency with which Aboriginal people do actually serve on juries in Western Australia.<sup>47</sup>

43. As cited in LRCWA, *Working Paper on Exemption from Jury Service*, Project No 71 (1978) 36.

44. See LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 14.

45. The Select Committee noted the then recent finding of Lord Devlin, in examining the issue in the United Kingdom, that 'the insistence on a juror being a property owner ... under 60 years of age and with the prevailing exemptions, resulted in juries being predominantly male, middle aged, middle class and middle-minded'. The Committee, similarly, considered that to draw jury lists from Legislative Assembly roles would go some way to redressing the lack of numbers on jury lists and provide a greater breadth of potential jurors.

46. McKay L, *The Decline of the Franchise and the Rise of the I-Generation: A Western Australian perspective* (Institute of Public Administration of Australia, Curtin University, Western Australia Department of Premier and Cabinet, 2006) 11; Phillips H, 'Electoral Law in the State of Western Australia: An overview' (Perth: Western Australia Electoral Commission, 2008) 136.

47. See below Chapter Two.

## Late 20th century amendments to the *Juries Act*

Minor amendments were made to the *Juries Act* in 1972<sup>48</sup> and 1973,<sup>49</sup> but the most significant changes to jury eligibility in Western Australia occurred in 1984<sup>50</sup> as a consequence of the recommendations of this Commission.<sup>51</sup> The 1984 amending Act made three essential changes that are still contained in the *Juries Act* of today. First, it replaced the earlier dichotomy of jurors being 'not qualified' or 'exempt' with a tripartite approach encompassing concepts of 'eligibility', 'qualification' and 'excuse' (which in turn may be as of right or at the discretion of the court or summoning officer).

Secondly, women were obliged to serve and could no longer be excused as of right. Moreover, the wives of people exempted from serving (such as judges and clergymen) were no longer automatically exempted merely by virtue of that status.

Thirdly, the disqualification of people convicted of crimes or misdemeanours was redrafted so that the disqualification became based on the penalty imposed. An earlier approach, basing disqualification simply on the class of offence, rather than the penalty actually imposed upon conviction, was capable of working illogically and inequitably. For example, a person convicted of a crime or misdemeanour who was merely fined would previously have been ineligible, while someone imprisoned for an offence determined summarily would be eligible.

Further amendments since 1984 have made relatively minor or specific changes to the regimes of eligibility, qualification and excuse. Of particular note is the varying of the ineligibility criteria in 2000 so as to increase the age of ineligibility from 65 years to 70 years, with those jurors older than 65 but under 70 years able to be excused as of right.<sup>52</sup>

48. The effect of the *Age of Majority Act 1972* (WA) was that the age of eligibility of jurors was decreased to 18 years.

49. The *Juries Amendment Act 1973* (WA) added certain professions to the categories of exemptions as of right, namely registered and practising chiropractors, persons engaged in civil emergency services, the secretary and academic staff of Murdoch University and the Parliamentary Commissioner for Administrative Investigations, or Ombudsman (whose office had been created by statute in 1971).

50. *Juries Amendment Act 1984* (WA).

51. LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980).

52. *Juries Amendment Act 2000* (WA).

# Role of the jury trial in Western Australia

## IMPORTANCE OF THE JURY SYSTEM

The jury system in Australia has been described as the ‘chief guardian of liberty under the law and the community’s guarantee of sound administration of criminal justice’.<sup>1</sup> Sir William Deane, a former Governor-General of Australia and Justice of the High Court, has observed that:

The institution of trial by jury ... serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept the jury’s verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people.<sup>2</sup>

The participation of the public, as jury members, in the administration of justice in turn legitimises the criminal justice system.<sup>3</sup> It ‘fosters the ideal of equality’ and ‘helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached’.<sup>4</sup> Indeed, it is the involvement of the community in the administration of justice that is perhaps the chief argument for retention of the jury system. While the efficiency of the jury as a tribunal of fact may be questionable,<sup>5</sup> the public confidence in the administration of justice that is engendered by the mere existence of the jury system is invaluable.<sup>6</sup>

## USE OF JURIES IN WESTERN AUSTRALIA

The use of juries in Western Australia has diminished significantly over recent decades. Where once juries were empanelled regularly for civil and coronial cases, the overwhelming majority of jury trials are now criminal in nature. While a judge of the Supreme Court has

discretion to empanel a six-person jury upon application in certain civil cases,<sup>7</sup> the Commission has been advised that no civil jury trial has occurred in Western Australia since 1994 and only about a dozen such trials have occurred in the last four decades.<sup>8</sup> Coroners juries—a three-person ‘expert’ jury used largely in relation to mining deaths—were abolished in 1996 with the passage of the *Coroners Act 1996* (WA).

## Criminal trial by jury

A person who pleads not guilty to a criminal offence in a superior court of Western Australia is entitled to have the issues of fact raised by the charge tried by a judge and jury.<sup>9</sup> A jury in a criminal trial will consist of 12 people<sup>10</sup> randomly selected from ‘the jurors’ book in the jury district in which the trial is to take place’.<sup>11</sup> The role of the jury is to weigh the evidence presented in court and apply the law, as directed by the trial judge, to the facts found. The jury then delivers its verdict as to whether the accused person is guilty or not guilty of the crime charged. Juries are not required to give reasons for their verdict. The judge is responsible for regulating the trial proceedings to ensure the issues raised by the parties may be determined according to law.

In 2008 there were 579 criminal trials heard in superior courts in Western Australia, 568 of which were dealt with

1. *Brown* (1986) 160 CLR 171, 197 (Brennan J).
2. *Kingswell* (1985) 159 CLR 264, 301 (Deane J).
3. See discussion in NZLC, *Juries in Criminal Trials: Part One*, Preliminary Paper 32 (July 1998) 19.
4. *Brown* (1986) 160 CLR 171, 202 (Deane J).
5. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (September 2001) 139.
6. Gleeson M, ‘Juries and Public Confidence in the Courts’ (2007) 90 *Reform* 12; Auld, *ibid* 135.

7. A judge of the Supreme Court is empowered by s 42 of the *Supreme Court Act 1935* (WA) to order a trial by jury in cases where fraud, defamation, ‘malicious prosecution, false imprisonment, seduction or breach of promise of marriage’ are in issue on the application of a party, unless the judge is of the opinion that the trial requires ‘any prolonged examination of documents or accounts or any scientific or local examination which cannot conveniently be made with a jury’. Section 21 of the *Defamation Act 2005* (WA) provides for a plaintiff or defendant in defamation proceedings to elect a trial by jury, subject to a similarly conferred discretion on the court to order to the contrary.
8. No records are apparently kept of civil jury trials in Western Australia. These comments constitute the recollections of jury officers conveyed to the Commission.
9. This is the effect of s 92 of the *Criminal Procedure Act 2004* (WA).
10. Up to six ‘reserve’ jurors may be selected under the *Juries Act 1957* (WA) s 18. Reserve jurors are usually empanelled where a case is likely to run for a long period to ensure that a full jury of 12 can retire to consider the verdict if a juror becomes incapacitated or is discharged.
11. *Juries Act 1957* (WA) s 18. The process of compiling the jurors’ book for jury districts is discussed below in Chapter Two.

by a judge sitting with a jury.<sup>12</sup> Jury trials represent only a small fraction (approximately 0.3%) of all criminal proceedings adjudicated in Western Australia.<sup>13</sup> The majority of criminal charges are dealt with summarily by the Magistrates Courts and many indictable offences are finalised by guilty plea before going to trial.

### Criminal trial by judge alone

Although most indictable offences that go to trial will be tried before a judge and jury, a very small number are tried by judge alone. Under s 118 of the *Criminal Procedure Act 2004* (WA) an accused (or the prosecution with the consent of the accused) may apply to the court for an order that the trial of the charge be by a judge alone without a jury. The court may make such an order if it considers it is in the interests of justice.<sup>14</sup> Without limiting this general discretion, s 188(4) provides that a judge may refuse an application for a trial by judge alone if 'the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness'. This provision reflects the idea that the decision of a jury, in contrast to a judge, may be more readily accepted by the community in these types of cases, thereby promoting public confidence in the justice system. Of the 579 criminal trials in superior courts in 2008, only 11 were tried by judge alone. Unlike jury trials, in the case of a trial by judge alone the judge must give reasons for his or her verdict.

12. The Supreme Court heard 65 trials and the District Court heard 514 trials in 2008. Of these, one trial in the Supreme Court and 10 trials in the District Court were heard by a judge sitting alone: figures supplied to the Commission by the Supreme Court and District Court.
13. In 2006–2007, 171,253 criminal charges were finalised in Western Australia. Only 0.376% or 644 of these charges were finalised by jury. In 2007–2008, the number of criminal charges increased to 189,533; however, the number of charges finalised by jury dropped to 0.317% or 601 charges.
14. An accused cannot elect to be tried by judge alone in a state court on a Commonwealth indictment. This is because s 80 of the *Australian Constitution* has been interpreted as guaranteeing trial by jury. See *Brown* (1986) 160 CLR 171.

# Juror selection: process and principles

## CURRENT SELECTION PROCESS

The *Juries Act 1957* (WA) sets out the system for selecting people for jury service in Western Australia. The process begins with the compilation of lists of potential jurors for each of Western Australia's jury districts.<sup>1</sup> The sheriff provides the Electoral Commissioner with an estimated number of jurors required for each district and a corresponding number of electors who are **liable** for jury duty are randomly selected by a computerised process.<sup>2</sup> The jury lists are then compiled into what is known as the 'jurors' book' and the Sheriff's Office undertakes a process to remove from the book the names of people who are, by law, not able to serve on a jury.<sup>3</sup> Some people will be **disqualified** from jury duty by reason of their criminal record or because they suffer from a physical or mental incapacity or do not understand English.<sup>4</sup> Others may be **ineligible** by reason of age or occupation.<sup>5</sup> Those who are left in the jurors' book become the potential jury pool for Western Australia for the year.

Each week the required number of potential jurors is randomly selected from the jurors' book by computer and those people are sent a summons to attend court on a specified date for jury service. A potential juror can apply to be **excused** from jury service if he or she has a right of excusal expressed under the Act. A person can be excused as of right<sup>6</sup> if they are a practising health professional, an emergency services staff member or a person who has taken holy orders.<sup>7</sup> A person also has the right to be excused if they are a full-time carer for children under 14 years, for an aged person or for a mentally or physically infirm person. Persons who are aged between 65 and 70 years and women who are

pregnant may also be excused as of right.<sup>8</sup> A person may also apply to be excused by reason of illness; undue hardship; circumstances of sufficient weight, importance or urgency; or recent jury service. However, excuse on these bases is not 'as of right' and evidence must usually be supplied to support the excuse.<sup>9</sup>

Those people who are not excused by virtue of the above processes are required to attend at the court at the specified time. On arrival at the jury assembly area, the potential jurors are given a short address by the jury pool supervisor and watch an informational video. After the video, potential jurors are invited to disclose issues such as defective hearing or lack of understanding of English that may affect their service as a juror.<sup>10</sup> The sheriff's officer may excuse the person at that time. A ballot is then undertaken to determine the jury pool from which jurors for a particular trial or trials may be drawn. Potential jurors are then taken to the courtroom where another ballot is staged and 12 people are randomly selected from the jury pool to serve as jurors for the trial. When a potential juror's number is called, he or she may offer a reason to the presiding judicial officer as to why he or she is unable or unwilling to serve as a juror for that trial and seek to be excused.<sup>11</sup> Reasons may include that the juror is acquainted with the accused or a witness (which may indicate bias) or that the jury service would cause undue hardship for whatever reason. A juror may be excused by the judge (whether on the juror's application or by the court's own motion) or may otherwise be challenged<sup>12</sup> by counsel for the prosecution or the defence before being sworn as a juror.

1. A jury district comprises one or more electoral districts of the Legislative Assembly: *Juries Act 1957* (WA) s 10(2). The compilation of jury lists is discussed in greater detail below in Chapter Two.
2. *Juries Act 1957* (WA) s 14.
3. *Juries Act 1957* (WA) s 34A.
4. *Juries Act 1957* (WA) s 5(b). For further discussion, see below Chapter Five.
5. *Juries Act 1957* (WA) s 5(a). For further discussion, see below Chapter Four.
6. That is, people who fall into the categories listed in sch 2, pt II of the *Juries Act 1957* (WA) have the choice whether or not to do jury service when summonsed.
7. *Juries Act 1957* (WA) sch 2, pt II. For further discussion, see below Chapter Six.

8. *Juries Act 1957* (WA) sch 2, pt II. For further discussion, see below Chapter Six.
9. *Juries Act 1957* (WA) sch 3. For further discussion, see below Chapter Six.
10. *Juries Act 1957* (WA) s 32FA and s 34B.
11. Potential jurors are advised by the jury officer of the type of trials to be heard and are given the opportunity to write a note to the judge outlining why they wish to be excused from a particular type of trial. This process has been used effectively to enable people who have been victims of sexual assault to avoid the potential trauma of making a statement about previous abuse in open court: Carl Campagnoli, Jury Manager (WA), consultation (7 December 2008).
12. For discussion of challenges and the empanelment process, see below Chapter Two.

## OBJECTIVES OF JUROR SELECTION

In its 2001 report on juries in criminal trials, the NZLC identified four goals of the juror selection process: competence, independence (supported by random selection), impartiality and representation of the community.<sup>13</sup> Another goal, advanced by the NSWLRC, is participation.<sup>14</sup> It is worth considering each of these interrelated objectives in the Western Australian context, beginning with the touchstone of representation.<sup>15</sup>

### Representation

Representation is generally considered to be the principal concept guiding juror selection.<sup>16</sup> As discussed above, the notion of the representation of the community is the basis from which the jury—and, in turn, the criminal justice system—derives its legitimacy. Representation does not mean that the selected jury of 12 need be perfectly or proportionately representative of the community at large.<sup>17</sup> Rather, the goal of representation is to gain a jury of diverse composition. It is the mix of different backgrounds, knowledge, perspectives and personal experiences that ‘enhances the collective competency of the jury as fact-finder, as well as its ability to bring common sense judgment to bear on the case’.<sup>18</sup> As Janata has observed, this encourages ‘both interaction among jurors and counteraction of their biases and prejudices’.<sup>19</sup>

In order to facilitate the goal of representation, it is important that all ethnic and social groups in the community should have the *opportunity* to be represented on juries. Australian juries are also often criticised for the absence of Aboriginal jurors, which is especially marked in the context of a disproportionate representation of Aboriginal people in the criminal justice system.<sup>20</sup> Many issues (including cultural inhibitions) conspire to prevent

Aboriginal people from serving more often on juries;<sup>21</sup> but selection processes could possibly be improved to heighten the opportunity for selection of Aboriginal jurors.<sup>22</sup>

In order to achieve the mix of backgrounds and experience that the objective of representation properly requires, it is necessary to limit those that are denied or discouraged from serving on juries to individuals who, as a matter of principle or capacity, cannot or should not serve.<sup>23</sup> The *Juries Act* in Western Australia currently denies people in certain occupations from serving on juries and gives many other groups in society an untrammelled right to be excused from jury duty. Those in the latter category include pregnant women, people with the full-time care of dependants, people aged over 65 years and people in health-related occupations such as dentists, veterinary surgeons, nurses, chiropractors, pharmacists, osteopaths and doctors.<sup>24</sup> To the extent that members of these groups choose not to undertake jury service, the representative nature of juries is diminished.<sup>25</sup>

### Independence and random selection

Random selection has been identified by the High Court as an important assurance of a jury’s representative and independent character.<sup>26</sup> Importantly, it provides protection for an accused against the potential of a jury chosen by the prosecution or the state.<sup>27</sup> This is the rationale behind the exemption of certain law enforcement and government-related occupations from jury duty, either permanently or within a certain timeframe of employment.<sup>28</sup> In Western Australia, as in all other Australian jurisdictions, exempt occupations include judges, serving police officers, lawyers and Members of Parliament.

13. NZLC, *Juries in Criminal Trials*, Report No 69 (February 2001) 55.

14. NSWLRC, *Jury Service*, Issues Paper No 28 (November 2006) 13–14.

15. In its 2007 report the NSWLRC considered the representative nature of a jury to be the essential underlying principle. It considered independence, impartiality and competence to flow as ‘benefits’ of a ‘properly representative jury’. NSWLRC, *Jury Selection*, Report No 117 (2007) 9–10.

16. *Cheatle v The Queen* (1993) 177 CLR 541, 560.

17. NSWLRC, *Jury Selection*, Report No 117 (2007) 9.

18. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 55.

19. Janata R, ‘The Pros and Cons of Jury Trials’ (1976) 11 *Forum* 590, 595–6.

20. McGlade H & Purdy J, ‘No Jury Will Convict: An account of racial killings in Western Australia’ (2001) 22 *Studies in Western Australian History* 91, 105; Israel M, ‘Ethnic Bias in Jury Selection in Australia and New Zealand’ (1998) 26 *International Journal of the Sociology of Law* 35, 37.

21. For example, issues such as increased mobility of Aboriginal people, decreased likelihood of being enrolled to vote and the possibility of relevant prior criminal convictions all impact upon the opportunity for Aboriginal people to be qualified for juror selection. Those that are qualified for selection and answer a summons to serve may also be denied participation because of poor literacy skills or through the in-court challenge process. See Israel, *ibid* 43.

22. See discussion below in Chapter Two.

23. Such as people with recent criminal convictions of a specified type, people closely involved with the criminal justice system (such as judges and criminal lawyers) and people who have a mental or (in some cases) physical incapacity that prohibits them from discharging the duties of a juror.

24. See *Juries Act 1957* (WA) sch 2, pt II.

25. See Fordham J, ‘Bad Press: Does the jury deserve it?’ (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 14.

26. *Cheatle v The Queen* (1993) 177 CLR 541, 560–1.

27. *Ibid*.

28. See *Juries Act 1957* (WA) sch 2, pt I.

All Australian jurisdictions have an express statutory provision requiring that the process of selection of prospective jurors be done randomly.<sup>29</sup> As explained earlier, selection of jurors in Western Australia is achieved through a series of random ballot processes, beginning with computerised retrieval of a specified number of people in each jury district from the electoral roll. However, systems that depend upon the electoral roll to provide the source list for juror selection have been criticised for impacting upon the representative nature of juries because there is sometimes an underrepresentation of 'those in their early 20s, ethnic minorities and more mobile sections of the community, such as those living in rented accommodation'.<sup>30</sup> Random selection may also be somewhat compromised by the concepts of excuse, qualification and eligibility, as well as the right of peremptory challenge.<sup>31</sup>

## Participation

As mentioned earlier, participation by the community in the administration of justice plays an important role in engendering public confidence in the criminal justice system.<sup>32</sup> A comprehensive study undertaken in Victoria, New South Wales and South Australia by the Australian Institute of Criminology has shown that empanelled jurors have a higher level of confidence in the justice system than non-empanelled jurors and the community at large.<sup>33</sup> In Western Australia, a survey of jurors undertaken by the Sheriff's Office for the 12 months from 1 June 2008 showed that 70% of respondents found that their confidence in the justice system was enhanced by their experience as a juror.<sup>34</sup>

In its 1980 report on exemption from jury service the Commission emphasised that jury service is an important civic obligation that should be spread as widely and fairly

as practicable throughout the community.<sup>35</sup> Indeed, civic responsibility is the reason most consistently cited by Western Australian jurors for wanting to perform jury duty.<sup>36</sup> Whether you perceive jury duty as a 'right' of citizenship or a burden, there is probably little contest to the idea that, so far as reasonably possible, people with the capacity to serve on juries should generally do so. If jury duty is a 'right' then it should not be arbitrarily removed by the operation of exemptions.<sup>37</sup> If it is a 'burden', then it is important that this burden is equally shared by all members of the community who are qualified to serve.<sup>38</sup> As Justice Michael Murray recently observed, widening the jury pool will give recognition to the 'principle that jury service is both an important civic obligation and a privilege'.<sup>39</sup>

Though the categories of exemption have been greatly reduced since the Commission's 1980 report, those that remain are extensive. This not only impacts upon the representative nature of the jury, but also places an unjustifiably onerous burden on those who have no claim to exemption or excuse. As the Auld review observed, avoidance of jury duty 'is unfair to those who do their jury service, not least because ... they may be required to serve more frequently and for longer than would otherwise be necessary'.<sup>40</sup> The Commission is advised that there are four regional jury districts in Western Australia in which every eligible person who is registered on the electoral roll is automatically included in the pool of possible jurors each year.<sup>41</sup> Those who are not in an occupation or personal circumstance for which they can claim an excuse 'as of right' must, in these regions, be unfairly shouldering the burden of jury duty. It is the Commission's view that the opportunities for people to avoid jury duty should therefore be strictly limited.

29. *Juries Act 2003* (Tas) s 4; *Juries Act 2000* (Vic) s 4; *Jury Act 1995* (Qld) ss 16 & 26; *Jury Act 1977* (NSW) s 12; *Jury Act 1967* (ACT) s 24; *Juries Act 1957* (WA) ss 14(2) & 32C; *Juries Act 1927* (SA) ss 23 & 29; *Juries Act* (NT) s 27. The only non-random part of the selection process is the challenge process in court; although excuses, exemptions and the derivation of the 'source list' do impact upon the randomness of selection and ultimately the representativeness of juries.

30. That is, groups who are not always enrolled or who have not kept their enrolment current. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 137.

31. *Ibid*; NSWLRC, *Jury Service*, Issues Paper No 28 (2006) 13.

32. It also assists those who participate as jurors to understand the justice system better: Horan J & Tait D, 'Do Juries Adequately Represent the Community?' (2007) 16 *Journal of Judicial Administration* 179, 185.

33. Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (2008) 148–50.

34. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009). Seven per cent of respondents provided no response to this question.

35. LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 13.

36. Civic duty significantly outweighs all other reasons for wanting to perform jury duty. Of 1,985 respondents to the 2008–2009 survey 1,116 responded that civic duty was their primary reason; this represents more than five times any other reason cited. *Results of Juror Feedback Questionnaire 2008–2009* (2009).

37. Horan J & Tait D, 'Do Juries Adequately Represent the Community?' (2007) 16 *Journal of Judicial Administration* 179, 184.

38. See NSWLRC, *Jury Selection*, Report No 117 (2007) 14–15.

39. Murray M, 'Bad Press: Does the jury deserve it? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 2.

40. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 140.

41. These districts are Kununurra, Carnarvon, Broome and Derby: Carl Campagnoli, Jury Manager (WA), email (15 February 2008).

## Competence

It is perhaps self-evident that individual jurors should be ‘competent in the sense that they are mentally and physically capable of acting as jurors in the trial’.<sup>42</sup> In Western Australia, a person is not qualified to serve as a juror if he or she is ‘incapacitated by any disease or infirmity of mind or body ... that affects him or her in discharging the duty of a juror’.<sup>43</sup> These qualifications on eligibility to serve as a juror are crucial to protect the interests of the accused, as well as the jury as a whole. However, it should be noted that many physically incapacitated people will be competent to serve as jurors if relevant facilities are provided to assist them in overcoming any physical barriers to discharging the duties of a juror.<sup>44</sup>

Competence can also refer to the effectiveness of the jury as a fact-finding tribunal. The NSWLRC has argued that a jury system that is ‘broadly representative’ has the benefit of producing more competent juries ‘because of the diversity of expertise, perspectives and experience of life that is imported into the system’.<sup>45</sup>

## Impartiality

The avoidance of bias or the apprehension of bias is an important component of a fair trial and a benefit of a randomly selected and broadly representative jury. Indeed, the VPLRC has argued that maximising the representativeness of juries should ‘promote impartiality by reflecting a greater cross-section of community experience (and prejudice) so that no one view dominates’.<sup>46</sup>

That jurors bring an impartial mind to bear on the evidence presented in court is crucial to the proper discharge of their duties.<sup>47</sup> It is also vital that jurors are perceived to be impartial in order to ensure that public confidence in the jury system is maintained. Matters that might affect a juror’s impartiality include acquaintance with the accused, a witness or a legal practitioner engaged in the trial or with the victim of the crime in question. The *Juries Act* therefore requires a potential juror to disclose any likelihood of bias when appearing in answer to a summons for jury duty.<sup>48</sup> The potential for bias is also cited as a reason for the practice of jury vetting and

is usually the basis of a challenge for cause (in the rare instances that such power is relied upon).<sup>49</sup>

## GUIDING PRINCIPLES FOR REFORM OF THE JUROR SELECTION PROCESS

The Commission has approached the task of reforming the law relating to juror selection with the aim of ensuring that the law is principled, clear, consistent and relevant to the specific conditions experienced in Western Australia. Taking into account the discussion above about the objectives of juror selection, the Commission has arrived at the following principles that it believes should guide consideration of the need for, and extent of, reform to the law relating to jury selection.

### 1 Principle 1 – juries should be independent, impartial and competent:

The law should protect the status of the jury as a body that is, and is seen to be, an independent, impartial and competent lay tribunal.<sup>50</sup>

### 2 Principle 2 – juries should be randomly selected and broadly representative:

The law should provide for jurors to be randomly selected from a broad and diverse cross-section of the community, both to protect the independence and impartiality of the jury and to ensure that all groups in the community have the opportunity to serve on a jury.

### 3 Principle 3 – wide participation in jury service should be encouraged:

The law should:

- (i) recognise the obligation to serve on a jury, when selected, as an important civic responsibility to be shared by the community;
- (ii) ensure only persons whose presence on a jury might compromise, or might be seen to compromise, its status as an independent, impartial and competent lay tribunal, should be prevented from serving; and

42. NZLC, *Juries in Criminal Trials*, Report 69 (2001) 55.

43. *Juries Act 1957* (WA) s 5(b)(iv).

44. For in-depth discussion of mental and physical incapacity as it relates to juror qualification, see below Chapter Five, ‘Incapacity’.

45. NSWLRC, *Jury Selection*, Report No 117 (2007) 11.

46. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 24.

47. NZLC, *Juries in Criminal Trials: Part One*, Preliminary Paper 32 (1998) 56.

48. *Juries Act 1957* (WA) sch 4.

49. The process of challenging jurors and the issue of jury vetting are discussed in more detail below in Chapter Two.

50. This important principle is underpinned by Article 14(1) of the *International Covenant on Civil and Political Rights* (ratified by Australia in 1980), which guarantees that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.

- (iii) ensure only persons who can demonstrate good cause or who are unable to discharge the duties of a juror are released from the obligation to serve.<sup>51</sup>

## 4 Principle 4 – adverse consequences of jury service should be avoided:

The law should seek to prevent or reduce any adverse consequences resulting from jury service.

## 5 Principle 5 – laws should be simple and accessible:

The law should be as simple and understandable as is practicable.

## 6 Principle 6 – reforms should be informed by local conditions:

In recommending reform to the law, account should be taken of Western Australia's geographic circumstances and cultural conditions.

### A principled approach

The Commission has applied the above principles in its examination of the parts of the *Juries Act* that guide or impact upon juror selection. In particular, the principles have been applied to the law relating to each category of exclusion or exemption from jury duty: eligibility, qualification and excuse. The effect of these categories is loosely described earlier<sup>52</sup> and each will be addressed in detail in the following chapters of this Paper. For now, it is useful to summarise how the above principles are reflected in each category and to indicate how they have guided the Commission's proposed reforms.

**Eligibility** is a category of exclusion that applies to judicial officers, lawyers, police officers, Members of Parliament and certain government officers. It is soundly based in the concept of independence; that is, it excludes occupations that are so connected with government and the courts that they cannot be, or cannot be seen to be, properly independent of the state or the administration of justice. This category reflects both Principle 1 and Principle 2. The Commission has examined each type of occupational ineligibility with regard to the underlying rationales expressed in these principles. The Commission has approached the task of reform in this area applying

Principle 3, which seeks to broaden participation in jury service and confine categories of ineligibility to those whose presence might compromise, or be seen to compromise, a jury's status as an independent, impartial and competent lay tribunal. The outcome of the Commission's examination of ineligible occupations is found in Chapter Four.

Presently the *Juries Act* includes age in the category of eligibility. In the Commission's opinion age is better understood as a characteristic rendering a person **liable** to serve as a juror. Proposed reforms in this regard are discussed in Chapter Three.

In the Commission's view the concept of **qualification** for jury duty is properly based in the concepts of competence and impartiality and is therefore an expression of Principle 1. It currently excludes people who have certain criminal convictions (impartiality) and those who do not understand English or have a permanent incapacity of body or mind (competence). However, in the Commission's view a physical disability will rarely affect a person's competency to discharge the duties of a juror, especially where facilities can be provided to overcome physical difficulties. Therefore, applying Principle 1, prospective jurors should not be disqualified from jury service on the basis of a physical disability alone.<sup>53</sup> This category of exclusion is explored in Chapter Five.

The category of **excuse** is currently split into two groupings under the *Juries Act*: excuse as of right (which exempts people in mainly health-related occupations and those with specified family commitments) and excuse for cause (which may apply in circumstances where a person considers he or she will suffer adverse consequences from serving as a juror). In Chapter Six the Commission advances proposals to simplify the category of excuse by abolishing excuse as of right, establishing a clearly defined excuse for 'good cause' and introducing a process of deferral of jury service. The proposed reforms in this chapter primarily reflect the Commission's Principle 3.

Principles 4, 5 and 6 are applicable to all categories of exemption and also impact strongly in the Commission's consideration of compilation of jury lists and regional issues in Chapter Two and juror allowances, protections for employment and enforcement of juror obligation in Chapter Seven.

51. Grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the court are expressed in the proposed reforms to the *Juries Act 1957* (WA) sch 3. For discussion of these reforms and the proposed reformulation of the Third Schedule, see below Chapter Six.

52. See above, 'Current selection process'.

53. Although, as explained below in Chapter Five, a physical disability that renders a person unable to discharge the duties of a juror in a particular trial will constitute a sufficient reason to be excused from jury service by the summoning officer or the trial judge under the Third Schedule to the *Juries Act 1957* (WA).

