

Introduction

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THE former Attorney General of Western Australia, the Hon. Jim McGinty MLA, gave the Law Reform Commission of Western Australia (the Commission) a reference to

examine and report upon the operation and effectiveness of the system of jury selection giving consideration to:

- (i) whether the current statutory criteria governing persons who are not eligible, not qualified or who are excused from jury service remain appropriate;
- (ii) the compilation of jury lists under Part IV of the *Juries Act 1957* (WA);
- (iii) recent developments regarding the selection of jurors in other jurisdictions; and
- (iv) any related matter.

And to report on the adequacy thereof and on any desirable changes to the existing law, practices and procedures in relation thereto.

The reference was initiated in response to concerns raised about the growing number of people who apply for and are granted exemptions from jury service, or who are disqualified or ineligible to participate on a jury. These concerns have been recently reiterated by the current Attorney General, the Hon. Christian Porter MLA.¹

SCOPE OF THE REFERENCE

A number of cases² in recent years have inspired vigorous public debate in Western Australia about the continuing viability and value of the jury system.³ Commentators

have criticised the lack of transparency of the jury process and the fact that juries are not—like other adjudicating bodies—required to give reasons for their decisions.⁴ As a result, jury verdicts are less amenable than judicial decisions to ‘proper appellate scrutiny’.⁵ Former Western Australian District Court judge Valerie French has argued that trial by jury is anachronistic and a ‘significant impediment to a timely, efficient and effective criminal justice system’.⁶ While defending the jury system, the Chief Justice of Western Australia has suggested that the process be changed to allow trial judges to oversee and guide jury deliberations.⁷ At the same time, senior members of the Western Australian legal profession have advocated that the system of trial by jury ought to be abolished.⁸

While the Commission accepts that the jury is a ‘dynamic institution’⁹ and acknowledges the very interesting law reform questions raised by this public debate, it is not mandated to inquire into the viability or fundamental characteristics of the jury system in Western Australia. Such questions are beyond the scope of this reference. As the above terms of reference make clear, the Commission’s inquiry is confined to a very specific and important aspect of the jury system in Western Australia: the operation and effectiveness of the system of jury selection. This Discussion Paper is therefore primarily concerned with those parts of the *Juries Act 1957* (WA) that provide for the selection, eligibility and exemption of jurors, together with the means by which lists of potential jurors are compiled.

1. ‘Jury Duty Crackdown’, *The West Australian* (1 March 2009) 3.
2. One such case in Western Australia (known as the Walsham case) concerned the conviction by a jury of three men for murder ultimately overturned by the Court of Appeal, while another (known as the McLeod case) concerned the acquittal by a jury of two men involved in a brawl in which a police constable was left paralysed. The conduct of jurors in the high-profile Folbigg case in New South Wales (where jurors made independent investigations outside of the court process leading to cause for appeal against the conviction) has also raised questions about the system of trial by jury: ‘Jury Sleuths Give Folbigg a Chance’, *The Australian* (28 November 2007) 10.
3. See eg, ‘Walsham Murder Jurors Ask “Is This Really Justice?”’ (10 July 2007) <www.crikey.com.au>; ‘Walsham Trio’s Lawyer Puts Juries in the Dock’, *The West Australian* (24 July 2007); ‘I’ll Change Jury Laws: Porter’, *The West Australian* (14 March 2009) 4; ‘Lawyers Defend Juries and Their Decisions’, *The West Australian* (14 March 2009) 5; ‘Porter Flags Switch to “Expensive” Jurors’, *The West Australian* (19 March 2009) 4; ‘DPP Backs Overhaul of Jury Selection System’, *The West Australian* (24 March 2009) 6; ‘Dumped Juror Takes Complaints to Porter’, *The West Australian*

- (30 March 2009); ‘Police Bash Case Juror “Set Up” for Expulsion’ *The West Australian* (31 March 2009).
4. See Martin WS, *Current Issues in Criminal Justice* (Speech delivered to the Rotary District Conference 2009, Perth, 21 March 2009) 20; ‘Walsham Trio’s Lawyer Puts Juries in the Dock’, *The West Australian* (24 July 2007).
5. French V, ‘Juries – A Central Pillar or an Obstacle to a Fair and Timely Criminal Justice System’ (2007) 90 *Reform* 40, 42.
6. *Ibid.*
7. Martin WS, *Current Issues in Criminal Justice* (Speech delivered to the Rotary District Conference 2009, Perth, 21 March 2009) 22; ‘Put Judges into Jury Rooms Says Court Chief’, *The West Australian* (21 March 2009) 1. See also ‘Radical Jury Plan is Rejected’, *The West Australian* (22 March 2009).
8. See eg, Malcolm McCusker QC’s views expressed in ‘Prejudice Sent Trio to Jail’, *The Perth Post* (9 June 2007); ‘Walsham Trio’s Lawyer Puts Juries in the Dock’, *The West Australian* (24 July 2007); ‘Attorney General Orders Review on Jury Duty Service’, *Perth Now* (28 February 2009).
9. Findlay M, ‘Juries Reborn’ (2007) 90 *Reform* 9, 11.

PREVIOUS INQUIRIES

Over the past two decades there have been a number of important inquiries by law reform agencies into the selection, eligibility and exemption of jurors and other aspects of jury service in common law jurisdictions. Among other sources, the Commission has been informed by the following important reviews of this area:

- The Victorian Parliament Law Reform Committee’s (VPLRC) comprehensive review of jury service in Victoria.¹⁰
- The New South Wales Law Reform Commission’s (NSWLRC) reviews of jury service, juror selection, and blind or deaf jurors.¹¹
- The New Zealand Law Commission’s (NZLC) review of juries in criminal trials.¹²
- Lord Justice Auld’s review of the criminal courts of England and Wales (‘the Auld Review’).¹³

The Commission has also been informed by earlier inquiries undertaken on this subject.¹⁴ Most important among these is the inquiry into exemption from jury service undertaken in Western Australia by this Commission from 1978 to 1980.¹⁵

ABOUT THIS DISCUSSION PAPER

This Discussion Paper is presented in seven chapters as follows:

Chapter One provides the history and current use of jury trials in Western Australia, summarises the selection process, highlights the objectives of juror selection and sets out the Commission’s guiding principles for reform.

Chapter Two outlines the current law and practice for compilation of jury lists from the electoral roll and details the summoning, selection and empanelment process. This chapter also discusses the issue of jury representativeness in regional Western Australia.

10. VPLRC, *Jury Service in Victoria* (1994–1997).
11. NSWLRC, *Jury Service* (2006); NSWLRC, *Blind or Deaf Jurors* (2004–2006); NSWLRC, *Juror Selection* (2007).
12. NZLC, *Juries in Criminal Trials* (1998–2001).
13. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (September 2001) ch 5.
14. NSWLRC, *The Jury in a Criminal Trial*, Report No 48 (1986); Law Reform Commission of Victoria (LRCV), *The Role of the Jury in Criminal Trials* (1985).
15. Law Reform Commission of Western Australia (LRCWA), *Report on Exemption from Jury Service*, Project No 71 (1980).

Chapter Three examines the criteria for liability to serve as a juror in Western Australia.

Chapter Four discusses the categories of occupational ineligibility for jury service found in s 5(a) and the second schedule of the *Juries Act*.

Chapter Five discusses the factors that will render a person not qualified for jury service found in s 5(b) of the *Juries Act*. These factors include certain criminal records, lack of understanding of English, and physical or mental incapacity.

Chapter Six discusses the categories of excuse, including the current construction of excuse ‘as of right’ and excuse for cause, found in the second and third schedules of the *Juries Act* respectively. This chapter also discusses the concept of deferral of jury service as a potential means of dealing with valid but temporary excuses.

Chapter Seven deals with allowances for jury duty, protection of employment and enforcement of juror obligations.

Submissions

The Commission invites interested parties to make submissions in respect of the proposals for reform contained in this Paper. Submissions will assist the Commission in formulating its final recommendations to the Western Australian Parliament for reform of the law in this area. All submissions will be considered by the Commission in its Final Report.

Submissions may be made by telephone, fax, letter or email to the address below. Alternatively, those who wish to request a face-to-face meeting with the Commission may telephone for an appointment.

The closing date for submissions is
Monday 14 December 2009

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