

Chapter Six

Excused from Jury Service

Contents

Excused from jury service	107
Excuse as of right	108
Categories of excuse as of right	108
Occupations	109
Family	109
Religion	111
Age	111
The Commission's view	112
Excuse for good cause	114
The Juries Act: Third Schedule	114
The grounds for excusal for cause	115
Guidelines	116
Right of review	118
Deferral of jury service	120
The benefits of deferral of jury service for Western Australia	120
Criteria for deferral	121
Deferral in practice	122

Excused from jury service

IN the preceding three chapters the Commission has examined the law in relation to liability, eligibility and qualification for jury service. The proposals made in relation to these three categories largely reflect the Commission's first two guiding principles: that juries should be impartial, independent and competent and that juries should be randomly selected and broadly representative. In summary, the Commission has proposed that people who are enrolled to vote and aged between 18 and 75 years should be liable for jury service. In order to ensure independence and impartiality, the Commission has also proposed that people holding positions that are closely connected to the justice system should be ineligible for jury service. Further, people who are not competent (because of a lack of understanding of English or mental incapacity) should be disqualified from serving as should people who may be perceived as impartial as a result of their criminal history or current obligations in the criminal justice system.

In practice, people summoned for jury service may be ineligible or not qualified for jury service because the process of compiling jury lists only takes into account liability (because only those who are liable are included in the original jury books) and qualification based on criminal history (because the sheriff undertakes a process of checking criminal convictions before summonses are issued). Hence, a person summoned may be excused from further attendance after completing a statutory declaration and returning it to the sheriff's office on the basis that they are not eligible or not qualified to serve.¹ Statistics provided to the Commission by the Sheriff's Office show that 6.5% of people summoned for jury service in Perth for the 2008 calendar year were released from the obligation to attend on the summons date because they were ineligible or disqualified from serving.² A person summoned may also be excused from further attendance when they attend court on the summons date. During induction, prospective jurors are told that they must disclose to the jury pool supervisor or the court any incapacity, a lack of understanding of English,

any relationship with people involved in the trial or any other reason why they may be biased. If so, the person may be excused from further attendance.

In addition, people summoned for jury service may apply to be excused from attendance because they fall within the categories of people who are entitled to be excused 'as of right' or because of good cause such as illness, pre-booked holidays, work commitments or recent jury service. These excuses generally reflect the concepts of hardship or inconvenience to the person, their family, or the public. Applications to be excused for these reasons can also be made by statutory declaration or by applying in person to the summoning officer or the judge. For the 2008 calendar year, 52% of people summoned for jury service in Perth were excused either as of right or for cause.³

In this chapter, the Commission examines the categories of excuse as of right and excuse for cause. However, because in practice the process of excusing prospective jurors from further attendance takes into account other circumstances (eg, disqualification or potential bias) the proposals in this chapter are designed to accommodate all of the possible reasons why the summoning officer or the court may need to excuse a prospective juror from further attendance.

1. The summons form includes information about eligibility and qualification for jury service and directs persons summoned to complete the statutory declaration if they believe that they are ineligible or disqualified.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).

3. Ibid. The statistics show that 74% of people summoned were excused from jury service but this figure includes those people who were excused because they were ineligible or disqualified from jury service; because they did not receive the summons at all or in sufficient time; because they were excused following an investigation of why they did not attend court; or because they were no longer required to attend.

Excuse as of right

THERE are several categories of people who are otherwise liable, eligible and qualified to serve as jurors but who are currently entitled to be excused from jury service. People who fall within these categories have a choice: to make themselves available for jury service or claim a statutory exemption. In Western Australia, people falling within certain occupational groups, people with family or carer responsibilities, people in religious orders and people who are aged 65 years or more are entitled to be excused as of right. Most Australian jurisdictions include categories of excuse or exemption as of right; however, over time the trend has been to reduce or abolish the right to be excused.¹ No one is excused as of right in Victoria or South Australia. In Queensland only those people who have attended in response to a jury summons in the previous year have the right to be excused.² Tasmania also has a single category of excuse as of right: people aged 70 years or more.³ Broader categories (similar, although not identical, to Western Australia) exist in New South Wales,⁴ the Northern Territory⁵ and the Australian Capital Territory.⁶

The rationale for providing a right to be excused is that the particular circumstances (ie, occupational or personal) are of such a nature that jury service would be unduly onerous or inconvenient. Thus the justification is no different than the justification for being excused for good cause – it is only the mechanism by which the person is excused that is different. An application to be excused for good cause requires consideration of the merits of the individual case. But, for those claiming an excuse as of right all that is required is that the person establishes that they belong to one of the specified

categories.⁷ Underpinning all of the categories of excuse as of right is the assumption that membership of the category alone is sufficient to establish undue hardship or substantial inconvenience. However, as is discussed below, this is not necessarily always the case.

CATEGORIES OF EXCUSE AS OF RIGHT

Section 5(c)(i) of *Juries Act 1957* (WA) provides that a person who is otherwise liable for jury service is excused from serving as a juror ‘as of right, if he or she is a person within the classes of person listed in Part II of the Second Schedule and claims to be excused by virtue of that fact’. Part II of the Second Schedule provides:

1. Emergency services.

Full-time operational staff of the State Emergency Service.

Officers and firemen of permanent fire brigades.

Pilots employed by the Royal Flying Doctor Service.

2. Health.

Medical practitioners registered under the *Medical Practitioners Act 2008* if actually practising.

Dentists registered under the *Dental Act 1939* if actually practising.

Veterinary surgeons registered under the *Veterinary Surgeons Act 1960* if actually practising.

Psychologists registered under the *Psychologists Act 2005* if actually practising.

Midwives and nurses registered under the *Nurses and Midwives Act 2006* if actually practising.

Chiropractors registered under the *Chiropractors Act 2005* if actually practising.

Physiotherapists registered under the *Physiotherapists Act 2005* and in private practice.

Pharmaceutical chemists registered under the *Pharmacy Act 1964* and actually in business whether as principal or manager for a principal.

Osteopaths registered under the *Osteopaths Act 2005* if actually practising.

1. For example, the *Juries Act 1967* (Vic) provided for a number of categories of excuse as of right including doctors, dentists, pharmacists, teachers, masters of crews, international airline pilots, mayors, town clerks, persons who reside more than 32 km from the courthouse and members of statutory corporations. But now, under the *Juries Act 2000* (Vic), there are categories of persons who are disqualified from jury service and categories of persons who are ineligible. There is no entitlement to be excused; instead, a person seeking to be excused must demonstrate a ‘good reason’. Also, the categories of excuse as of right have been reduced over time in New South Wales: see NSWLRC, *Jury Service*, Issues Paper No 28 (1996) 74.
2. *Jury Act 1995* (Qld) s 23.
3. *Juries Act 2003* (Tas) s 11.
4. *Juries Act 1977* (NSW) sch 3 and s 39.
5. *Juries Act* (NT) s 11 and sch 7.
6. *Juries Act 1967* (ACT) s 11(2) and sch 2, pt 2.2.

7. In practice this is usually done by signing a statutory declaration.

3. Religion.

Persons in holy orders, or who preach or teach in any religious congregation, but only if they follow no secular occupation except that of a schoolteacher.

4. Family.

Pregnant women.

Persons residing with, and having full-time care of, children under the age of 14 years.

Persons residing with, and having full-time care of, persons who are aged, in ill-health, or physically or mentally infirm.

5. Age.

Persons who have reached the age of 65 years.

Occupations

Various emergency services personnel and health professionals are entitled to be excused from jury service because of the importance of their roles in the community.⁸ Providing a right to be excused for emergency services personnel and health professionals reflects the view that members of these occupational groups cannot be spared from their usual occupations to undertake jury service. In its 1980 report on jury selection, the Commission concluded that people employed in emergency services should be excused as of right because of the risk to the community if they were unavailable in the event of a major emergency.⁹ Similarly, it was observed that health professionals need to be available for emergencies and in some cases (especially in regional areas) it would be difficult to find a locum.¹⁰

However, most emergency services personnel and health professionals take leave¹¹ (such as annual leave, long service leave and parental leave) and therefore the temporary and planned absence of these workers does not necessarily put the safety of the community in jeopardy. As the New South Wales Law Reform Commission (NSWLRC) observed, '[m]ost professionals are able, as a matter of course, to arrange for their duties to be performed by locums or substitutes when they take various forms of leave'.¹² Moreover, medical and health services are, today, delivered in a variety of ways; medical practices exist with a large number of doctors and allied health professionals and these practices often accommodate part-time workers. In such practices, existing patients

can potentially access any available doctor or other health professional if required.

Further, the Commission notes that the current occupational categories are not entirely consistent. For example, pharmacists, chiropractors, physiotherapists, optometrists and osteopaths are included in Part II of the Second Schedule but various other allied health professionals (eg, podiatrists, radiographers, dieticians, opticians and occupational therapists) are not. Similarly, ambulance officers and paramedics employed by St John Ambulance are not entitled to claim an excuse as of right whereas certain State Emergency Services employees, fire-fighters employed in permanent brigades and Royal Flying Doctor Service pilots are included in the list of categories under Part II of the Second Schedule. In this regard, it has been observed that:

[I]t is extremely difficult to draw the line between those whose work is and is not so crucial that it would be against the public interest to compel them to serve as jurors. Invidious choices of that sort can be avoided, and the jury strengthened, by replacing excusal of right in such cases with discretionary excusal or deferral.¹³

The Commission acknowledges that many emergency services personnel and health professionals will justifiably seek to be excused from jury service. In many cases it would be inconvenient to the public to require emergency services personnel and health professionals to undertake jury service. However, membership of the particular occupational group should not of itself be a sufficient basis to be excused. The person's specific work responsibilities and commitments and their specialist skills should be considered along with the availability of suitable substitutes during the likely jury service period.¹⁴

Family

Family circumstances (ie, pregnancy; the need to care for children; and the need to care for aged people, people who are ill and people with physical or mental disabilities) is the second largest category of excusal in Western Australia. Just over 12% (6,849 people) of people summoned for jury service in Perth in 2008 were excused from serving on this basis.¹⁵

Currently, in order for a pregnant woman to be excused from jury service all that is required is the completion of a

8. See VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.144].

9. LRCWA, *Exemption from Jury Service*, Report No. 71 (1980) 25.

10. *Ibid.*

11. See NSWLRC, *Jury Selection*, Report No.117 (2007) 115.

12. *Ibid* 110.

13. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 150.

14. Later in this chapter the Commission proposes a system for deferral of jury service. In the majority of cases, this will enable emergency services personnel and health professionals to defer jury service to a more suitable time.

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

statutory declaration.¹⁶ Hence, there is no consideration of the stage of pregnancy or likely impact on the general health and comfort of the woman if she was required to serve. In the 2008 calendar year 281 women who were summoned for jury service in Perth were excused because of pregnancy. This constitutes less than 0.5% of all people summoned.¹⁷ It may well be that some pregnant women elect to remain available for jury service because during the early and middle stages of pregnancy it is unlikely that there would be any difficulty in undertaking jury service.¹⁸ Instead of providing a right to be excused, pregnant women who have specific health issues or risks could seek to be excused in the same way as people who are ill (ie, by producing a medical certificate).¹⁹ The Commission does not see any reason for providing pregnant women with an absolute right to be excused – pregnancy should be dealt with on a case-by-case basis.

Persons residing with and having full-time care of children under the age of 14 years are also entitled to be excused as of right. The Commission supported this approach in its 1980 report because of the difficulty in arranging substitute care.²⁰ In 1986 the NSWLRC concluded that:

The proper care and supervision of young children is, we believe, a more important responsibility than jury service. People who have such responsibilities should not be compelled to abandon them for the sake of jury service.²¹

However, today there are many families with both parents working and single working parents²² and, as a result, their children are placed in child care or attend after-school care. In some cases, other family members or paid babysitters look after children while their primary carers are at work. The Commission has been told that in Western Australia there are people who exercise their

right to be excused on this basis even though they are working part-time or full-time.²³

The NSWLRC concluded in its 2007 report that child care needs should be assessed on a case-by-case basis and people should be excused for good cause if ‘reasonable alternative arrangements cannot be made, or where a particular need is demonstrated for the care of the child by the person having the responsibility for the child’s care, custody or control’.²⁴ The Commission agrees but also emphasises that a parent or guardian should not be compelled to place their child in alternative care. A case-by-case approach would enable consideration of not only the availability of child care but also the parent or guardian’s view about the suitability of any available alternative care.

The Commission is of the view that if reasonable and suitable alternative care is available, then jury service should be undertaken, subject to one condition. A parent or guardian should not be out-of-pocket for any reasonable child care expenses that are incurred directly as a result of jury service.²⁵ If, for example, a person put their child in after-school care for extra days than is normally the case, those additional fees should be reimbursed. Although there is currently no legislative provision for reimbursement in Western Australia, the Commission understands that as a matter of policy child care expenses are reimbursed.²⁶ Similarly, reasonable child care fees are reimbursed in Tasmania.²⁷ In South Australia a juror can claim monetary loss (including child care) up to a maximum of \$108 per day.²⁸ In the Northern Territory there is no direct child care reimbursement but jurors can generally apply for an extra \$30 per day if they suffer financial loss.

The same reasoning applies to people who reside with and have the full-time care of persons who are aged, in ill health, or physically or mentally infirm. In some

16. Carl Campagnoli, Jury Manager (WA), consultation (5 June 2009).

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

18. See VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.172]; NSWLRC, *Jury Selection*, Report No 117 (2007) 120.

19. NSWLRC, *ibid* 120.

20. LRCWA, *Exemption from Jury Service*, Report No.71 (1980) 26.

21. NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1996) [4.38].

22. Census statistics show that in Western Australia in 2006 there were 114,778 families with two working parents (including full-time and part-time work) and 40,357 single parent families where the parent works either full-time or part-time. These figures have increased over time: in 1996 there were 103,074 families with two working parents and 27,364 single parent families where the parent works: ABS, *Family Composition and Labour Force Status of Parent(s)/Partners by Gross Family Income (Weekly) for Time Series*, 2006 Census Tables.

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

24. NSWLRC, *Jury Selection*, Report No 117 (2007) 121.

25. In its 2007 report the NSWLRC recommended reimbursement of reasonable child care or substitute care expenses: *ibid*, Recommendation 62.

26. In the 2008–2009 financial year there were 20 inquiries to the Sheriff’s Office regarding reimbursement of child care expenses and nine claims actually submitted: Carl Campagnoli, Jury Manager (WA), consultation (11 September 2009). The *Juror Information Sheet* attached to the juror summons notes that child care costs may be reimbursed.

27. Supreme Court of Tasmania, *Jury Duty* (2008). In New Zealand the Ministry of Justice website states that a juror can claim the ‘reasonable cost of childcare provided to children in your care while you are serving as a juror’: <<http://www.justice.govt.nz/publications/global-publications/j/jury-service-information-on-jury-service>>.

28. <http://www.courts.sa.gov.au/sheriff/jury_duty/content.html>.

instances, these people will be assisted by paid carers such as Silver Chain or may be assisted by other family members. The Victorian Parliamentary Law Reform Committee (VPLRC) noted that those who have care of an elderly parent may be in a position to serve.²⁹ Similarly, the NSWLRC recommended that these circumstances should be considered on a case-by-case basis but highlighted that when assessing applications to be excused on the basis of carer obligations, the risk that the person requiring care may be upset or worried if a substitute carer is used should be taken into account.³⁰ Again, any expenses incurred to obtain substitute care as a result of jury service should be reimbursed.

The Commission believes that the provision for reimbursement of reasonable child care expenses or other expenses incurred for carers should be contained in legislation – this reflects the Commission’s Guiding Principle 4: that the law should seek to prevent or reduce any adverse consequences resulting from jury service.³¹ Presently, s 58B(2) of the *Juries Act* provides that a person who attends in response to a summons or serves on a jury is entitled to be paid the prescribed allowances and expenses. As discussed further in Chapter Seven, regulation 5 of the *Juries Regulations 2008* (WA) provides for allowances and expenses for travel costs. The Commission proposes that a new regulation be enacted to provide for the reimbursement of out-of-pocket child care or other carer expenses incurred as a consequence of jury service.³²

PROPOSAL 44

Child care or other carer expenses

1. That the *Juries Regulations 2008* (WA) be amended to insert a new regulation 5B to cover reimbursement of child care and other carer expenses.
2. That this regulation provide that, for the purpose of s 58B of the *Juries Act 1957* (WA), the reasonable out-of-pocket expenses incurred for the care of children who are aged under 14 years, or for the care of persons who are aged, in ill health, or physically or mentally infirm are prescribed as an expense provided that those expenses were incurred solely for the purpose of jury service.

29. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.172].

30. NSWLRC, *Jury Selection*, Report No 117 (2007) 122.

31. See above Chapter One, ‘Guiding principles for reform of the juror selection process.’

32. Some people are eligible for child care rebates from the government. Jurors should only be reimbursed for those expenses that are not otherwise claimable or reimbursed.

Religion

Currently, persons in holy orders or who preach or teach in any religious congregation are entitled to be excused as of right if they follow no other secular occupation (other than being a school teacher). Different rationales have been suggested for providing a right to be excused for ministers of religion including that they should be available to carry out pastoral responsibilities; that they may have confidential information about the accused or the victim; that they may be too compassionate to remain objective; and that they may have a conscientious objection to jury service.³³

The VPLRC concluded that ministers of religion should not have a right to be excused from jury service, emphasising that they ‘will usually have knowledge, experience and gifts which would be very useful inside a jury room’.³⁴ It was concluded that ministers of religion should be able to apply to be excused on the basis of conscientious objection, undue hardship or the possibility of bias. In particular, it was noted that in smaller regional communities it may not be possible for ministers of religion to undertake jury service because it will be difficult to find suitable replacements and it will be more likely that the minister will know the parties involved in case.³⁵

Age

The Commission has examined age in Chapter Three. Currently, a person aged 65 years or more may claim an excuse as of right while those aged 70 years or older are not eligible to serve. In the 2008 calendar year, 2.6% of people summoned for jury service in Perth exercised their right to be excused on the basis of age.³⁶ After considering the position in other jurisdictions the Commission has proposed that the maximum age for liability for jury service should be raised to 75 years of age and that persons who have reached the age of 65 years should no longer have a right to be excused.³⁷ The Commission is of the view that there is no valid reason for providing a right to be excused for those people who have reached the age of 65 years. Individual circumstances such as hardship, illness or infirmity can easily be accommodated by an excuse process that enables the summoning officer or the judge to take into account the individual circumstances of the case.

33. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.92]–[3.94]. See also LRCWA, *Exemption from Jury Service*, Report No 71 (1980) 26.

34. VPLRC, *ibid* [3.96].

35. NSWLRC, *Jury Selection*, Report No.117 (2007) 111–12.

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

37. See Proposal 10.

THE COMMISSION'S VIEW

Based on information provided by the Sheriff's Office, it appears that approximately 18% of people (just over 10,000 individuals) summoned for jury service in Perth in 2008 were excused as of right before the jury summons date.³⁸ It is impossible to know how many of these people would have had a sufficient reason to be excused over and above their membership of one of the categories in Part II of the Second Schedule of the *Juries Act*.

Providing an automatic right for certain groups to be excluded from jury service potentially undermines the representative nature of juries. The goal of representation is to obtain a jury of diverse composition; that is, people with different backgrounds, knowledge, perspectives and personal experiences.³⁹ According to media reports, the current Western Australian Attorney General plans to remove the categories of excuse as of right in order to ensure that juries are more representative of the community.⁴⁰ Likewise, the NSWLRC noted that automatic categories jeopardise the representative nature of the jury⁴¹ and 'can have the effect of limiting the collective skill and experience of the jury'.⁴²

The available empirical evidence suggests that juries in Perth are reasonably representative and diverse. For example, responses to the juror survey in Perth for 2008–2009 shows that of 1,985 people who responded approximately 82% were employed (including those employed in private sector, public sector and self-employed).⁴³ As noted in Chapter Four, jurors employed in the private sector or self-employed appeared to come from a wide range of occupations including professionals, managers, supervisors and administrators, tradespersons, technicians, salespeople and apprentices.⁴⁴ But whether people who fall within the excuse as of right occupational categories are adequately represented on juries is unknown. A breakdown of occupations for 667 jurors, who submitted claims for reimbursement of lost

income for the first three months of 2009, shows that only one health professional listed in Part II of the Second Schedule undertook jury service (a psychologist). Also the list includes only two pastors and one fire-fighter. However, this list does not cover the public sector so the number of public sector health professionals and emergency service personnel undertaking jury service is not able to be determined.⁴⁵

Consistent with the Commission's Guiding Principle 3—that wide participation in jury service should be encouraged—it is important that members of the community share the responsibility of jury service. The NSWLRC explained in its 2007 report that the continuation of automatic categories of excuse may cause resentment among other members of the community.⁴⁶ Providing certain members of the community with an absolute right to be excused, irrespective of their individual circumstances, means that the burden of jury service is not being shared equitably.⁴⁷

In support of retaining the categories of excuse as of right it has been argued that abolishing the categories would increase the work load of the Sheriff's Office.⁴⁸ However, the Commission notes that the practice in Western Australia is for people summoned for jury service to fill out a statutory declaration explaining their reasons for being unable to undertake jury service. This includes people who are entitled to claim an excuse as of right. If the categories of excuse as of right are abolished, the number of people seeking to be excused is unlikely to increase. If anything, the number of people seeking to be excused is likely to fall because of the requirement to demonstrate good cause. For example, a pregnant woman currently only has to fill out a statutory declaration stating that she is pregnant. If excuses were assessed on a case-by-case basis a woman who was two-months pregnant and not experiencing any significant health issues may not have any grounds for applying to be excused. Similarly, a medical practitioner who works two afternoons per week in a large metropolitan practice or a mother of two school-aged children who works full-time and ordinarily places her children in after-school care may find it difficult to demonstrate a sufficient cause for excuse.

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

39. See above Chapter One, 'Objectives of juror selection' and the Commission's Guiding Principle 2.

40. Banks A, 'Tighter Rules To Make It Harder to Skip Jury Duty', *The West Australian*, 5 August 2009, 7.

41. NSWLRC, *Jury Selection*, Report No 117 (2007) 106.

42. *Ibid* 110.

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

44. *Ibid*. These results are consistent with an earlier study in New South Wales in 1994 which found that unemployed persons only constituted 1.2% of jurors; over 50% of jurors were categorised as employed in professional/executive positions; and between 35–40% of jurors indicated that they have achieved tertiary level education: Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 61.

45. Regulation 6 of the *Juries Regulations 2008* (WA) provide that for the purposes of s 58B(4) of the *Juries Act 1957* (WA) persons employed by a state instrumentality, state trading concern or a government department are not able to claim reimbursement of income.

46. NSWLRC, *Jury Selection*, Report No. 117 (2007) 106.

47. *Ibid* 110.

48. NSWLRC, *ibid* 107; NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1996) [4.34].

PROPOSAL 45

Abolition of 'excuse as of right'

That Part II of the Second Schedule of the *Juries Act 1957* (WA) be abolished.

As the VPLRC observed, those who are entitled to be excused as of right invariably exercise that right.⁴⁹ Similarly, the NSWLRC noted that the problem with exemptions as of right is that people 'may regard it as an invitation to be excused from jury service, which they will readily accept, without giving any consideration to the wider public interest involved in that form of service'.⁵⁰ The Commission acknowledges that the administrative burden on the Sheriff's Office may increase to some extent because the processing of applications may take longer (as a result of the need to assess whether the person has demonstrated good cause). However, the Commission notes that the Jury Manager in Western Australia supports the removal of the categories under Part II of the Second Schedule.⁵¹ In addition, during initial consultations for this reference a number of judges stated that they did not support the continuation of excuses as of right.⁵²

In its 2007 report, the NSWLRC recommended that no person should be entitled to be excused from jury service as of right solely because of their occupation, profession or calling or because of personal characteristics or situations. Instead, they should be able to apply, on a case-by-case basis, to be excused for good cause.⁵³ The Commission agrees and therefore proposes that Part II of the Second Schedule of the *Juries Act* should be repealed. Emergency services personnel, health professionals, pregnant women and those with carer responsibilities will be able to apply to be excused from jury service on a case-by-case basis on the grounds stipulated in the Third Schedule (discussed below). And ministers of religion or people aged over 65 years will similarly be able to apply to be excused on the basis of hardship or inconvenience. Furthermore, at the end of this chapter the Commission proposes a system for deferral of jury service; this will enable prospective jurors who previously had a right to be excused to arrange jury service around their work and family responsibilities. If deferral does not alleviate inconvenience or hardship, then it will still be possible for the summoning officer or the court to excuse that person from further attendance.

49. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.146].

50. NSWLRC, *Jury Selection*, Report No 117 (2007) 106.

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

52. Chief Judge Kennedy, consultation (17 January 2008); Judge Yeats, consultation (20 December 2007); Justice McKechnie, consultation (19 December 2007). The Commission notes that the Western Australian Jury Advisory Committee indicated its support for the removal of excuse as of right categories in 2007: Carl Campagnoli, Jury Manager (WA), consultation (11 September 2009).

53. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendations 26 & 27.

Excuse for good cause

A person summoned for jury service is able to apply to be excused for cause either before or on the jury summons date. Currently, the grounds for seeking to be excused on this basis cover illness; undue hardship to the person summoned or another person; circumstances of sufficient weight, importance or urgency; and recent jury service.¹

From statistics provided by the Sheriff's Office it appears that work-related excuses are the most frequent reason for excusing people from jury service. In the 2008 calendar year, over 18% of people summoned for jury service in Perth were excused for work-related reasons before the jury summons date.² The Commission highlights that because jurors either continue to be paid their usual salary or are fully reimbursed for loss of income, any applications for excusal that are tied to loss of income are promptly rejected.³ Other common excuses (not including those who are excused as of right) included health issues (5%), circumstances of sufficient weight, importance or urgency (4.4%) and pre-booked holidays (2.9%). Only 0.38% of people summoned for Perth were excused because of recent jury service.⁴ Excuse for cause constitutes approximately 65% of all excusals (ie, excuse as of right and excuse for cause).

As noted in Chapter One the Commission is of the view that, in order to ensure wide participation, people should only be excused from jury service if they can demonstrate good cause. But, as mentioned at the beginning of this chapter, people summoned for jury service may also need to be excused from further attendance if they are unable to discharge the duties of a juror (eg, because of a lack of understanding of English, a physical disability or prior knowledge of the parties involved in the trial).⁵ In these circumstances, a person may be released by the summoning officer or the court from the obligation to serve as a juror even though the person has not actually made an application to be excused. In this section, the Commission therefore considers the power to excuse a

person who has been summoned for jury service from further attendance (either because the person has made an application to be excused or because the summoning officer or the court is of the view that the person should not undertake jury service in the particular circumstances). The Commission has approached this topic with a view to ensuring that people who are summoned for jury service are not excused from further attendance too readily – it is vital that jury service is shared among the community as equitably as possible and that juries represent a broad range of people with different skills, backgrounds and life experiences.

THE JURIES ACT: THIRD SCHEDULE

Section 5(c)(ii) of *Juries Act 1957* (WA) provides that a person who is otherwise liable for jury service is excused from serving as a juror 'if, pursuant to the provisions of this Act, the court, judge, sheriff or summoning officer excuses him or her from serving as a juror'.

The Third Schedule of the *Juries Act* provides for the grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the by the court, namely:

- illness,
- undue hardship to himself or another person,
- circumstances of sufficient weight, importance or urgency, or
- recent jury service.

Pursuant to ss 27(1) and 32 of the *Juries Act* the summoning officer and the trial judge have the power to excuse from further attendance a member of a jury panel (ie, the group of people assembled in the courtroom and from which the final jury will be selected). This power is tied to the grounds specified in the Third Schedule.

In addition, the summoning officer has the power to excuse from further attendance any person who has been summoned for jury service.⁶ This power enables the summoning officer to excuse people summoned before the jury summons date or before a jury panel is assembled. There is also a general power vested in the court (before which a pool precept is returnable) to excuse from attendance any person whose name is included in

1. *Juries Act 1957* (WA) sch 3.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
3. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007). See further discussion below Chapter Seven, 'Reimbursement of lost income'.
4. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
5. See above Chapter One, Guiding Principle 3(iii).

6. *Juries Act 1957* (WA) s 32D(3).

the jury panel.⁷ Neither of these provisions specifies the grounds on which a person may be excused and they appear to accommodate reasons other than those set out in the Third Schedule.

Currently, applications for excuse are assessed subjectively by the Sheriff's Office. There are no guidelines although the Western Australian Jury Manager explained that he stresses to staff the importance of ensuring that people seeking to be excused have demonstrated 'real hardship' not just minor inconvenience.⁸ Most people seek to be excused before the jury summons date; however, there are also some people who seek to be excused when they attend court. Obviously, circumstances may change from the time a person receives a summons to the time that they attend court.⁹

The grounds for excusal for cause

Currently, there are four (somewhat overlapping) grounds on which a person summoned can seek to be excused for cause:

Illness: The Commission has been advised that a medical certificate is typically required if a person seeks to be excused on the basis of illness but in some instances the Sheriff's Office has accepted a statutory declaration without a medical certificate.¹⁰ Similarly, the trial judge may require a person whom he or she excuses to provide a medical certificate at a subsequent time. While viewing the empanelment of a jury in a five-week trial, the Commission observed a number of jurors who applied to the trial judge to be excused. In one instance, the person explained that he had a medical condition that made it difficult to concentrate for long periods of time. The judge excused this person but ordered that documentary proof be submitted to the Sheriff's Office within a specified period.

Undue hardship: This ground covers hardship to the person summoned but also hardship to any other person. For example, in the above five-week trial a man was excused because he was required to accompany his wife, who was ill with cancer, to a number of appointments during the jury service period.

Circumstances of sufficient weight, importance or urgency: There is a significant degree of overlap between this ground and the ground of undue hardship. During the abovementioned jury empanelment a number of

prospective jurors were excused including a person who was due to depart for a pre-booked holiday; a self-employed stockbroker who would be unable to maintain his client base if required to undertake jury service for five weeks; a person due to attend a pre-paid one-off conference; and a person who was accommodating elderly relatives from interstate. These excuses fall under both concepts (ie, undue hardship or circumstances of sufficient weight, importance or urgency).

Recent jury service: A person is usually excused on this basis if they have served on a jury within the previous 12–18 months.¹¹ The Commission notes that some jurisdictions provide an automatic right to be excused for jurors who have undertaken recent or lengthy jury service.¹² The VPLRC concluded that persons who have served for a lengthy period should be entitled to an exemption in order to ensure that 'the burden of jury duty is spread more evenly among the community'.¹³ Similarly, recent jury service was the only category of exemption as of right that was recommended to be retained by NSWLRC.¹⁴ While the Commission acknowledges that people who have undertaken recent or lengthy jury service may have a very strong basis for being excused, the Commission favours a case-by-case approach because it enables the individual circumstances to be considered. Specifically, in Western Australia there are a number of jury districts in regional Western Australia whose required juror quota is higher than the number of eligible persons on the electoral roll in that jury district. Bearing in mind the Commission's Guiding Principle 6—that reforms should take into account local conditions—it would not be feasible to provide an automatic right to be excused on the basis of jury service because in these jury districts members of the community are sometimes required to serve on a jury more than once a year.

The formulation of the grounds for excuse varies between jurisdictions. In some jurisdictions the legislation contains extensive criteria¹⁵ but in others the legislation merely states that jurors can be excused for good or sufficient cause.¹⁶ Western Australia, like South Australia and the Australian Capital Territory, defines the grounds

7. *Juries Act 1957* (WA) s 32H(5).

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

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

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

11. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009). Although in some regional areas this is not necessarily the case because of a lack of available jurors: see Chapter Two, 'Regional issues'.

12. *Jury Act 1995* (Qld) s 23; *Juries Act 1977* (NSW) s 39; *Juries Act 1967* (ACT) s 18A.

13. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1 [3.181].

14. NSWLRC, *Jury Selection*, Report No 117 (2007) 106.

15. See *Juries Act 2003* (Tas) s 9; *Juries Act 2000* (Vic) ss 8 & 12; *Jury Act 1995* (Qld) s 21.

16. *Juries Act 1977* (NSW) s 38; *Jury Act* (NT) s 15.

for excusal in fairly general terms.¹⁷ After examining the legislation in other jurisdictions the Commission has formed the view that two concepts—hardship and inconvenience—encompass all of the potential reasons a person would seek to be excused from jury service. However, it is vital that the degree of hardship or inconvenience that must be demonstrated is sufficiently high so that people are not excused from jury service too readily. In this regard, the Commission is attracted to two expressions used by the Law Reform Commission of Hong Kong. In addition to the presence of bias or beliefs that are incompatible with jury service, it was recommended that a person should only be exempted, excluded or deferred from jury service ‘where substantial inconvenience to the public may result’ or ‘where undue hardship or extreme inconvenience may be caused to the person’.¹⁸ The Commission agrees with the distinction between inconvenience to the public and inconvenience to the person. This is especially the case bearing in mind the Commission’s proposed abolition of the categories of excuse as of right for emergency services personnel and health professionals. The test for these types of occupational groups should not be as strict as it is for an individual because jury service may potentially impact upon a significant number of people.

In addition, as mentioned above, the summoning officer or the judge may also need to excuse a person summoned from further attendance if the particular circumstances indicate that they are unable to discharge their duties as a juror. For example, the summoning officer may notice that a prospective juror in the jury assembly room is unable to sufficiently understand English. Also, a person may advise the court that they know the accused and the judge may need to release this person from the jury panel. The NSWLRC recommended that the concept of ‘good cause’ should be defined to cover the following situations:

- (a) service would cause undue hardship or serious inconvenience to an individual, to his or her family, or to the public;

17. Under ss 16(1) & (2) of the *Juries Act 1927* (SA) a person may be excused by sheriff or judge from further attendance for the following reasons: the person has served within the previous three years; the person is one of two or more partners or two or more employees from the same establishment who have both or all been summoned on the same days; ill-health, conscientious objection or matter of special urgency or importance; or any reasonable cause. In the Australian Capital Territory, a judge or the sheriff has power to excuse a person summoned for jury service because of illness; pregnancy; the need to care for children, aged persons or ill persons; circumstances of sufficient importance or urgency; or two or more partners or employees of the same establishment have been summoned on the same day: *Juries Act 1967* (ACT) ss 14 & 15.

18. Law Reform Commission of Hong Kong, *Juries Sub-Committee, Criteria for Service as Jurors*, Consultation Paper (2008) 107, Recommendation 8.

- (b) some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror; and
- (c) a conflict of interest or some other knowledge, acquaintance or friendship exist that may result in the perception of a lack of impartiality in the juror.¹⁹

Based partly on this formulation and the concepts used by the Law Reform Commission of Hong Kong, the Commission proposes that the Third Schedule be amended to make absolutely clear the circumstances in which the summoning officer or the judge may excuse or release a person summoned from further attendance. Consistent with the Commission’s Guiding Principle 5, that the law should be simple and accessible,²⁰ this proposal enables all those who are potentially involved in the jury system to understand the grounds on which a person may seek to be excused from jury service or otherwise relieved of the obligation to serve.

PROPOSAL 46

Third Schedule: grounds on which a person may be excused from jury service

That the Third Schedule of the *Juries Act 1957* (WA) be amended to provide that the grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the court are:

- Where service would cause substantial inconvenience to the public or undue hardship or extreme inconvenience to a person.
- Where a person who, because of an inability to understand and communicate in English or because of sickness, infirmity or disability (whether physical, mental or intellectual), is unable to discharge the duties of a juror.
- Where a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror.

Guidelines

In some jurisdictions, guidelines are available for the summoning officer or the court to assist in determining applications for excuse. The benefit of guidelines is increased consistency and direction to ensure that

19. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendation 31.

20. See above Chapter One, Guiding Principle 5.

prospective jurors are not too readily excused from their important civic responsibility. In England, guidelines cover both excuses and deferral. It is stated that deferral should always be considered first and, hence, a person should only be excused from jury service in 'extreme circumstances'.²¹

In New South Wales there are formal guidelines but these guidelines are not publicly available.²² A New South Wales study in 1994 observed that written guidelines in the form of a three-page memorandum had been distributed to staff of the Sheriff's Office in order to promote consistency in determining applications to be excused for good cause.²³ The study also noted that the following reasons were usually sufficient to grant an application for excuse: illness of the person summoned or illness of a family member; a pre-planned holiday or overseas trip; a pre-planned business meeting; the need to prepare or sit for exams or complete assignments; the need for teachers or lecturers to supervise exams; attendance at a job interview; very recent commencement of a new job and genuine financial hardship. It was also explained that applications based on ordinary work commitments and reluctance or lack of interest in participating in jury service would normally be rejected.²⁴

Despite noting that the provision of publicly available guidelines might 'provide a template of potential excuses that could be abused by those who set out to avoid jury service'²⁵ the NSWLRC recommended that guidelines should be published. It also recommended that the guidelines should take into account a number of matters including:

- where illness, pregnancy, poor health or disability would make jury service unreasonably uncomfortable or incompatible with good health;
- undue hardship (both personal and business);
- excessive court travelling time;
- inconvenience to the public or functioning of the government;
- care-giving obligations where no reasonable substitute care available;

- where a person is one of two or more partners in the same business or one of two or more employees of same business establishment (with less than 25 employees) who have been summoned at the same time;
- objectively demonstrated religious or conscientious beliefs that would be incompatible with jury service;
- existence of possible bias because of previous relationship with the accused or the victim;
- where age would make jury service unduly onerous;
- where the person has a high public profile and jury service may pose a security risk;
- pre-existing commitments such as holidays, weddings, funerals, graduations, exams, etc;
- where a teacher or lecturer is scheduled to supervise exams; or
- any other matter of special or sufficient weight, importance or urgency.²⁶

Similarly, the VPLRC concluded in its 1996 report that 'the criteria governing excusal for good reason should be generally known and consistently applied'.²⁷ It was recommended that guidelines should be developed by the judges of the Supreme Court and District Court and published as a practice direction.²⁸

During consultations for this reference it was suggested to the Commission that guidelines for excusal should not be publicly available. It was noted that if people became aware of guidelines they may adjust their application to fit the criteria.²⁹ The Commission considers that guidelines would be useful for those who are required to assess applications for excusal but does not consider that it is necessary for guidelines to be made publicly available. The legislative criteria (substantial inconvenience to the public or undue hardship or extreme inconvenience to a person) are sufficient to enable a prospective juror to complete a statutory declaration or apply in person for excusal on the jury summons date. Guidelines should be prepared by the Sheriff's Office (in consultation with the

21. Her Majesty's Courts Service, *Guidance for Summoning Officers When Considering Deferral and Excusal Applications*: see <<http://www.hmcourts-service.gov.uk>>. Deferral of jury service is discussed below.

22. Goodman-Delahunty et al, *Practice, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 20. See also NSWLRC, *Jury Selection*, Report No 117 (2007) 129.

23. Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 41.

24. Ibid 41–2.

25. NSWLRC, *Jury Selection*, Report No 117 (2007) 134.

26. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendation 33.

27. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.190].

28. Ibid, Recommendation 48. Section 8 of the *Juries Act 2000* (Vic) stipulates criteria for determining 'good reason' and including illness or poor health; incapacity; excessive travelling time; substantial hardship; substantial financial hardship; substantial inconvenience to the public; the need to care for dependants where no alternative care reasonably available; advanced age; incompatible religious beliefs; and any other matter of special urgency or importance.

29. Judge Yeats, consultation (20 December 2007); Justice McKechnie, consultation (19 December 2007).

judiciary) to ensure that applications are assessed in a consistent and rigorous manner.³⁰ In order to emphasise this, the Commission suggests that the guidelines should contain specific reference to two important principles – that juries should be broadly representative and that jury service is an important civil duty to be shared by the community.

The Commission notes that the Attorney General has suggested that a selection of excuse applications should be objectively verified by testing a sample of approximately 15–20% of all excuse applications.³¹ The Commission emphasises that properly prepared guidelines that include useful examples of undue hardship and substantial or extreme inconvenience and that also contain information about the nature or degree of evidence required to support a successful application in particular circumstances may alleviate the need for such a costly testing process. Furthermore, guidelines should include relevant information to assist the summoning officers and judges in determining if a person summoned for jury service is unable to discharge the duties of the juror and should therefore be released from the obligation to serve.

PROPOSAL 47

Guidelines

That the Sheriff's Office in consultation with Supreme Court and District Court judges should prepare guidelines for determining whether a person summoned for jury service should be excused from further attendance and that these guidelines should include:

1. guidance for determining applications to be excused by persons summoned for jury service on the basis of substantial inconvenience to the public or undue hardship or extreme inconvenience to a person including specific examples of applications that should ordinarily be granted and examples of applications that should ordinarily be rejected;
2. that applications for excuse should be assessed with reference to two guiding principles – that juries should be broadly representative and that jury service is an important civil duty to be shared by the community;

3. guidance for determining if a person summoned for jury service should be excused from further attendance because he or she is unable to understand and communicate in English, including guidelines for dealing with literacy requirements in trials involving significant amounts of documentary evidence;³²
4. guidance for determining whether a person summoned is unable to discharge the duties of a juror because of sickness, infirmity or disability (whether physical, mental or intellectual) bearing in mind the nature of the particular trial or the facilities available at the court;
5. guidance for determining whether a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror;
6. guidance about the type and nature of evidence required to support an application to be excused (eg, medical certificate, copies of airline tickets, student identification card); and
7. relevant procedures such as enabling prospective jurors to record their reasons for seeking to be excused where those reasons are of a private nature.³³

Right of review

While the provision of comprehensive guidelines will promote greater consistency, it is recognised that applications for excuse (and deferral) will still be determined on a discretionary basis and hence there is the potential for applications to be unreasonably rejected. The Commission is not suggesting that applications are currently not processed in a fair and reasonable manner. However, because of the Commission's proposal to abolish the categories of excuse as of right there will be many more applications made on the basis of undue hardship or substantial or extreme inconvenience. The NSWLRC noted that any inconvenience to members of occupations previously excused as of right can be alleviated by ensuring that applications for excusal are dealt with in writing before the juror's attendance date and by also providing for a right of review if the application is refused.³⁴ It was explained that a right to

30. Guidelines will be particularly useful in regional areas because the summoning officer is the registrar of the court and has a variety of different responsibilities over and above the selection of juries.

31. Western Australia Parliamentary Debates, *Legislative Assembly*, 26 May 2009, 162–178 (Attorney General, Mr CC Porter).

32. See Proposal 40.

33. The practice occurs now in Western Australia. The NSWLRC noted that it may be embarrassing for prospective jurors to air their reasons in open court so it was recommended that the practice of enabling jurors to write down on a document their grounds for seeking to be excused should be encouraged: NSWLRC, *Jury Selection*, Report No.117 (2007) 131.

34. *Ibid* 113.

a redetermination should be available before the day of the trial because

providing an avenue to seek a redetermination from a duty judge in advance of the date on the summons would provide greater certainty for those who, if their applications to be excused are not successful, may need to make alternative arrangements with respect to work, or other commitments.³⁵

Some jurisdictions provide for a right of appeal or review against the decision of a summoning officer to reject an excuse application. For example, s 16(5) of the *Juries Act 1927* (SA) provides for a right of review to judge against a decision of the sheriff to refuse an application for excuse or deferral. This right of review is separate to a judge's power to excuse or defer at first instance. In Victoria, there is a right to appeal a decision of the Juries Commissioner to reject an application for excuse or deferral.³⁶ The Commission has been advised that there have been no appeals under this provision. But if a juror is disgruntled, the Juries Commissioner simply refers the matter to the judge who then determines the application.³⁷

The Commission's preliminary view is that it would be useful if the *Juries Act* provided a mechanism for a person to apply to a judicial officer to be excused before the jury summons date. This would mean that in the event that the application was unsuccessful, the person would be in a better position to arrange alternative work or carer substitutes or cancel other commitments. As it currently stands, a person whose application has been rejected by the summoning officer must attend court and seek to be excused on the jury summons date. In regional areas, it would be difficult for an application to be made before the jury summons date because the circuit judge would not usually arrive in the location until that day. Therefore, it may be preferable to enable an application to be made to either a judge or magistrate in the relevant court. Because the Commission is not aware of any complaints about the current process of assessing and determining applications, submissions are sought about whether a right to apply to the court before the jury summons date is necessary and appropriate.

INVITATION TO SUBMIT I

Right to apply to the court to be excused from jury service before the jury summons date

The Commission invites submissions about whether the *Juries Act 1957* (WA) should be amended to enable a person who has been summoned for jury service to apply to the court (either a judge or magistrate) to be excused at a time before the date on which the person is due to attend court in response to the summons.

35. Ibid, Recommendation 35.

36. *Juries Act 2000* (Vic) s 10.

37. Rudy Monteleone, Juries Commissioner (Vic), consultation (16 June 2009). See also *Juries Act 2000* (Vic) s 11.

Deferral of jury service

MANY people apply to be excused from jury service for temporary reasons such as holidays, illness, exams, specialist medical appointments, weddings, or pressing work commitments (eg, a scheduled business trip or end of financial year responsibilities for accountants). In other cases, the reason for applying to be excused may be ongoing (eg, carer responsibilities or important professional responsibilities such as those undertaken by emergency services personnel). In these types of situations the ability to undertake jury service will depend on the availability of substitute carers or workers. For both temporary and ongoing reasons, the capacity to postpone jury service is likely to facilitate greater participation in jury service. This will in turn ease the burden on other members of the community and increase the representative nature of juries.

In Western Australia, people summoned for jury service are currently not permitted to defer jury service; however, deferral is available in other jurisdictions (Victoria, South Australia, Tasmania and the Northern Territory). One potential concern with a system of deferral is that it may undermine the principle of randomness (because the person is electing to undertake jury service at a specified time). However, the Commission emphasises that those who seek to defer jury service have already been randomly selected.¹ Therefore, deferral is not the same as volunteering for jury service. It is only after people have been randomly selected for jury service that they can seek to postpone their service.

THE BENEFITS OF DEFERRAL OF JURY SERVICE FOR WESTERN AUSTRALIA

In Perth for the 2008–2009 financial year, approximately 56,935 people were summoned for jury service. Of these people, less than 10% (5,647 people) actually served as jurors.² Thus, a substantial number of people are required to respond to a jury summons by either submitting a statutory declaration or attending court on the jury summons date. The ability to defer jury service would reduce the number of people required to be summoned for each court sitting because the Sheriff's Office would have a number of people flagged in the system who had postponed their jury service to that time. This would be

1. NSWLRC, *Jury Selection*, Report No 117 (2007) 134.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Juror usage 2008–2009*.

particularly beneficial for regional Western Australia. The Commission notes that seasonal work such as tourism or farming is conducive to deferral. Deferral of jury service would assist in alleviating some of the pressures in those regional areas where the number of available jurors is limited.³ Instead of being excused, seasonal workers could be available for jury service during the off-peak season and this will relieve the burden on other members of the local community.

It appears that the majority of jurors who have served in Perth would support a system of deferral. In the juror survey for Perth in 2008–2009, jurors were asked if they would prefer to have a say about when they performed jury service within a 12-month period. Of the 1,985 people who responded to the survey approximately 62% said that they would like to be able to determine when they undertook jury service.⁴ It is also noted that a number of Western Australian judges have indicated their support for deferral during initial consultations for this reference.⁵ The Western Australian Jury Manager also supports deferral of jury service because it will ease problems in regional trial courts and generally reduce the number of people excused from jury service.⁶ Further, from consultations with those responsible for managing systems of deferral in other jurisdictions it appears that deferral is viewed extremely favourably.⁷

The Commission believes that a system of deferral should be introduced in Western Australia because it will result in a more equitable sharing of the responsibility of jury service and it will increase the representative nature of Western Australian juries. Furthermore, the ability to postpone jury service will ensure that any inconvenience caused by jury service is minimised because those people

3. See above Chapter Two, 'Regional issues.'
4. Thirty-two per cent replied 'no' and 6% did not answer this question: Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (June 2009).
5. Justice McKechnie, consultation (19 December 2007); Judge Mazza, consultation (19 December 2007); Judge Yeats, consultation (20 December 2007); Chief Judge Kennedy, consultation (18 January 2008).
6. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007) and (6 July 2009).
7. Rudy Montelone, Juries Commissioner (Vic) consultation (16 June 2009); Neil Iversen, Jury Manager (SA) consultation (17 June 2009); Mary Anne Warren (Jury Manager (NT) consultation (8 September 2009); Peter Graham, Jury and Security Coordinator (Tas) consultation (8 September 2009).

who defer jury service will have additional time to organise their affairs and reduce any inconvenience to themselves, to their families or to the public.

CRITERIA FOR DEFERRAL

As mentioned above, deferral of jury service is available in four Australian jurisdictions.⁸ It also exists in England and is soon to commence in New Zealand.⁹ In 2001 the New Zealand Law Commission recommended that people summoned for jury service should have an absolute right to defer jury service on one occasion to a specified period at any time within the following 12 months. In other words, it was proposed that the person seeking deferral would not be required to provide any reasons.¹⁰ After examining the system for deferral in the various jurisdictions it appears that in all cases deferral of jury service is tied to excuse. For example, in South Australia a person can be excused from jury service on condition that their name is included in a list of people to be summoned at a later time or that they attend for jury service on a specified date.¹¹ Thus, the reason for any deferral must fit within the statutory criteria for excusal. The Commission has been told that an application for excuse that is based on temporary grounds is refused and the person is instead encouraged to defer jury service.¹² A similar provision exists in the Northern Territory.¹³ In Victoria and Tasmania the legislation does not expressly stipulate that a person must demonstrate a good reason to be granted a deferral but in practice the Commission understands that this is the case.¹⁴ In England, a person seeking deferral must show 'good reason' – the same terminology used in the provision enabling jurors to be excused from further attendance.¹⁵

In Victoria, there is a two-stage pre-attendance deferral process. Initially, a person who has been randomly

selected for jury service is sent a Notice of Selection and questionnaire. In response to this notice, a person can indicate availability during the specified period (and will therefore be summoned), seek to be excused or seek postponement of jury service. At this stage of the process (for the 2007–2008 financial year) approximately 11% of people postponed jury service. At the summons stage, 24% of people deferred jury service.¹⁶ The Commission has been advised that approximately 10% of people summoned for jury service in South Australia apply for deferral.¹⁷ A study in England in 1999 found that about 17% of people summoned for jury service had their jury service deferred to a later date.¹⁸ The Commission notes that approximately 52% of people summoned for jury service in Perth are currently excused before the summons date and if deferral was available a significant proportion of these people could be deferred to a later time instead of being totally excused.

The Commission has concluded that deferral of jury service should be tied to excuse. In order for jury service to be deferred the person should first have demonstrated a valid reason to be excused from attending on the jury summons date. If it were otherwise, people may seek deferral simply to avoid minor inconvenience. If the majority of people summoned sought to postpone their jury service on this basis (ie, as of right) a deferral system would not assist in reducing the number of people required to be summoned; instead it would mean that more people would have to be summoned to accommodate deferrals. Thus, deferral of jury service should operate as a sub-category of excuse so that some people who would otherwise have been excused can be deferred instead.

Accordingly, the Commission proposes that the criteria for deferral should be tied to the grounds for excuse specified in the Third Schedule. Generally, this will mean that a person will need to demonstrate that at the relevant time jury service would cause substantial inconvenience to the public or undue hardship or extreme inconvenience to a person in order for jury service to be postponed.¹⁹

8. *Juries Act 2003* (Tas) s 8; *Juries Act 2000* (Vic) s 7; *Juries Act 1927* (SA) s 16(4); *Juries Act* (NT) s 17A.
9. *Juries Act 1974* (Eng) s 9A; Section 11 of the *Juries Amendment Act 2008* (NZ) inserts ss 14B & 14C into the *Juries Act 1981* (NZ) and provides for deferral of jury service to a period within the next 12 months. Sections 14B and 14C have not yet been proclaimed.
10. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 193.
11. *Juries Act 1927* (SA) s 16(4).
12. Jo Edwards, Sheriff's Office (SA), consultation (18 June 2009).
13. *Juries Act* (NT) s 17A.
14. Section 7 of the *Juries Act 2000* (Vic) provides that a person may apply to the Juries Commissioner for deferral. However, the *Jury Eligibility Questionnaire* sent to prospective jurors includes a question as to whether the person wishes to seek to be excused for at least 12 months. Another question asks if the person seeks to postpone jury service because they have a valid reason why they cannot serve during the jury service period. The Commission has also been told that in Tasmania a person seeking deferral must provide a valid reason: Peter Graham, Jury and Security Coordinator (Tas), consultation (8 September 2009).
15. *Juries Act 1974* (Eng) s 9A.

16. Rudy Monteleone, Juries Commissioner (Vic), consultation (2 July 2009).
17. Neil Iversen, Jury Manager (SA), consultation (17 June 2009).
18. Airs J & Shaw A, 'Jury Excusal and Deferral', *Home Office Research, Development and Statistics Directorate Research Findings No. 102* (1999) 2.
19. If it appeared to the summoning officer that a person was unable to discharge the duties of a juror that person would usually be excused. However, if the inability to discharge the duties of a juror was linked to the actual trial (eg, person unable to read or write in a trial involving a significant amount of documentary evidence or a person discloses knowledge of the one of the parties) the summoning officer could order that that person's juror service be deferred.

Deferral in practice

In Victoria, Northern Territory and Tasmania the time period for deferral is 12 months. The South Australian legislation is silent in relation to the time period but the Commission has been advised that in practice a person is usually deferred to a stipulated time during the following 12 months.²⁰ In its 2007 report the NSWLRC recommended that prospective jurors should be able to defer jury service to a suitable time within the next 12 months.²¹ The Commission agrees that 12 months is an appropriate period but emphasises that a person who successfully applies for deferral cannot in practice have an unrestricted right to nominate the deferral date. At the time of deferral, the person should be permitted to nominate the most suitable date from a list of available options. However, available court sitting dates for the next 12 months will not always be known and are sometimes subject to change. In Perth, criminal sittings of the District Court and the Supreme Court commence every month. But in regional areas, criminal sittings vary and usually take place three to five times each year. The Commission is of the view that if jury service is postponed the person should be provided with an opportunity to select the most suitable date for their deferred jury service. But because the court sitting dates for the next 12 months will not always be known at the time of deferral it should be possible for the summoning officer to further defer jury service in the event that the date selected is a date on which the relevant court is not sitting.

Other than in those circumstances, the Commission believes that deferral of jury service should only be permitted on one occasion. In this regard, it has been observed that enabling a person to defer jury service on several occasions 'does not foster public respect for the jury system'.²² The NSWLRC also recommended that a person who is 'otherwise eligible to be excused, should be allowed one opportunity to defer' jury service.²³ Having said that, the Commission emphasises that a person who is summoned to attend on the deferral date will still be entitled to apply to be excused for good cause because circumstances may have changed since the time that the person deferred jury service.²⁴ The Commission is of the

view that the guidelines proposed above in relation to excusal²⁵ should incorporate relevant guidelines about deferral, including guidelines for excusing people on the deferral date.

PROPOSAL 48

Deferral of jury service

1. That the *Juries Act 1957* (WA) be amended to provide that:
 - (a) The summoning officer may, instead of excusing a person from further attendance on the grounds specified in the Third Schedule defer a person's jury service to a specified time within the next 12 months.
 - (b) When the person whose jury service has been deferred is summoned to attend on the specified date, the summoning officer is not permitted to again defer that person's jury service unless the date on which the person is due to attend is not a date on which the relevant court is sitting.
 - (c) When the person whose jury service has been deferred is summoned to attend on the specified date, the court or the summoning officer may excuse that person from further attendance on the grounds specified in the Third Schedule.
2. The Sheriff's Office in consultation with Supreme Court and District Court judges prepare guidelines for determining whether a person summoned for jury service should be permitted to defer jury service and that these guidelines should include guidance about the circumstances in which it would be appropriate to excuse a person from further attendance on the subsequent deferral date.

20. Neil Iversen, Jury Manager (SA), consultation (17 June 2009).

21. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendation 32.

22. Report to the Chief Judge of the State of New York, *The Jury Project* (1994) 36, as cited in NSWLRC, *ibid* 133.

23. NSWLRC, *ibid*, Recommendation 32.

24. The NZLC stated that it 'would expect that excusals would not be readily granted to a juror who has already had the opportunity to defer to a more convenient time. However, circumstances may have arisen after deferral which necessitate excusal and it should be granted where appropriate': see NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 193.

25. Proposal 47.