

Chapter Three

Liability for Jury Service

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Liability to serve as a juror

SECTION 4 of the *Juries Act 1957* ('the Act') provides that a person who is enrolled to vote at an election of members of the Legislative Assembly of the Western Australian Parliament is, subject to the exclusions in the Act,¹ liable to serve as a juror. In order to qualify to vote at a Western Australian election, one must have attained the age of 18 years and be an Australian citizen.²

THE REQUIREMENT OF CITIZENSHIP

The requirement of citizenship is a feature of juror liability in all Australian jurisdictions. However, recent reviews of juror selection processes in Victoria and New South Wales have raised the question whether eligibility for jury service should be extended beyond those who possess, or have attained, Australian citizenship.³ The rationale for the inclusion of non-citizens as potential jurors is that people from culturally and linguistically diverse backgrounds might be seen to enhance the representative quality of juries and address 'any apprehension of bias held by members of minority immigrant groups' charged with a criminal offence.⁴

While the Victorian Parliamentary Law Reform Committee (VPLRC) and the New South Wales Law Reform Commission (NSWLRC) considered that there was merit in the contention that many non-citizen permanent residents had made a sufficient commitment to the community in Australia to warrant their inclusion on jury lists, there was little support from submissions

to extending the basic criterion beyond citizenship.⁵ The NSWLRC also observed that, in light of the high uptake of citizenship in Australia,⁶ any apparent under-representation of migrant groups may be more due to 'the requirement that jurors understand English and to the exercise of the right of peremptory challenge' than to them not having enrolled as electors.⁷

Whether any apparent under-representation of migrant groups in fact exists in Western Australia is debatable. Records maintained by the Sheriff's Office in Western Australia show that at least 29% of jurors who completed an exit survey following jury duty in Perth were overseas born.⁸ This compares favourably to the general Western Australian community, which at the last census recorded 27.1% of overseas-born residents (including non-citizens).⁹ The Commission concedes that, while this might mean migrant groups are relatively well represented on Western Australian juries, because of the qualification that jurors understand English they may not all be from culturally and linguistically diverse backgrounds.¹⁰ The requirement that jurors understand

1. That is, the person must not be disqualified by reason of s 5(b) or ineligible by reason of s 5(a) of the *Juries Act 1957* (WA). The concepts of qualification and eligibility are discussed in the following chapters.
2. *Electoral Act 1905* (WA) s 17. A limited exception to the requirement of citizenship applies to people who, although not Australian citizens, would, if earlier citizenship laws of the Commonwealth had continued in force, be British subjects within the meaning of that earlier citizenship law and who were at some time within the three months immediately preceding 26 January 1984, an elector of the WA Legislative Assembly or of the Commonwealth Parliament: s 17(a)(ii).
3. See eg, NSWLRC, *Jury Selection*, Report No 117 (2007); VPLRC, *Jury Service in Victoria*, Final Report (1996). Earlier consideration of this issue by the Australian Law Reform Commission (ALRC) rejected the proposition that permanent residents be eligible to serve on juries, stating that citizenship was the appropriate qualification: ALRC, *Multiculturalism: Criminal Law*, Discussion Paper No 48 (1991) 63.
4. NSWLRC, *ibid* 28.

5. The NSWLRC received two submissions in support of inclusion of permanent residents only on jury source lists, while the VPLRC stated that 'almost all the submissions and evidence ... supported the current criteria [for liability]': NSWLRC, *ibid* 28; VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 28.
6. The latest figures on citizenship are found in the 2006 census, which revealed that 83.5% of persons usually resident in Western Australia at that time identified as Australian citizens. This is slightly below the national average of 86.1% but may reflect the high intake of skilled migrants into Western Australia. It is impossible to speculate how many of the remaining 15.4% (after having removed the 1.1% who were visitors from overseas on census night) were permanent residents and how many were residing in Western Australia on temporary visas. However, it is worth noting that, based on current age comparatives in Western Australia, only two-thirds of this number would be between 18 and 69 (representing the eligible age for service on a jury). See ABS, *2006 Census QuickStats: Western Australia* (2007).
7. NSWLRC, *Jury Selection*, Report No 117 (2007) 28–9. The same requirement of understanding English and rights of peremptory challenge exist in Western Australia.
8. According to the Jury Manager, the juror feedback questionnaire has a 41% response rate. Of the jurors completing the questionnaire, 8% gave no response to this question.
9. Department of Immigration and Citizenship (Cth) & Office of Multicultural Interests (WA), *The People of Western Australia: Statistics from the 2006 Census* (2008) table 2.22.1.
10. In 2008, 2.6% of jurors summonsed for jury duty in Perth were excused on the basis of lack of understanding of English: Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).

English is an important qualification on jury service and is discussed in Chapter Five. In this context, however, it is pertinent to note that there is nothing to suggest that non-citizen permanent residents from culturally and linguistically diverse backgrounds would understand English any better than Australian citizens with similar backgrounds. Indeed, it is more likely that citizens (who have necessarily lived in Australia for a longer period) would have a better understanding of the English language.

On a practical level, both the Victorian and New South Wales reviews noted the difficulty in obtaining an officially verifiable list of non-citizen permanent residents to augment the electoral roll as a source for potential jurors.¹¹ In light of this difficulty, the VPLRC speculated that a procedure might be established whereby non-citizen permanent residents could apply to the sheriff to be enrolled for jury service. However, after investigating the possibility, it concluded that this option was unlikely to be well utilised and would be unduly expensive.¹² Submissions to the NSWLRC on this point argued that a system of voluntary registration would seriously undermine the principle of random selection.¹³ As discussed in Chapter One, random selection is fundamental to ensuring the independence of juries and, in this Commission's opinion, is a standard with which any proposed amendment to the juror selection process must conform.¹⁴

Like the Australian Law Reform Commission before them,¹⁵ both the VPLRC and the NSWLRC ultimately recommended that the Australian citizenship requirement remain unaltered.¹⁶ In view of the arguments above and, in particular, the practical difficulties associated with summoning permanent residents for jury duty in such a way that would not breach the principle of random selection, the Commission is not convinced that the basic criterion of citizenship for liability for jury service in Western Australia should be changed.

11. The LRCWA's enquiries of the Commonwealth Department of Immigration and Citizenship were also unable to uncover the existence of a suitable source list. See VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 29; NSWLRC, *Jury Selection*, Report No 117 (2007) 29.
12. Based on experience in jurisdictions overseas, in particular, the United States: VPLRC, *ibid*.
13. NSWLRC, *Jury Selection*, Report No 117 (2007) 29.
14. See above Chapter One, Guiding Principle 2.
15. See ALRC, *Multiculturalism: Criminal Law*, Discussion Paper No 48 (1991) 63; ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992).
16. Although Victoria did recommend that 'investigations should take place to determine the administrative feasibility of establishing an accurate database of citizens and non-citizen permanent residents for jury service', no amendment has yet been made to the basic qualification requiring citizenship: VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, recommendation 4.

ITINERANT AND OVERSEAS ELECTORS

From 1 October 2009 electors enrolled and registered under the *Electoral Act 1918* (Cth) as having no fixed address (known as itinerant electors)¹⁷ will be recognised as enrolled on the state electoral roll under the *Electoral Act 1907* (WA).¹⁸ Overseas electors (ie, those who have notified the Commonwealth Electoral Commission that they are resident outside of Australia)¹⁹ have been recognised as eligible to be enrolled on the state electoral roll since 2006.²⁰ Currently there are 1195 eligible overseas electors registered as enrolled on the state electoral roll and the Western Australian Electoral Commission expects approximately 702 electors to be enrolled as itinerant electors once that provision comes into effect.²¹

Both itinerant and overseas electors, by definition, do not reside at the address for which they are enrolled to vote. Effectively, therefore, they are not resident in any Western Australian jury district. However, on the face of s 4 of the *Juries Act* they remain liable for jury service as if they did reside in the jury district. While under s 14(8) of the *Juries Act* the sheriff has power to remove a person's name from the jury list if it appears that the person no longer resides in the relevant jury district,²² this power only comes into effect after the jury lists are prepared by the Western Australian Electoral Commission. In practice, the sheriff exercises this power after a summons has been issued and it is returned to sender as being not known at the address²³ or where the person has mail forwarded and advises the summoning officer that he

17. A person may apply to the Commonwealth Electoral Commission to be recognised as an itinerant elector if he or she is in Australia but does not reside permanently at any fixed address. The person may retain his or her enrolment as an itinerant elector for so long as the person remains itinerant (that is, he or she does not reside in any place for longer than one month). Should the person fail to vote at the next general election, his or her enrolment as an itinerant elector will lapse. See *Electoral Act 1918* (Cth) s 96(9)(a).
18. *Electoral Amendment (Miscellaneous) Act 2009* (WA) s 6, inserting s 17B into the *Electoral Act 1907* (WA).
19. A person may apply to the Commonwealth Electoral Commission to be recognised as an eligible overseas elector if he or she has ceased to reside in Australia but intends to return within six years. However, by virtue of the *Electoral Act 1918* (Cth) ss 94(8) and 94(9), eligible overseas electors can theoretically obtain an indefinite number of one-year extensions so long as they continue to have the intention to resume their residence in Australia. Should they fail to vote at a general election, their status as an eligible overseas elector will be cancelled.
20. See *Electoral Act 1907* (WA) s 17A.
21. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, email (21 August 2009).
22. Power also exists for the sheriff to remove a name from the jurors' book for the same reason: *Juries Act 1957* (WA) s 34A(3).
23. Presently approximately 40 to 50 summons per week (ie, per 1000–1200) are returned to sender: Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).

or she no longer resides in the jury district. Sometimes the issue does not come to light until the Sheriff's Office conducts an investigation to establish why the person did not attend for jury service pursuant to the summons.²⁴

The Commission has consulted with the Western Australian Electoral Commission and the Jury Manager to discuss ways to accommodate these changes to the *Electoral Act* in the jury selection process. In this Commission's view, it is an inefficient use of the sheriff's time to investigate failures to attend where they can be clearly identified as not residing in the relevant jury district from the outset. Further, the Commission is concerned that itinerant and overseas electors may be unfairly penalised for not attending pursuant to a jury summons when they have already notified the Electoral Commission of their non-resident status.

The Commission has concluded that it is appropriate for itinerant and overseas electors to be expressly identified as not being liable for jury service and that s 4 of the *Juries Act* should be amended to reflect this. The Commission is advised that this is the most practical option because it clearly authorises the Electoral Commission to leave out the names of overseas and itinerant electors during the jury list compilation process. According to the Electoral Commission, this is very simple to do because itinerant and overseas electors are already 'flagged' on their computer system. The Commission's Proposal 9—removing the liability for jury service of people registered as itinerant or overseas electors—is also subsumed into the proposed redraft of s 4 of the *Juries Act* which appears in Proposal 11 at the end of this chapter.

PROPOSAL 9

Overseas and itinerant electors not liable for jury service

That provision be made in s 4 of the *Juries Act 1957* (WA) to remove the liability for jury service of people who are registered under the *Electoral Act 1918* (Cth) as eligible overseas electors or as electors with no fixed address and are recognised as such pursuant to ss 17A or 17B of the *Electoral Act 1907* (WA).

24. Known as a 'did not attend' investigation.

AGE

As discussed above, liability for jury service is attached to registration on the electoral roll and entitlement to vote at an election of members of the Legislative Assembly of the Parliament of Western Australia.²⁵ Although under s 17(4a) of the *Electoral Act 1907* (WA) a person may be enrolled on the electoral roll at the age of 17 years, he or she is not entitled to vote—and therefore not liable to serve as a juror—until having attained the age of 18 years.²⁶ Although most Australian jurisdictions refer to an upper age limit at which a person can opt out of jury duty,²⁷ Western Australia and South Australia are the only Australian jurisdictions in which a person over 70 years of age is not permitted to serve as a juror. The upper age limit is treated differently in all jurisdictions: some jurisdictions attach age to liability to serve, some to eligibility to serve and others to an exemption or excuse from serving. Table A on page 54 summarises the position in the various Australian jurisdictions.

As Table A shows, New South Wales, the Australian Capital Territory, the Northern Territory and Tasmania allow a person over a particular age (between 60 and 70 years) to claim exemption²⁸ from jury service as of right. In each of these jurisdictions the exemption must be claimed in writing to the relevant authority and on receipt of such written claim (and subsequent verification of age) a person is automatically excused from service for that summons.²⁹ Victoria permits jury service at any age but allows an excuse for a person of an undefined 'advanced age' if good reason is given.³⁰ In South Australia a person aged 70 years or more is not liable to serve as a juror and in Queensland a person aged 70 years or more is not eligible to serve as a juror, unless they elect to do so in writing.

Western Australia is the only jurisdiction with a two-stage system of age exemption. Under the current law in this state, a person aged 65 years or more may claim

25. *Juries Act 1957* (WA) s 4.

26. *Electoral Act 1907* (WA) s 17(4b).

27. Note that in Queensland a person over the age of 70 is required to opt in to jury service: *Jury Act 1995* (Qld) s 4(4).

28. Although in Tasmania (and Western Australia) this is known as an 'excuse as of right', exemption effectively amounts to the same thing.

29. Tasmania and the Northern Territory also allow a person over the stated age to apply to be permanently excused from serving upon request in writing. In Victoria a person may be permanently excused if they are of 'advanced age'.

30. Whether a person of advanced age is excused upon application is at the discretion of the Juries Commissioner (or judge). The concept of 'advanced age' is not defined in legislation or policy; however, applications for excuse by people over 70 years of age will often be granted, especially if accompanied by good reason such as health or mobility issues. A person who is excused from jury service on the basis of advanced age will generally be excused permanently.

Table A: Upper age limit – liability for jury service

	Age (years)	Exemption category	Legislative Provision
WA	65 to 69 70 or more	Excuse as of right (must claim) Ineligible	<i>Juries Act 1957</i> (WA) s 5(c)(i) <i>Juries Act 1957</i> (WA) s 5(a)(ii)
QLD	70 or more	Ineligible (unless has elected to serve)	<i>Jury Act 1995</i> (Qld) s 4(3)(j) & s 4(4)
NSW	70 or more	Exemption as of right (must claim)	<i>Jury Act 1977</i> (NSW) s 7
ACT	60 or more	Exemption as of right (must claim)	<i>Juries Act 1967</i> (ACT) s 11(2)
NT	65 or more	Exemption as of right (must claim)	<i>Juries Act</i> (NT) s 11(2)
SA	70 or more	Not liable to serve	<i>Juries Act 1927</i> (SA) s 11(b)
VIC	Advanced age	Excuse for cause/good reason (must claim)	<i>Juries Act 2000</i> (Vic) s 8(3)(i)
TAS	70 or more	Excuse as of right (must claim)	<i>Juries Act 2003</i> (Tas) s 11

an excuse as of right to jury service on the basis of age alone, while those aged 70 years or older are not eligible to serve.³¹ In the Commission's opinion there is no good reason for retaining an excuse as of right for people aged between 65 and 70 years. Indeed, the Commission is of the view that there should be no excuses as of right on any basis. This reflects the Commission's guiding principle supporting wide participation in jury service (Principle 3) and is discussed in more detail in Chapter Six.

Should there be an age restriction and what should it be?

As the table above shows, the upper age limit for eligibility for, or excuse from, jury duty is most commonly set at between 65 and 70 years of age. The rationale for an identified age limit of 65 years appears to be that it is the commonly cited age of retirement³² and the age at which one may qualify for the age pension, while the age limit of 70 years appears to be pegged to the compulsory retirement age of judges in most jurisdictions.³³

31. This two-stage process was introduced by the *Juries Amendment Act 2000* (WA), which increased the upper age limit from 65 years to 70 years and added an excuse as of right for persons aged 65 years and over to the second schedule.

32. Although the Seniors Australia website states that a recent Australian Bureau of Statistics (ABS) survey shows that 76% of men retire before the age of 63 and the same percentage of women retire before the age of 60: see <<http://www.seniors.gov.au/internet/seniors/publishing.nsf/Content/Retirement+ages>>.

33. See NSWLRC, *Jury Service*, Issues Paper No 28 (2006) 92. The compulsory retirement age for judges in Western Australia is 70 years: *Judges' Retirement Act 1937* (WA) s 3. However, under s 18A of the *District Court of Western Australia Act 1969* (WA) and s 11AA of the *Supreme Court Act 1935* (WA) a person older than the compulsory age of retirement may serve for a period of 12 months as an auxiliary judge.

There are good reasons for retaining reasonable age limits on jury service. The NSWLRC referred to the 'difficulties of old age that may accompany such activities as sitting in court for protracted periods and travelling to and from a court'.³⁴ Another argument for placing an upper age limit on jury duty is 'the belief that jury service is a duty that ought not be demanded of people at an age when they are entitled to the freedom that comes in retirement'.³⁵ While the Commission does not believe that jury service will necessarily place an undue burden on retirees, this argument does have some merit in the context of International Labour Organisation studies which place Australia's population among the hardest-working developed populations in the world judged on average working hours.³⁶

On the other hand, there are also good arguments for the proposition that people over the qualification age for the age pension should be permitted to serve as jurors. An obvious benefit is that people in this age group will generally be retired and therefore will have more available time to commit to jury duty. Another is that people of an advanced age bring a wealth of life experience to the task of a juror. Further, like many other countries Australia is experiencing a rapid growth in its ageing population. In this environment, jury systems that exclude people from age 65 may be said to be less representative than those that do not have such restrictions.³⁷

34. NSWLRC, *Jury Service*, Issues Paper No 28 (November 2006) 92.

35. *Ibid.*

36. Lee S, McCann D and Messenger J, *Working Time Around the World: Trends in working hours, laws and policies in a global comparative perspective* (Geneva: International Labour Organisation, 2007).

37. Perhaps in recognition of this, many Australian jurisdictions have a system of voluntary excuse which recognises that while a person

The Commission acknowledges in Guiding Principle 2 that representation of the community is a fundamental tenet of juror selection, so it is important to test this last proposition. Currently the *Juries Act* offers an excuse as of right to people aged 65 to 69 years. In 2008, 2.6% of the potential jurors summonsed for Perth were excused from jury duty on this basis.³⁸ But of those jurors actually empanelled in Perth at least 3% were in this age bracket.³⁹ When compared with the Western Australian population, of which 3.6% fall within the 65–69 age bracket,⁴⁰ it can be seen that juries have a relatively proportionate representation to the wider community. The representation of this age group will be increased if the existing excuse as of right is abolished as the Commission proposes.⁴¹

While the Commission is of the opinion that the present age cap at 70 years is too low, it is persuaded—primarily by practical arguments—that Western Australia should retain an upper age limit for jury duty. The Commission is not convinced that an open-ended age limit with a system of excuse as of right or for cause is either efficient or fair. Such a system will create significant administrative burdens upon the sheriff’s office in processing excuses and retracting summonses. It may also place an unnecessary burden upon the elderly who will be required to claim their excuse in written form and who may face an automatic penalty if they fail to attend in the absence of such a claim.⁴² In contrast, an upper age limit can be applied (as is the case currently) at the time of compilation of jury lists from the electoral roll. This means that there is no increased administrative burden placed on the sheriff’s office and no distress caused to very elderly people who might otherwise receive a summons for jury duty. There is also, as the NSWLRC pointed out, the possibility that a large number of elderly people may be summoned in a single pool and then seek to be excused, leaving the sheriff with insufficient numbers

who has reached a certain age may not be willing or able to serve as a juror and should on that basis be excused, the person should not be automatically deprived of the opportunity to serve as a juror. This is the system currently operating in Western Australia for people aged between 65 and 70 years.

38. Sheriff’s Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
39. Two per cent of those completing the juror feedback questionnaire for this period did not respond to this question. Sheriff’s Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009). An earlier snapshot taken from 1 July 2007 to 14 February 2008 showed an even higher representation at 4.4%.
40. ABS, *Estimated Resident Population by Single Year of Age, Western Australia* (at 30 June 2008) Cat No 3201.0, Table 5: Statistical estimate by ABS based on the last census of population and housing in 2006.
41. Proposal 1.1.
42. The VPLRC reported that ‘the receipt of jury notices by elderly people is often the cause of a great deal of distress to them or their family’: VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 79.

to meet the courts’ requirements.⁴³ Because potential jurors are selected randomly by computer, the number of elderly people called for jury service at any one time cannot be foreseen.

Taking into account the various arguments, the Commission has formed the preliminary view that 75 years is an appropriate age cap for jury duty.⁴⁴ Because many people retire outside the metropolitan area, this small raise in age has the potential to expand the jury pool significantly in some regional areas.⁴⁵ It also has the benefit of capturing a great deal more people who are currently ineligible for jury service for a period of five years following cessation of employment in certain positions.⁴⁶ In combination with the abolition of the excuse as of right for people aged 65 years or over, this proposed reform will potentially expand the jury pool in Western Australia by approximately 140,000 people.⁴⁷ Of course, those people who are unable to perform jury duty because of illness, mental or physical incapacity (including mobility, hearing or vision impairment) or undue hardship, may still apply to be excused for good cause.

PROPOSAL 10

Raise the maximum age for jury service

1. That the excuse as of right for persons who have reached the age of 65 years currently found Part II of the Second Schedule to the *Juries Act 1957* (WA) be abolished.⁴⁸
2. That the maximum age for liability for jury service be raised to 75 years.

43. NSWLRC, *Jury Service*, Issues Paper No 28 (2006) 92.

44. In preliminary consultations with judges in the District Court and Supreme Court there was no support for raising the age limit above a maximum of 75 years.

45. The movement of retirees from metropolitan areas to regional areas is a key theme of the latest Statistician’s Report. See ABS, *A Picture of the Nation*, Cat No 2070.0 (2009).

46. See *Juries Act 19757* (WA) sch 2, pt I, cl 2. Occupations in this category include Members of Parliament, employees or contractors of the Departments of the Attorney General or Corrective Services, officers of the Corruption and Crime Commission, police officers, and judge’s associates or ushers.

47. See ABS, *Estimated Resident Population by Single Year of Age, Western Australia* (at 30 June 2008) Cat No 3201.0, Table 5: Statistical estimate by ABS based on the last census of population and housing in 2006.

48. The Commission has proposed that the entire Part II of the Second Schedule to the *Juries Act 1957* (WA) be abolished. See detailed discussion in Chapter Six.

Where should the age limit be placed?

As foreshadowed in Chapter One, the Commission is of the opinion that age is better placed as a quality rendering a person liable to serve as a juror, rather than as a factor that causes a person to be ineligible for jury service. The only other causes of ineligibility under the *Juries Act* are occupation-based, with the underlying rationale that the named occupations are so closely connected with government and the courts that they cannot be, or cannot be seen to be, properly independent of the prosecuting authority (that is, the state) or sufficiently impartial. This is a potentially disabling factor that is not similarly reflected in a person of advanced age.

Another factor that has influenced the Commission's view is that age is already a factor that is taken into account at the very first stage of the jury selection process, which is effectively the liability stage. Currently when lists of potential jurors are compiled from the electoral roll the computer program is set to only return electors in the relevant jury districts aged between 18 and 70 years. The Commission understands that the Western Australian Electoral Commission's computer program can be easily adjusted to raise the upper age limit to 75 years.⁴⁹

PROPOSAL 11

Amend juror liability provision

That s 4 of the *Juries Act 1957* (WA) be amended to read:

Liability to serve as juror

1. Each person residing in Western Australia —
 - (a) who is enrolled on any of the rolls of electors entitled to vote at an election of members of the Legislative Assembly of the Parliament of the State; and
 - (b) who is not above the age of 75 years,
is, subject to this Act, liable to serve as a juror at trials in the jury district in which the person is shown to live by any of those rolls of electors.
2. A person who is an elector who has left Australia and who is enrolled pursuant to s 17A of the *Electoral Act 1907* (WA) or an elector with no fixed address and who is enrolled pursuant to s 17B of the *Electoral Act 1907* (WA) is not liable to serve as a juror.

49. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, telephone consultation (15 June 2009).