

Chapter Four

Eligibility for Jury Service

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Eligibility for jury service

THE previous chapter discussed the concept of liability for jury service; essentially, liability for jury service is dependent on enrolment as an elector for the Legislative Assembly of the Western Australian Parliament. The Commission proposes in Chapter Three that age—which is a personal characteristic that renders someone ineligible for jury service under s 5(a) of the *Juries Act 1957* (WA)—be moved to the liability provision in s 4 and that the upper age limit be increased from 70 years to 75 years.¹ A person's current or past occupation is the only other characteristic that can render someone ineligible for jury service.

OCCUPATIONAL INELIGIBILITY

Part I of the Second Schedule to the *Juries Act* contains a list of persons that are ineligible for jury service based on their occupational status. The schedule provides as follows:

Part I

Persons not eligible to serve as jurors

1. A person who is or has been a —
 - (a) judge of the Supreme Court, Family Court or District Court;
 - (b) master or registrar of the Supreme Court, Family Court or District Court;
 - (c) President or commissioner of the Industrial Relations Commission established under the *Industrial Relations Act 1979*;
 - (d) Parliamentary Commissioner for Administrative Investigations;
 - (da) Commissioner appointed under the *Corruption and Crime Commission Act 2003*;
 - (db) Parliamentary Inspector of the Corruption and Crime Commission appointed under the *Corruption and Crime Commission Act 2003*;
 - (e) magistrate;
 - (ea) magistrate of the Children's Court;
 - (f) an Australian lawyer (as defined in the *Legal Profession Act 2008* section 3).
2. A person who is or has been, within a period of 5 years before being summoned to serve as a juror —
 - (a) member or officer of the Legislative Assembly;

- (b) member or officer of the Legislative Council;
 - [(c) *deleted*]
 - (d) justice of the peace;
 - (e) Sheriff of Western Australia or officer of the Sheriff of Western Australia;
 - (f) bailiff or assistant bailiff appointed under the *Civil Judgments Enforcement Act 2004*;
 - (g) associate or usher of a judge of the Supreme Court, Family Court or District Court;
 - (h) police officer;
 - [(i) *deleted*]
 - (j) officer of the Corruption and Crime Commission under the *Corruption and Crime Commission Act 2003*;
 - (ja) officer of the Parliamentary Inspector of the Corruption and Crime Commission under the *Corruption and Crime Commission Act 2003*;
 - (k) officer as defined in section 3 of the *Children and Community Services Act 2004*;
 - (l) member of the Mentally Impaired Accused Review Board under the *Criminal Law (Mentally Impaired Accused) Act 1996*;
 - (m) member of the Prisoners Review Board or honorary community corrections officer under the *Sentence Administration Act 2003*;
 - (n) member of the Supervised Release Review Board under the *Young Offenders Act 1994*;
 - (o) person who —
 - (i) is an officer or employee of an agency as defined in section 3(1) of the *Public Sector Management Act 1994*; or
 - (ii) provides services to such an agency under a contract for services; or
 - (iii) is a contract worker as defined in section 3 of the *Court Security and Custodial Services Act 1999* or section 15A of the *Prisons Act 1981*;
- being a person prescribed or of a class prescribed by regulations.²

1. See Proposals 1 and 2.

2. *Juries Act 1957* (WA) sch 2.

UNDERLYING RATIONALE AND THE COMMISSION'S APPROACH

The above list dealing with occupational ineligibility is confined to persons who are or have been engaged in occupations that are closely connected to law enforcement, the administration of justice (in particular criminal justice) and the legislative arm of government. Similar lists of exempt occupations exist in all Australian jurisdictions.³ The primary rationale underlying these exemptions is to protect the accused against the potential of a jury chosen or influenced by the state (which prosecutes offences). A jury's independence from government is not only crucial to commanding public confidence in the criminal justice system,⁴ it is also a requirement of fair trial recognised by international law.⁵ Another rationale for the exclusion of certain occupations from jury service is to preserve the jury's status as a lay tribunal. Both of these rationales are reflected in the Commission's Guiding Principle 1 which provides that the status of the jury as 'an independent, impartial and competent lay tribunal' must be protected.⁶

The Commission has examined each of the above occupational categories having regard to the rationales behind occupational ineligibility for jury service and to the guiding principles set out in Chapter One. In line with Principle 3, the Commission favours an approach to reform that broadens participation in jury service and limits ineligibility to those whose presence might compromise, or be seen to compromise, a jury's status as an independent, impartial and competent lay tribunal. In this regard it is useful to refer to the recent report of the New South Wales Law Reform Commission (NSWLRC), which concluded—in cognisance of the

above rationales—that occupational ineligibility be confined to officers or employees who 'have an integral and substantially current connection' with:

- 'the administration of justice, most particularly criminal justice'; or
- 'the formulation of policy affecting [the administration of justice] and to those who perform special or personal duties to the state'.⁷

The Commission agrees with this conclusion. The discussion below applies this approach to the current categories of occupational ineligibility for jury service in Western Australia, taking special account of additional rationales for exclusion that are specific to a particular occupation. However, before turning to each occupation, it is important to discuss the permanence of occupational ineligibility in Western Australia and the system of 'total eligibility' currently operating in England.

Permanence of ineligibility

As will be apparent, Part I of the Second Schedule sets up a dichotomous system of ineligibility for jury service. Those in the first section of the list (eg, judges, magistrates and lawyers) are considered permanently ineligible for jury service, while those in the second section (eg, police officers, court staff, departmental staff and MPs) are ineligible while they hold that position and for five years thereafter. Some Australian jurisdictions do not make this distinction: in the Australian Capital Territory and South Australia occupational ineligibility exists only while the person holds office.⁸ Once that person has left office he or she becomes liable and eligible for service as a juror. In the Northern Territory and Tasmania, occupational ineligibility extends for a period of 10 years beyond the termination of commission for judicial officers (and for police officers in Tasmania).⁹ The Victorian legislation applies the 10-year ineligibility rule to all listed occupations apart from the Electoral Commissioner, the Ombudsman and employees of legal practitioners.¹⁰

New South Wales, Queensland and Western Australia are the only jurisdictions to feature a system of permanent ineligibility for jury service on the basis of a current or former occupation. Queensland permanently excludes judicial officers and police officers from liability for jury service. In New South Wales the exclusion extends further to encompass coroners, public prosecutors and public defenders. In Western Australia judicial officers, registrars, members of the Industrial Relations

3. *Juries Act 2003* (Tas) sch 2; See *Juries Act 2000* (Vic) sch 2; *Jury Act 1995* (Qld) s 4(3); *Jury Act 1977* (NSW) sch 2; *Jury Act 1967* (ACT) sch 2; *Juries Act 1927* (SA); *Juries Act* (NT) sch 7. It is noted that Western Australia has one of the most defined lists of ineligible occupations which, with the exception of clause 2(o), confines ineligibility to those who hold particular positions.

4. See NSWLRC, *Jury Selection*, Report No 117 (2007) 62; NZLC, *Juries in Criminal Trials: Part One*, Preliminary Paper No 32 (1998) 19; LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 16.

5. See 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'. In *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, a majority of the High Court held that ratification of an international convention gave rise to a 'legitimate expectation' that government would act in accordance with its terms.

6. See above Chapter One, 'Guiding principles for reform of the juror selection process'. Indeed the notion of an independent and impartial lay tribunal is what underpinned the insertion of the schedule in 1984 following the Commission's 1980 report on exemption from jury service: LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 16.

7. NSWLRC, *Jury Selection*, Report No 117 (2007) 62.

8. *Jury Act 1967* (ACT) sch 2; *Juries Act 1927* (SA) sch 3.

9. *Juries Act 2003* (Tas) sch 2(2) & (5); *Juries Act* (NT) sch 7.

10. *Juries Act 2000* (Vic) sch 2(1).

Commission, the Ombudsman, the Corruption and Crime Commissioner¹¹ and admitted lawyers are permanently ineligible for jury service; however, police officers are only ineligible while employed as a police officer and for five years after termination of employment. Having regard to the primary underlying rationale for occupational ineligibility for jury service—that jurors be, and be seen to be, independent of government and of the administration of justice—the Commission considers there is no ground for permanent occupational ineligibility. The Commission draws support for this view from the fact that only three of the nine Australian jurisdictions (including the Commonwealth) feature permanent ineligibility. It also notes that the most recently enacted ‘jury service’ legislation¹² and the most recent review of legislation¹³ in this area have rejected the concept of permanent ineligibility.

PROPOSAL 12

Permanence of occupational eligibility

That no occupation or office should render a person permanently ineligible for jury service.

Period of ineligibility

In order to preserve public confidence in the impartiality of the criminal justice system and to ensure that the independence of the jury is not compromised, the Commission considers that some occupations should be ineligible for jury duty for a period of five years following termination of the potential juror’s employment in that occupation. The Commission examines each relevant occupation in some detail below and provides justification for extended exclusion from jury service, but for present purposes it is useful to note that the Commission considers that the following occupations fall into this category:

- judges, masters and magistrates (including acting judges or magistrates, auxiliary judges and commissioners of courts);
- the State Coroner;
- the Commissioner of Police and police officers;
- members of Parliament;
- the Commissioner and Parliamentary Inspector of the Corruption and Crime Commission;

11. And the Parliamentary Inspector of the Corruption and Crime Commission.

12. *Juries Act 2003* (Tas); *Juries Act 2000* (Vic).

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

- officers, employees and contracted service providers of the Corruption and Crime Commission and of the Parliamentary Inspector of the Corruption and Crime Commission who are involved in the detection and investigation of crime, corruption and misconduct or the prosecution of charges;
- the Sheriff of Western Australia and sheriff’s officers;
- members of the Mentally Impaired Accused Review Board, the Prisoners Review Board and the Supervised Release Review Board; and
- officers, employees and contracted service providers of the Department of the Attorney General and the Department for Corrective Services whose work is integrally connected with the administration of criminal justice.¹⁴

THE ENGLISH SYSTEM: TOTAL OCCUPATIONAL ELIGIBILITY

In 2004 amendments were made to the *Juries Act 1974* (Eng),¹⁵ which made all occupations that were previously excluded or exempted from jury duty eligible. No Australian jurisdiction has yet followed this lead.¹⁶ Although the English approach was discussed by the NSWLRC, it was not considered appropriate in relation to any justice-related occupational category and was rejected. Nonetheless, the Commission considers that the reasons behind the English amendments should be examined to determine whether such an approach is appropriate or required in the Western Australian context.

The English amendments followed the Auld Review of the English criminal justice system in 2001. One of the concerns expressed by Auld was that professionals were too often able to avoid jury service on the basis of work commitments.¹⁷ To overcome this Auld recommended that existing statutory excuses as of right (which applied to health professionals and others) be removed and that those for whom jury service was costly or burdensome could apply to be excused or defer their service.¹⁸ Auld also made the quite radical recommendation that all statutory occupational exclusions—including those

14. The Commission seeks submissions on whether registrars and legal practitioners should also be excluded for a period of five years beyond employment in those occupations.

15. *Criminal Justice Act 2003* (Eng) sch 33 amended the *Juries Act 1974* (Eng). The amended Act commenced on 5 April 2004.

16. Other United Kingdom jurisdictions of Scotland and Northern Ireland are currently enquiring into whether they will follow the English approach.

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

18. *Ibid.*

for police, judges and lawyers—be abolished.¹⁹ Auld supported his recommendation by reference to a similar practice adopted by several US states, where it appears that jury service by police, lawyers and judges is a routine occurrence.²⁰

The Commission's view

While the Commission agrees that professional commitments are not sufficient excuse for avoiding jury service and that there is no reason to retain 'as of right' statutory excuses,²¹ it is important to point out that there are good reasons for the exclusion of justice-related occupations. As the Commission notes above and in Chapter One, the integrity of the jury system depends upon its independence from government and impartiality and it is this that inspires public confidence in the criminal justice system. While it is true that some US states have abolished occupation-based exclusions, these jurisdictions also have established and rigorous jury vetting practices to ensure that juries are as impartial and independent as possible.²² Such practices exist neither here nor in England.²³

The failure of the Auld review (and the subsequent Criminal Justice White Paper)²⁴ to properly appreciate the importance of the rationales underlying justice-related occupational exclusions has left the jury system in England vulnerable to criticism that it is not properly independent or impartial. A number of appeals have been advanced on the basis of apparent bias in cases where police officers and prosecutors have served on juries²⁵ and several have succeeded.²⁶ Practical difficulties have

also emerged, with some barristers called for jury service being continuously rejected because they know the judge or barristers in the case.²⁷ The Commission observes that if this is the case in England where there is a relatively large legal profession, then it will be enormously difficult in Western Australia to find cases where potential judge-jurors and lawyer-jurors are not at all known to those involved in the case.

These issues and other concerns will be explored further below in relation to each of the relevant occupations. However, for now it is important to make clear that the Commission does not consider total occupational eligibility for jury service to be appropriate to the conditions in Western Australia. It is the Commission's strongly held view that, even without the attendant practical difficulties, the underlying rationale of juror independence from the justice system and the status of the jury as an impartial lay tribunal preclude adoption of the English approach in this jurisdiction. The Commission notes that various English judges and commentators have expressed the view that the fair trial of the accused is potentially at risk where judicial officers, police officers and lawyers can sit on juries.²⁸ More importantly, the English House of Lords has found that the potential of bias in some cases where police officers and prosecutors have served on juries is such that the jury's verdict must be considered unsafe and the conviction quashed.²⁹

In addition, the Commission considers that the English approach is not *required* in Western Australia. The primary reason advanced by Parliament for the English amendments was that potential jurors were being excused at such a rate that juries were considered to be 'dominated by housewives and the unemployed' and no longer

19. Ibid 149. Auld was, however, somewhat hesitant in recommending that judges be eligible for jury service. See discussion below under 'Judicial officers'.

20. Ibid 141.

21. The Commission proposes the abolition of all excuses as of right (including occupational excuses) in Chapter Six.

22. See above Chapter Two, 'Jury Vetting: The alternative challenge for cause'. The voir dire jury selection process in the United States allows jurors to be cross-examined and questioned extensively to establish their background and potential biases. Jury questioning is lengthy (and therefore costly) and can be very intrusive. Lawyers are generally advised by specialist jury selection teams about which jurors should be challenged.

23. For the extent of jury vetting in Western Australia, see discussion above in Chapter Two.

24. The Home Office, *Criminal Justice White Paper: Proposals on jury exemptions and excusals* (2002) only looked at the cost impact to professions that were previously excluded from jury duty; it did not consider other practical impacts resulting from the reforms, such as the potential for apparent bias with police-jurors.

25. See *R v Khan* [2008] EWCA Crim 531, which constituted six conjoined appeals raising issues of apparent juror bias on account of a juror's occupation.

26. See, for example, *R v Pintori* [2007] EWCA Crim 1700 where an appeal against conviction was upheld on the basis that one of the jurors worked as a civilian employee of the police and was acquainted with the police giving evidence. See also *R v I* [2007]

ECWA Crim 2999 where an appeal was allowed on the basis that a police officer-juror knew each of the four officers giving evidence at the trial. The court found that the judge should have excluded the police officer-juror once this became known. See also *R v Abdroikov*; *R v Green*, *R v Williamson* [2007] UKHL 37 where appeals against convictions of two accused were upheld by a majority of the House of Lords because of the apparent bias found in the presence of a police officer and a crown prosecutor on their respective juries.

27. 'Barrister told to turn up for jury despite rejections', *The Independent* (17 June 2004); 'Judge and jury', *The Lawyer* (23 August 2004).

28. See, for example, the comments of Judge George Bathurst-Norman who dismissed a Queen's Counsel from jury service because of his specialist knowledge of trial procedure. He added 'where do you draw the line? It deeply troubles me. ... At the end of the day I have to ensure a fair trial. I just don't know how this legislation is going to work intelligently if judges are to sit on juries': 'Barrister told to turn up for jury despite rejections', *The Independent* (17 June 2004). See also 'Case comment: Police officers and CPS lawyers as jurors' (2007) 9(2) *Archbold News* 2; Lord Bingham and Baroness Hale's comments in the House of Lords appeal in *R v Abdroikov*, *R v Green*, *R v Williamson* [2007] UKHL 37.

29. *R v Abdroikov*, *R v Green*, *R v Williamson* [2007] UKHL 37.

representative of the community.³⁰ Although a similar criticism has been made of Western Australian juries in the popular press,³¹ an analysis of data maintained by the Sheriff's Office reveals that this criticism cannot be sustained. Of the 1,985 people who responded to the juror survey in 2008–2009 only 2% were Centrelink recipients and only 3% listed their employment status as 'home duties'.³² A further 25% of respondents were employed in the public sector with 3% self-funded retirees and 2% students.³³ The majority (57%) of respondents were employed in the private sector³⁴ representing an extremely diverse occupational cross-section of the community including professionals,³⁵ managers,³⁶ supervisors and administrators, tradespersons,³⁷ technicians,³⁸ salespeople and apprentices.³⁹

It is also worth noting that, unlike other Australian jurisdictions, employers in Western Australia are reimbursed for any loss of income incurred by an employee performing jury duty. There is no limit to the amount an employer (or self-employed juror) can claim, so long as the loss can be substantiated.⁴⁰ This means that jurors or their employers, including professionals, are never out of pocket; as a consequence, financial hardship is rarely considered to be a satisfactory excuse for avoiding jury service.

Currently less than 1% of people summonsed for jury service in Perth are excused on the basis of occupational ineligibility, while 18% are excused as of right and 28% for time-specific excuses (such as work or study pressures

and booked holidays).⁴¹ By removing the excuse as of right for health professionals, clergy, people with care of dependants and emergency service workers, by reducing the categories of occupational ineligibility, and by introducing a system of deferral of jury service,⁴² the Commission expects that the number of excusals will dramatically decrease and representation of the community will correspondingly increase. Importantly, these improvements can be achieved without implementing total occupational eligibility, which will unnecessarily prejudice an accused's right to a fair and impartial trial before a lay jury that is independent of the state.⁴³

30. 'Jury Service: Should the government turn the clock back?', *The Times* (24 October 2007).

31. 'DPP Backs Overhaul of Jury Selection System', *The West Australian* (24 March 2009).

32. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009).

33. Four per cent of respondents responded 'other' in relation to their employment status and 3% provided no response: *ibid.*

34. Including those self-employed.

35. For example, architects, engineers, scientists, accountants, geologists, news editors, conveyancers, environmental planners, teachers and librarians. Some health professionals also served as jurors including radiographers, veterinary nurses, nursing assistants, phlebotomists, pharmacy assistants, occupational therapists and psychologists.

36. Including a chief executive officer, an executive officer and a managing director.

37. For example, carpenters, plumbers, mechanics, electricians, drivers, welders, cabinet-makers, drilling contractors and boilermakers. Food production trades were also well represented including bakers, chefs, butchers and kitchen hands.

38. For example, sterilising technicians, laboratory technicians, geotechnicians, IT and software engineers, surveyors, draftspersons and graphic designers.

39. Sheriff's Office (WA), *Juror Reimbursement Claims Occupation Breakdown: January–March 2009* (2009).

40. For discussion of juror allowances and reimbursement of loss of income, see below Chapter Seven.

41. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).

It is worth noting that almost 20% of jurors summonsed for Perth were not qualified for jury service (because of criminal convictions or inability to understand English) or did not receive their summons.

42. See discussion of abolition of Part II of the Second Schedule to the *Juries Act 1957* (WA) and the introduction of a system enabling deferral of jury service in Chapter Six below.

43. The Commission also notes the significant savings to the justice system by circumventing the unnecessarily high level of excusals that must be assessed should a total eligibility regime be introduced.

Categories of occupational ineligibility

JUDICIAL OFFICERS

Judges and magistrates

Judges and magistrates in all Australian jurisdictions are ineligible for jury service while holding office.¹ In Western Australia, New South Wales and Queensland a person who has been a judge or magistrate is permanently ineligible for jury service, while in the Northern Territory, Tasmania and Victoria a former judge or magistrate becomes eligible for jury service 10 years after his or her last judicial appointment.

There are many arguments justifying the exclusion of judges and magistrates from jury service. The most often cited argument for excluding judicial officers is that they have special knowledge of the conduct of trials and the administration of justice (in particular criminal justice) in the courts. It is said that this close connection with court practice may allow judicial officers to ‘deduce from the lack of reference to a defendant’s good character, that he has previous criminal convictions’.² While this may indeed be able to be deduced by any juror with knowledge of the system, judicial officers (and criminal trial lawyers) are unusually well equipped to identify when certain evidence usually admitted in criminal trials has been withheld from the jury and this may lead to speculation as to why.³ Other concerns are that judge-jurors may ‘unduly influence their fellow jurors’⁴ or be unable to divorce themselves from their judicial role, such that if they disagree with the trial judge’s summing up they may be tempted (whether consciously or unconsciously) to correct it in the jury room.⁵ Such

possibility has been openly accepted by the Lord Chief Justice of England and Wales where, as discussed above, judges are currently eligible for jury service. In his guidance to judicial officers called for jury service, he says:

Judges who serve as jurors should be mindful of the fact that jurors play a different role in the trial from the judge ... Judges should avoid the temptation to correct guidance they perceive to be inaccurate as this is outside the scope of their role as jurors. They should also have in mind the fact that they have not been party to all the legal argument and may not therefore have all the information available as to the correct legal position.⁶

As noted earlier, the Commission agrees with the proposition advanced by the New South Wales Law Reform Commission (NSWLRC) that those who have an ‘integral and substantially current connection with the administration of justice, most particularly criminal justice’,⁷ should be excluded from jury service. Judges and magistrates certainly fall within this definition and in the Commission’s opinion should continue to be ineligible for jury service.⁸ In coming to this conclusion the Commission notes that to enable judges and magistrates to serve on juries would compromise the nature of the jury as being comprised of lay people, which is recognised as a ‘fundamental characteristic’⁹ of juries and is highlighted by the Commission’s Guiding Principle 1.

1. *Juries Act 2003* (Tas) sch 2; *Juries Act 2000* (Vic) sch 2; *Jury Act 1995* (Qld) s 4(3); *Jury Act 1977* (NSW) sch 2; *Jury Act 1967* (ACT) sch 2; *Juries Act 1957* (WA) sch 2; *Juries Act 1927* (SA); *Juries Act* (NT) sch 7.
2. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 146. The same argument applies to criminal trial lawyers and court staff such as judges’ associates.
3. In England a Queen’s Counsel was discharged from a jury for precisely this reason. The judge warned that to allow someone on the jury with such specialist knowledge might prejudice the accused’s right to a fair trial. See ‘Barrister Told to Turn Up for Jury Despite Rejections’, *The Independent* (17 June 2004).
4. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 146; NSWLRC, *Jury Selection*, Report No 117 (2007) 64. Auld also noted that depending on the judge-juror’s seniority or personality he or she may inhibit the trial judge or advocates in their conduct of the case: 148.
5. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 50.

6. Lord Chief Justice Woolf, *Observations for Judges on Being Dalled for Jury Service* (15 June 2004) <http://www.judiciary.gov.uk/publications_media/general/juryservice.htm>.
7. NSWLRC, *Jury Selection*, Report No 117 (2007) 62. See above ‘Underlying rationale and the Commission’s approach’.
8. Although judicial officers of the Family Court have very limited criminal jurisdiction, the Commission considers they should remain ineligible for jury service. Such officers have sufficient knowledge of trial and court procedure to speculate as to evidence and because of the small size of the judiciary in Western Australia they are likely to be known to trial judges and lawyers. Further, many family court specialists (including some judicial officers) have jointly practised in the criminal courts during their legal careers. As with other judicial officers and lawyers, permitting Family Court judges to serve on juries would compromise the lay nature of the jury.
9. *Report of the Departmental Committee on Jury Service* (Morris Committee), Cmnd 2627 (1965) 34.

The Commission also notes the significant practical difficulties that attend making judicial officers eligible for jury service. To avoid the possibility of the jury's independence being compromised, in the few jurisdictions where judicial officers are eligible for jury service they must seek to be excused where they have knowledge of the case or where they know or are known to the parties or their lawyers.¹⁰ This has proven to be a problem in England, where judges who are not excused completely from jury service (usually after several attempts)¹¹ are referred to a court where they are less likely to be known.¹² But in Western Australia, where the judiciary and legal profession is significantly smaller, finding a trial where the judge-juror is unknown to the trial judge or the barristers and solicitors involved in the trial would be very slim. This would not only waste the trial court's time, but also that of the judge-juror who would be unable to perform his or her judicial duties while waiting to be selected on a trial, which in all likelihood he or she would be excused from. It is also possible that a judicial officer may be called for jury service on a particular trial without realising that he or she had dealt with the accused in the past. Discovery of such dealing may leave the verdict open to appeal for being unsafe. To suggest that judicial officers should nonetheless be eligible for jury service in the face of these realities would be to condone unnecessary interruption to the administration of justice in this state.

However, as discussed above, it is the Commission's view that no occupation should render a person permanently ineligible for jury service and this includes judicial officers. The Commission therefore proposes that judges and magistrates remain ineligible for jury service while holding office and for a period of five years after the termination of their last commission as a judicial officer. It is considered that a period of five years is sufficient to enable judges and magistrates to be sufficiently removed from their direct role in the administration of justice (in particular, criminal justice) such that their presence on a jury will not threaten public confidence in the impartiality of the criminal justice system. In making this proposal the Commission notes that the compulsory

retirement age for judges in Western Australia is currently 70 years. The Commission's proposed increase of the age limit for liability for jury service to 75 years would mean that only judges who retired before the compulsory retirement age would have the opportunity to serve as a juror following the five-year exclusion period if selected.¹³ Although not currently mentioned in the *Juries Act 1957* (WA),¹⁴ the Commission is of the opinion that the same ineligibility should extend to acting and auxiliary judges and commissioners¹⁵ of the Supreme Court, District Court and Family Court of Western Australia and to acting magistrates (including acting magistrates of the Children's Court of Western Australia). The Commission notes that judges and magistrates of federal courts who are resident in Western Australia are exempted from jury service by virtue of the *Jury Exemption Act 1965* (Cth) and *Jury Exemption Regulations 1987* (Cth).¹⁶

PROPOSAL 13

Ineligibility for jury service – judicial officers

1. That judges and magistrates should remain ineligible for jury service while holding office and for a period of five years from the date of the termination of their last commission as a judicial officer.
2. That this same ineligibility should extend to those holding acting or auxiliary judicial commissions in any of the state's courts and to commissioners of the Supreme Court and District Court.

Masters

Under the *Juries Act* a 'master ... of the Supreme Court, Family Court or District Court' is permanently ineligible for jury service. There is currently only one master of the Supreme Court of Western Australia and there is no legislative provision to appoint masters in other Western Australian courts. Although masters do not engage in any work in the criminal field, they are judicial officers who are generally well known to counsel and other judicial officers. Like judges, they also have a sufficiently high degree of knowledge of trial and court procedure

10. Lord Chief Justice Woolf, *Observations for Judges on Being Called for Jury Service* (15 June 2004) <http://www.judiciary.gov.uk/publications_media/general/jury-service.htm>; NSWLRC, *Jury Selection*, Report No 117 (2007) 64.

11. See 'Barrister Told to Turn Up for Jury Despite Rejections', *The Independent* (17 June 2004).

12. Her Majesty's Courts Service, *Guidance for Summoning Officers when Considering Deferral and Excusal Applications* (2004). Paragraph 18 deals specifically with applications made by members of the judiciary. It states that 'members of the judiciary or those involved in the administration of justice who apply for excusal or deferral on grounds that they may be known to a party or parties involved in the trial should normally be deferred or moved to an alternative court where the grounds for exclusion may not exist. If this is not possible, then they should be excused.'

13. It is noted that the compulsory retirement age for magistrates is 65 years under the *Magistrates Court Act 2004* (WA) sch 1, cl 11.

14. This is likely not mentioned because such people would be necessarily caught by the permanent ineligibility of all lawyers under sch 2, pt I, cl 1(f). Under the Commission's proposals, however, this ineligibility will be confined to practising lawyers and will not extend beyond the term in actual practice.

15. Appointed under the *Supreme Court Act 1934* (WA) s 49 or *District Court of Western Australia Act 1949* (WA) s 24.

16. However, it appears that the Commonwealth exemption only applies whilst the person holds office as a judge or magistrate.

to speculate as to why certain evidence may have been omitted in a criminal trial. Given the high likelihood that a master would be excused from jury service if called¹⁷ and the fact that there is currently only one master (and rarely more than two), the Commission does not see any benefit in making masters eligible for jury service. Further, the Commission is of the opinion that, because of a master's status within the judicial hierarchy and to preserve the lay nature of a jury, masters should, like judges and magistrates, be ineligible for a period of five years following the date of termination of their last commission as a master. The Commission considers that five years is adequate time to enable a master to be sufficiently removed from the administration of justice such that his or her presence on a jury will not threaten public confidence in the impartiality of the criminal justice system.

PROPOSAL 14

Ineligibility for jury service – masters

That masters of the Supreme Court and those holding acting commissions as masters of the Supreme Court should remain ineligible for jury service while holding office and for a period of five years from the date of the termination of their last commission as a master.

State Coroner

The state coroner does not hold office as a judge or magistrate¹⁸ and is therefore not covered by the above proposal, though the deputy state coroner (who is a magistrate) would remain ineligible. Currently the state coroner would be ineligible to serve on the basis that he has been admitted as a lawyer; however, the Commission proposes below that this exclusion be confined to practising lawyers. The Commission has therefore considered the position of the state coroner separately.

The coroner's functions are to investigate 'reportable'¹⁹ deaths and make findings as to the identity of the

17. Either because of knowledge of the trial judge or lawyers, or because the position is so integral to the proper daily functioning of the Supreme Court that he or she would be excused for undue hardship or substantial inconvenience to the public under the Third Schedule.
18. The state coroner is, however, entitled to the same salary and is entitled to hold office on the same terms as the Chief Magistrate of the Magistrates Court: *Coroners Act 1996* (WA) s 6.
19. Not all deaths are required to be reported to the coroner. Deaths that are reportable include deaths that are 'unexpected, unnatural or violent' or which appear to result from injury; deaths during anaesthetic or as a result of anaesthetic; deaths in custody or care; deaths that involve members of the police; and cases where the identity of the deceased is unknown.

deceased; how death occurred; the cause of death; and the particulars required to register the death.²⁰ A coroner may comment on any matter connected with the death including matters relating to public safety and the administration of justice.²¹ Where the death is in care (eg, a death of an involuntary mental patient or of a ward of the state) or custody (eg, in prison or police custody) a coroner must comment on the 'quality of the supervision, treatment and care of the person'.²²

While a coroner will infrequently deal with open homicide cases,²³ some deaths under coronial investigation will involve or uncover evidence to support a criminal conviction; for example, where a person has been killed in a high-speed crash previously thought to be accidental or where a baby has died in circumstances unknown. Although coroners can no longer commit to trial and are precluded from framing a comment or finding in a way that suggests that a person is guilty of an offence, they can refer a matter to prosecuting authorities where they believe that an offence has been committed in connection with the death which the coroner has investigated.²⁴

A coroner may also be called upon to investigate certain cases that are clearly homicide but where the person responsible for the death cannot be pursued in the criminal courts. For example, in the case of a murder-suicide, where the person is unfit to stand trial or where the person has died prior to or during criminal proceedings.²⁵ Coroners may also hold inquests in cases where, for example, a police officer has killed a person but the relevant police investigation has found that the officer's actions were in self-defence.²⁶ In such a case the coroner will have to make a coronial determination on the facts and to do so he or she must have sufficient knowledge of criminal law and defences.

In all the circumstances, the Commission is of the opinion that the state coroner is close enough to the administration of criminal justice to warrant his or her exclusion from jury service on the same terms as a judicial officer.

20. *Coroners Act 1996* (WA) s 25 (1).

21. *Coroners Act 1996* (WA) s 25 (2).

22. *Coroners Act 1996* (WA) s 25 (3).

23. Sometimes an inquest will be held at the request of police or prosecutors in a 'cold case' where investigations have unearthed insufficient evidence to charge or identify a suspect with a known homicide. In these cases an inquest may be undertaken to uncover systemic problems with the administration of a particular investigation, to identify a deceased or to confirm a suspected death by homicide where a body has not been found.

24. *Coroners Act 1996* (WA) s 27(5).

25. In such cases, if sufficient evidence is uncovered, the coroner will bring down a verdict of unlawful homicide.

26. See, for example, the coronial findings in relation to the investigation into the death of Daniel Paul Rolph (7 July 2008).

PROPOSAL 15

Ineligibility for jury service – state coroner

That the state coroner should be ineligible for jury service while holding office and for a period of five years from the date of the termination of his or her commission as state coroner.

President or Commissioner of the Industrial Relations Commission

The *Juries Act* excludes the president or a commissioner of the Industrial Relations Commission established under the *Industrial Relations Act 1979* (WA). The Industrial Relations Commission has jurisdiction to deal with any matter affecting, relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein including:

- wages, salaries, allowances, remuneration;
- hours of employment, leave of absence, sex, age, qualification, or status of employees and conditions of employment;
- employment of children or young persons, or of any person or class of persons, in any industry;
- dismissal or refusal to employ any person or class of persons;
- relationship between employers and employees; and
- privileges rights and duties of any organisation or association or any officer or member thereof in or in respect of any industry.²⁷

Offences against the *Industrial Relations Act* are determined by industrial magistrates. These magistrates are drawn from the general magisterial ranks and are, therefore, ineligible for jury service as judicial officers. Appeals from decisions of industrial magistrates lie to the full bench of the Industrial Relations Commission²⁸ with further appeal to the Western Australian Industrial Relations Court, which is constituted by three Supreme Court judges. The Industrial Relations Commission, therefore, has very limited criminal or prosecution jurisdiction.

Given the exclusive nature of the industrial relations jurisdiction and its very limited role in the administration of criminal justice, the Commission does not believe that the same arguments that apply to render judges and

magistrates ineligible for jury service necessarily extend to the president and commissioners of the Industrial Relations Commission. In particular, applying Guiding Principle 3 the Commission does not immediately see how the independence of a jury might be comprised by the presence of an industrial relations commissioner among its number. However, the Commission concedes that there may be functions in this unique jurisdiction that support the ineligibility of its president and commissioners of which it is not aware. For this reason the Commission seeks submissions about whether or not the president and commissioners of the Industrial Relations Commission should remain ineligible for jury service.

INVITATION TO SUBMIT E

Ineligibility for jury service – industrial relations commissioners

Taking into account the desire for broad participation in jury service and the proposition that occupational ineligibility should be confined to those occupations that have an integral connection to the administration of justice, most particularly criminal justice, should the president and commissioners of the Industrial Relations Commission remain ineligible for jury service while holding office? If so, why?

Justices of the Peace

The *Juries Act* provides that justices of the peace are excluded from jury service while they hold that commission and for a period of five years after termination of the commission.²⁹ Justices of the peace are volunteer officers appointed by the Governor who authorises them to carry out a wide range of official administrative and judicial duties in the community. They are not required to have any legal training but must undertake a 10-week justice of the peace training course. There are currently approximately 3,300 justices of the peace in Western Australia many of whom perform solely administrative duties such as witnessing wills, statutory declarations and other documents for community members. Some justices of the peace are also called upon to perform criminal justice-related administrative duties such as signing search warrants, approving sureties to admit people to bail, and witnessing complaints and summonses. Whilst justices of the peace do have authority to preside in the Magistrates Court,³⁰ the Commission is advised that less

27. *Industrial Relations Act 1979* (WA) s 7.

28. *Industrial Relations Act 1979* (WA) s 84(2). The full bench is constituted by at least two commissioners and the President: s 15(1).

29. *Juries Act 1957* (WA) sch 2, pt I, cl 2(d).

30. Generally justices of the peace will preside over very minor matters such as bail applications (where police bail cannot be given), restraining order application and minor traffic offences.

than 10% of justices of the peace perform court duties.³¹ The Commission understands that approximately 100 justices of the peace are called upon to perform court duties in the metropolitan area,³² while regional areas may rely on justices of the peace for these duties more regularly.³³

Only Western Australia and South Australia expressly exclude justices of the peace from jury service and the South Australian provision is confined to ‘justices of the peace who perform court duties’.³⁴ On balance, the Commission does not believe that the presence of a justice of the peace on a jury would compromise the independence of the jury or threaten public confidence in the impartiality of the criminal justice system. However, applying the proposition that occupational ineligibility should be confined to those who have an ‘integral and substantially current connection with the administration of justice, most particularly criminal justice’, the Commission considers that there is a reasonable case for excluding from jury service those justices of the peace who have exercised the jurisdiction of the Magistrates Court at any time within a period of five years before being summoned to serve as a juror. Of course, should any current or former justice of the peace selected for jury service in a particular trial have knowledge of any party or witness through their work as a justice of the peace (or otherwise) they should, like any prospective juror, seek to be excused from service in that trial.

PROPOSAL 16

Ineligibility for jury service – justices of the peace

That the exclusion of justices of the peace from jury service be confined to justices of the peace who have exercised the jurisdiction of the Magistrates Court at any time within a period of five years before being summoned to serve as a juror.

Justices of the peace may also act as ‘visiting justices’ determining offences by prisoners against prison regulations.

31. Peter Scotchmer, Acting Manager, Justices of the Peace Branch, Department of the Attorney General, telephone consultation (May 2009).
32. Justices of the peace are used daily at the Central Law Courts in Perth to deal with violence restraining orders and there is a regular twice-weekly list dealing with minor traffic offences that is presided over by justices of the peace.
33. Under regulation 10 of the *Magistrates Court Regulations 2005* (WA), justices of the peace in country Magistrates Courts have broader jurisdiction than justices of the peace sitting in metropolitan Magistrates Courts.
34. *Juries Act 1927* (SA) sch 3, cl 2.

LAWYERS

All Australian jurisdictions exclude lawyers from jury service; however, they vary as to the length of time. Some jurisdictions exclude lawyers while in practice,³⁵ some extend the exclusion for a 10-year period beyond practice³⁶ and others render lawyers permanently ineligible for jury service.³⁷ Western Australia falls into the latter category: under the *Juries Act* an ‘Australian lawyer’ is permanently ineligible for jury service. The term Australian lawyer is defined under s 3 of the *Legal Profession Act 2008* (WA) as ‘a person who is admitted to the legal profession under this Act or a corresponding law’.³⁸

The traditional justification for excluding lawyers from jury service is that they ‘possess legal knowledge and experience that could possibly result in them exercising undue influence on other jurors, and even usurping the role of the judge’.³⁹ However, this argument is difficult to substantiate and has been rejected by some commentators.⁴⁰ For example, Auld argued that a lawyer’s status counts for nothing in the jury room because ‘people no longer defer to professionals or those holding particular office in the way they used to do’.⁴¹ He called in support the experience of the United States where lawyers are permitted to serve on juries in some state jurisdictions.⁴² It has also been argued that allowing lawyers to serve on juries may in fact assist other jurors to clarify issues.⁴³

35. *Juries Act 2003* (Tas) sch 2; *Jury Act 1995* (Qld) s 4; *Jury Act 1967* (ACT) sch 2; *Juries Act 1927* (SA) sch 3; *Juries Act* (NT) sch 7.
36. *Juries Act 2000* (Vic) sch 2.
37. *Jury Act 1977* (NSW) sch 2; *Juries Act 1957* (WA) sch 2. New South Wales expressly permanently excludes lawyers in particular positions, such as the prosecutors and ‘public defenders’. All other lawyers are excluded if they are ‘an Australian lawyer, whether or not an Australian legal practitioner’. This has the effect of excluding anyone who has ever been admitted to legal practice permanently, whether practising or not.
38. That is, admitted under the laws of another Australian jurisdiction.
39. NSWLRC, *Jury Selection*, Report No 117 (2007) 72. See also the comments of the UK Criminal Bar Association in Robins J, ‘Judge and jury’, *The Lawyer* (23 August 2004).
40. NSWLRC, *ibid* 74.
41. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 147.
42. *Ibid*. Though it should be noted that in the United States, where jurors are permitted to speak about their jury service, lawyers have suggested that they did get some deference because of their professional status and were required to advise fellow jurors on process. See eg, Adina G, ‘Lawyers Can Gain Unique Perspective by Serving Jury Duty’, *Long Island Business News* (4 November 2005); Nossiter A, ‘Sitting Judge Chosen for Jury Panel’, *The New York Times* (13 June 1996).
43. LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 20; NSWLRC, *Jury Selection*, Report No 117 (2007) 73.

Leaving aside the United States where there is greater scope for challenging jurors and an established culture of meticulous jury vetting,⁴⁴ it is worth examining the experiences of two jurisdictions that permit, or have sought to permit, lawyers to serve as jurors: England and Queensland. As discussed above, lawyers have been eligible to serve on English juries since 2004.⁴⁵ It is difficult to say how often lawyers have in fact been empanelled on English juries because Her Majesty's Court Service does not retain juror occupation data,⁴⁶ however, media reports suggest that there have been difficulties empanelling lawyer-jurors. Generally, this is because the lawyer is known to the advocates or trial judge,⁴⁷ but at least one lawyer has been dismissed by a judge because of 'specialist knowledge of legal matters that could be prejudicial' to the accused.⁴⁸ At the time of the amendments, the Chairman of the Criminal Case Review Commission in England warned that allowing lawyers to serve on juries would lead to 'challenges and appeals'.⁴⁹ Although the mere presence of a lawyer on a jury is unlikely to be enough to ground an appeal, appeals have succeeded where the potential for bias is apparent. Following a recent appeal against conviction where a lawyer from the Crown Prosecution Service was empanelled as foreman of a jury,⁵⁰ summoning officers have been instructed that prosecutors can only serve on a jury where the prosecution is brought by another authority.⁵¹

When it was passed in 1995, Queensland's *Jury Act* allowed lawyers to serve on juries. This amendment was made despite a recommendation by the Queensland Litigation Reform Commission that practising lawyers should remain ineligible for jury service.⁵² Six months

later an amending Bill was passed to restore the exclusion of lawyers from jury service.⁵³ Unfortunately, there is no evidence of difficulties or otherwise with lawyers being permitted to serve on juries in Queensland because the relevant provision had not come into effect by the time the amending Bill was introduced into Parliament. However, the decision to restore the exclusion was explained by the Queensland Government in the following way:

[T]he presence of practising lawyers on a jury may potentially, even unwittingly, have an undesirable effect on the outcome of a jury's deliberations. The possibility of having lawyers exert such an influence on their fellow jury members could produce a perception, if not an actual situation, in which jury verdicts are liable to be tainted. Further, persons who are admitted to practise as barristers or solicitors possess the status of officers of the court. This relationship places certain ethical and professional responsibilities on them. While it is not likely that jury service eligibility will lead to conflicts of interest arising out of the two roles, it has the potential to unnecessarily complicate the position of lawyers in respect of their professional relationship with the court system. The same situation does not apply as far as other professions are concerned.⁵⁴

The Commission notes the Queensland Government's argument that the professional relationship between lawyers and the courts may be compromised if practising lawyers are permitted to serve on juries.⁵⁵ However, it is important to remember that jurors serve as private persons and not as representatives of their professions. A more persuasive argument is that permitting practising lawyers to serve as jurors goes against the fundamentally lay nature of a jury. While the Commission is not convinced that a lawyer-juror would necessarily dominate a jury's deliberation, there is a real danger that fellow jurors may seek a lawyer-juror's guidance on legal issues rather than that of the judge.⁵⁶ Because juries are not required to give reasons and cannot speak publicly about their participation in a particular trial,⁵⁷ it is impossible to know whether a jury has been unduly influenced by an interpretation of the law provided by a lawyer-juror.

It is the Commission's opinion that, on balance, the risk of prejudice to an accused by allowing lawyers to serve as jurors is too high. Although it is noted that when the NSWLRC considered this question it recommended

Procedure Division (1993) 8.

44. It is worth noting here that reports state that even though the occupational exemption for lawyers in New York was abolished over a decade ago, very few lawyers have been chosen for jury service. Most are apparently challenged off 'because they don't want a third lawyer influencing the jury': Adina G, 'Lawyers Can Gain Unique Perspective by Serving Jury Duty', *Long Island Business News* (4 November 2005).

45. See above, 'The English System: Total occupational eligibility.'

46. Ian Norrish, Jury Summoning Officer, Her Majesty's Court Service (England and Wales), email (30 June 2009).

47. 'Barrister Told to Turn Up for Jury Despite Rejections', *The Independent* (17 June 2004).

48. 'No Escaping Jury Duty, Lawyers Told', *The Guardian* (17 June 2004).

49. Professor Graham Zellick, Chairman Criminal Cases Review Commission, quoted in 'Barrister Told to Turn Up for Jury Despite Rejections', *The Independent* (17 June 2004).

50. *R v Williamson* [2007] UKHL 37.

51. Her Majesty's Courts Service, *Guidance for Summoning Officers When Considering Deferral and Excusal Applications* (2004) [18]. In practice this is a rare occurrence and is generally limited to prosecutions brought by customs services. A prosecutor cannot be directly referred to a non-CPS prosecuted case because that would undermine the principle of random selection.

52. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland: Report of the Criminal*

Jury Amendment Bill 1996 (Qld) introduced on 16 May 1996. The *Jury Act 1995* (Qld) was assented to on 9 November 1995.

54. Queensland, *Parliamentary Debates*, Legislative Assembly, 16 May 1996, 1192 (Mr DE Beanland, Attorney General).

55. Under s 29 of the *Legal Profession Act 2008* (WA) lawyers in Western Australia become officers of the Supreme Court upon admission to practice.

56. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 53; Robins J, 'Judge and Jury', *The Lawyer* (23 August 2004).

57. *Juries Act 1957* (WA) s 56B.

that lawyers without any association to the criminal law should be permitted to serve as jurors,⁵⁸ the Commission is not persuaded that the risk of prejudice is any less with non-criminal lawyers. Indeed, the Commission believes that the risk of prejudice to an accused may well increase should a lawyer-juror give advice or guidance to fellow jurors on an area of law that is not within his or her specialty.

The Commission has argued above that permanent ineligibility of any occupation is unjustified and that it should be abolished.⁵⁹ However, even if permanent ineligibility is removed, the current wording of the exclusion for lawyers has the effect of rendering ineligible anyone who has ever been admitted to legal practice in any Australian jurisdiction, regardless of whether the lawyer is still in practice or left the profession immediately after admission. The Commission believes that the exclusion as it currently stands is unjustifiably wide. It is noted that these days many people qualify as lawyers for the purposes of pursuing other career paths, such as in business, finance or government: the Commission can see no reason in principle that such people should be excluded from jury service.⁶⁰ Having regard to the terminology of the *Legal Profession Act* the Commission believes that the exclusion should be confined to 'Australian legal practitioners';⁶¹ that is, those people holding current practising certificates. This would include practising government lawyers (who are not necessarily certificated practitioners) by virtue of the operation of s 36(3) of the *Legal Profession Act*.

PROPOSAL 17

Ineligibility for jury service – practising lawyers

That the exclusion of lawyers from jury service be confined to Australian legal practitioners, within the meaning of that term in the *Legal Profession Act 2008* (WA) s 5(a).

58. NSWLRC, *Jury Selection*, Report No 117 (2007) recommendations 14, 15 & 16.

59. Proposal 3.

60. The Commission recognises that an argument could be made for exclusion of others with some knowledge or experience of the law and court procedure, such as academics in law and related fields (eg, criminology), expert witnesses and employees of legal practitioners; however, the line must be drawn somewhere. It is noted that while law clerks were exempt from service in Western Australia's first *Jury Act 1898* (WA) s 8, the exemption was removed when the Act was modernised in 1957. Currently only the Australian Capital Territory and the Northern Territory exclude people who are not qualified as lawyers but who have a direct connection to legal practice and this is limited to law clerks, graduate clerks and, in the ACT, employees of legal practitioners.

61. *Legal Profession Act 2008* (WA) s 5(a).

The Commission has not reached a firm view about whether lawyers should be excluded from jury service for a period of time (notionally five years) after they cease to practise or whether they should be eligible for jury service immediately. The Commission seeks submissions on this issue. As noted earlier, the Commission believes that masters and registrars should be treated in the same way as legal practitioners in respect of the period of exclusion from jury service. This should be kept in mind when considering submissions on this issue.

INVITATION TO SUBMIT F

Length of lawyers' ineligibility for jury service

Should lawyers remain ineligible for jury service for a five-year period after they cease practising law? If so, why?

COURT OFFICERS

Registrars

Under the *Juries Act* a registrar of the Supreme Court, Family Court or District Court is permanently ineligible for jury service.⁶² Registrars are the official taxing officers of the court and are responsible for many aspects of the administration of civil matters through the court process. It was once the case that registrars had very little interaction with the administration of criminal justice. However, pressures on the justice system have caused more and more judicial and quasi-judicial functions in the criminal sphere to be delegated to registrars.

Section 124(5) of the *Criminal Procedure Act 2004* (WA) permits delegation of jurisdiction to a registrar of the Supreme Court or District Court 'to deal with applications and other matters that do not involve the final determination of a prosecution'. Under this delegation, Supreme Court registrars currently settle criminal appeal books and are involved in listing and case management of criminal appeals. District Court registrars are also involved in case management of criminal matters and may perform all criminal functions of a judge of the District Court that do not involve trial or sentencing (pre- and post-committal). The latter functions are currently performed under commission from the Governor⁶³ as a temporary measure while any legislative provisions

62. Registrars of the Magistrates Court are not excluded from jury service. This is probably because they are designated as administrative staff under s 26 of the *Magistrates Court Act 2004* (WA).

63. Two registrars, including the Principal Registrar have been appointed as Commissioners of the District Court of Western Australia for this purpose for a period of 18 months from 20 May 2008.

that may unintentionally inhibit the full delegation of powers under the *Criminal Procedure Act* are corrected. Once this is done the delegated criminal jurisdiction of all registrars in that court (and most likely also in the Supreme Court) will expand.⁶⁴

It is also worth noting that since October 2007 two Supreme Court registrars have been permanently commissioned as magistrates to constitute the Stirling Gardens Magistrates Court.⁶⁵ In this capacity these officers perform pre-committal functions on a weekly basis for indictable matters that attract the jurisdiction of the Supreme Court. Where matters are downgraded to the Magistrates Court jurisdiction or where there are unrelated summary charges, these officers will also sentence an accused. Because these officers hold permanent commissions as magistrates, they would be excluded under the Commission's proposals while in office and for a period of five years thereafter.

In view of the current criminal functions of registrars in the Supreme Court and District Court and the realistic potential for further delegation of criminal jurisdiction to these court officers under the *Criminal Procedure Act*, the Commission believes that registrars of these courts should be excluded from jury service while they hold office as a registrar. Because registrars are not involved in the trial or final determination of criminal matters (unless under separate commission as a judicial officer), the Commission does not believe it is necessary to extend the exclusion period beyond the period in which they hold office. However, the Commission does see the attraction in dealing with registrars in the same way as legal practitioners. The Commission will therefore base its final recommendation as to length of exclusion period on the submissions received in relation to Invitation to Submit B above.

PROPOSAL 18

Ineligibility for jury service – Supreme Court and District Court registrars

That registrars, and those holding acting commissions as registrars, in the Supreme Court or District Court should remain ineligible for jury service while holding office.

64. Michael Gething, Principal Registrar of the District Court, telephone consultation (14 July 2009); Keith Chapman, Principal Registrar of the Supreme Court, telephone consultation (14 July 2009).
65. Matters that attract the jurisdiction of the Supreme Court will be remanded by a magistrate in the general Magistrates Court to the Stirling Gardens Magistrate Court. Serious indictable matters where concurrent jurisdiction lies with the Supreme Court and District Court will also often be referred to the Stirling Gardens Magistrate Court for committal

The Commission does not see the same arguments applying to registrars of the Family Court who do not exercise any criminal jurisdiction. For this reason, the Commission proposes that the exclusion should not extend to Family Court registrars; however, should there be any reason that a registrar of that court not serve as a juror in a particular matter, they may seek to be excused or defer their jury service.

PROPOSAL 19

Eligibility for jury service – Family Court registrars

That Family Court registrars be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 1(b) of the *Juries Act 1957* (WA).

Judges' associates and ushers

The *Juries Act* currently excludes judges' associates and ushers of the Supreme Court, Family Court or District Court from jury service. The rationale behind this exclusion is that these officers, who are personal staff of the judge,⁶⁶ are so intimately involved in the criminal trial process as to call into question the independence or impartiality of the jury should they be permitted to serve. Judges' associates and ushers (or orderlies as they are sometimes known) have important roles in criminal trials. Associates act as the Clerk of Arraigns in a criminal trial and their functions include arraigning the accused, selecting the jury using a random ballot process, recording and handling exhibits, taking the jury's verdict and signing warrants.⁶⁷ Ushers' functions in a criminal trial include announcing the judge, calling witnesses, swearing jurors and witnesses, and keeping order in the court.

Western Australia is the only Australian jurisdiction that *expressly* excludes judges' personal staff from jury service. However judges' staff are rendered ineligible for jury service in all other jurisdictions (except Queensland) under wide general exclusions covering court staff or public sector employees engaged in the administration of justice.⁶⁸ Taking into account the standard of 'integral and substantially current connection with the administration of justice, most particularly criminal justice', the Commission considers that judges' associates

66. Appointed under the *Supreme Court Act 1935* (WA) s 155A.
67. Although there are many career associates, often an associate (especially in the Supreme Court) will be legally trained and will occupy that position for only one or two years following graduation from university.
68. See eg, *Juries Act 2003* (Tas) sch 2, cl 4; *Juries Act 2000* (Vic) sch 2, cl 1(f); *Jury Act 1977* (NSW) sch 2, cl 8; *Jury Act 1967* (ACT) sch 1, cl 16; *Juries Act 1927* (SA) sch 3(2); *Juries Act* (NT) sch 7.

and ushers have sufficient connection with the criminal justice system during the period of their employment to support their continuing ineligibility for jury service. Further, the Commission notes that many associates and ushers will be acquainted with counsel regularly appearing in criminal trials and such acquaintance may be seen, under Principle 3, to compromise the jury's status as an impartial and independent lay tribunal.

However, while the Commission sees merit in retaining the exclusion for judges' staff who are employed in the criminal trial jurisdictions of the Supreme Court or District Court, the Commission sees no reason to extend this exclusion to staff of the Family Court of Western Australia. Further, the Commission does not see any reason to maintain the exclusion beyond the period of employment. While the duties of judges' associates and ushers are important in the criminal trial context, they are largely administrative and would be unlikely to be seen to compromise the jury's independence outside the context of current employment. Should any former judge's associate or usher selected for jury service in a particular trial have knowledge of any party or witness as a consequence of their former employment (or otherwise) they should seek to be excused from service in that trial.

PROPOSAL 20

Ineligibility for jury service – judges' associates and ushers of the Supreme Court and District Court

That associates and ushers of judges of the Supreme Court or District Court should remain ineligible for jury service during their term of employment.

PROPOSAL 21

Eligibility for jury service – judges' associates and ushers of the Family Court

That judges' associates and ushers of the Family Court be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(g) of the *Juries Act 1957* (WA).

Sheriff and sheriff's officers

The *Juries Act* excludes the Sheriff of Western Australia or any officer of the sheriff from serving as a juror. The exclusion extends beyond the period of employment to five years after termination of employment. The sheriff and his or her deputies are officers of the Supreme Court and contemporaneously the District Court and

Magistrates Court.⁶⁹ Under the *Supreme Court Act 1935* (WA), the sheriff is 'charged with the service and execution of all writs, applications, summonses, rules, orders, warrants, [jury] precepts, process and commands of the court'.⁷⁰ The sheriff is also required, under the *Supreme Court Act*, to take, receive and detain all persons who are committed to his or her custody by the court and to discharge all such persons when directed by the court.⁷¹ The sheriff is also charged with recovery of debts and execution of warrants under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA). Importantly, in the current context, the sheriff is the designated summoning officer under the *Juries Act* and all jury management functions fall under the auspices of the Sheriff's Office.⁷²

Because of the sheriff's overt law enforcement duties, the Commission is satisfied that the sheriff and his or her officers or deputies should remain ineligible for jury service while holding office. The Commission is further of the opinion that because the office is responsible for summoning jurors and managing the jury system in Western Australia this exclusion from jury service should extend for a period of five years following termination of employment as sheriff, deputy sheriff or sheriff's officer to ensure sufficient independence from this role.

PROPOSAL 22

Ineligibility for jury service – Sheriff and sheriff's officers

That the Sheriff of Western Australia and deputies or officers of the Sheriff of Western Australia should remain ineligible for jury service during their term of employment and for a period of five years following termination of their employment as Sheriff or deputy sheriff.

Bailiffs

A bailiff or assistant bailiff appointed (by the sheriff) under the *Civil Judgments Enforcement Act 2004* (WA) is currently ineligible to serve as a juror. The exclusion extends beyond the period of employment to five years after termination of employment.

The sheriff may delegate to a bailiff the performance of any function under s 156(1) of the *Supreme Court Act*.

69. *Supreme Court Act 1935* (WA) s 156. The powers of the Sheriff extend to his or her deputies appointed under s 158.

70. *Supreme Court Act 1935* (WA) s 156(1).

71. *Ibid.*

72. The Commission is aware that there is a current proposal to move the management of the jury system in Western Australia under the umbrella of the Higher Courts Directorate.

These functions include the service and execution of writs and warrants and the detention of persons committed to custody by the court. Because of this potential for delegation of sheriff's law enforcement duties, the Commission is persuaded that exclusion from jury duty should extend to bailiffs and assistant bailiffs. However, because bailiffs are divorced from jury management, the Commission sees no reason to extend the exclusion for a period beyond termination of employment as a bailiff or assistant bailiff.

PROPOSAL 23

Ineligibility for jury service – bailiffs and assistant bailiffs

That a bailiff or assistant bailiff appointed under the *Civil Judgments Enforcement Act 2004* (WA) should remain ineligible for jury service during their term of employment.

MEMBERS AND OFFICERS OF PARLIAMENT

Members

All Australian jurisdictions exclude Members of Parliament from jury service. Under the *Juries Act*, 'a member or officer' of the Legislative Assembly or Legislative Council of the Parliament of Western Australia is excluded from jury service for the term of their parliamentary appointment and for a further five years. The Commission considers that the current exclusion of Members of Parliament from jury service is appropriate to preserve public confidence in the independence and impartiality of the criminal justice system. In this regard the Commission's view remains unchanged from its 1980 report on this matter where it said:

The Commission considers it inappropriate that a person who is involved in the making of laws should be able to serve on a jury which may be called upon to decide whether there has been a breach of any such law.⁷³

The Commission also made the point in its 1980 report that in the exercise of Parliament's power to punish for contempt, members held a 'judicial or quasi-judicial' function that further justified their exclusion from jury service.⁷⁴ Recognising that political influence may exist (or be seen to exist) beyond a member's term of office, the Commission believes that it is prudent, in the interests of preserving public confidence, to extend the exclusion of members of Parliament from jury service for

73. LRCWA, *Report on Exemption from Jury Service*, Project No 71 (1980) 17.

74. *Ibid.*

a period of five years following the termination of their elected office.

PROPOSAL 24

Ineligibility for jury service – Members of Parliament

That a duly elected member of the Legislative Assembly or Legislative Council should remain ineligible for jury service during their term of office and for a period of five years thereafter.

Officers

The Commission does not believe that the above exclusion should extend, as it currently does, to 'officers' of either House of Parliament. There is no clear definition of an officer of Parliament⁷⁵ and the Commission is concerned that this may unnecessarily extend the exclusion beyond those properly excluded by virtue of their legislative role. The Commission believes that its proposal to permit deferral of jury service⁷⁶ will ensure that Parliament is not unduly inconvenienced or delayed should an officer who is integral to the running of Parliament (eg, the sergeant-at-arms and the usher of the black rod) be called for jury service. These officers may seek deferral of their jury service to a month when Parliament is not sitting.

PROPOSAL 25

Eligibility for jury service – officers of Parliament

That officers of the Legislative assembly and Legislative Council be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(a) and 2(b) of the *Juries Act 1957* (WA).

OCCUPATIONS INVOLVED IN LAW ENFORCEMENT AND INVESTIGATION OF CRIME

Police officers

Police officers are excluded from jury service in all Australian jurisdictions. Some jurisdictions have made police permanently ineligible for jury service,⁷⁷ while others extend ineligibility to 10 years following termination of employment from the police service.⁷⁸ In Western Australia, the *Juries Act* expressly excludes police

75. Section 4(2) of the *Salaries and Allowances Act 1975* (WA) defines an Officer of the Parliament for the purposes of that Act, but it only extends to elected members.

76. See below Chapter Six, Proposal 48.

77. *Jury Act 1995* (Qld) s 4; *Jury Act 1977* (NSW) sch 2.

78. *Juries Act 2003* (Tas) sch 2; *Juries Act 2000* (Vic) sch 2.

officers from jury service during their employment and for five years thereafter. There are important justifications for excluding police officers from jury service. First, police officers are intimately involved with enforcement of laws and criminal investigation and are an integral part of the prosecution process. As such their presence on a jury would seem to militate against the underlying rationale that a jury be independent from government as the prosecuting authority. Secondly, because of their role in the prosecution process, police officers might be seen to have a bias toward the prosecution case. Although they may not have a demonstrable or actual bias, the perception of bias is enough to unduly threaten public confidence in the impartiality and fairness of the criminal justice system.

While the Auld review in England played down the potential bias of police-jurors (comparing their potential bias to that possibly held by jurors who had been victims of crime), developments in that jurisdiction since Auld's recommendations were implemented show that problems of partiality (whether apparent or real) cannot be ignored.⁷⁹ In particular, there have been a number of successful appeals against conviction in cases where police officers have been empanelled on juries and it has later come to light that they had some connection with a police officer who was on the prosecution team or somehow connected to the case.⁸⁰ Concern has also been raised that if, during a trial, police evidence is subject to challenge or if it forms an integral part of the prosecution case, a police-juror's partiality (or perceived partiality) toward a fellow officer may put in doubt the safety of the conviction and render the trial unfair.⁸¹ In the absence of legislative amendment to reinstate police officers' exclusion, the English Court of Appeal has instructed that trial judges must be made 'aware at the time of juror selection if any juror in waiting is, or had been, a police officer or a member of a prosecuting authority, or is a serving prison officer'.⁸²

79. 'Trial judges must be told if police are on jury', *The Times* (7 April 2007); 'Should the Police be Reporting for Jury Duty?', *The Times* (24 July 2007); 'Jury Service: Should the government turn the clock back?', *The Times* (24 October 2007).

80. See, for example, *R v Pintori* [2007] EWCA Crim 1700 where an appeal against conviction was upheld on the basis that one of the jurors worked as a civilian employee of the police and was acquainted with the police giving evidence. See also *R v I* [2007] ECWA Crim 2999 where an appeal was allowed on the basis that a police officer-juror knew each of the four officers giving evidence at the trial. The court found that the judge should have excluded the police officer-juror once this became known. See also *R v Abdroikov*; *R v Green*, *R v Williamson* [2007] UKHL 37 where appeals against convictions of two accused were upheld by a majority of the House of Lords because of the apparent bias found in the presence of a police officer and a crown prosecutor on their respective juries.

81. *R v Khan and Ors* [2008] ECWA Crim 531; 'Trial Judges Must be Told if Police Are on Jury', *The Times* (7 April 2007).

82. *R v Khan and Ors* [2008] ECWA Crim 531.

Taking into account the experience in England, the Commission is strongly of the view that the current exclusion of police officers from jury service during the term of their employment and for five years thereafter should remain in place. In coming to this conclusion, the Commission finds the following points to be persuasive:

- the integral role that police officers play in the detection and investigation of crime and prosecution of criminal charges;
- the fact that police officers have ready access to information that may concern an accused or witness and that is not available to lay jurors and may not be adduced in evidence;
- the potential for partiality of police-jurors toward the prosecution or the evidence of fellow officers, whether real or apparent;
- the risk of unsafe verdicts should a police-juror know or be known to a witness or prosecutor or an accused in a trial;
- the appearance to an accused that he or she would not receive a fair trial where a police-juror was empanelled; and
- the need to preserve public confidence in the impartial administration of criminal justice.⁸³

Interestingly, it is observed that the Commissioner of Police, who does not come under the general designation of 'police officer' under the *Police Act 1892* (WA),⁸⁴ is not expressly excluded from jury service under the current *Juries Act*. The Commission believes that this is an oversight that should be corrected by the addition of the Commissioner of Police to the list of ineligible persons in the Second Schedule.

PROPOSAL 26

Ineligibility for jury service – Commissioner of Police and police officers

1. That the Commissioner of Police should be ineligible for jury service during his or her term as Commissioner of Police and for a period of five years thereafter.
2. That a police officer should remain ineligible for jury service during his or her term of employment as a police officer and for a period of five years thereafter.

83. Similar arguments have been made in the following reports considering this matter: NSWLRC, *Jury Selection*, Report No 117 (2007) 80–5; VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 59–60; *Report of the Departmental Committee on Jury Service* (Morris Committee), Cmnd 2627 (1965) 34–5.

84. While 'police officer' is not generally defined in the *Police Act 1892* (WA) it is defined for the purposes of Part III and Part IIIA to exclude the Commissioner of Police: see ss 34 & 38A.

Corruption and Crime Commission

The Corruption and Crime Commission was established in 2004 to combat organised crime⁸⁵ and reduce the incidence of corruption and misconduct in the public service. The Corruption and Crime Commission also has extensive investigative powers, including the power to compel a witness to attend a hearing, to produce documents, to obtain a search warrant on application to a judge, to intercept telecommunications and use surveillance devices, to use assumed identities and to conduct integrity tests. The Office of the Parliamentary Inspector of the Corruption and Crime Commission is responsible for auditing the operations of the Corruption and Crime Commission and dealing with any misconduct of its officers.⁸⁶

The *Juries Act* excludes the following officers of the Corruption and Crime Commission and the Office of the Parliamentary Inspector of the Corruption and Crime Commission from jury service:

- the Commissioner of the Corruption and Crime Commission;
- the Parliamentary Inspector of the Corruption and Crime Commission;
- officers of the Corruption and Crime Commission; and
- officers of the Parliamentary Inspector of the Corruption and Crime Commission.

The Commissioner and Parliamentary Inspector of the Corruption and Crime Commission are permanently ineligible for jury service, while officers of the Corruption and Crime Commission and its parliamentary inspector are ineligible while holding office and for five years thereafter.

The term ‘officer’ is defined in s 3 of the *Corruption and Crime Commission Act 2003* (WA) and includes all staff, seconded staff and contracted service providers of the Corruption and Crime Commission and the parliamentary inspector’s office. As such, the exclusion extends beyond investigations staff to general administrative staff (such as receptionists and human resources staff) and contracted service providers (which include office cleaners and external providers such as proofreaders). In the Commission’s opinion, the exclusion net is cast too wide. In the interests of increasing participation in jury

85. While the Corruption and Crime Commission does not investigate organised crime itself, it can grant the Commissioner of Police exceptional powers not normally available to police to investigate organised crime. The use of these powers is authorised and monitored by the Corruption and Crime Commission Commissioner.

86. *Corruption and Crime Commission Act 2003* (WA) s 195.

service pursuant to Guiding Principle 3, the Commission proposes that the exclusion be confined to officers of the Corruption and Crime Commission whose presence on a jury might compromise, or be seen to compromise, the jury’s status as an independent, impartial and competent lay tribunal.

The Commission can see good sense in maintaining the exclusion of officers, seconded employees and contracted service providers of the Corruption and Crime Commission who are directly involved in the detection and investigation of crime, corruption and misconduct or prosecution of relevant charges.⁸⁷ Like police, such officers may have access to potentially prejudicial information about an accused or the circumstances of a case or may be biased toward a prosecution case.⁸⁸ The Commission is also of the view that the exclusion of the Commissioner and Parliamentary Inspector of the Corruption and Crime Commission (and any person acting in those roles) should be maintained as such officers cannot properly be seen to be independent of the state and its interests.

However, the Commission acknowledges that the Corruption and Crime Commission is somewhat unique because of the various secrecy and confidentiality provisions under the *Corruption and Crime Commission Act* that bind its officers, employees and service providers.⁸⁹ In particular, these provisions may prevent such persons from divulging the nature of the work they do within the Corruption and Crime Commission if summoned for jury service. Thus, unlike the other categories of exclusion discussed in this chapter, it may not be possible for an officer of the Corruption and Crime Commission to disclose to the sheriff the nature of his or her work in order to demonstrate ineligibility for jury service. In these circumstances the Commission proposes that consideration of eligibility for jury service should, in this instance, be judged internally by the Commissioner of the Corruption and Crime Commission applying the standard discussed above of direct involvement in the detection and investigation of crime, corruption and misconduct or prosecution of relevant charges.

87. Classes of officers meeting this definition would include officers within the investigations unit, including financial investigators, investigatory assistants and intelligence analysts. There is also cause to exclude officers in the investigation review and complaints assessment area who monitor and assess complaints to the Corruption and Crime Commission.

88. It is also noted that some investigations staff employed by the Corruption and Crime Commission are former police officers.

89. See, in particular, *Corruption and Crime Commission Act 2003* (WA) pt 9.

PROPOSAL 27

Ineligibility for jury service – Corruption and Crime Commission

That the following officers of the Corruption and Crime Commission be ineligible for jury service during their term of employment, secondment or contract for services and for a period of five years thereafter:

- the Commissioner of the Corruption and Crime Commission (or any person acting in this role);
- the Parliamentary Inspector of the Corruption and Crime Commission (or any person acting in this role); and
- officers, seconded employees and contracted service providers of the Corruption and Crime Commission and of the Parliamentary Inspector of the Corruption and Crime Commission who are, in the opinion of the Commissioner of the Corruption and Crime Commission, directly involved in the detection and investigation of crime, corruption and misconduct or the prosecution of charges.

OCCUPATIONS INVOLVED IN THE ADMINISTRATION OF CRIMINAL JUSTICE

Members of review boards

Under the *Juries Act* members of the following boards are excluded from jury service while holding commission as a member and for a period of five years thereafter:

- the Mentally Impaired Accused Review Board under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA);
- the Prisoners Review Board under the *Sentence Administration Act 2003* (WA);
- the Supervised Release Review Board under the *Young Offenders Act 1994* (WA).

These boards are involved in the preparation for release and the release of prisoners, detainees or mentally impaired accused in Western Australia. As such, members of these boards cannot be said to be independent of the criminal justice system. The Commission is satisfied that members of the above boards have sufficient connection to the administration of criminal justice to warrant their exclusion from jury service and that such exclusion should extend for a period of five years after their membership of the relevant board.

PROPOSAL 28

Ineligibility for jury service – members of review boards

That members of the Mentally Impaired Accused Review Board, the Prisoners Review Board and the Supervised Release Review Board should be ineligible for jury service for the term of their membership of the relevant board and for a period of five years thereafter.

Officers and employees of the Department of the Attorney General and the Department of Corrective Services

Clause 2(o) of Part I of the Second Schedule of the *Juries Act* excludes for the term of their employment and for five years thereafter a person who:

- (i) is an officer or employee of an agency as defined in section 3(1) of the *Public Sector Management Act 1994*; or
- (ii) provides services to such an agency under a contract for services; or
- (iii) is a contract worker as defined in section 3 of the *Court Security and Custodial Services Act 1999* or section 15A of the *Prisons Act 1981*;
being a person prescribed or of a class prescribed by regulations.

The *Jury Pools Regulations 1982* (WA) provide that a 'person is prescribed for the purposes of the Second Schedule, Part I, clause 2(o) of the Act if the person':

- (a) is employed in a department of the Public Service that principally assists the Attorney General to administer Acts administered by the Attorney General, other than a person employed for the purposes of—
 - (i) the *Births, Deaths and Marriages Registration Act 1998* section 7; or
 - (ii) the *Public Trustee Act 1941* section 6,or provides services to such a department under a contract for services; or
- (b) is employed in a department of the Public Service that principally assists the Minister for Corrective Services to administer Acts administered by the Minister, or provides services to such a department under a contract for services; or
- (c) is a person referred to in the Second Schedule Part I clause 2(o)(iii) of the Act.⁹⁰

90. *Jury Pools Regulations 1982* (WA) reg 10 (inserted 3 April 2007).

It can be seen that by referring in such general terms to employees and contracted service providers of the Department of the Attorney General and the Department for Corrective Services the exclusion net is again cast unnecessarily wide. Such exclusion picks up employees such as receptionists, IT specialists and graphic designers who may have no involvement whatsoever in any activity that could threaten the independence or impartiality of a jury. Likewise, external service providers such as cleaners, proofreaders and conference organisers may also be swept up in this broad exclusion.

Applying the principle that occupational exclusions should be confined to those whose presence on a jury might compromise, or be seen to compromise, the jury's status as an independent, impartial and competent lay tribunal, the Commission believes that the current provision should be significantly narrowed. It is the Commission's opinion that the provision should be confined to those employees and service providers whose work is integrally connected with the administration of criminal justice including (but not limited to) the detection, investigation or prosecution of crime; the management, transport or supervision of offenders; the security or administration of criminal courts or custodial facilities; the direct provision of support to victims of crime; and the formulation of policy or legislation pertaining to the administration of criminal justice. The exclusion of these people is justified because their connection to the administration of criminal justice and their potential access to information as a consequence of their employment suggests that a reasonable person might not perceive them to be sufficiently independent or impartial in a criminal trial.

PROPOSAL 29

Ineligibility for jury service – officers and employees of the Department of the Attorney General and the Department of Corrective Services

That those officers, employees and contracted service providers of the Department of the Attorney General and the Department for Corrective Services, other than clerical, administrative and support staff, whose work involves:

- the detection, investigation or prosecution of crime;
- the management, transport or supervision of offenders;
- the security or administration of criminal courts or custodial facilities;
- the direct provision of support to victims of crime; and
- the formulation of policy or legislation pertaining to the administration of criminal justice

should be ineligible for jury service during the term of their employment or contract for services and for a period of five years following termination of their employment or contract for services.

OTHER EXEMPT OCCUPATIONS

Ombudsman

The *Juries Act* provides that the 'Parliamentary Commissioner for Administrative Investigations' (that is, the ombudsman) is permanently excluded from jury service. Officers of the ombudsman are not excluded from jury service. The ombudsman is an independent and impartial parliamentary commissioner whose office investigates complaints from individuals about Western Australian government agencies, statutory authorities, local governments and public universities that are administrative in nature. The ombudsman also has the authority to initiate an inquiry or investigation about these public bodies where no specific complaint has been received.

While the ombudsman's duties bear little relationship to criminal justice, the ombudsman can investigate complaints about the administration of Western Australian prisons and the police service. However, the ombudsman can only make recommendations to agencies as the outcome of its investigation; the office is not involved in the prosecution of matters and cannot direct that action be taken. It is the Commission's preliminary view that the ombudsman has insufficient connection to the administration of justice, and in particular criminal justice, to warrant his or her exclusion from jury service. The Commission recognises that the ombudsman is a parliamentary commissioner;⁹¹ however, given the ombudsman's role as 'an independent and impartial person'⁹² investigating public complaints, the Commission does not believe that the ombudsman's presence on a jury would necessarily compromise a jury's status as an independent, impartial and competent lay tribunal.

PROPOSAL 30

Eligibility for jury service – ombudsman

That the Parliamentary Commissioner for Administrative Investigations (the ombudsman) be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 1(d) of the *Juries Act 1957* (WA).

91. *Parliamentary Commissioner Act 1971* (WA).

92. Ombudsman (WA) <<http://www.ombudsman.wa.gov.au>>.

Officers of the Department for Child Protection

The *Juries Act* presently excludes officers ‘as defined in s 3 of the *Children and Community Services Act 2004*’ (WA).⁹³ This Act in turn defines officer as:

A person employed in, or engaged by, the Department [for Child Protection] whether as a public service officer under the *Public Sector Management Act 1994*, under a contract for services, or otherwise.

The Department for Child Protection provides social services to meet the needs of vulnerable children and families. Officers ‘authorised’ under s 25 of the *Children and Community Services Act* can ‘conduct investigations into whether a child may be in need of protection,’⁹⁴ and may search and restrain a child,⁹⁵ and move a child to a ‘safe place’.⁹⁶ While an authorised officer’s investigation may be used to support a charge of abuse or neglect in relation to a child, the officer has no power to arrest or apprehend a person suspected of offending in this way.

In the Commission’s opinion, the current exclusion for officers of the Department for Child Protection is unnecessarily wide. It excludes all officers and contracted service providers whether or not they have any investigative function (which lies only with officers authorised under s 25). On balance, the Commission does not believe that there is sufficient connection to the administration of criminal justice or the investigation of crime to warrant exclusion of officers of the Department for Child Protection, whether authorised or otherwise. In particular, the Commission cannot see how such an officer’s presence on a jury might compromise, or be seen to compromise, the jury’s status as an independent, impartial and competent lay tribunal. In the interests of increasing participation in jury service pursuant to Guiding Principle 3, the Commission proposes that the exclusion for officers of the Department for Child Protection be removed.

PROPOSAL 31

Eligibility for jury service – officers of the Department for Child Protection

That officers of the Department for Child Protection be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(k) of the *Juries Act 1957* (WA).

93. *Juries Act 1957* (WA) sch 2, pt I, cl 2(k).

94. *Children and Community Services Act 2004* (WA) s 32(1)(d).

95. *Children and Community Services Act 2004* (WA) ss 114, 115 & 116.

96. *Children and Community Services Act 2004* (WA) s 41.

COMMONWEALTH EXEMPTIONS

Certain occupations are exempted from jury service by the operation of the *Jury Exemption Act 1965* (Cth) and *Jury Exemption Regulations 1987* (Cth). Generally these exemptions relate to occupations involved in the administration of justice, the creation of legislation, law enforcement and defence. However, exemptions extend to occupations considered to be integral to the executive public service, to the smooth running of federal Parliament and to national security. Exempted occupations include Members of federal Parliament and people holding specific positions in support of Ministers and departments of the Senate;⁹⁷ federal judicial officers; court and tribunal staff; members of the defence forces; Australian Federal Police officers; senior members of the Australian Public Service; officers or employees of the Commonwealth whose duties involve the provision of legal professional services; employees in the Department of Primary Industries and Energy whose duties relate to exotic diseases; and certain other positions relating to public administration. These provisions, while beyond the scope of what may be recommended for reform by the Commission, nevertheless comprise a small component of the present regime against which any recommendations must be considered.

97. For a full list, see *Jury Exemption Regulations 1987* (Cth) reg 7.