

Chapter Five

Qualification for Jury Service



Contents

Qualification for jury service	81
Criminal history	82
Categories of disqualification based on criminal history	82
The process for identifying people with disqualifying convictions	82
Underlying rationale and the Commission's approach	83
Structuring disqualifying categories	84
Permanent disqualification	85
Temporary disqualification	86
Unconvicted accused	87
Unsentenced offenders	88
Current court orders	88
Traffic matters	88
The Commission's proposal	89
Lack of understanding of English	92
The appropriate formulation of the English language requirement	92
Is a literacy requirement necessary?	92
Identifying people who do not understand English	94
Representativeness	96
Incapacity	98
Mental Incapacity	99
Excusing mentally impaired jurors	100
Physical incapacity	100
Accommodating physical disabilities	101
Mobility difficulties	101
Deaf and hearing impaired	101
Blind and vision impaired	102
Provision of relevant facilities	102
Excusing physically disabled jurors	103

Qualification for jury service

IN the preceding two chapters the Commission has considered the legislative provisions that determine liability and eligibility for jury service. This chapter examines a third category: those people who are otherwise liable and eligible but who are considered not qualified for jury service. Section 5 of the *Juries Act 1957* (WA) provides that people are not qualified for jury service if they have specified criminal records, do not understand the English language, or are incapacitated by any disease or infirmity of the mind or body that affects their ability to discharge the duties of a juror.

As explained in Chapter One of this paper, the category of disqualification is an expression of the Commission's Guiding Principle 1: that juries should be, and should be seen to be, independent, impartial and competent. The exclusion of people from jury service who are unable to discharge the duties of a juror—because of a lack of understanding of English or because of incapacity—reflects the concept of competence. The exclusion of people with criminal histories reflects the view that juries should be impartial. In this chapter, the Commission closely examines the disqualification categories in order to ensure that they properly reflect the Commission's first guiding principle. In other words, people who may be biased or incapable of discharging the duties of a juror should be disqualified. Clear legislative criteria for these categories enables those who are not qualified for jury service to be more easily identified and removed from the relevant jury lists at the earliest possible stage. Thus, such people will not unnecessarily be summoned for jury service.¹

1. There will still be some people who are not qualified for jury service but are nonetheless summoned for jury service. These people can be excused from further attendance if the relevant circumstances are presented to the Sheriff's Office or the trial judge.

Criminal history

ALL Australian jurisdictions disqualify people with criminal convictions from jury service. In essence, the scope of any exclusionary category based on criminal history requires a balancing exercise between maintaining public confidence in the jury system (by excluding people who are perceived as lacking impartiality) and recognising the principle of rehabilitation (by ensuring that reformed offenders can participate in ordinary civic duties).¹ Because it is difficult to know where to draw the line between these two competing principles, the applicable legislative provisions in each Australian jurisdiction vary substantially.²

The appropriateness of the current Western Australian criminal history disqualification categories has recently been called into question following the acquittals in the McLeod case.³ As noted earlier, in this case a police officer was seriously injured following a violent incident outside a Perth tavern. In Parliament it was stated that one juror in this case had a criminal conviction but the nature of that conviction has never been publicly disclosed.⁴ On 26 May 2009 the Attorney General stated in Parliament that he favoured

a system that decreases the number of people with criminal records who appear on jury pools. That is a delicate balancing act because I do not want to unfairly exclude people from an important civic duty based on minor convictions of one type or another.⁵

In this section, the Commission carefully examines the legislative provisions in Western Australia and elsewhere to determine whether the current categories of exclusion based on criminal history are appropriate and fair.

CATEGORIES OF DISQUALIFICATION BASED ON CRIMINAL HISTORY

Under s 5(b) of the *Juries Act 1957* (WA) a person who is otherwise liable to serve as a juror is not qualified to serve as a juror if he or she

- (i) has been convicted of an offence in Western Australia or elsewhere and sentenced to —
 - (I) death whether or not that sentence has been commuted;⁶
 - (II) strict security life imprisonment referred to in section 282 or 679 of *The Criminal Code*;⁷
 - (III) imprisonment for life; or
 - (IV) imprisonment for a term exceeding 2 years or for an indeterminate period, unless he or she has received a free pardonor, where sub-subparagraph (IV) applies, the conviction in respect of which the sentence of imprisonment was imposed is a spent conviction within the meaning in section 3 of the *Spent Convictions Act 1988*;
- (ii) has at any time within 5 years in Western Australia or elsewhere —
 - (I) been the subject of a sentence of imprisonment or been on parole in respect of any such sentence;
 - (II) been found guilty of an offence and detained in an institution for juvenile offenders; or
 - (III) been the subject of a probation order, a community order (as defined in the *Sentencing Act 1995*), or an order having a similar effect, made by any court.

Thus, the Western Australian provisions contain two categories of criminal history disqualification: permanent disqualification and temporary disqualification.

THE PROCESS FOR IDENTIFYING PEOPLE WITH DISQUALIFYING CONVICTIONS

Pursuant to s 18 of the *Electoral Act 1907* (WA) a person who is serving (or is yet to serve) a sentence of imprisonment or detention is disqualified from voting. In practice, prisoners or detainees are ‘flagged’ in the system and will therefore not be included in the jury lists sent by the Electoral Commission to the Sheriff’s Office.⁸

1. VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [3.23].
2. See NSWLRC, *Jury Selection*, Report No 117 (2007) [3.14].
3. Banks A, ‘Keep Criminals Off Juries: AG’, *The West Australian*, (21 March 2009) 8.
4. Western Australia, *Parliamentary Debates*, Legislative Council, 19 March 2009, 2141 (Hon Simon O’Brien).
5. Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 May 2009, 162–78 (Christian Porter, Attorney General).

6. Capital punishment was abolished in Western Australia in 1984. However, there may be people who were sentenced to death before 1984 but that sentence was commuted to strict security life imprisonment or life imprisonment.
7. The penalty of strict security life imprisonment was abolished in 2008 by the *Criminal Law Amendment (Homicide) Act 2008* (WA). Again, there will be people in Western Australia who were previously sentenced to strict security life imprisonment before these amendments took effect.
8. Warren Richardson, Manager, Enrolment Group, Western Australian Electoral Commission, telephone consultation

Presently, the Western Australian Sheriff's Office checks each person who is included in the jury lists against an online criminal record database to determine if anyone is disqualified under the *Juries Act*. If so, they are removed from the list and will not be summoned for jury service. The Commission understands that usually between 6 and 10 people in every 1000 are removed from the jurors' books during this process.⁹ Of course, this process is not foolproof because a person might have been sentenced for an offence after the Sheriff's Office has checked the criminal records but before he or she actually attends court in response to the summons. The Commission understands that the number of people who are excused from jury service on the basis of disqualifying convictions after a summons has been issued is relatively small. For example, in the 2008 calendar year less than 1% of the total excusals in Perth were a result of disqualifying convictions.¹⁰

Further, although the legislation disqualifies people with relevant convictions in other Australian jurisdictions, the Sheriff's Office does not yet have access to an Australia-wide criminal record database. Thus, it is possible that Western Australian juries have included people with disqualifying criminal convictions in other jurisdictions. The Commission understands that the Sheriff's Office is working towards obtaining access to *CrimTrac* (an Australia-wide database) and this will enable the sheriff to check for relevant criminal convictions in other states and territories.¹¹

UNDERLYING RATIONALE AND THE COMMISSION'S APPROACH

Generally, it is argued that people with criminal histories should not serve as jurors because they are more likely than those without criminal histories to be biased against the police or prosecution case.¹² The Queensland Criminal Justice Commission (QCJC) observed that convicted people are disqualified because they may be 'biased', 'dishonest' or 'resentful of authority'.¹³ It has also been argued that some offenders (or accused) may be so closely connected to the criminal justice system

that they may be incapable of properly discharging the duties of a juror. For example, the New South Wales Law Reform Commission (NSWLRC) concluded that people awaiting trial or sentence should be excluded because it is 'difficult to see how they could give a completely detached consideration to the question of the guilt of others'.¹⁴ In addition, it has been suggested that convicted criminals may be prone to undue influence¹⁵ (eg, predisposed to jury tampering¹⁶). On the other hand, it is contended that certain offenders who have since reformed should not be precluded from jury service.¹⁷ As mentioned at the outset, when determining who should be excluded from jury service it is necessary to take into account 'the desirability of not applying unnecessary restrictions on those who have paid their debt to society'.¹⁸

In order to maintain impartiality it could be argued that anyone with a criminal conviction should be disqualified from jury service. However, this view assumes that all offenders are biased against police and this is clearly not always the case. The New Zealand Law Commission (NZLC) observed that:

Convicted offenders are thought more likely to have criminal associates and a criminal 'lifestyle', with a correspondingly biased view towards the criminal justice system. It is less likely, but nonetheless arguable, that a reformed former offender may judge more harshly. Neither of these views appears to have been justified empirically.¹⁹

In fact, a person wrongfully charged and subsequently acquitted may be far more prejudiced against the police than a person who has since reformed.

On the other hand, to facilitate rehabilitation and ensure that reformed offenders are not unfairly precluded from participating in civic responsibilities, it could be argued that anyone who has not reoffended for a specified period of time should be qualified for jury service. It is noted in Western Australia that a person is only disqualified from being a Member of Parliament if he or she has been convicted on indictment (ie, by a higher court) for an offence which carries a penalty of more than five years' imprisonment.²⁰ It has recently been observed that the 'standard set for the nomination or election of legislators is [arguably] equally appropriate for the selection of

(15 June 2009). Section 18 also provides that a person attainted of treason is ineligible to vote.

9. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
10. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
11. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
12. See eg, VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [3.15]; NZLC, *Juries in Criminal Trials: Part One*, Preliminary Paper No 32 (1998) [320]; Tasmanian Department of Justice, *Review of Juries Act 1899*, Issues Paper (1999) 4; NSWLRC, *Jury Selection*, Report No 117 (2007) [3.3]–[3.5].
13. QCJC, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 11.

14. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.66].

15. Ibid [3.3]–[3.5].

16. Western Australia, *Parliamentary Debates*, Legislative Council, 15 August 1983, 783 (Hon John Williams).

17. See eg, QCJC, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 11; NSWLRC, *Jury Selection*, Report No 117 (2007) [3.3]–[3.5].

18. Tasmanian Department of Justice, *Review of Juries Act 1899*, Issues Paper (1999) 4.

19. NZLC, *Juries in Criminal Trials: Part One*, Preliminary Paper No 32 (1998) [320].

20. *Constitution Acts Amendment Act 1899* (WA) s 32(1).

jurors'.²¹ While the Commission acknowledges that a person with known convictions may not be elected, it is important not to lose sight of the fact that some offenders can be rehabilitated and resume a productive life (including as a Member of Parliament).

Nonetheless, some people are convicted of offences that are so serious that public confidence in the jury system would be undermined if such people were entitled to serve as jurors. The Commission is of the view that maintaining public confidence in the jury system is the strongest argument for excluding people with criminal convictions from jury service.²² The jury is arguably 'the last remaining feature of the criminal justice process in which the public at large has confidence'²³ so it is justifiable to exclude people with certain criminal convictions from jury service in order to maintain the integrity of the jury system.

Furthermore, the Commission emphasises that people should only be disqualified from jury service on the basis of clear legislative criteria. In Chapter Two, the Commission explains why the practice of vetting and challenging jurors in order to exclude people from jury service who have *non-disqualifying* criminal records is inappropriate.²⁴ It has been argued that jury vetting reduces the risk of inappropriate people being selected for jury service;²⁵ however, the Commission has concluded that the degree of past criminality that renders a person unqualified for jury service should be determined by Parliament, not by the prosecution. Therefore, it is imperative that the legislative criteria are sufficiently broad to maintain public confidence in the jury system (because under the Commission's proposals it will not be possible for the prosecution to check the criminal records of prospective jurors before the trial).²⁶

Structuring disqualifying categories

There are different ways to judge the seriousness of an offence and, therefore, determine whether the seriousness of an offence justifies exclusion from jury service. Offence seriousness can be established by its categorisation as either an indictable or summary offence.

Some indictable offences are considered too serious to be dealt with summarily by a Magistrates Court and, therefore, must be dealt with by a superior court. Other indictable offences (sometimes described as 'either way' offences) can be dealt with by either the Magistrates Court or a superior court.²⁷ Summary offences are less serious offences, which are dealt with by the Magistrates Court.²⁸ The seriousness of an offence is also determined by reference to the maximum penalty available and from consideration of the actual sentence imposed.

All Australian jurisdictions (other than the Australian Capital Territory) base their disqualification categories, at least in part, by reference to the actual sentence imposed. As observed by the Victorian Parliament Law Reform Committee (VPLRC), the actual sentence imposed is a practical way of determining offence seriousness.²⁹ The actual sentence imposed takes into account the nature and circumstances of the offence and the maximum penalty available. However, relying solely on the sentence imposed may result in anomalies. For example, if only people who are sentenced to imprisonment are disqualified, a person sentenced to imprisonment for a driving offence will not be able to serve on a jury but a person fined or given a community-based order for aggravated burglary would qualify for jury service.

Likewise, basing disqualification categories on the nature of the offence will also result in inconsistencies. In 1980 a person convicted of a crime or a misdemeanour was disqualified from serving as a juror for life. At that time, the Commission observed that this provision was too wide because it did not take into account the severity of the penalty imposed (eg, a person could be sentenced to imprisonment for a summary offence but fined for a crime).³⁰ Currently, in the Australia Capital Territory a person who has been convicted of an offence punishable by imprisonment for one year (or more) is disqualified from jury service.³¹ This legislation does not distinguish between those offenders who are sentenced to imprisonment for lengthy periods and those offenders who are fined or given some form of community-based disposition.

21. Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.25].
22. See NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [179]; NSWLRC, *Jury Selection*, Report No 117 (2007) [3.3]–[3.5]; Law Reform Commission of Hong Kong, *ibid* [5.24].
23. Findlay M, 'Juries Reborn' (2007) 90 *Reform Journal* 9.
24. See above Chapter Two, 'Jury vetting'.
25. VPLRC, *Jury Service in Victoria*, Final Report, (1997) vol 1, [3.24].
26. This stance appears to be supported by Robert Cock (the former Director of Public Prosecutions) who reportedly stated that the previous practice of checking jurors' criminal records should not be reinstated: Banks A, 'Juror Challenge Limits Planned', *The West Australian*, 13 May 2009, 13.

27. Section 3(5) of the *Criminal Code* (WA) provides that if a person is convicted by a court of summary jurisdiction of an indictable offence, the conviction is to be regarded as being a conviction of a simple offence only unless the person is convicted of the offence by the Children's Court under section 19B(4) of the *Children's Court of Western Australia Act 1988* (WA) or another written law provides otherwise.
28. A superior court can deal with pending summary offences at the same time as sentencing a person for an indictable offence: *Sentencing Act 1995* (WA) s 32.
29. VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [3.30].
30. LRCWA, *Exemption from Jury Service*, Report, Project No 71 (1980) [3.59].
31. *Juries Act 1967* (ACT) s 10.

The Commission believes that the best way to ensure that the disqualifying provisions operate fairly and maintain public confidence in the jury system is to use a combination of offence-based and sentenced-based classifications. Further, the legislative criteria should continue to distinguish between those convictions that are so serious as to justify permanent disqualification and those which only demand temporary exclusion from jury service. In other words, there should be graduated categories: the most-serious convictions resulting in permanent disqualification, other convictions resulting in disqualification for a specified period, and less-serious convictions resulting in disqualification for a lesser period of time.³²

Permanent disqualification

In general terms, a person is permanently disqualified from serving on a jury if he or she has ever been sentenced to imprisonment (in Western Australia or elsewhere) for longer than two years. The only exception is when a conviction has been spent under the *Spent Convictions Act 1988* (WA). In order to obtain a spent conviction for an offence that resulted in a sentence of more than two years' imprisonment (including indefinite imprisonment) it is necessary to apply to a judge of the District Court.³³ The person must generally wait at least 10 years from the time the sentence is completed before becoming eligible to apply for a spent conviction and the judge has discretion whether or not to make the order.³⁴

Other than New South Wales, all Australian jurisdictions permanently disqualify people from jury service on the basis of their criminal history. Queensland and the Australian Capital Territory are the most stringent. Section 10 of the *Juries Act 1967* (ACT) provides that a person who 'has been convicted of an offence punishable by imprisonment for one year or longer is not qualified for jury service'. Therefore, a person will be permanently disqualified even if he or she has not in fact been

sentenced to imprisonment. In Queensland anyone who has been convicted of an indictable offence or who has been sentenced to imprisonment is permanently disqualified.³⁵

However, most jurisdictions are more relaxed than Western Australia in terms of permanent disqualification. In New South Wales, no one is permanently disqualified.³⁶ In Victoria and Tasmania, a person must have been sentenced to three years' imprisonment (or more) for an indictable offence in order to be permanently disqualified from jury service.³⁷ In the Northern Territory, only those people who have been subject to a mandatory sentence of life imprisonment are permanently disqualified.³⁸ Also, it is noted that in New Zealand to be permanently disqualified a person must have been sentenced to at least three years' imprisonment³⁹ and in England the person must have been sentenced to five years' imprisonment (or more).⁴⁰

The Commission is of the view that some past convictions justify permanent disqualification. Selecting a person for jury service who has been sentenced to imprisonment for life (usually for murder but also possibly for other offences such as armed robbery and attempted murder) would seriously undermine public confidence in the jury system and the ultimate verdict. Similarly, people sentenced to relatively lengthy periods of imprisonment for serious crimes should be permanently disqualified from jury service.

The current cut-off for permanent disqualification in Western Australia is a sentence of more than two years' imprisonment. A two-year cut-off period was recommended by this Commission in its 1980 report⁴¹ and the *Juries Act* was amended in 1984 to reflect this recommendation.⁴² Bearing in mind that in many other

32. Some Australian jurisdictions adopt a 'sliding differential scale': NSWLRC, *Jury Selection*, Report No 117 (2007) [3.16].

33. Under s 6 of the *Spent Convictions Act 1988* (WA) an application for a spent conviction must be made to a judge of the District Court if the conviction is a 'serious conviction'. A serious conviction is defined under s 9 as a conviction in respect of which the sentence imposed is 'imprisonment for more than one year or for an indeterminate period' or 'a fine of \$15,000 or more'.

34. The Commission notes that in November 2008 the Standing Committee of Attorneys-General released a draft Model Spent Convictions Bill. This proposed legislation appears to be more restrictive than the current Western Australia law. For example, it provides that a conviction resulting in imprisonment for more than 12 months cannot be spent: Standing Committee of Attorneys-General, *Model Spent Convictions Bill*, Draft Consultation Paper (2008) 2. If this Bill is enacted in Western Australia, the number of people permanently disqualified from jury service would rise.

35. *Jury Act 1995* (Qld) s 4.

36. Schedule 1 of the *Juries Act 1977* (NSW) disqualifies people from jury service if at any time in the last 10 years they have been served a sentence of imprisonment. Others are disqualified if they are currently subject to specified court orders or on awaiting sentence or trial.

37. In Victoria a person is also permanently disqualified if they have ever been convicted of treason: *Juries Act 2000* (Vic) sch 1. See also *Juries Act 2003* (Tas) sch 1.

38. *Juries Act* (NT) s 10. South Australia is similar to Western Australia – those people who have been convicted of an offence that carries life imprisonment or who have been sentenced to a term of imprisonment greater than two years are permanently disqualified: *Juries Act 1927* (SA) s 12.

39. This includes life imprisonment and preventative detention: see *Juries Act 1981* (NZ) s 7.

40. This includes life imprisonment and indefinite detention: see *Juries Act 1974* (UK) sch 1, pt II and the *Criminal Justice Act 2003* (UK) sch 33, pt 2.

41. LRCWA, *Exemption from Jury Service*, Report, Project No 71 (1980) [3.61].

42. *Juries Amendment Act 1984* (WA) s 6.

jurisdictions people are not permanently disqualified from jury service unless they have been sentenced to at least three years' imprisonment, the Commission invites submissions about whether the current two-year cut-off period should be increased.

In this regard, the Commission notes that people who have been sentenced to more than two years' imprisonment may become qualified for jury service if they apply and are granted a spent conviction. However, as previously observed by the Commission, an application to the District Court may be difficult for some people (in particular, Aboriginal people) because of remoteness, language and communication barriers, and because the application may be cost-prohibitive.⁴³ Therefore, extending the permanent disqualification cut-off will enable some reformed offenders to participate in jury service without the need to first apply for a spent conviction.

INVITATION TO SUBMIT G

Permanent disqualification from jury service

The Commission invites submissions about whether s 5(b)(i)(IV) of the *Juries Act 1957* (WA) (which currently provides that a person is not qualified for jury service if he or she has been convicted of an offence in Western Australia and sentenced to imprisonment for a term exceeding two years) should be amended and the period of two years increased (eg, to three years).

Temporary disqualification

In Western Australia anyone who has, within the past five years, been the subject of a sentence of imprisonment (or been on parole), been detained in a juvenile detention centre following conviction, or been subject to probation or a community order (or an order having a similar effect) is disqualified from jury service. A community order is defined under the *Sentencing Act 1995* (WA) as a Community Based Order or an Intensive Supervision Order. Consequently, not all people with criminal histories are excluded from jury service. For example, a person who was sentenced eight years ago to two years' imprisonment is qualified for jury service. Further,

43. LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No 94 (2006) 103. An information kit produced by Legal Aid WA states that in order to make an application for a spent conviction it is necessary to fill out the appropriate paperwork and pay the court filing fee. As at August 2008 the filing fee was \$475. Further, an unsuccessful application may result in an order to pay the costs of the Commissioner of Police: Legal Aid WA, *How to Apply to Have Your Serious Old Conviction Removed From Your Record: An information kit* (August 2008).

irrespective of the seriousness of the offence or how recent the conviction, an adult who has been sentenced to a fine, community service⁴⁴ or a Conditional Release Order is qualified to serve.

It is also not entirely clear on the face of the legislation whether offenders sentenced to suspended imprisonment (or conditional suspended imprisonment) are qualified, although the Commission understands that in practice these sentences are treated in the same way as a sentence of immediate imprisonment.⁴⁵ Also, the provision disqualifying a person who has (in the past five years) been the subject of a probation order or a community order does not expressly apply to young offenders. However, the Commission has been advised that young offenders who have in the last five years been subject to a Youth Community Based Order or an Intensive Youth Supervision Order are routinely disqualified.⁴⁶

The Commission is of the view that the current categories of temporary disqualification produce anomalies because not all sentencing orders result in disqualification and because adults and young offenders are—contrary to Western Australia's legislated principles of juvenile justice—treated in the same way.⁴⁷ In 1986 the NSWRLC recognised that young offenders should be treated differently to adult offenders in relation to jury service. Then, both adult and young offenders were disqualified from jury service if at any time in the last 10 years they had served a sentence of imprisonment or detention. The NSWRLC concluded that young offenders should only be disqualified if they had served a sentence of detention in the last five years.⁴⁸ Likewise, in 2007 the NSWRLC stated that:

44. It is the Commission's understanding that a person sentenced to a Community Based Order with a community work requirement only is treated as qualified to serve: Teresa Sullivan, Sheriff's Office, consultation (25 August 2009).

45. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).

46. Teresa Sullivan, Sheriff's Office, consultation (25 August 2009).

47. Under the *Young Offenders Act 1989* (WA) there is a strong emphasis on rehabilitation and integrating young offenders back into the community. Further, s 189 of the *Young Offenders Act 1989* (WA) provides that certain convictions are not to be regarded as a conviction for any purpose. In summary, if two years has expired since the discharge of any sentence imposed the conviction is to be treated as a spent conviction. This provision reflects the principle of rehabilitation and encourages young offenders to reform without the stigma of a criminal record. Arguably, this provision does not effect the disqualification categories because s 5(b)(ii)(III) of the *Juries Act 1957* (WA) does not refer to a conviction but simply that the person has been subject to a specified order.

48. NSWRLC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.16] & [4.21]. Schedule 1 of the *Juries Act 1977* (NSW) now provides that adults are disqualified from jury service if they have in the last 10 years served a sentence of imprisonment. Young offenders are only disqualified if they have served detention in the last three years.

We recognise the force of the argument that the rehabilitation of young offenders, and their reintegration into society as quickly as possible, and with full rights, is important.⁴⁹

The Commission agrees that the young offenders should not be disqualified from jury service for as long as adult offenders. Furthermore, the omission of accused and unsentenced offenders from the current temporary disqualification categories also creates problems (discussed further below).

Table B (at the end of this section) provides some hypothetical examples to illustrate the anomalies that are produced under the current legislative criteria. For example, a person could have been fined for fraud in the District Court and be qualified for jury service the following day, while a person who was sentenced to a Community Based Order for disorderly conduct four years ago is disqualified from serving as a juror. Further, an adult offender convicted and sentenced in 2002 for sexual assault would qualify for jury service, while a young offender sentenced to a Youth Community Based Order in 2005 for stealing would be disqualified.

Unconvicted accused

Whether an unconvicted accused should be entitled to serve on a jury is a difficult question. Under the current legislative criteria, anyone who is awaiting trial is qualified to serve. However, four Australian jurisdictions disqualify unconvicted accused persons from jury service. New South Wales disqualifies from jury service a person who is awaiting trial (on bail or in custody).⁵⁰ In Victoria, anyone who has been charged with an indictable offence and released on bail or anyone who is remanded in custody in relation to any alleged offence is disqualified from jury service.⁵¹ In South Australia a person who has been charged with an offence that carries imprisonment as a penalty is disqualified,⁵² and in Tasmania an accused who is remanded in custody is disqualified.⁵³

It is arguable that it is inappropriate to exclude unconvicted accused from jury service because they are presumed innocent until proven guilty. In 1997 the VPLRC was, for this reason, persuaded that people who have been charged with an offence should be eligible for jury service.⁵⁴ The NZLC agreed that accused should

be eligible noting that the prosecution could always exercise its peremptory challenges to exclude an accused in a particular trial.⁵⁵ However, as explained in Chapter Two, the Commission does not support prosecution jury vetting practices that would facilitate such an approach.

In contrast, it has been argued that accused should not be eligible for jury service because of the 'currency of their association with the criminal justice process'.⁵⁶ In 2007 the NSWLRC concluded that people awaiting trial or sentence should continue to be excluded from jury service because they may not be objective.⁵⁷ Further, it was recently observed by the Law Reform Commission of Hong Kong that people charged with a serious offence should be disqualified from serving on a jury in order to maintain public confidence in the justice system.⁵⁸

The Commission agrees that in order to maintain public confidence in the jury system accused people should not be qualified to serve. This approach does not mean that an unconvicted accused is presumed guilty but rather recognises that people charged with criminal offences may be perceived to be biased against the police or the prosecution (irrespective of their guilt or innocence).⁵⁹ It is vital that the public has confidence in the jury's verdict. If, for example, a person was on trial for sexual assault and a juror was also awaiting trial for a similar offence it would be difficult for that juror to remain objectively detached from the process.⁶⁰ Furthermore, the community would lack confidence in any verdict delivered in these circumstances. Accordingly, the Commission has concluded that an accused on bail or remanded in custody⁶¹ should not be qualified for jury service.⁶²

be a perceived conflict if accused were required to serve on a jury: Victorian Government, *Response to the Recommendations of the Law Reform Committee Final Report Vol 1: Jury service* (1997) 6.

49. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.36].

50. *Juries Act 1977* (NSW) sch 1.

51. *Juries Act 2000* (Vic) sch 1.

52. *Juries Act 1927* (SA) s 12.

53. *Juries Act 2003* (Tas) sch 1. Also, in England, a person on bail in any criminal proceedings is disqualified: *Criminal Justice Act 2003* (UK) sch 33, pt 2.

54. VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [3.59]. However, the Victorian Government did not support this recommendation because it was of the view that there may

55. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [185]–[186].

56. NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.19]–[4.20].

57. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.66].

58. Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.30].

59. In this sense, an unconvicted accused would not meet the requirement of impartiality set out in the Commission's Guiding Principle 1.

60. Justice McKechnie suggested that people charged with an offence who are awaiting trial should be ineligible for jury service because they may find it difficult to concentrate and adjudicate another's guilt or innocence: Justice McKechnie, consultation (19 December 2007).

61. In any event, there is an obvious practical impediment to anyone who is remanded in custody from participating in jury service.

62. It is acknowledged that this proposal will require administrative changes. The Sheriff's Office will need access to information about pending charges in order to delete accused from the jury lists.

PROPOSAL 32

Qualification for jury service: unconvicted accused

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that an accused who is currently remanded on bail or in custody awaiting trial is not qualified for jury service.

Unsentenced offenders

Currently, convicted offenders who have not yet been sentenced are qualified for jury service. It is incongruous that a person who has been convicted of, but not yet sentenced for, an extremely serious offence can serve as a juror while a person placed on a Community Based Order for a minor offence four years ago is disqualified. In New South Wales, it is expressly provided that a person awaiting sentence (irrespective of whether they are on bail or in custody) is disqualified from jury service.⁶³ The legislative provisions in Victoria, South Australia and Tasmania that disqualify certain accused who have been charged with an offence may also capture some unsentenced offenders.

In Western Australia, sentencing can be deferred for up to six months and, in cases where imprisonment is warranted, an offender can be placed on a Pre-Sentence Order for up to two years.⁶⁴ A Pre-Sentence Order can be imposed by the District Court and the Supreme Court for serious offences. The Commission is of the view that unsentenced offenders should not be qualified to serve on a jury. Again, even in the case of less serious offences the fact that unsentenced offenders are currently being dealt with by the criminal justice system is sufficient reason to exclude them from jury service. For both this (and the above proposal) the Sheriff's Office will need access to court records to determine if people who are included in the jury lists and jurors' books have been convicted of an offence but not yet sentenced.

PROPOSAL 33

Qualification for jury service: unsentenced offenders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a convicted accused who is currently on bail or remanded in custody awaiting sentence is not qualified for jury service.

63. *Juries Act 1977* (NSW) sch 1.

64. In a recent report this Commission has recommended that sentencing should be able to be deferred for up to 12 months and has also recommended the introduction of a pre-sentence Drug Treatment Order: see LRCWA, *Court Intervention Programs*, Final Report, Project No 96 (2009) Recommendations 13 & 20.

Current court orders

The Commission is also of the view that anyone who is currently subject to a court order should be disqualified from jury service because of the currency of their association with the criminal justice system. As discussed above, not all sentencing orders are included in the current legislative criteria. The NSWLRC observed that the main reason for excluding people subject to current sentencing orders is that 'while these orders are in force, the offender is very close to the criminal justice system' and, in some cases, subject to ongoing supervision by justice agencies and liable to be brought back to court in the event of a breach.⁶⁵ The Commission therefore proposes that s 5(b) of the *Juries Act* should be amended to create a category of disqualification that covers people who are currently subject to an ongoing court-imposed order (following conviction for an offence and excluding compensation or restitution) and who are not otherwise disqualified under the legislation.

PROPOSAL 34

Current orders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she is currently subject to an ongoing court-imposed order following conviction for an offence (excluding compensation or restitution but) including any of the following orders:

- (a) a Conditional Release Order or a Community Based Order (with community work only) under the *Sentencing Act 1995* (WA);
- (b) a Pre-Sentence Order under the *Sentencing Act 1995* (WA);⁶⁶ and
- (c) A Good Behaviour Bond or a Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA).

Traffic matters

Traffic and vehicle offences constitute the largest proportion of matters dealt with by the Magistrates Court (27.4% of all offences in 2005).⁶⁷ The majority of these are driving offences such as driving without a licence or

65. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.43].

66. If the Commission's recent recommendation to introduce a pre-sentence Drug Treatment Order (in its report on court intervention programs) is implemented this list will need to include a Drug Treatment Order under the *Sentencing Act 1995* (WA).

67. Loh N et al, *Crime and Justice Statistics for Western Australia: 2005* (Perth: Crime Research of Western Australia, 2007) 80.

driving under suspension. The most common penalty imposed for driving offences is a fine (over 87% of all driving offences in 2005 resulted in a fine). Nonetheless, 5.9% of all driving offences resulted in imprisonment and over 10% in a non-custodial sentence.⁶⁸ Under the current disqualification categories for jury service, traffic offenders who have been fined are qualified to serve but those who have been subject to imprisonment, suspended imprisonment or a community order in the last five years would be disqualified from serving.

There are many different types of traffic offences, some carrying a penalty of a fine only (eg, driving without a valid licence, careless driving, driving with excess 0.08% or excess 0.02% blood alcohol) and others carrying a possible penalty of imprisonment and disqualification from driving (eg, driving under suspension, driving under the influence of alcohol, dangerous driving, reckless driving, dangerous driving causing bodily harm). In those cases where offenders are disqualified from driving in addition to the imposition of a fine or imprisonment, the length of the disqualification period usually reflects the seriousness of the offence and the offender's prior traffic history.⁶⁹

In considering the suitability of people with past traffic convictions for jury service, it is noted that there are very few driving-related offences that can be dealt with in the District Court.⁷⁰ Thus, jury trials will not often involve the consideration of driving behaviour. Further, more-serious traffic offenders are now disqualified from jury service if they have served imprisonment or have been subject to a community order in the past five years. Under the Commission's proposal above, traffic offenders who are currently subject to an ongoing court order will not be qualified. However, there are traffic offenders who have been repeatedly fined and disqualified from driving for multiple and repeat offences and it may be inappropriate for such people to serve on juries (especially if the trial involves a driving offence such as dangerous driving causing death).

In this regard, it is noted that in New South Wales a person is not qualified for jury service if he or she is currently bound by an order disqualifying the person

68. Ibid 85–6.

69. For example, a person convicted of reckless driving is liable to be disqualified from driving for no less than six months for a first offence, no less than 12 months for a second offence and for life for a third or subsequent offence: *Road Traffic Act 1974* (WA) s 60.

70. For example, dangerous driving causing death/grievous bodily harm; offences relating to the failure to render assistance or report an accident where someone has been injured; and offences relating to the failure to provide a breath sample for analysis where there has been an accident resulting in injury: *Road Traffic Act 1974* (WA) ss 55, 56, 59 & 67.

from driving.⁷¹ In 2007 the NSWLRC recommended that this provision be amended so that a person is only disqualified from jury service if currently subject to a disqualification of 12 months or more.⁷² While New South Wales only disqualifies from jury service those traffic offenders who are currently disqualified from driving, South Australia disqualifies from jury service those offenders who have been disqualified from holding a drivers licence for a period greater than six months at any time within the last five years.⁷³ No other Australian jurisdictions refer to drivers licence disqualification.

In the same way that the penalty imposed for an offence is a useful guide to the seriousness of an offence, the period of disqualification from driving is a good indicator of the offence seriousness and the person's history of traffic offending. The Commission is of the view that it would be unduly harsh to exclude from jury service a person who has been convicted, fined and disqualified from driving on only one occasion in the previous five years. Instead, excluding those traffic offenders who are currently subject to a drivers licence disqualification should capture the most serious and repeat traffic offenders (especially if the disqualification period is set at 12 months). Of course, traffic offenders who have been imprisoned in the past five years will also be disqualified from jury service.

PROPOSAL 35

Traffic offenders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she is currently subject to a drivers licence disqualification for a period of 12 months or more.

The Commission's proposal

Bearing in mind the above discussion, the Commission has concluded that there is a compelling case for reform of the current criminal history disqualification criteria. All of the above proposals are subsumed into the proposed redraft of s 5(b) of the *Juries Act* which appears below. The Commission emphasises that it is impossible to structure the criteria in such a way as to exclude every person who might be considered unsuitable as a juror and, at the same time, include every person who is considered suitable for jury service.⁷⁴ However, the Commission

71. *Juries Act 1977* (NSW) sch 1.

72. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.9]–[3.10].

73. *Juries Act 1927* (SA) s 12.

74. Table B, below p 91, includes a number of hypothetical examples and shows how these examples would be dealt with under the Commission's proposals.

believes that its proposal strikes an appropriate balance between the need to maintain public confidence in the jury system and the need to ensure that less serious and rehabilitated offenders are not unfairly excluded from the important civic duty of jury service.

PROPOSAL 36

Disqualification from jury service on the basis of criminal history

That ss 5(b)(i) and 5(b)(ii) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she:

1. Has *at any time* been convicted of an indictable offence (whether summarily or on indictment) and been sentenced to death; strict security life imprisonment; life imprisonment; or imprisonment for a term exceeding 2 years⁷⁵ or for an indeterminate period.⁷⁶
2. Has in the *past 10 years* been convicted of an indictable offence (dealt with either summarily or on indictment) and been the subject of a sentence of imprisonment (including an early release order such as parole, suspended imprisonment or conditional suspended imprisonment).⁷⁷
3. Has in the *past 5 years*:
 - (a) been convicted of an offence on indictment (ie, by a superior court);
 - (b) been the subject of a sentence of imprisonment (including parole or another early release order, suspended imprisonment or conditional suspended imprisonment); or
 - (c) been subject to a sentence of detention (including a supervised release order) of 12 months or more in a juvenile detention centre.⁷⁸
4. Has in the *past 3 years*:
 - (a) been subject to a community order under the *Sentencing Act 1995* (WA); or
 - (b) been subject to a sentence of detention (including a supervised release order).

75. The Commission has invited submissions as to whether this period should be extended: see Invitation to Submit [Q](#).

76. Unless he or she has received a free pardon; the conviction and/or sentence has been overturned on appeal; or the conviction is a spent conviction within the meaning of the *Spent Convictions Act 1988* (WA).

77. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

78. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.

5. Has in the *past 2 years* been convicted of an offence and been subject to a Youth Community Based Order, an Intensive Youth Supervision Order or a Youth Conditional Release Order under the *Young Offenders Act 1994* (WA).
6. Is *currently*:
 - (a) on bail or in custody in relation to an alleged offence;
 - (b) on bail or in custody awaiting sentence;
 - (c) subject to imprisonment for unpaid fines;⁷⁹ or
 - (d) subject to an ongoing court-imposed order following conviction for an offence (excluding compensation or restitution) but including:
 - (i) a Conditional Release Order or a Community Based Order (with community work only) under the *Sentencing Act 1995* (WA);
 - (ii) a Pre-Sentence Order under the *Sentencing Act 1995* (WA);
 - (iii) a Good Behaviour Bond or a Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA); or
 - (iv) a drivers licence disqualification for a period of 12 months or more.

Taking into account convictions, sentences and court-imposed orders in other Australian jurisdictions

That a new s 6 of the *Juries Act 1957* (WA) be inserted to provide that for the purposes of s 5(b) a person is not qualified for jury service in Western Australia

1. if he or she has been sentenced to or placed on an order that is of a similar nature to any one of the sentences or orders referred to in s 5(b) provided that the person was subject to that similar sentence or order in the relevant time period as set out above;
2. if he or she has been convicted of an offence on indictment in the past five years in another Australian jurisdiction; or
3. if he or she is currently on bail in relation to an alleged offence or awaiting sentence in another Australian jurisdiction.

79. The Commission notes that a person serving imprisonment for unpaid fines would not be practicably able to serve as a juror in any event.

Table B: Criminal history disqualification examples

Sentence imposed	Sentence type	Qualified status as at 1 September 2009	Qualified status as at 1 September 2009 under Commission's proposals
31 August 2002	2 years' imprisonment for sexual assault imposed by District Court	Qualified	Not qualified
31 August 2003	18 months' imprisonment for driving under the influence of alcohol imposed by Magistrates Court	Not qualified	Not qualified
31 August 2003	12 months' detention for armed robbery and grievous bodily harm imposed by Children's Court	Qualified	Qualified
31 August 2004	1 week detention for stealing imposed by Children's Court	Not qualified	Qualified
31 August 2005	6-month Youth Community Based Order for stealing imposed by Children's Court	Not qualified	Qualified
31 August 2005	6-month Community Based Order for disorderly behaviour imposed by Magistrates Court	Not qualified	Qualified
31 August 2005	100 hours' community work for disorderly behaviour imposed by Magistrates Court	Qualified	Qualified
31 August 2006	Fine of \$1000 for disorderly behaviour by Magistrates Court	Qualified	Qualified
31 August 2007	12 months' imprisonment for driving under suspension imposed by Magistrates Court	Not qualified	Not qualified
31 August 2008	12-month Conditional Release Order for aggravated burglary imposed by District Court	Qualified	Not qualified
31 August 2009	2-year Pre-Sentence Order for armed robbery imposed by Supreme Court	Qualified	Not qualified
31 August 2009	Fine of \$10,000 for fraud imposed by District Court	Qualified	Not qualified
31 August 2009	Released on bail with surety of \$100,000 for conspiracy to sell heroin	Qualified	Not qualified

Lack of understanding of English

SECTION 5(b)(iii) of the *Juries Act 1957* (WA) provides that a person is not qualified to serve as a juror if he or she ‘does not understand the English language’. The reason for this condition is clear: jurors must be able to understand the evidence presented in court and to communicate with other jurors during deliberation. In other words, as stipulated by the Commission’s Guiding Principle 1, jurors must be competent to discharge their duties.¹ In addition, non-English speaking people may be excluded from serving as a juror because they are not liable for jury service under the *Juries Act*. As explained in Chapter Three, liability for jury service is attached to the entitlement to vote. In order to be enrolled to vote, a person must be 18 years or over and an Australia citizen. To be eligible to apply for Australian citizenship,² a person must ‘possess a basic knowledge of the English language’.³ However, eligibility for citizenship does not depend on the ability to read or write English.⁴ There will be people who are liable for jury service who do not understand English to a sufficient level to properly discharge the duties of a juror (eg, a person who automatically attained citizenship or a citizen who only has basic understanding of English). In this section the Commission considers the current formulation of the English language requirement, the processes for identifying jurors who do not understand English and the impact of the English language requirement on the representative nature of juries.

THE APPROPRIATE FORMULATION OF THE ENGLISH LANGUAGE REQUIREMENT

An English language requirement for jury service exists in every state and territory; however, the formulation of the test varies between jurisdictions. The Northern Territory has the strictest formulation, disqualifying from jury service those people who are ‘unable to read, write and

speak the English language’.⁵ A literacy requirement also exists in Queensland.⁶ In New South Wales a person is ineligible for jury service if he or she ‘is unable to read or understand English’.⁷ Similarly, in the Australian Capital Territory a person is not qualified for jury service if he or she is ‘unable to read and speak the English language’.⁸ The Victorian and Tasmanian legislative provisions do not refer to the ability to read; instead it is stated that in order to be eligible for jury service a person must be able to adequately communicate in and understand English.⁹ The formulation of the English language test in South Australia is expressly related to the duties of a juror – a person is ineligible for jury service if he or she ‘has insufficient command of the English language to enable him or her properly to carry out the duties of a juror’.¹⁰

Because the Western Australian provision only refers to an ability to understand English, it is arguably broad enough to encompass both understanding of spoken and written English. However, in practice prospective jurors are not tested for literacy and the obligation that exists under the Fourth Schedule for people who have been summoned for jury service to disclose a lack of understanding of English does not refer to any literacy requirements.

Is a literacy requirement necessary?

Only two jurisdictions require jurors to be able to write English and four jurisdictions refer to the requirement to be able to read English. A number of law reform bodies have supported a literacy requirement for jury service. The principal reason is that jurors are often required to consider documentary evidence and other written material (and jurors may wish to make notes about important aspects of the evidence).¹¹

1. See Chapter One, Guiding Principle 1.
2. There are a number of ways in which a person automatically becomes an Australian citizen (eg, being born in Australia and having one or more parents who are Australian citizens or permanent residents; or being adopted under an Australian law by an Australian citizen).
3. *Australian Citizenship Act 2007* (Cth) s 21(2)(e).
4. Generally, an applicant must pass a citizenship test. The Department of Immigration and Citizenship offers assistance to those people who are unable to read English (staff can read the questions and answer options aloud for the person): see <<http://www.citizenship.gov.au/test/eligibility.htm>>.

5. *Juries Act* (NT) s 10(3)(c).
6. *Jury Act 1995* (Qld) s 4(k).
7. *Juries Act 1977* (NSW) sch 2.
8. *Juries Act 1967* (ACT) s 10.
9. *Juries Act 2000* (Vic) sch 2; *Juries Act 2003* (Tas) sch 2.
10. *Juries Act 1927* (SA) s 13(b).
11. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.141]; NSWLRC, *Criminal Procedure: The Jury in a criminal trial*, Report No 48 (1986) [4.30]; NSWLRC, *Jury Selection*, Report No 117 (2007) 98 & Recommendation 23. At the time of the Commission’s 1980 report the Western Australian legislation provided that anyone who could not read or understand English was not qualified for jury service: LRCWA, *Exemption from Jury Service*, Report, Project No 71 (1980) [3.65]. The Commission

Traditionally, criminal trials have predominantly consisted of oral evidence, oral submissions and oral directions; however, in more recent years different practices have evolved to assist jurors in their understanding of the evidence and legal issues. For example, jurors may be provided with a transcript of proceedings and written directions from the judge. It has been noted that in Queensland it is common for jurors to be provided with chronologies, lists of witnesses, outlines of evidence and glossaries of legal terms.¹² Further, in some jurisdictions deliberation aids (such as ‘step directions’ and flow-charts) are being used.¹³ The New South Wales Law Reform Commission (NSWLRC) recently observed that one Western Australian judge has used PowerPoint presentations to supplement oral jury directions.¹⁴

The Commission recognises that these types of practices are increasing. As the Queensland Law Reform Commission noted, in modern times, information is often processed in written or visual form and the ‘oral tradition of criminal trials originated in times well before these modern developments, indeed well before general literacy’.¹⁵ However, the Commission emphasises that written and visual aids do not replace oral submissions and directions. Some jurors may be assisted by these aids but others (including those who cannot read) may be accustomed to and prefer processing information orally.

The NSWLRC noted that ‘some people who have become Australian citizens, but who have come from communities adopting a different alphabet or writing style, may be able to speak and communicate in English but have only a limited ability to read it’.¹⁶ The Commission agrees and considers that a literacy requirement across the board would exclude people from jury service who are capable of discharging their duties as jurors.¹⁷ In those cases where written aids are

provided, it is also possible for one juror to read relevant parts of the material to other jurors if necessary.

However, for trials involving a significant amount of written evidence (as distinct to written aids) the Commission believes that it is necessary for jurors to be able to read. In such cases, there needs to be a process to identify and exclude any members of the jury panel who cannot read. The Auld review in England observed that

The present system of leaving the judge as the final filter during the process of jury selection is probably the best that can be achieved. By then the nature of the case for trial and its likely demands on the literacy of potential jurors can be assessed. The judge should give the panel of potential jurors an ample and tactfully expressed warning of what they are in for, and offer them a formula that would enable them to seek excusal without embarrassment.¹⁸

Similarly, the New Zealand Law Commission (NZLC) concluded that in cases with large amounts of documentation, the judge could conduct a literacy test.¹⁹

In Western Australia, once the jury panel is assembled in the courtroom the trial judge advises the panel of the nature and probable duration of the trial (as well as the name of the accused and witnesses). It is at this stage that prospective jurors are entitled to seek to be excused from serving for reasons associated with the nature and length of the trial. For example, a juror might seek to be excused from a sexual assault trial if he or she was previously a victim of a sexual crime. Or a juror might seek to be excused if they have holidays booked during the trial. Jurors are told that they can write down their reasons if those reasons are of a private nature. This process can accommodate literacy requirements on a case-by-case basis.²⁰ The trial judge can advise the panel that, if selected, they will be required to read large amounts of documentary evidence and if they do not believe that they are capable of this task they should seek to be excused and can confidentially write a note for the judge.

In order to make the minimum requirements for jury service clear, the Commission has concluded that the current formulation should be amended to stipulate that jurors must be able to understand and communicate in

did not recommend any changes to this formulation but the current provision (ie, omitting a requirement to be able to read) was inserted by s 6 of the *Juries Amendment Act 1984* (WA). It appears from the parliamentary debates that this amendment might have been made to reduce the number of people from different cultural backgrounds being excluded from jury service: Western Australia, *Parliamentary Debates*, Legislative Council, 15 August 1984, 782 (John Williams).

12. QLRC, *A Review of Jury Directions*, Working Paper No 66 (2009) 178.
 13. See NSWLRC, *Jury Directions*, Consultation Paper No 4 (2008) [10.36]–[10.42].
 14. *Ibid* [10.27].
 15. QLRC, *A Review of Jury Directions*, Working Paper No 66 (2009) 177.
 16. NSWLRC, *Jury Service*, Issues Paper No 28 (2006) [7.3]
 17. During preliminary consultations for this reference, three Western Australian judges agreed that literacy was not required for every trial: Justice McKechnie, consultation (19 December 2007); Judge Yeats, consultation (20 December 2007); Chief Judge Kennedy, consultation (17 January 2008).

18. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 155.
 19. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 82.
 20. The Juries Commissioner in Victoria has advised that issues surrounding literacy are dealt with on a case-by-case basis by the judge. In cases where there is a lot of documentary evidence the judge makes the panel aware of this and advises that if they are ‘uncomfortable’ about dealing with a lot of documentary evidence then they should seek to be excused from the trial. This works quite effectively in practice: Rudy Monteleone, Juries Commissioner (Vic), telephone consultation (16 June 2009).

English. This reflects the need to be able to understand the evidence and court proceedings and to be able to discuss the case with the other jurors during deliberation.

PROPOSAL 37

English language requirement

That section 5(b)(iii) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified to serve as a juror if he or she is unable to understand and communicate in the English language.

IDENTIFYING PEOPLE WHO DO NOT UNDERSTAND ENGLISH

Obviously there is no way of identifying from the jury lists those people who are not qualified for jury service because of insufficient understanding of the English language. The system essentially relies on self-identification. A person summoned for jury service is required under the Fourth Schedule of the *Juries Act* to disclose a lack of understanding of the English language. Attached to the summons is a Juror Information Sheet which explains that if the person summoned does not understand English he or she should complete the statutory declaration and return it to the Sheriff's Office. In the 2008 calendar year approximately 2.6% of people (1500 people) summoned for jury service in Perth were excused from attendance because they were disqualified on the basis of a lack of understanding of English.²¹

People who cannot read or write English will clearly need assistance in responding to the summons and completing the statutory declaration. The Juror Information Sheet includes an instruction in four languages (Italian, Vietnamese, Cantonese and Mandarin) to take the summons to an interpreter. An information booklet provided to prospective jurors in New South Wales contains a similar instruction in six languages (Chinese, Arabic, Vietnamese, Greek, Italian and Spanish).²² In South Australia information is provided in Chinese, Greek, Italian, Pitjantjatjara, Polish, Serbian and

Vietnamese.²³ The Commission notes that information for people applying for citizenship is provided in 29 different languages.

The Commission is concerned that non-English speaking people may be unfairly penalised as a consequence of failing to complete the statutory declaration or failing to attend court. Although there is a process for investigating why a person failed to respond to a summons,²⁴ this process may disadvantage those who cannot understand English. If phone contact is not possible, a letter is sent asking the person to explain within 14 days why they did not respond. If there is no response to this letter the person may be fined.²⁵

In 1991 the Australian Law Reform Commission (ALRC) suggested that the jury summons should note that translations are available in other languages.²⁶ The Commission agrees and prefers this approach than the current advice to simply attend an interpreter. Online access to translated versions of the juror summons and the Juror Information Sheet would enable non-English speaking people (and people who cannot read English) to easily access the necessary information. For those people who do not have access to the internet, a hard copy of the translated documents should be available on request by telephoning the Sheriff's Office. The Commission proposes that the jury summons and the Juror Information Sheet should state—in a number of different languages—that translations are available on the website or by telephoning the Sheriff's Office. This will ensure that non-English speaking people and people who cannot read English are aware of the requirement to respond to the summons as soon as possible.²⁷ Based on 2006 census data, the 10 most commonly spoken languages in Western Australia (other than English) are Italian, Mandarin, Cantonese, Vietnamese, Arabic, German, Indonesian, Polish, Croatian and Spanish.²⁸ The Commission suggests that, as a starting point, the juror summons and the Juror Information Sheet should be updated to include relevant information in these more common languages.

21. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009). Figures for regional areas are significantly lower: in Bunbury 0.1% of people summoned were disqualified due to a lack of understanding of English, in Geraldton the figure was 0.3% and in Kalgoorlie the figure was 0.6%: Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Bunbury, Geraldton & Kalgoorlie Jury Districts 2008* (2009).

22. New South Wales Attorney General's Department, *Jury Service: A rewarding responsibility* (2008).

23. Goodman-Delahunty et al, *Practice, Polices and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 31.

24. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).

25. For further discussion, see Chapter Seven, 'Process for dealing with non-compliance'.

26. ALRC, *Multiculturalism: Criminal law*, Discussion Paper No 48 (1991) 63.

27. See NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.30].

28. Office of Multicultural Interests (WA), *Top 30 Overseas Language Groups Western Australia: 2006 Census*.

PROPOSAL 38

Provision of information in different languages

That the jury summons and the Juror Information Sheet be updated to provide that if the person summoned does not understand or cannot read English, translated versions are available online or by telephoning the Sheriff's Office and that this information should be provided in at least the 10 most commonly spoken languages in Western Australia.

While people who claim to be not qualified for jury service on the basis of a lack of understanding of English usually respond by completing a statutory declaration, some respond by telephoning the Sheriff's Office or when they attend the jury assembly room. The Commission has been told that the summoning officer determines these claims on a case-by-case basis. For example, the summoning officer might ask the person if they understood the Juror Induction DVD or ask the person about the nature of their employment.²⁹ However, this process is subjective: there are no guidelines to assist staff from the Sheriff's Office or the court to evaluate a person's English ability.

Census information for 2006 shows that 1.7% of people in Western Australian (34,962 people) indicated that they did not speak English well or at all.³⁰ However, 2.6% of people summoned are being excused because of a lack of understanding of English. It appears therefore that people from culturally and linguistically diverse backgrounds may too readily be self-identifying as lacking the ability to understand English. Jury awareness raising strategies (as proposed in Chapter Two³¹) should specifically target people from culturally and linguistically diverse backgrounds to ensure that they are encouraged to participate in jury service. For example, these strategies should include information that the ability to read English is not necessarily a requirement for jury service and that if the ability to read English is necessary for a specific trial there will be an opportunity to disclose any issues in a confidential manner.

29. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).

30. A further 4,297 people did not specify their proficiency in English.

31. Proposal 8.

PROPOSAL 39

Jury service awareness raising – people from culturally and linguistically diverse backgrounds

That the Western Australian government provide resources for the Sheriff's Office to conduct regular jury service awareness raising strategies specifically targeted to people from culturally and linguistically diverse backgrounds.

Further, the Commission proposes that the sheriff should develop guidelines³² with standardised procedures and questions to assist staff and judges to assess English language ability so that people are only excluded from jury service if absolutely necessary. In this regard, it is noted that the Commission proposes in Chapter Six that the grounds on which a person may be excused by the summoning officer or by the court from jury service include circumstances where a person is unable to discharge the duties of a juror because of an inability to understand and communicate in English.³³

PROPOSAL 40

Guidelines for assessing English language requirements

1. That the sheriff develop guidelines to assist staff and judges in assessing whether prospective jurors can understand and communicate in English to a sufficient degree to enable them to discharge their duties as jurors.
2. That these guidelines include standardised questions to be asked if a person self-identifies as not understanding English; circumstances where further inquiries might be warranted (eg, juror appears unable to follow verbal instructions from jury officers); and specific processes to be used in cases involving a significant amount of documentary or written evidence.

32. NSWLRC concluded that the sheriff's officers and the judge should be able to excuse a prospective juror who appears to not be able to read or understand English and that guidelines should be developed for this purpose: NSWLRC, *Jury Selection*, Report No 117 (2007) 97.

33. Currently, the *Juries Act 1957* (WA) sch 3 provides that the grounds for excusing a person from jury service are illness; undue hardship; circumstances of sufficient weight, importance or urgency; or recent jury service. See Chapter Six, Proposal 46.

REPRESENTATIVENESS

The Commission noted above that people from culturally and linguistically diverse backgrounds should be encouraged to participate in jury service. One potential consequence of the English language requirement is that people from culturally and linguistically diverse backgrounds may be underrepresented on juries. In 1991 the ALRC observed that '[j]uries do not reflect the cultural diversity of the community because persons who do not have an adequate command of the English language are excluded'.³⁴

In 2006 in Western Australia, 11.4% of the population reported speaking a language other than English at home and 81.8% of Western Australians spoke only English at home.³⁵ Of those Western Australians who reported speaking a language other than English at home (and hence likely to come from a culturally and linguistically diverse background) the vast majority stated that they spoke English well or very well (84.1%). Only 1.7% of Western Australians aged over 5 years (34,962 people) were recorded as not speaking English well or at all.

In assessing the representativeness of Western Australian juries, the available evidence is limited because statistics are not collected on a statewide basis. As noted in Chapter Three, the proportion of overseas-born jurors appears similar to the proportion of overseas-born residents in Western Australia; however, this does not necessarily mean that people from culturally and linguistically diverse backgrounds are adequately represented. The only available information in this regard is found from an exit survey conducted with jurors who served in Perth from 1 June 2008 until 4 June 2009. Of those jurors who completed the survey, 95% stated that their 'preferred' language spoken at home was English. Only 2% stated that their preferred language was a language other than English and the remaining 3% did not respond to this question. The proportion of jurors who stated that they preferred speaking a language other than English at home (2%) is lower than the proportion of Western Australians who reported speaking a language other than English at home in the 2006 census (11.4%). However, it is difficult to compare these statistics because the juror feedback questionnaire asks jurors to specify their 'preferred' language while census data refers to the language spoken at home. Furthermore, the 11.4% of people who speak a language other than English at

home includes people who are not liable for jury service because they are not Australian citizens, are otherwise not eligible to vote, or because they are under 18 years or over the age limit for jury service (currently 70 years). The Commission is of the view that the juror feedback questionnaire should be amended to enable a proper assessment to be made whether people from culturally and linguistically diverse backgrounds are adequately represented on juries.

PROPOSAL 41

Statistics in relation to jurors from culturally and linguistically diverse backgrounds

That the Sheriff's Office should revise its juror feedback questionnaire to ensure that data is recorded in relation to the number of jurors who state that they speak a language other than English at home. For those people who respond that they do speak a language other than English at home, there should be an additional question asking if the other language is their first language.

To the extent that people from culturally and linguistically diverse backgrounds are underrepresented on juries, it is important to consider if there are any other ways to increase their participation in jury service. The ALRC considered the option of providing interpreters and installing translation facilities in all courtrooms so that non-English speaking Australians could undertake jury service. However, this option was ultimately abandoned because of the large number of different languages spoken and the obvious cost that would be involved.³⁶ Similarly, the NZLC rejected the option of providing Maori interpreters principally because of the high cost and likely delays involved.³⁷ The NSWLRC, which recommended that interpreters and 'other reasonable accommodation' should be provided for blind and deaf jurors, declined to examine the option of interpreters for non-English speaking jurors.³⁸

As the Commission notes in the following section, if sign language interpreters are provided for deaf jurors these interpreters would be required to be accredited, to swear an oath to faithfully interpret proceedings and to comply with requirements pertaining to the secrecy

34. ALRC, *Multiculturalism: Criminal law*, Discussion Paper No 48 (1991) 61.

35. The proportion of people who reported only speaking English at home was 78.4% nationally, 74% in Victoria and New South Wales; 66% in the Northern Territory; 86% in Queensland; 83% in South Australia; 80.9% in the Australian Capital Territory; and 91.9% in Tasmania: ABS, *2006 Census QuickStats: Western Australia* (2007).

36. ALRC, *Multiculturalism: Criminal law*, Discussion Paper No 48 (1991) 63.

37. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 81. See also Horan J & Tait D, *Do Juries Adequately Represent the Community? A case study of civil juries in Victoria* (2007) 16 *Journal of Judicial Administration* 179, 195 where it is noted that in New Mexico, interpreters are provided for non-English speaking jurors.

38. NSWLRC, *Jury Selection*, Report No 117 (2007) 97.

of jury deliberations. Nevertheless, the Commission acknowledges that the provision of language interpreters for non-English speaking Western Australians involves quite different practical considerations to the provision of sign language interpreters for deaf jurors. Deaf Australia Inc notes that the estimated number of deaf users of sign language in Australia is 15,400³⁹ while the number of people who do not understand English well or at all in Western Australia is 34,962. Moreover, because there are so many different languages spoken in Western Australia, the provision of interpreters for jurors in criminal trials would be extremely cumbersome. For instance, there could be four non-English speaking jurors and the proceedings may need to be interpreted in four different languages. This would cause significant and inappropriate delays. The Commission cannot see a realistic way of providing interpreters for non-English speaking jurors; however, the Commission is interested to receive submissions about the best way to increase the opportunity for people from culturally and linguistically diverse backgrounds to participate in jury service.

INVITATION TO SUBMIT H

Participation in jury service by people from culturally and linguistically diverse backgrounds

That Commission invites submissions about the best way to increase the opportunity for people from culturally and linguistically diverse backgrounds to participate in jury service.

39. <<http://www.deafau.org.au/info/deafcomm.php>>.

Incapacity

SECTION 5(b)(iv) of the *Juries Act 1957* (WA) provides that a person is not qualified to serve as a juror if he or she ‘is incapacitated by any disease or infirmity of mind or body, including defective hearing, that affects him or her in discharging the duty of a juror’. As discussed in Chapter One, the Commission has established a principled approach as to who should be excluded from jury service. Qualification for jury service in relation to incapacity reflects the principle that potential jurors must be competent in order to discharge their duties as a juror.¹ In other words, jurors must be able to understand the evidence given in court, discuss the evidence as a group and arrive at a verdict based on that evidence.

The number of people disqualified each year for incapacity is reasonably low. In the 2008 calendar year only 2.5% of people summoned for Perth were disqualified on this basis,² while figures for regional areas such as Geraldton and Kalgoorlie were significantly lower at 0.2%.³ Although the sheriff must remove people who appear to be not qualified before the jury lists become jurors’ books for each district,⁴ it is impossible to identify from the jury lists those prospective jurors who may have a mental or physical incapacity that affects their ability to serve as a juror. In practice, therefore, s 5(b)(iv) works similarly to excuse. That is, people summoned for jury service who consider themselves not qualified by reason of incapacity must state the grounds on which they claim to be disqualified⁵ and sign the statutory declaration attached to the summons.⁶ In most cases, they will be asked to provide medical certification or other supporting evidence of their ‘disease or infirmity’. Decisions to exclude people from jury service for incapacity are made on a case-by-case basis by the summoning officer taking into account the evidence supplied.

1. See above Chapter One, Guiding Principle 1.
2. Sheriff’s Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
3. Sheriff’s Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Geraldton and Kalgoorlie Jury Districts 2008* (2009).
4. *Juries Act 1957* (WA) s 14(8).
5. The summons states that a person is not qualified if they ‘have any disease or infirmity of mind or body that will affect [their] ability to be a juror’.
6. In some cases the potential juror’s family or carers will contact the Sheriff’s Office to explain the nature of the incapacity. In these cases, again, a medical certificate will be sought to support the claim.

In the Commission’s view, case-by-case consideration is an appropriate approach to dealing with incapacity. The only question is whether a decision to exclude for incapacity should be made on the basis of disqualification by reason of incompetence or on the basis of excuse by reason of a temporary or permanent disability that affects the person’s capacity to discharge the duties of a juror.

As discussed earlier, not having sufficient understanding of spoken English can render a person incompetent in relation to discharging the duties of a juror because they cannot adequately understand the court proceedings. Similarly, a mental or cognitive impairment may render a person incompetent to discharge the duties of a juror; in particular, where the impairment impacts upon the person’s decision-making ability or the capacity to properly evaluate information. However, in the Commission’s view, a physical disability will rarely affect a person’s competency to discharge the duties of a juror, especially where facilities can be provided to overcome physical difficulties. The Commission has therefore determined that prospective jurors should not be automatically disqualified from jury service on the basis of a physical disability. However, a physical disability that renders a person unable to discharge the duties of a juror in a particular trial will constitute a sufficient reason for that person to be excused from jury service by the summoning officer or the trial judge under the proposed changes to the Third Schedule to the *Juries Act 1957* (WA).⁷

For this reason the Commission proposes that the current legislative formulation under s 5(b)(iv) of the *Juries Act* be repealed and replaced. New legislative provisions to deal with incapacity of mind or body that will assist the summoning officer to more easily distinguish between those people whose incapacity should disqualify them from jury service and those whose incapacity may support their release from the obligation to serve as a juror are discussed in more detail below. It is important to note that mental, intellectual or physical incapacity may also support a valid excuse (whether temporary or permanent)⁸ from jury service on the application of the prospective juror on the basis of undue hardship or extreme inconvenience as discussed in Chapter Six.

7. See below Proposal 43, ‘Physical incapacity’.

8. *Juries Act 1957* (WA) s 34A(2).

MENTAL INCAPACITY

People of ‘unsound mind’ are disqualified or disentitled from voting in every Australian jurisdiction.⁹ This can impact upon a person’s liability to serve as a juror because in order to be liable for jury service a person must be entitled to vote. In Western Australia s 18 of the *Electoral Act 1907* (WA) relevantly provides that:

- (1) Every person, nevertheless, shall be disqualified from voting at any election, who —
 - (a) is of unsound mind; or
 - ...
 - (cd) is, or is taken to be, a mentally impaired accused as defined in the *Criminal Law (Mentally Impaired Accused) Act 1996*.

While mentally impaired accused are ‘flagged’ in the Western Australian Electoral Commission’s computer system and would usually be excluded from the random process that generates a jury list, it is less easy to identify people of ‘unsound mind’ (a term that is not defined in the *Electoral Act*). In practice, a person may be removed from the electoral roll for being of unsound mind if they do not understand the concept of voting and they have medical certification to that effect.¹⁰ But unless the Electoral Commission is advised¹¹ that a person is of unsound mind (and relevant documentary evidence is provided), the person will remain on the electoral roll and will still be liable for jury service.

All Australian jurisdictions exclude from jury service people suffering from mental impairment¹² where the impairment renders the person incapable, unable or unfit to perform the functions of a juror.¹³ Mental impairment can range significantly from short-term anxiety or depressive disorders¹⁴ to long-term psychotic

and delusional disorders¹⁵ and includes cognitive deficits such as those caused by intellectual disability,¹⁶ acquired brain injury,¹⁷ senility or dementia.¹⁸ These conditions may impair a person’s perception, thought processes, memory retention, reasoning, problem-solving skills or decision-making capacity. In the Commission’s view it is appropriate that people suffering these conditions are excluded from jury service where their mental impairment impacts upon their ability to discharge the duties of a juror.

Under the current formulation in s 5(b)(iv) of the *Juries Act*, if a mentally impaired person is summoned for jury service he or she must essentially self-identify¹⁹ to claim disqualification on the basis of mental incapacity and medical evidence is required to support that claim.²⁰ This is the only way that the summoning officer can practically assess whether the person is incapable of discharging the duties of a juror and should be disqualified from serving. If the person attends for jury service and fails to disclose a relevant mental impairment, there is little that

Statistics, *Mental Health and Wellbeing: Profile of adults 1997* (Canberra: ABS, 1998) 18.

9. *Electoral Act 2004* (Tas) s 31; *Electoral Act 1992* (ACT) s 72; *Electoral Act 1992* (Qld) s 64; *Electoral Act 1985* (SA) s 29; *Constitution Act 1975* (Vic) s 48; *Commonwealth Electoral Act 1918* (Cth) s 93; *Parliamentary Electorates and Elections Act 1912* (NSW) s 21; *Electoral Act 1907* (WA) s 18(1(a)); *Electoral Act* (NT) s 21.
10. Warren Richardson, Manager Enrolment Group, Electoral Commission (WA), telephone consultation (15 June 2009).
11. Usually by a person’s doctor, a family member or by a guardian of the person appointed under the *Guardianship and Administration Act 1990* (WA) s 43.
12. Australian juries legislation variously refers to ‘mentally unfit’, ‘mental disability’, ‘disease or infirmity of the mind’ and ‘unsound mind’. The Commission uses the term ‘mental impairment’ to encompass all these phrases.
13. *Juries Act 2003* (Tas) sch 2(9); *Juries Act 2000* (Vic) sch 2; *Jury Act 1995* (Qld) s 4(3)(1); *Jury Act 1977* (NSW) sch 2(12); *Jury Act 1967* (ACT) s 10; *Juries Act 1957* (WA) s 5(b)(iv); *Juries Act 1927* (SA) s 13; *Juries Act* (NT) s 10(2)(d).
14. The most prevalent mental disorders are anxiety disorders (eg, social phobias, obsessive-compulsive disorder and post-traumatic stress disorder), followed by affective disorders (eg, depression, bipolar affective disorder and hypomania): Australian Bureau of

15. Psychotic and delusional disorders, such as schizophrenia and substance-induced psychoses, are considered to be low prevalence disorders: Jablensky A et al, *People Living with Psychotic Illness: An Australian study 1997–1998* (Canberra: National Survey of Mental Health and Wellbeing, 1999).
16. Intellectual disability describes a condition of arrested development of the mind, which is characterised by impairment of cognitive, language, motor and social skills. Generally, the term ‘intellectually disabled’ refers to an individual with below average cognitive functioning (indicated by an IQ of 70 or less) and associated deficits in adaptive behaviour (the practical, conceptual and social skills of daily living). Clinical definitions of intellectual disability require the onset of the disability to have occurred during the developmental period; that is, before the age of 18 years.
17. Acquired brain injury is a term used to describe an injury caused by severe head trauma, substance abuse, stroke, brain infections, brain tumours or other causes that lead to deterioration of the brain or reduced oxygen supply to the brain. Acquired brain injury may manifest in intellectual and adaptive deficits similar to intellectual disability.
18. ‘Dementia’ is a term used to describe loss of cognitive skills and intellectual functioning, including memory loss, loss of emotional control, and impairment of perception, reasoning or problem solving capacity. Common causes of dementia include Alzheimer’s disease, organic or acquired brain injury, meningitis or substance abuse. Although it is usually found in adults, dementia (particularly from disease, poisoning or infection) can occur in children. The term ‘senility’ is associated with similar mental impairment occurring in old age.
19. If a family member or other interested person contacts the summoning officer to advise of the prospective juror’s mental condition, supporting evidence pertaining to the condition must still be supplied to the summoning officer’s satisfaction.
20. It should be noted that under the Fourth Schedule to the *Juries Act 1957* (WA) prospective jurors are required to disclose ‘any incapacity by reason of disease or infirmity of mind or body, including defective hearing, that may affect the discharge of the duty of a juror’.

the summoning officer can do to disqualify the person from jury service, even where a family member has telephoned to alert the summoning officer of the relative's mental impairment or where a mental impairment is apparent.²¹

Several jurisdictions have sought to ameliorate problems stemming from total reliance on self-identification of relevant mental impairments by tying the concept of mental incapacity to definitions contained in mental health legislation.²² For example, the *Juries Act 2000* (Vic) refers to relevant definitions under a number of Acts²³ to exclude from jury service mental health patients, people with intellectual disabilities, mentally impaired accused and people the subject of guardianship orders (who generally have decision-making disabilities). This approach assists potential jurors, their family members and summoning officers to more clearly define when a person is not *qualified* to serve by reason of mental incapacity. It also ensures that people who do not meet these criteria are not unfairly disqualified (as opposed to excused) from serving as jurors. The Commission favours this approach for Western Australia and makes the following proposal to amend s 5(b)(iv).

PROPOSAL 42

Disqualification for mental incapacity

That s 5(b) be amended to read:

Notwithstanding that a person is liable to serve as a juror by virtue of section 4 that person –

...

(b) is not qualified to serve as a juror if he or she –

...

(iv) is an involuntary patient within the meaning of the *Mental Health Act 1996* (WA);²⁴

(v) is a mentally impaired accused within the meaning of Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA);²⁵ or

21. Cases where a mental impairment is clearly apparent in the person's behaviour may, however, invoke a challenge from counsel.
22. See *Juries Act 2000* (Vic) sch 2; *Juries Act* (NT) s 10; *Juries Act 1981* (NZ) s 2; *Juries Act 1974* (Eng) as amended by the *Criminal Justice Act 2003* (Eng) sch 33.
23. See *Juries Act 2000* (Vic) sch 2, which refers to the *Mental Health Act 1986* (Vic), *Crimes (Mentally Impaired and Unfitness to be Tried) Act 1997* (Vic), *Disability Act 2006* (Vic) and *Guardianship and Administration Act 1986* (Vic).
24. *Mental Health Act 1996* (WA) s 3 defines 'involuntary patient' as a person detained in an authorised hospital pursuant to an order made under the Act or a person who has been placed on a community treatment order.
25. Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) defines a 'mentally impaired accused' as a person who is subject to a custody order under the Act. Such orders may be made where the accused has run a successful defence of insanity

(vi) is the subject of a Guardianship Order under s 43 of the *Guardianship and Administration Act 1990* (WA).²⁶

Excusing mentally impaired jurors

It should be noted that under the Commission's proposals in Chapter Six it is open for a person with a mental impairment, who does not fit within the definitions under the relevant Acts, to apply to be *excused* from jury service or to be excused on the motion of the summoning officer or the trial judge. Under ss 27(1) and 32 of the *Juries Act*, both the summoning officer and the court are tied to excusal on the grounds of the Third Schedule which currently only specifies 'illness' as a relevant ground for excusal. Proposal 46 in Chapter Six amends this schedule to make clear that the power to excuse may apply to 'a person who ... because of sickness, infirmity or disability (whether physical, mental or intellectual), is unable to discharge the duties of a juror'. Excuses will of course continue to be assessed on a case-by-case basis on the provision of relevant evidence.

PHYSICAL INCAPACITY

As discussed above, the Commission has taken the approach that people should only be disqualified from jury service on the basis that they are not impartial (ie, those with certain criminal histories) or are not competent to discharge the duties of a juror (ie, those who cannot understand English or who have a mental incapacity that brings them within the terms of Proposal 42 above). In the Commission's view, a person should not be disqualified from jury service merely because of the existence of a physical disability. A physical disability will rarely affect a person's *competency* to discharge the duties of a juror; although it may—for reasons of inadequate facilities, the particular circumstances of the trial, or extreme inconvenience or hardship to the individual—be sufficient to excuse a person from serving as a juror.²⁷

In 2006 the New South Wales Law Reform Commission (NSWLRC) released a report which examined the issues surrounding jury service by blind or deaf jurors. Like the Commission, it concluded that blind or deaf people

under s 27 of the Criminal Code or where he or she is found by the court to be mentally unfit to plead. As mentioned earlier, mentally impaired accused are usually 'flagged' on the electoral roll and would not usually be subject to selection for a jury list.

26. Section 43 of the *Guardianship and Administration Act 1990* (WA) provides that a guardianship order may be made by the State Administrative Tribunal where a person is, among other things, 'unable to make reasonable judgments in respect of matters relating to his person'.
27. See below 'Excusing physically disabled jurors' and Chapter Six.

should not be automatically excluded from jury service on the basis of their disability alone, but that their ability to discharge the duties of a juror in the circumstances of a particular trial should be considered on a case-by-case basis.²⁸ The NSWLRC recommended that, where practicable, reasonable adjustments or accommodation should be provided to assist blind or deaf jurors. Such adjustments might include the provision of sign language interpreters and computer-aided real-time transcription for deaf people, and Braille or computer-aided speech translation of documentary evidence for blind people.²⁹

Accommodating physical disabilities

Physical disabilities may range from mobility difficulties to total or partial hearing or vision impairment. In many cases a person's physical disability may be able to be overcome by the provision of facilities to accommodate the relevant disability so that the person can properly discharge his or her duties as a juror. It is nonetheless acknowledged that in some cases a physical disability will be such that, even with the reasonable provision of facilities to accommodate the potential juror's needs, it will be difficult or uncomfortable for the person to discharge the duties required of him or her as a juror. There will also be cases where a person is so profoundly and relevantly disabled that his or her service as a juror may impact upon the fair trial of an accused. There must, therefore, be capacity for the court or summoning officer to excuse jurors with a relevant physical disability in certain circumstances.

Mobility difficulties

In recent years steps have been taken to improve the facilities in some Western Australian courts to accommodate jurors with mobility difficulties. For example, the new District Court building in Perth was designed to be wheelchair friendly and includes private lifts from the jury assembly room to the jury deliberation rooms and through to the various courts. However, jurors with mobility difficulties are not well catered for in older courts, such as the Supreme Court building and some circuit courts. Although public administration areas in most courts are adapted to accommodate people with disabilities (such as by provision of lifts, ramps and disabled toilets), the jury box or jury deliberation room is not always accessible to people who use wheelchairs or who have significant mobility issues. In Perth, such concerns are accommodated by excusing the juror from service (or returning the juror to the jury pool) if the juror is randomly selected on a panel that is to be held

28. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (2006) recommendation 1.

29. *Ibid* 48–50.

in a court, such as the Supreme Court, where adequate facilities for disabled jurors do not exist.

Deaf and hearing impaired

The hearing impaired are particularly well catered for in modern Western Australian courthouses. Most metropolitan courts now have amplification of proceedings with audio streamed to speakers throughout the court and including the jury box. New courts (such as the Perth District Court and Rockingham courthouse) have also installed a 'hearing loop' to enhance audio for wearers of hearing aids. This works by passing an electrical current from the amplifier through a wire loop which surrounds the courtroom walls. If jurors have a hearing aid, this audio is automatically inducted into their hearing aid without any requirements to physically connect cables. The Commission is informed that the District Court is currently purchasing two devices that can be used to connect to the hearing loop for those who have hearing problems but do not have a hearing aid.³⁰

Currently, it appears that most hearing impaired people seek to be excused or claim disqualification at the summons stage. Those that do attend for jury service generally self-identify (as they are required to do under the Fourth Schedule) to the summoning officer who explains the facilities (if any) that the court may have to cater for their impairment. The potential juror is excused (or disqualified) by the summoning officer if the impairment is such that existing facilities are not sufficient to assist and the person will be unable to discharge their duties if selected as a juror. Where it is not clear whether the person will be able to effectively discharge their duties as a juror, they are asked to identify to the court upon selection if they have difficulties hearing the preamble in the courtroom at which time they may be excused by the judge or challenged by counsel.

While those with hearing impairments are well catered for, the same cannot be said for prospective jurors who are profoundly deaf. While it is possible for the jury to have recourse to written records and transcript of proceedings to assist understanding,³¹ this will not assist the profoundly deaf to understand jury deliberations, which are undertaken in secrecy and are not transcribed. In its 2006 report into this issue the NSWLRC recommended that, where practicable,³² reasonable adjustments such as the provision of sign language

30. Gavin Whittome, Operations Manager for the District Court Building, Western Liberty Group, telephone consultation (20 August 2009).

31. Should the trial judge order it pursuant to s 110 of the *Criminal Procedure Act 2004* (WA).

32. That is, where facilities are available and where the sheriff has been advised in advance of the need to provide for reasonable adjustments to accommodate the disability.

interpreters should be made to accommodate the needs of deaf jurors.³³ Sign language interpreters would be required to be accredited,³⁴ to swear an oath to faithfully interpret proceedings, and to comply with requirements pertaining to the secrecy of jury deliberations.³⁵ It was noted that because of the physical demands of the role of a sign language interpreter, a deaf juror would need two such interpreters who would be required to take turns (in blocks of approximately 40 minutes) to interpret proceedings.³⁶ The NSWLRC received a number of submissions that suggested this would add to the cost and length of a trial and would be impracticable in longer trials.³⁷ The difficulties of securing the services of the required two interpreters for the duration of a trial also figured as a legitimate concern. The NSWLRC conceded that it would be likely that in consequence deaf people would only be able to be empanelled on short trials.³⁸

Blind and vision impaired

It appears that it is relatively standard in all Western Australian courthouses for television screens to be installed in the jury box to enable jurors to more easily see any video evidence (such as video records of interview or crime scene video). This may assist those jurors who have vision that is only partially impaired and can be reasonably corrected with eyeglasses. It is more difficult to cater for people with significant visual impairments in a trial setting.

The most often raised concern with severely visually impaired or blind jurors is that they cannot observe the demeanour of witnesses. In its 2006 report on this subject the NSWLRC found that this was not a significant impediment to comprehension of evidence. Indeed, it noted that recent High Court cases have downplayed the importance of demeanour and observation of a witness as a determinant of credibility³⁹ and that this had also been supported by scientific evidence.⁴⁰ It is worth noting that

current Western Australian law appears to accept that it is not always necessary to observe a witness's demeanour by permitting courts to take evidence by audio link.⁴¹ In its submission to the NSWLRC's report, the Royal Blind Society stated that:

One of the main misconceptions ... is that people who are blind will not be able to observe the demeanour of witnesses. We accept that people who are blind will not be able to observe all visual aspects of a witness's demeanour but we assert that there are many aspects of a person's demeanour which are non-visual and which are just as important and relevant.⁴²

Another concern raised regarding blind jurors is that they cannot observe and assess visual evidence; in particular, crime scene video evidence, photographic evidence (that cannot be adequately described in speech) and jury views. It should, however, be noted that much of the evidence in a typical criminal trial is oral in nature, which, if you accept that demeanour is not necessarily an issue, presents no difficulty for a blind juror. Even trials where there is a small amount of documentary evidence would not be problematic. In such cases the documents would be able to be read in open court or may be translated into Braille form by a computer and printed by a Braille printer. Many blind people also have computer adaptive technology that can scan documents and read them out in high quality synthetic speech.⁴³ However, in trials where it is apparent that there will be crucial visual evidence that cannot be comprehended by a blind or severely visually impaired juror (even where reasonable adjustments have been made to accommodate the juror), the Commission proposes that the trial judge may on his or her own motion, excuse a blind juror for the purposes of that particular trial.⁴⁴

Provision of relevant facilities

Noting the concerns raised above, the Commission nonetheless agrees with the NSWLRC that deaf or blind (and, by extension, other physically disabled) jurors who wish to answer a jury summons should not be automatically denied the possibility of performing this civic duty.⁴⁵ Although there is no 'right' (as distinct from duty) attached to jury service, enabling, where practicable, physically disabled jurors to serve on juries can only enhance a jury's representative nature.⁴⁶ Any decision to exclude a physically disabled juror must

33. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (2006) recommendation 1.

34. The National Accreditation Authority for Translators and Interpreters has developed accreditation standards for Australian sign language (otherwise known as Auslan).

35. Section 56B of the *Juries Act 1957* (WA) makes it an offence punishable by a fine of \$5000 for a 'person' (which would include non-jurors, such as interpreters) to disclose any protected information, which includes the content of jury deliberations and the identity of jurors in a trial. Amendments may need to be contemplated to pt 4, div 6 of the *Criminal Procedure Act 2004* (WA) to permit a sign language interpreter to enter the jury room and to communicate with other jurors on behalf of the deaf juror.

36. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (2006) 35.

37. *Ibid.*

38. *Ibid.*

39. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (2006) 51, citing *Fox v Percy* (2003) 214 CLR 118, among other cases.

40. *Ibid* 52–3.

41. So long as the court is satisfied that it is in the interests of justice to do so: *Evidence Act 1907* (WA) s 121.

42. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (2006) 53–4.

43. *Ibid* 49.

44. See below Proposal 43.

45. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (2006) recommendation 1; see also, Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 153.

46. Auld, *ibid* 152–3. See also the Commission's Guiding Principle 2.

therefore lie in an assessment of facilities required and available to accommodate the person's disability and whether, considering the provision of facilities, the person can effectively discharge their duties as a juror.

In order to enable the summoning officer to give consideration to whether adequate facilities are able to be provided for the person on the return of summons, the summoning officer must be given notice of the prospective juror's requirements as soon as possible after receipt of the summons. The court should be made aware in advance of empanelment that the pool includes a prospective juror (identified by number) who has a disability for which facilities have been provided. Should the person be selected during the empanelment process, it would be a question for the trial judge in the circumstances of the particular case whether the evidence in the trial would be able to be sufficiently comprehended by the person using the facilities provided. If that is not possible, the prospective juror would have to be excused by the judge.⁴⁷

Excusing physically disabled jurors

Although the Commission believes that a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability alone, it nonetheless acknowledges that physical disabilities may ground a valid excuse from jury service and, in some cases, may ground a permanent excuse from liability for jury service.⁴⁸ Further, the Commission recognises that some disabilities may, in the circumstances of a particular trial, render a person unable to properly discharge the duties of a juror. For example, where a trial involves a large amount of documentary or video evidence (such as crime scene video) or where a 'view' is to be undertaken by a jury,⁴⁹ it may be inappropriate for a totally blind person to serve on the jury in that particular trial.

The Commission agrees with its New South Wales counterpart that the fairness of a trial and the interests of justice 'must take precedence over the potential rights of a prospective juror'.⁵⁰ Under the Commission's proposed amendments to the Third Schedule, either the summoning officer⁵¹ or the judge⁵² will, on their own motion, have the power to excuse a person from serving

where it appears that the person's physical disability in the circumstances of the case (and despite the provision of facilities to assist) would render him or her unable to properly discharge the duties of a juror.⁵³ A full discussion of the power and circumstances of excuse from jury service is found in the following chapter.

PROPOSAL 43

Physical incapacity

1. That a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability. However, a physical disability that renders a person unable to discharge the duties of a juror in a particular trial will constitute a sufficient reason to be excused from jury service by the summoning officer or the trial judge under the Third Schedule to the *Juries Act 1957* (WA).
2. That a person who has a physical disability that may impact upon his or her ability to discharge the duties of a juror—including mobility difficulties and severe hearing or visual impairment—must notify the summoning officer upon receiving the summons so that, where practicable, reasonable adjustments may be considered to accommodate the disability.
3. That the sheriff should develop guidelines for the provision of reasonable adjustments, where practicable, to accommodate a prospective juror's physical disability.
4. That, where a physically disabled juror for whom relevant facilities to accommodate the disability have been provided is included in the jury pool, the court should be made aware of, in advance of empanelment, the nature of the disability and the facilities provided to accommodate or assist in overcoming the disability.

47. Under the *Juries Act 1957* (WA) s 32 with reference to the Commission's proposed amendments to the Third Schedule.

48. *Juries Act 1957* (WA) s 34A(2).

49. Pursuant to *Criminal Procedure Act 2004* (WA) s 109.

50. NSWLRC, *Blind or Deaf Jurors*, Report No 114 (2006) 11.

51. Under the power found in s 27(1) of the *Juries Act 1957* (WA).

52. Under the power found in s 32 of the *Juries Act 1957* (WA). Such power is also grounded in the common law in cases such as *Mansell* (1857) 8 E&B 54, 80–1; *Ford* [1989] QB 868, 871; and *Jago v District Court of New South Wales* (1989) 168 CLR 23, 25.

53. This is an important function of the court as it is the judge's duty to ensure that the accused receives a fair trial. See eg. *Crofts* (1996) 186 CLR 427, 451; *Pemble* (1971) 124 CLR 107, 117.

