LAW REFORM COMMITTEE

Jury Service in Victoria

FINAL REPORT

Volume 1

DECEMBER 1996

PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

Jury Service in Victoria

FINAL REPORT

VOLUME 1

Ordered to be Printed

Melbourne

Government Printer

December 1997

N° 24 Session 1996

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FUNCTIONS OF THE COMMITTEE

PARLIAMENTARY COMMITTEES ACT 1968

4E. The functions of the Law Reform Committee are —

(a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;

(b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

TERMS OF REFERENCE

Pursuant to section 4F (1) (a) (ii) of the *Parliamentary Committees Act 1968* the Governor in Council refers the following matters to the Law Reform Committee—

1. To review and make recommendations on the criteria governing ineligibility for, and disqualification and excusal from, jury service under sections 4 and 5 of the *Juries Act 1967*.

2. To review and make recommendations in respect of the compilation of jury lists under Part II and the pre-selection of jurors under Part III of the *Juries Act 1967*.

3. To review and make recommendations in respect of the preparation of jury panels and the summoning of jurors under sections 20, 20A, 21, 23, 24, 25, 26 and 27 of the *Juries Act 1967*.

Under section 4F (3) of the *Parliamentary Committees Act 1968* the Governor in Council specifies 31 October 1996 as the date by which the Committee is required to make its final report to the Parliament on this matter.

Dated: 12 June 1996

Responsible Minister: JAN WADE, MP
Attorney-General

Victoria Government Gazette, G24, 20 June 1996, pages 1567–1568

CHAIRMAN'S FOREWORD

I have great pleasure in presenting the Law Reform Committee's final report on Jury Service in Victoria. The committee has worked hard to produce this report which represents the work of Parliamentarians working in a bipartisan manner in consultation with the public and interest groups.

The committee's terms of reference were directed to improving the composition and selection of juries. The inquiry commenced in late 1994 because of concern that the range of people sitting on juries is so narrow that many juries are unrepresentative of the general community. The committee has addressed this concern and related matters during its two year investigation. While it is tempting to produce a headline-grabbing solution, the cautious approach of the committee should lead to a resolution of problems without undermining other cornerstones of our systems of justice and government.

Jury service is an important civic duty and provides an opportunity for members of the community to actively participate in the administration of justice. Through the recommendations contained in this report, it is hoped that more people have the opportunity to serve on a jury and find it to be an enjoyable and enlightening experience.

Public participation in the jury process is important. The English author G. K. Chesterton sat on a jury and 'saw with a queer and indescribable kind of clearness what a jury really is, and why we must never let it go'.[1] He wrote:[2]

> Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing around.

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1 G. K. Chesterton, 'The twelve men', in *Tremendous Trifles*, Methuen & Co., London, 1909, p. 65.

2 ibid., p. 68.

While two years may seem a long time for such a study, the committee conducted extensive investigations and received a large number of written submissions. A State election was held on 30 March 1996. The committee was dissolved and the reference lapsed. The current committee was elected by the Parliament on 14 May. The reference was again referred to the committee by the Governor in Council on 20 June 1996. The seven new members, including me as the new Chairman, had to acquaint themselves with a large volume of evidence and to hear new witnesses.

I wish to express my appreciation for the substantial contributions made by the committee's former Chairman, the Hon James Guest and his members: the Hon Bill Forwood, MLC, the Hon Jean McLean, MLC, Dr Robert Dean, MP, Mr Peter Ryan, MP, Dr Gerard Vaughan and Mr Kim Wells, MP.

In my experience the work of all-party committees in the Victorian Parliament is one of the great success stories of Westminster-style democracy. The work of the committee has been enhanced by the spirit of bipartisanship of its Liberal, Labor and National Party members—the Hon Carlo Furletti, MLC, the Hon Monica Gould, MLC, Mr Florian Andrighetto, MP, Mr Noel Cole, MP, Mr Peter Loney, MP, Mr Noel Maughan, MP, Mr Alister Paterson, MP and Mr John Thwaites, MP. I thank all of those members for their contributions to this final report.

I wish to thank the many individuals and organisations which made written submissions and the expert witnesses who gave generously of their time to assist the committee with its inquiry.

The committee has been helped by the hard work of its staff. Mr Douglas Trapnell as Director of Research and Ms Rebecca Waechter, Research Officer, have provided invaluable advice and have served the public well. The Office Manager, Mrs Rhonda MacMahon provided excellent back-up to the committee members and other staff.

I commend the report to the Parliament.

Victor Perton, MP
Chairman
November 1996

LIST OF RECOMMENDATIONS

Representativeness and the Jury System

Recommendation 1

As a general proposition the Victorian jury system should seek to reflect a broad cross-section of the demographic attributes of the Victorian adult population.

Paragraphs 2.20–2.22

Random Selection as a Means of Achieving a Representative Jury

Recommendation 2

A computer generated method of random selection is the best way to achieve a representative jury.

Paragraphs 2.23–2.30

Powers of Courts Regarding the Representativeness of Juries

Recommendation 3

The court's powers over juries should not be extended to allow the discharge of a jury or a stay of proceedings on the ground that the jury is considered by the court to be insufficiently representative of the community.

Paragraphs 2.31–2.34

Basic Qualification for Jury Service

Recommendation 4

Investigations should take place to determine the administrative feasibility of establishing an accurate database of citizens and non-citizen permanent residents for jury service. In the interim, the basic qualification for jury service—that is, being enrolled as an elector for the Legislative Assembly—should remain unaltered.

Paragraphs 3.2–3.14

Categories of Disqualification

Disqualification by Reason of Bankruptcy

Recommendation 5

Undischarged bankrupts should be eligible for jury service.

Paragraphs 3.18–3.21

Persons Convicted of Treason

Recommendation 6

There should be no change to clause 1(a) of Schedule 2 of the* Juries Act 1967 *which disqualifies from jury service any person who has been convicted of treason.

Paragraph 3.26

Persons Convicted of an Indictable Offence

Recommendation 7

There should be no change to clause 1(b) of Schedule 2 of the* Juries Act 1967 *which disqualifies from jury service any person who has been convicted of one or more indictable offences and sentenced to imprisonment for a term or terms in the aggregate not less than three years .

Paragraphs 3.27–3.38

Persons Imprisoned or on Parole

Recommendation 8

There should be no change to clause 2 of Schedule 2 of the* Juries Act 1967 *which disqualifies from jury service for a period of five years any person who has been imprisoned or on parole, except where the total sentence served does not exceed in the aggregate three months, or was incurred as a result of failure to pay a fine or where a free pardon has been granted.

Paragraphs 3.39–3.43

Persons Subject to Certain Court Orders

Recommendation 9

The category of disqualification which applies to a person who is bound by a recognizance entered into after conviction for any offence should be repealed.

Paragraphs 3.44–3.50

Recommendation 10

The category of disqualification which applies to a person who is subject to a community-based order that includes a condition referred to in section 38(1)(b) of the* Sentencing Act 1991 *made by a court should be repealed.

Paragraphs 3.44–3.50

Intensive Corrections Orders and Suspended Sentences of Imprisonment

Recommendation 11

The categories of persons disqualified from serving as jurors should be amended to include persons who have been ordered to serve a term of imprisonment by way of intensive correction in the community at any time within the last preceding five years.

Paragraphs 3.52–3.53

Recommendation 12

The categories of persons disqualified from serving as jurors should be amended to include persons who have been ordered to serve a term of imprisonment exceeding three months that is suspended by the court wholly or partly at any time within the last preceding five years.

Paragraphs 3.52–3.53

Youth Training Centre Orders

Recommendation 13

The categories of persons disqualified from serving as jurors should be amended to include persons who have been ordered to serve a period of detention in a youth training centre exceeding six months. The period of disqualification should be for two years after the expiry of the order.

Paragraphs 3.54–3.55

Persons on Bail

Recommendation 14

Persons on bail or charged with a criminal offence which has not been determined should continue to be eligible for jury service.

Paragraphs 3..56–3.59

Persons Subject to an Intervention Order under the Crimes (Family Violence) Act

Recommendation 15

Persons subject to an intervention order under the* Crimes (Family Violence) Act *should continue to be eligible for jury service.

Paragraphs 3.60–3.61

Categories of Ineligibility and Excusal as of Right

Recommendation 16

The categories of ineligibility and excusal as of right should be repealed in favour of a system which renders all members of the Victorian community, who are enrolled to vote for the Legislative Assembly and are not disqualified, liable for jury service regardless of their status or occupation, unless their exemption or excusal is justified by some overriding principle. The overriding principles are:

- ***(a) The need to maintain the separation of powers between the executive, legislative and judicial branches of government.***
- ***(b) The need to ensure, as best as can be, that an accused person receives, and is generally perceived to receive, a fair trial from an impartial tribunal.***
- ***(c) The need to maintain respect for the justice system.***
- ***(d) The need to ensure that public health and safety are not adversely affected by service on a jury.***
- ***(e) The need to provide for special cases where jury service on a particular occasion, or at any time, would cause undue hardship to the person or the public served by the person.***

Paragraphs 3.62–3.69

Recommendation 17

The application of recommendation 16 requires that the existing categories of ineligibility should be reduced.

Paragraphs 3.62–3.69

Recommendation 18

As a consequence of the introduction of a one trial or one day system of jury service, the application of recommendation 16 requires that the categories of excusal as of right should be abolished and replaced with a system of discretionary excusal based on published guidelines.

Paragraphs 3.62–3.69

Categories of Ineligible Persons

Judges

Recommendation 19

Any person who is a judge, magistrate or holder of another judicial office should be ineligible to serve as a juror

Paragraphs 3.72–3.77

Justices of the Peace and Bail Justices

Recommendation 20

Any person who is a justice of the peace or a bail justice should be ineligible to serve as a juror.

Paragraphs 3.78–3.79

Legal Practitioners and their Employees

Recommendation 21

Any person who is a duly qualified legal practitioner in active practice should be ineligible to serve as a juror.

Paragraphs 3.80–3.88

Recommendation 22

The category of ineligibility which currently applies to any person employed by a duly qualified legal practitioner in connection with the practice of the law should be repealed.

Paragraphs 3.80–3.88

Ministers of Religion, Monks, Nuns and other Vowed Members of Religious Communities

Recommendation 23

The category of ineligibility which currently applies to a minister of religion, monk, nun or other vowed member of a religious community should be repealed.

Paragraphs 3.89–3.97

Persons Employed by the Attorney-General

Recommendation 24

Any person who is employed in a department of the Government whose duties of office are connected with the investigation of offences, the administration of justice or the punishment of offenders should be ineligible to serve as a juror.

Paragraphs 3.98–3.104

Chief Commissioner of Police and Persons Employed Under his or her Direction and Control

Recommendation 25

Any person who is a member of the police force should be ineligible to serve as a juror.

Paragraphs 3.106–3.110

Director-General of Community Services and Persons Employed Under his or her Direction and Control; Honorary Probation Officers

Recommendation 26

The categories of ineligibility which currently apply to the Director-General of Community Services, to persons employed under his or her direction and control and to honorary probation officers should be repealed.

Paragraphs 3.111–3.115

Persons Employed under the Direction and Control of the Director-General of Corrections

Recommendation 27

Any person who is employed in a non-government corporation or organisation specified by proclamation published in the Victoria Government Gazette whose duties of office are connected with the investigation of offences, the administration of justice or the punishment of offenders should be ineligible to serve as a juror.

Paragraphs 3.116–3.120

Volunteers under the Corrections Act

Recommendation 28

The category of ineligibility which currently applies to a volunteer within the meaning of the* Corrections Act 1986 *should be repealed.

Paragraphs 3.121–3.123

Electoral Commissioner and Persons Employed under the Direction and Control of the Electoral Commissioner

Recommendation 29

The category of ineligibility which currently applies to the Electoral Commissioner and any person employed under his or her direction and control should be repealed.

Paragraphs 3.124–3.125

Court Reporters

Recommendation 30

Any person who is employed as a court reporter or in connection with any court or tribunal recording service should be ineligible to serve as a juror.

Paragraphs 3.126–3.128

Ombudsman and Officers of the Ombudsman

Recommendation 31

The category of ineligibility which currently applies to an officer of the Ombudsman should be repealed.

Paragraphs 3.129–3.131

Recommendation 32

The category of right to be excused which currently applies to the Ombudsman should be repealed.

Paragraphs 3.129–3.131

Persons with Disabilities

Recommendation 33

The current specific categories of ineligibility from jury service relating to persons with mental, intellectual and physical disabilities should be repealed in favour of a general category which renders ineligible a person who has a physical, intellectual or mental disability that makes the person incapable of effectively performing the functions of a juror.

Paragraphs 3.132–3.140

Inability to Read and Write and Inadequate Knowledge of the English Language

Recommendation 34

A person who is not able to read or write the English language should be ineligible for jury service.

Paragraphs 3.141–3.142

Categories of Entitlement to be Excused as of Right

Obsolete Categories

Recommendation 35

The category of right to be excused which purports to apply to members of the Public Service Board, Police Service Board and Teachers' Tribunal should be repealed.

Paragraph 3.151

Governor, the Official Secretary to the Governor, Members and Officers of the Parliament

Recommendation 36

The category of right to be excused which currently applies to the Governor and the Official Secretary to the Governor should be redesignated as a category of ineligibility.

Paragraphs 3.152–3.155

Recommendation 37

The category of right to be excused which currently applies to Members of Parliament should be redesignated as a category of ineligibility.

Paragraphs 3.152–3.155

Recommendation 38

The category of right to be excused which currently applies to Officers of the Legislative Council and Officers of the Legislative Assembly should be redesignated as a category of ineligibility, but should only apply to the Clerks of both Houses of the Parliament, the Usher of the Black Rod and the Serjeant-at Arms.

Paragraphs 3.152–3.155

Other Occupational Groups

Recommendation 39

The categories of a right to be excused relating to the following occupational groups should be repealed:

(a) The permanent heads of all State Government Departments.

(b) ***The Commissioners, members and secretaries of all statutory corporations.***

(c) ***The Auditor-General.***

(d) ***Medical practitioners, dentists and pharmacist registered under certain specified Acts.***

(e) ***Masters and teachers in State schools or schools registered under the* Education Act 1958.**

(f) ***Masters and crews of trading vessels.***

(g) ***Pilots holding a licence under the* Marine Act 1988.**

(h) ***Airline pilots and crews regularly engaged on international flights.***

(i) ***Mayors, presidents, councillors, town clerk and secretaries of municipalities.***

Paragraphs 3.156–3.161

Persons aged over 65 years

Recommendation 40

There should be no upper age limit for jury service. Persons aged 70 years and over should be entitled to elect not to be eligible for selection for jury service.

Paragraphs 3.163–3.168

Pregnant Women and Carers

Recommendation 41

The categories of right to be excused relating to pregnant women and persons who are required to undertake the full-time care of children or persons who are aged or in ill-health should be abolished.

Paragraphs 3.169–3.173

Physically Handicapped Persons

Recommendation 42

Consistent with recommendation 33 the current category of right to be excused relating to 'persons who are so physically handicapped as to be unable to perform the duties of jurors without undue hardship' should be abolished.

Paragraph 3.174

Persons who Reside Outside a 32 Kilometre Radius

Recommendation 43

Persons may claim an exemption from jury service if they reside more than 50 kilometres from the court in metropolitan Melbourne or 100 kilometres outside metropolitan Melbourne.

Paragraphs 3.175–3.177

Certificates of Exemption

Recommendation 44

A person who holds a current certificate of exemption on account of lengthy jury service should be able to claim an exemption from further jury service for such period as the court determines.

Paragraphs 3.178–3.186

Recommendation 45

Any person attending for jury service should be entitled to a certificate of exemption for three years. Persons who have served on a jury for a trial lasting more than five days should be exempt from jury service for five years.

Paragraphs 3.178–3.186

Recommendation 46

The trial judge should have a discretion to grant exemption for longer periods in special circumstances.

Paragraphs 3.178–3.186

Recommendation 47

There should be no statutory maximum period for which a court may grant a certificate of exemption.

Paragraphs 3.178–3.186

Entitlement to be Excused for Good Reason

Recommendation 48

Guidelines for the exercise of the discretion to excuse a person from jury service for good reason should be developed by the judges of the Supreme and County Courts and be published as a practice direction.

Paragraphs 3.187–3.192

Conscientious Objection

Recommendation 49

Guidelines for the exercise of the discretion to excuse a person from jury service for good reason should include excusal on the grounds of conscientious objection to jury service.

Paragraphs 3.193–3.199

Civil Juries

Recommendation 50

The present ineligibility for persons employed in the liability insurance industry should be repealed.

Paragraphs 3.200–3.201

Commonwealth Exemptions

Recommendation 51

The Victorian Attorney-General should request that the Federal Attorney-General take note of the committee's recommendations and order a review of Commonwealth exemptions from jury service with a view to substantially reducing the number of persons who are exempt under Commonwealth law.

Paragraphs 3.202–3.205

Jury District Formation

Recommendation 52

The whole State of Victoria should be divided into jury districts in a manner which ensures that all persons liable for jury service are included in at least one jury district.

Paragraphs 4.2–4.11

Defining Jury Districts

Recommendation 53

For administrative purposes jury districts should be based on Legislative Assembly electoral districts.

Paragraphs 4.14–4.18

Recommendation 54

The initial jury district boundaries should be proclaimed by the Governor in Council on the recommendation of the Electoral Boundaries Commission which should consult with the Supreme Court Sheriff. The proclamation should be published in the Victoria Government Gazette.

Paragraphs 4.14–4.18

Changes to Jury Districts

Recommendation 55

The jury list should be compiled on a three monthly basis.

Paragraphs 4.19–4.21

Overlapping Jury Districts

Recommendation 56

Where a person resides within two or more overlapping jury districts the person should be allocated to the jury district which serves the court town nearest the person's place of residence. Where this cannot be easily determined, the State Electoral Commissioner should have a discretion to allocate the person to such jury district as the State Electoral Commissioner considers appropriate.

Paragraphs 4.22–4.24

Jury List Compilation

Recommendation 57

The jury list should be compiled on a three monthly basis.

Paragraphs 4.25–4.35

Improvements to the Process of Jury List Compilation

Recommendation 58

A committee should be established under the chairmanship of a senior judge and with representatives from the State Electoral Commission, the Supreme Court Sheriff 's office and any other interested and relevant body, to investigate how the accuracy and utility of the jury list can be improved.

Paragraphs 4.37–4.43

Preselection of Jurors

Improving the Process of Preselection

Recommendation 59

A committee should be established under the chairmanship of a senior judge and with representatives from the State Electoral Commission, the Supreme Court Sheriff 's office and any other interested and relevant body, to investigate how the process of juror per-selection can be improved, and ways in which information can be shared which will improve the accuracy and utility of the State Roll System.

Paragraphs 4.49–4.51

Quantum of Fines

Recommendation 60

The maximum fine for the offences of failing to return a questionnaire, and for wilfully making an untrue or misleading statement in a questionnaire should be increased to 5 penalty units and 10 penalty units respectively.

Paragraphs 4.54–4.55

Method of Enforcement of Fines

Recommendation 61

***Provision should be made for persons who fail to complete juror questionnaires and who also fail to respond to follow-up letters to be issued with infringement notices. These should be combined with enforcement provisions similar to the PERIN procedure set out in section 99 and schedule 7 of the* Magistrates' Court Act 1989.**

Paragraphs 4.56–4.66

One Trial or One Day Systems of Jury Service

Recommendation 62

A system of one trial or one day jury service should be introduced.

Paragraphs 5.2–5.12

Recommendation 63

Consistent with recommendation 45, a one trial or one day system should incorporate a provision exempting a person who attends for jury service from further jury service for three years.

Paragraphs 5.2–5.12

Jury Panel Preparation

Recommendation 64

Jury panels should include the dates of birth of the prospective jurors.

Paragraphs 5.13–5.15

Jury List Vetting

Recommendation 65

Vetting of jury lists to detect disqualified persons and persons with non-disqualifying criminal convictions should continue.

Paragraphs 5.16–5.33

Should the Defence have Access to this Information?

Recommendation 66

Information obtained from jury vetting should be provided to the trial judge prior to the commencement of the impanelling process.

Paragraphs 5.32–5.37

Recommendation 67

The defence should also have access to information obtained from jury vetting at the impanelment stage with leave of the trial judge.

Paragraphs 5.32–5.37

Who Should Carry Out the Jury Vetting Function?

Recommendation 68

The jury vetting function should be carried out by the sheriff.

Paragraphs 5.38-–5.41

Recommendation 69

Jury vetting should be extended to include all known convictions, including interstate and international convictions, if practicable.

Paragraphs 5.42–5.43

Informing Potential Jurors About the Jury Vetting Process

Recommendation 70

The sheriff should publish guidelines for his or her procedures in performing the jury vetting function.

Paragraphs 5.44–5.47

Recommendation 71

The questionnaire sent to prospective jurors should include advice concerning the jury vetting process and the correction of criminal history records.

Paragraphs 5.44–5.47

Summoning of Jurors

Improving the Summoning Process

Recommendation 72

A policy document should be developed which sets out minimum notice periods for jury service. In general people should be given not less than four weeks notice and where a jury pool is to be summoned for a particularly lengthy trial there should be a longer period of notice.

Paragraphs 5.51–5.56

Improving the Community's Attitude Towards Jury Service

Community Education Programs

Recommendation 73

A common curriculum unit should be developed on citizenship for use in Victorian schools. This is a subject to which every student at year 9 or year 10 level should be exposed, and it should include general information concerning the operation and importance of the jury system and the obligation to perform jury service.

Paragraphs 6.4–6.11

Recommendation 74

The community should be educated regarding the importance of jury service through adult education on citizenship, the distribution of brochures on jury duty and the establishment of top quality information sources in jury pool rooms and via the Internet.

Paragraphs 6.4–6.11

A Courts Charter

Recommendation 75

The possibility of compiling and publishing a Courts Charter which, among other things, lays down minimum standards for the service provided to court users, including jurors, should be further investigated.

Paragraphs 6.12–6.15

Improving the conditions of Jury Service

Remuneration

Recommendation 76

The financial burden of jury service should be borne by the community as a whole rather than individuals and businesses, particularly small businesses.

Paragraphs 6.16–6.25

Recommendation 77

The payment system for persons summoned and attending for jury service be restructured as follows—

- ***(a) An allowance should be paid to all persons, regardless of where they reside, for each kilometre travelled in excess of eight kilometres.***
- ***(b) Compensation at a daily rate approximately equivalent to the average weekly salary should be paid for each day or part thereof.***

Paragraphs 6.16–6.25

Recommendation 78

The* Juries Act 1967 *should contain a minimum condition of employment relating to jury service equivalent to that provided for in the Workplace Relations and Other Legislation Amendment Bill 1996 (Cwlth).

Paragraphs 6.16–6.25

Physical Conditions

Recommendation 79

Future court buildings and the refurbishment of existing buildings should be designed to take account of the needs of jurors, especially those with physical disabilities and those who would benefit from the provision of child minding facilities.

Paragraphs 6.26–6.30

Other Matters

Should the Crown's Right to Peremptory Challenge be Replaced with a Right to Stand Aside?

Recommendation 80

A right in the Crown to stand aside prospective jurors should be substituted for the right in the Crown of peremptory challenge.

Paragraphs 6.32–6.41

Guidelines for Standing Aside by the Crown

Recommendation 81

The Director of Public Prosecutions should publish guidelines on the exercise of the Crown's right to stand aside (or to peremptorily challenge, in the event that this is retained).

Paragraphs 6.42–6.45

1. INTRODUCTION

Scope of the Inquiry

1.1 On the 20 September 1994 the Victorian Law Reform Committee received a reference from the Governor in Council to review and make recommendations concerning the categories of exemption from jury service under the *Juries Act 1967* (Vic.) and other matters relating to the administration of the jury system in Victoria.[3] These terms of reference were amended in February 1995 to include a review of the practice of jury vetting.[4]

1.2 On 5 March 1996 the Parliament was dissolved for the State election and the committee's reference lapsed. Following the election a new committee was appointed on 14 May 1996 consisting of two former members and seven new members, including a new Chairman. The committee wishes to record its appreciation for the substantial contributions made by its former members: Dr Robert Dean, MP, Hon Bill Forwood, MLC, Hon Jean McLean, MLC, Mr Peter Ryan, MP, Dr Gerard Vaughan, Mr Kim Wells, MP and particularly the former Chairman, Hon James Guest. Terms of reference for the current inquiry were published in the *Victoria Government Gazette* on 20 June 1996. They are in identical form to those as amended in February 1995.[5]

1.3 The Law Reform Committee is a joint investigatory committee of the Victorian Parliament with a statutory power to conduct investigations into matters concerned with legal, constitutional and parliamentary reform or the administration of justice.[6] The committee's membership, which includes lawyers and non-lawyers, is drawn from both Houses of the Victorian Parliament and all political parties are represented.

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3 Victoria, *Government Gazette*, G 39, 29 Sept. 1994, p. 2343.

4 Victoria, *Government Gazette*, G 5, 9 Feb. 1995, p. 311.

5 Victoria, *Government Gazette*, G 24, 20 June 1996, p. 1567.

6 *Parliamentary Committees Act 1968* (Vic.), s. 4E.

1.4 In accordance with its terms of reference, the committee has reviewed and makes recommendations on the following matters:

a. the criteria governing ineligibility for, and disqualification and excusal from, jury service under sections 4 and 5 of the *Juries Act 1967*;

b. the compilation of jury lists under Part II and the pre-selection of jurors under Part III of the *Juries Act 1967*; and

c. the preparation of jury panels and the summoning of jurors under sections 20, 20A, 21, 23, 24, 25, 26 and 27 of the *Juries Act 1967*.

1.5 The committee has consulted widely in Victoria, inter-state and in a number of overseas common law jurisdictions during its inquiry. Two issues papers were published in November 1994 and November 1995 respectively, 2,500 copies of which were distributed to interested individuals and organisations. Advertisements were placed in a number of national and major metropolitan newspapers. The committee has received a record total of 137 written submissions in response to these initiatives. This indicates a high degree of professional, academic and community interest in the subject-matter of the inquiry. The names of persons and organisations who made written submissions are listed in Appendix I to this report.

1.6 The committee also took evidence from thirty-two expert witnesses. Most appeared before the committee in Melbourne, while telephone conferencing was used to obtain information from interstate and overseas experts. The names of persons who gave oral evidence to the committee are listed in Appendix II to this report.

1.7 In June and July 1995 a subcommittee consisting of five members and two staff travelled overseas to investigate the operation of the jury system in the United States, Canada, the United Kingdom, Ireland and Hong Kong. The delegation held forty-four meetings in sixteen cities across three continents. In total the delegation received evidence from over 130 experts; including judges, politicians, government and court officials, legal practitioners (both prosecution and defence) and legal and social-science academics. The results of this investigation will be published separately as volume two of the committee's report.

1.8 The committee commissioned three research papers on topics of particular importance for a complete understanding of the varied and complex issues raised by the reference. These papers will be published separately as volume three of the committee's report: They are:

1. *Jurisprudential and historical aspects of jury service in Victoria* by Rebecca Waechter (April 1995)
2. *Juries and complex trials* by Mark T. Cowie (November 1995)
3. *Gender issues, multiculturalism and the Victorian jury system* by Angelene Falk (August 1996)

1.9 Two empirical studies were conducted. A database containing demographic information relating to over 17,000 people summoned for jury service in the Melbourne jury district in 1994 was prepared in an effort to test the representativeness of the summoned jury pool and juries in Melbourne. Persons summoned were identified by their jury pool number—no names or addresses were recorded. Information was also gathered from the Deputy Sheriff (Juries) relating to the level and nature of exemptions from jury service sought in a sample of 13,000 questionnaires sent out during three months in early 1996.

Background to the Inquiry

1.10 The last major review of the Victorian jury system occurred in 1967.[7] This relied heavily upon an exhaustive examination of all aspects of jury service in England and Wales which was conducted by Lord Morris of Borth-y-Gest in 1965.[8] The Victorian review, which adopted many of the Morris committee's recommendations, resulted in the *Juries Act 1967* and, in particular, in the extensive categories of disqualification, ineligibility and excusal as of right provided for in that Act.

1.11 Since 1967 the Victorian jury system has received some attention from law reformers and the government. The Legal and Constitutional Committee of the Victorian Parliament raised a number of issues relating to the

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7 Victoria, Law Department, Jury Service in Victoria—Joint paper presented to the Honourable the Attorney-General by the Secretary and Assistant Secretary to the Law Department, 20 Jan. 1967, copy in possession of the Law Reform Committee, Melbourne.

8 United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Lord Morris, Chairman), HMSO, London, 1965, Cmnd, p. 2627.

administration of juries in two reports tabled in 1984.[9] In 1985 the Law Reform Commission of Victoria published a background paper on *The Role of the Jury in Criminal Trials* as part of a research project into 'Corporate Crime'.[10] Also in that year the Shorter Trials Committee of the Victorian Bar and the Australian Institute of Judicial Administration considered some proposed reforms to the jury system in their *Report on Criminal Trials*.[11] None of these studies produced definitive reform proposals and no legislative amendments flowed directly from their work.

1.12 Nonetheless, the *Juries Act* has not remained static since 1967. The major legislative changes to the Victorian jury system in recent years have been:

(a) the inclusion of women in the jury list and the later removal of their right to be excused from jury service on account of their gender alone;[12]

(b) a tightening of the rules relating to the confidentiality of jury deliberations;[13]

(c) increasing the number of jurors required to serve on a jury in a County Court civil trial from four to six;[14]

(d) providing for majority verdicts in civil trials[15] and in criminal trials, other than for murder or treason;[16]

(e) giving a court the power to impanel up to three additional jurors in long trials or where otherwise indicated;[17]

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9 Parliament of Victoria, Legal and Constitutional Committee, *Preliminary Report on Delays in the Courts*, F. D. Atkinson, Government Printer, Melbourne, 1984, pp. 124–129, 175–176, 179; Parliament of Victoria, Legal and Constitutional Committee, *Report on Overseas Court Delays and Remedies*, F. D. Atkinson, Government Printer, Melbourne, 1984, pp. 177–194 Note—no final report was produced.

10 Law Reform Commission of Victoria, *The Role of the Jury in Criminal Trials*, Background Paper No. 1, Melbourne, 1985.

11 Shorter Trials Committee, *Report on Criminal Trials* (Mr Justice McGarvie, Chairman), by P. A. Sallmann, Victorian Bar & Australian Institute of Judicial Administration, Melbourne, 1985, pp. 62–165, 166–167, 172 & 194–195.

12 *Equal Opportunity Act 1977*, s. 57; *Juries (Amendment) Act 1975*, s. 6.

13 *Juries (Amendment) Act 1985*, s. 4.

14 *Courts (Amendment) Act 1987*, s. 5(1).

15 *Juries (Amendment) Act 1990*, s. 11(1).

16 *Juries (Amendment) Act 1993*, s. 7.

17 *Juries (Amendment) Act 1990*, s. 6; *Juries (Amendment) Act 1995*.

(f) giving a court the power to continue a criminal trial with a minimum of ten jurors or five jurors in civil cases;[18]

(g) reducing the maximum number of peremptory challenges to jurors allowed to the defence in criminal trials to between four and six per accused depending on the number of accused arraigned in the trial;[19]

(h) removing the right of the Crown to stand aside jurors and substituting a right of peremptory challenge equivalent to that of the accused;[20]

(i) requiring employers to make up the difference between the ordinary pay of an employee who attends for jury service and the compensation paid under the *Juries Act*;[21]

(j) giving a court the power to allow a jury to separate after retiring to consider its verdict.[22]

1.13 The most extensive reforms were effected by the *Juries (Amendment) Act 1993* (see (d) and (g) to (j) above). In his second reading speech introducing the Bill, Mr S. J. Plowman, on behalf of the Attorney-General, foreshadowed the present inquiry when he said:[23]

> The issue of just how representative modern juries are requires closer examination. In particular, the schedules to the Act, which set out the broad categories of persons who are ineligible for, exempt from or able to be readily excused from jury service, deserve close scrutiny.
>
> That issue has been raised by a number of organisations in the course of the consultation on this Bill, which suggested that the range of people who end up on juries is so narrow that many juries are a long way from being a representative cross-section of the community. The Attorney-General therefore intends to review those schedules at the earliest opportunity.

1.14 The Attorney-General's intention may have arisen from the judgment of the High Court delivered two month's earlier in *Cheatle v. R.*, where the court said:[24]

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18 *Juries (Amendment) Act 1992*, s. 3.

19 *Juries (Amendment) Act 1993*, s. 6.

20 *Juries (Amendment) Act 1993*, s. 6.

21 *Juries (Amendment) Act 1993*, s. 8.

22 *Juries (Amendment) Act 1993*, s. 9.

23 Victoria, Legislative Assembly 1993, *Debates*, p. 1157.

24 (1993) 177 C.L.R. 541, 560.

> The relevant essential feature or requirement of the institution [of trial by jury] was, and is, that the jury be a body of persons representative of the wider community. It may be that there are certain unchanging elements of that feature or requirement such as, for example, that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State. The restrictions and qualifications of jurors which either advance or are consistent with it may, however, vary with contemporary standards and perceptions.

1.15 Through the written submissions and oral evidence it has received, the committee has become aware that contemporary standards and perceptions concerning many of the categories of disqualification, ineligibility and excusal have changed since the enactment of the *Juries Act* in 1967. Indeed, many would argue that the present reassessment comes none too soon.

1.16 Since 1967 a number of law reform agencies in Australia have reviewed the categories of exemption from jury service in their jurisdictions—the Criminal Law and Penal Methods Reform Committee of South Australia in 1975;[25] the Law Reform Commission of Western Australia in 1980;[26] the New South Wales Law Reform Commission in 1986[27] and the New South Wales Jury Task Force in 1993;[28] the Queensland Law Reform Commission in 1985;[29] and the Litigation Reform Commission of that State in 1993.[30] Additionally, in 1987 the then Commonwealth Director of Public Prosecutions, Ian Temby QC, criticised the degree to which juries were representative of the community and called for a review of State law. [31]

1.17 In 1995 Queensland implemented many of the recommendations of the Litigation Reform Commission by enacting legislation which seeks to improve the representativeness of juries by reducing the categories of persons who are

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25 South Australia, Criminal Law and Penal Methods Reform Committee, Third Report, *Court Procedure and Evidence*, A. B. James, Government Printer, Adelaide, 1975, pp. 95–102 & 107–108.

26 Law Reform Commission of Western Australia, *Report on Exemption from Jury Service*, Project No. 71, Law Reform Commission, Perth, 1980, *passim*.

27 New South Wales Law Reform Commission, *The Jury in a Criminal Trial: Report*, LRC 48, Sydney, 1986, pp. 31–44.

28 New South Wales, Jury Task Force, *Report*, (Mr Justice Abadee, Convenor), Sydney, 1993, pp. 21–25.

29 Queensland Law Reform Commission, *A Report on a Bill to Amend and Reform the Jury Act and Other Acts*, Report No. 35, Brisbane, 1985.

30 Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland: Report of the Criminal Procedure Division*, Brisbane, 1993, pp. 3–9.

31 Commonwealth, Director of Public Prosecutions, *Annual Report 1986–87*, AGPS, Canberra, 1987, p. 94.

ineligible for jury service and tightening the criteria for excusal.[32] In New South Wales the manner in which jurors are selected and summoned for jury service was reformed by the *Jury Amendment Act 1996*. The New South Wales Government also has plans to increase the representativeness of juries by reducing the categories of persons who are ineligible, disqualified or exempt from jury service.[33]

1.18 The New Zealand Department of Justice and the New Zealand Law Commission are both currently examining matters relating to the representativeness of the jury system in that country.[34] A number of Canadian law reform agencies also have considered various aspects of this issue recently.[35] Through their recommendations these agencies, in general, have sought to increase the representativeness of their respective jury systems by limiting the categories of persons excluded from jury service.

1.19 It is evident therefore, that there is a national—if not an international—trend towards increasing the representativeness of juries through limiting the categories of disqualification and exemption.

Meaning of 'Representativeness'

1.20 The concept of 'representativeness' is central to the committee's inquiry, however, it is difficult to define what is meant by the term. In its search for a working definition the committee gratefully adopts a recent New Zealand Law Commission formulation of the concept.[36] '"Representative" means an accurate reflection of the composition of [Victorian] society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status (etc)'. Of course, it is not possible to obtain a representative jury in each and every case. The best that can be achieved in practice is that juries overall are broadly

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32 *Jury Act 1995* (Qld). See also Jury Amendment Bill 1996 (Qld).

33 New South Wales, Legislative Assembly 1995, *Debates*, p. 4459.

34 New Zealand, Department of Justice, *Trial by Peers? The Composition of New Zealand Juries*, by S. Dunstan, J. Paulin & K. Atkinson, Wellington, 1995, *passim*; New Zealand, Law Commission, *Juries: Issues Paper*, Wellington, 1995, pp. 6–8.

35 Canada, Department of Justice, Criminal Law Policy Section, *Visible Minority Representation on the Criminal Jury*, Ottawa, 1992; Canada, Department of Justice, Research & Statistics Directorate, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases*, by D. Pomerant, Working Document, Ottawa, 1994; Canada, Department of Justice, Research & Statistics Directorate, *Ethnocultural Groups and the Justice System in Canada—A Review of the Issues*, by A. Currie, Technical Report, Ottawa, 1994; Law Reform Commission of Nova Scotia, *Juries in Nova Scotia*, 1994.

36 New Zealand, Law Commission, op. cit., p. 6.

representative of the Victorian community. Even this statement is subject to qualification. For example, no one could argue reasonably that young children should be required to serve on juries, and most would accept that it is unreasonable to require (as opposed to permit) elderly or invalid persons to perform jury service.

1.21 The committee has identified five main factors which operate to reduce the representativeness of the Victorian jury system. First, there are extensive categories of persons who are disqualified, ineligible or entitled to be excused as of right from jury service. Secondly, the manner in which jury districts are determined in practice means that a large number of Victorians are unavailable for selection because they do not live within 32 kms of a Supreme or County Court town. Thirdly, the right of peremptory challenge further reduces the representativeness of juries during the impanelment phase. Fourthly, the conditions of jury service may discourage some people from participating in the system; for example, inadequate remuneration and a lack of childcare facilities and other amenities at court-houses. Finally, there is a public perception that jury duty is an onerous obligation which is to be avoided if at all possible.

1.22 The retention or abolition of peremptory challenges is beyond the scope of the present inquiry. Consequently, in seeking to increase the representativeness of the Victorian jury system the committee has focussed on the other four factors identified above.

Committee's Approach to its Inquiry

Qualification Criteria and the Categories of Exclusion from Jury Service

1.23 The committee has sought to improve the representativeness of juries by broadening the range of people who may be selected for jury service. It recommends that the qualification criteria be broadened to include non-citizen permanent residents when this becomes technically feasible. Moreover, the categories of disqualification should be narrowed and the categories of excusal as of right should be abolished. There should be a short list of categories of persons who are ineligible for jury service. Excusal from jury service for good reason should be granted only in accordance with published guidelines. There should be no upper age limit on qualification for jury service, however, persons aged 70 years and over will be entitled to apply to have their names

removed from the jury list. Commonwealth exemptions should be reviewed and limited.

1.24 The committee has approached this aspect of its inquiry on the basis that all members of the Victorian community should be qualified and liable to serve on a jury regardless of their status or occupation, unless their exclusion is justified by some overriding principle. The committee has applied the following overriding principles:

(a) The need to maintain the separation of powers between the executive, legislative and judicial branches of government.

(b) The need to ensure, as best as can be, that an accused person receives, and is generally perceived to receive, a fair trial from an impartial tribunal.

(c) The need to maintain respect for the justice system.

(d) The need to ensure that public health and safety are not adversely affected by the requirements of jury service.

(e) The need to provide for special cases where jury service on a particular occasion, or at any time, would cause undue hardship to the person or the public served by the person.

Jury District Formation

1.25 In order to increase the representativeness of juries, the committee recommends that the whole of Victoria be divided into jury districts, so that every habitation within the State falls within at least one jury district. The problem of overlapping jury districts is specifically addressed. This approach will significantly increase the number of people who are available to serve on juries. Jury lists should be compiled on a three monthly basis.

1.26 In addition to this proposal, the committee recommends that people living in the Melbourne jury district who reside more than 50 kilometres from the Supreme Court, and those living in provincial centres and rural areas who reside more than 100 kilometres from the nearest court-house, should be entitled to apply to be excused from jury service.

Conditions of Jury Service

1.27 The committee recommends the introduction of a one trial or one day system of jury service. Under this system a person is summoned to attend for jury service for only one day unless they are impanelled on a jury, in which

case they are required to serve for the duration of that trial alone, regardless of its length.

1.28 This system would be coupled with a right to a certificate of exemption from jury service for three years for all those who attend as part of a jury pool, five years for those who serve on a jury in a trial which lasts more than five days and longer periods of exemption for those who serve on lengthier trials.

1.29 The committee believes that the introduction of this system will reduce the burden of jury service and thereby encourage greater community participation. People who cannot afford to be absent from work for long periods, or who have other commitments which exclude them from performing lengthy jury service, would be able to serve for just a few days.

1.30 The committee believes that the representativeness of juries can be increased further by improving the conditions of jury service. It has found that the remuneration provided to jurors is frequently inadequate. This means that many people associate jury service with a significant financial loss, particularly in trials lasting more than five days. The loss is not always borne exclusively by the juror. It often extends to operators of small businesses and employers conducting small businesses, who have to pay for replacement staff as well as make up the difference between the juror's normal salary and the compensation paid for jury service. The effect on proprietors of small businesses of lengthy periods of jury service—that is trials extending beyond ten sitting days—is regularly regarded by judges as justification for excusing employed persons. Consequently, the committee recommends an increase in the compensation paid to persons attending for jury service to a level approximately equivalent to the average wage.

1.31 The committee also recommends that future court buildings and the refurbishment of existing buildings should be designed to take account of the needs of jurors, especially those with physical disabilities. Such improvements should include the provision of child minding facilities.

Community Education

1.32 During its inquiry the committee perceived that the institution of trial by jury is generally highly respected by the community and there is a great deal of interest in the operation of the jury system. However, respect and interest, it seems, are not always reflected in a willingness on the part of individual members of the community to actively participate in the system. A

commonly expressed view is that 'the jury system is important, but not for me'. To a large extent, this attitude reflects a general community perception that jury service is an onerous duty which is to be avoided if at all possible. Consequently, a number of the committee's recommendations are intended to alleviate the burden of jury service and to change community attitudes through educational programs.

1.33 The committee recommends that the public should be educated regarding the importance of jury duty. Education should begin in the school system through the inclusion of the role and importance of juries in a common curriculum unit taught at year 9 or year 10 level. The adult population should be educated through adult education programs on citizenship, the production and distribution of informative brochures (including brochures produced and written in community languages) and top quality information sources made available in jury pool rooms and through the Internet.

1.34 Improvements are required to the procedure applied to those persons who fail to respond to questionnaires and follow-up letters. The committee recommends an increase in the fines which apply to persons who fail to return questionnaires and that a method of fine enforcement involving the issue of infringement notices, together with enforcement through the PERIN procedure, should be adopted with respect to offences under the *Juries Act*.

Other Recommendations

1.35 In accordance with representations made by the Director of Public Prosecutions (DPP), the committee recommends that the Crown's right of peremptory challenge should be abolished and replaced with a right to stand aside prospective jurors. This was the position in Victoria prior to the enactment of the *Juries (Amendment) Act 1993*. The DPP should publish guidelines on the exercise of the Crown's right to stand aside.

1.36 The committee further recommends that the practice of jury vetting for disqualifying and non-disqualifying criminal convictions (but not findings of guilt, or acquittals) should continue, but should be carried out by the sheriff's office. Information obtained from jury vetting should be provided to the trial judge prior to the commencement of the impanelling process and the defence should also have access to this information with leave of the trial judge. Prospective jurors should be informed concerning the jury vetting function

and the sheriff should publish guidelines for his or her procedures in performing this function.

2. GENERAL PRINCIPLES

Historical Origin of Trial by Jury in Victoria

2.1 The committee commenced its review of jury service in Victoria by examining the historical development of trial by jury, particularly in Victoria.[37]

2.2 In Victoria there is no constitutional right to trial by jury such as exists under the Australian *Constitution* in relation to the trial of federal offences charged on indictment.[38] Rather, the position is similar to that which exists in Britain where Lord Devlin has observed that trial by jury for serious criminal offences 'is protected only by the reluctance of Parliament to interfere with what is seen as a venerable institution still, as in the past, necessary or at least highly desirable to protect individual liberty'.[39]

2.3 It was the famous English lawyer Sir William Blackstone, writing in the eighteenth century, who popularised the notion that clause 39 of the Magna Carta of 1215 embodied a right to trial by jury.[40] However, this view is no longer regarded as being historically accurate. The clause provides:[41]

> No free man shall be taken or imprisoned or desseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.

2.4 Modern scholars generally accept that there are three reasons for rejecting a correlation between the terms of clause 39 and trial by jury as we

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37 See generally R. L. Waechter, 'Jurisprudential and historical aspects of jury service in Victoria' in Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Final Report*, vol. 3, *Report on Research Projects*, Melbourne, 1996.

38 *Constitution*, s. 80. The limitations that have been placed upon the application of this provision are beyond the scope of this report. See *R. v. Archdall & Rockruge; ex parte Carrigan and Brown* (1928) 41 C.L.R. 128, 139-140; *Li Chia Hsing v. Rankin* (1978) 141 C.L.R. 182, 189–191, 193; *Kingswell v. R.* (1985) 159 C.L.R. 264, 276–277.

39 Lord Devlin, 'Trial by jury for fraud', a memorandum submitted to the Fraud Trials Committee (Lord Roskill chairman), Oct. 1984.

40 W. Blackstone, *Commentaries on the Laws of England*, vol. 3, Oxford, Clarendon Press, 1768, p. 350.

41 The translation is taken from J. C. Holt, *Magna Carta*, Cambridge University Press, Cambridge, 1965, p. 327.

know it.[42] First, the criminal petty jury cannot be intended, because it did not exist in 1215. Secondly, the word *peers* is used in the sense of the Latin *pars* or *equals*. Accordingly, the phrase *judgment of his peers* refers not to the jury, but to 'a tribunal in which they [the barons] would not be judged by their inferiors'[43]; for example, the King's justices, who were not *peers* (that is, earls or barons). Thirdly, 'from the time when trial by jury first commenced, either in civil or in criminal cases, to [the] present ... no jury ever did or could give judgement on any matter whatsoever'.[44] A judgment is given by a judicial officer, not by a body comprised of witnesses. As Holt observes: 'Cap. 39 owes its greatness to the assertion of the principle that judgement should precede execution'.[45]

2.5 McKechnie rightly contends that the mistaken interpretation of clause 39 'probably owes its origin to a not unnatural tendency of later generations of lawyers to explain what was unfamiliar in the great Charter by what was familiar in their own experience'.[46] Put at its highest, in England and Wales there is a right to trial by jury which has developed over time according to constitutional convention.[47]

2.6 In Lord Devlin's opinion this right arose from a popular misreading of the Magna Carta which has 'nurtured a custom that is now three centuries old'.[48] As Geoffrey Hindley in *The Book of Magna Carta* observes the words contained in clause 39 'coined by a distant society in a half forgotten language, have been treasured by generations of men and women in the English-speaking world as a safeguard of individual liberty'.[49]

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42 e.g. W. M. A. Forsyth, *History of Trial by Jury*, 2nd edn, rev. J. A. Morgan, London, 1878, pp. 91–95; L. O. Pike, *A Constitutional History of the House of Lords*, London, Macmillan, 1894, pp. 169–170; F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, vol. 1, Cambridge University Press, Cambridge, 1895, p. 152; W. S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, Glasgow, James Maclehose & Sons, 1905, pp. 158–163 & 436–459; F. M. Powicke, 'Per judicium parium vel per legem terrae', in *Magna Carta Commemoration Essays*, ed. H. E. Malden, Royal Historical Society, [London], 1917, pp. 78–95; J. C. Holt, op. cit., pp. 63–64 & 226-229. Cf. P. Vinogradoff, 'Clause 39', in H. E. Malden ed., op. cit., pp. 96–121; W. Ullmann, *Principles of Government and Politics in the Middle Ages*, London, 1961.

43 W. Holdsworth, *A History of English Law*, Vol. 1, 7th edn, eds. A. L. Goodhart & H. G. Hanbury, Methuen & Co & Sweet & Maxwell, London, 1956, p. 59.

44 L. O. Pike, loc. cit.

45 J. C. Holt, op. cit., p. 229.

46 W. S. McKechnie, op. cit., p. 456; cf. J. C. Holt, op. cit., pp. 1–2.

47 P. Darbyshire, 'The lamp that shows that freedom lives—is it worth the candle?" [1991] *Crim. L. R.* 740, 743.

48 Lord Devlin, 'Trial by jury for fraud' (1986) 6 *O. J. L. S.* 312.

49 G. Hindley, *The Book of Magna Carta*, Constable & Co., London, 1990; pp. ix-x.

2.7 This right was in effect conveyed to the inhabitants of the present State of Victoria in September 1836 when the infant settlement of the Port Phillip District received official recognition with the appointment of Captain William Lonsdale as the first Police Magistrate. In addition to his powers as a magistrate, Lonsdale was given 'the general superintendence in the new settlement of all such matters as require the immediate exercise of the authority of Government'.[50] However, Lonsdale had no jurisdiction to conduct jury trials and consequently, in all cases of felony and nearly all misdemeanours offenders either went unpunished or were committed for trial in Sydney.[51]

2.8 Criminal jury trials could not take place in the Port Phillip District until Courts of General Quarter Sessions were established in August 1838.[52] The first sessions commenced on 29 April 1839 under the Chairmanship of Edward Brewster, a member of the Irish Bar.[53] Initially juries consisted of seven military and naval officers.[54] At the first sessions several military officers were brought from Sydney because there were insufficient officers resident in the District to form a jury.[55] Juries constituted by 12 local inhabitants were introduced in November 1839.[56] 'Altogether 46 offenders were convicted and sentenced before military juries were abolished'.[57]

2.9 A Court of Requests to hear civil cases involving amounts up to £10 was established in October 1839, but the opening of the first sittings was delayed until April 1840. Brewster was Commissioner of the court which did not conduct jury cases.[58]

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50 Colonial Secretary of New South Wales to William Lonsdale, 14 Sept. 1836, reproduced in *Historical Records of Victoria*, M. Cannon (ed. in chief), vol. 1, *Beginnings of Permanent Settlement*, P. Jones (ed.), Victorian Government Printing Office, Melbourne, 1981, pp. 49 & 52–54 (hereafter 'HRV 1').

51 HRV 1, p. 274.

52 2 Victoria No. 5 (NSW), reproduced in HRV 1, pp. 277–282.

53 HRV 1, pp. 273 & 284.

54 9 George IV cap. 83 (Imp).

55 HRV 1, pp. 283 & 285.

56 3 Victoria No. 11 (NSW).

57 HRV 1, p. 274.

58 HRV 1, p. 291–294; M. Cannon, *Old Melbourne Town Before the Gold Rush*, Loch Haven Books, Main Ridge, Vic., 1991, pp. 62-63.

2.10 Courts of General Session could not determine capital cases[59] which continued to be sent to Sydney until the arrival in March 1841 of Mr Justice Willis of the Supreme Court of New South Wales as the first Resident Judge at Port Phillip.[60] A month after his arrival, Willis began the first Supreme Court sittings in Melbourne.[61]

Meaning of 'Peers' and 'Community'

2.11 Few would argue nowadays that the institution of trial by jury should be completely abolished. In any event, this issue is not within the scope of the committee's inquiry. What is relevant is the issue of what content is to be given to the concept of trial by a jury of one's peers. Who are an accused person's 'peers'?

2.12 As noted above, 'the word Peer was probably originally derived of the Latin Par an equal'.[62] It has also been said that 'in contemporary Australia, all individuals are equal before the law'.[63] It might be concluded that the tradition of *Magna Carta* requires trial by a representative group of members of the Australian community. Given the inevitably local nature of most jury trials, at least before the advent of the railway, the description of the community in which an accused's peers are to be found may be arguable.

2.13 If the provisions of clause 39 of *Magna Carta* have ever formed part of the law of Victoria,[64] they have long since been displaced by local statutes. Under section 395 of the *Crimes Act 1958* all persons presented for trial who plead 'not guilty' place themselves on the 'country' for trial. At the end of the jury impanelling process, the Judge's Associate charges the jury to the effect that the prisoner has pleaded 'not guilty' and 'for his trial has placed himself upon God and his country, which country you are'. The jurors are representatives of the 'country' in which the trial takes place and, presumably, where the crime occurred. However, this formulation itself dates back to medieval times when the jury was a body of witnesses summoned from the

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59 HRV 1, p. 285.

60 HRV 1, p. 274.

61 Cannon, op. cit., pp. 148-149.

62 R. Thomson, *Magna Carta*, 1829, reprinted Legal Classics Library, Birmingham, Alabama.

63 *Walker v. R.* (1988) 38 A. Crim. R., 150 per McPherson J.

64 See *Australian Courts Act 1828* (Imp.), s.24; *Imperial Acts Application Act 1980* (Vic.), s 3. schedule 1 & Part II, Division 3. See also, *Clarkson v. Director-General of Corrections* [1986] V.R. 425.

neighbourhood to decide the litigated question by their sworn testimony, and with personal knowledge of the relevant facts.

2.14 Moreover, not all members of the local community were eligible for jury service. It is only in recent times that women became eligible[65] and that property qualifications ceased to apply.[66] It follows that the community which a jury should represent is not clearly determined by history or statute.

2.15 The evolutionary development of the relevant 'community' from which jurors are to be drawn was recognised by the High Court in *Cheatle v. R.* where the court noted that:[67]

> a liberalization of the qualifications of jurors involves no more than an adjustment of the institution to conform with contemporary standards and to bring about a situation in which it is more truly representative of the community.

The committee's recommendations are directed towards achieving this end.

Importance of Jury Trial within the Civil and Criminal Justice System

2.16 There is considerable support for the institution of trial by jury among the Victorian community. This support was reflected in a *Herald Sun* survey conducted in November 1994 in which 76 percent of persons responding to the questionnaire described the jury as the 'fairest way to judge a criminal or civil trial'.[68]

2.17 The importance of trial by jury to the community has been formally recognised by the courts. Deane J in *Brown v. R.* said that 'the institution of trial by jury is for the benefit of the community as a whole as well as for the benefit of the particular accused'.[69] His Honour elaborated the point in his judgment in *Kingswell v. R.* where he said that the 'rationale and the essential function' of trial by jury is to ensure 'the protection of the citizens against those who customarily exercise the authority of government: legislators...administrators

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65 See *Juries (Women Jurors) Act 1964*, s. 2; *Equal Opportunity Act 1977*, s. 57.

66 See *Juries Act 1956*, s. 4.

67 (1993) 177 C.L.R. 541, 560.

68 G. Wilkinson, 'Majority verdict in favour of system', *Herald Sun*, 3 Feb. 1995, pp. 22-23.

69 (1986) 160 C.L.R. 171, 201, See also ibid., 197 per Brennan J.

...judges.'[70] In His Honour's view jury trial also brings important practical benefits to the administration of criminal justice.[71]

> A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a 'fair go' tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases.

2.18 Deane J's opinion concerning the importance of trial by jury and its continuing relevance in a modern society was repeatedly confirmed to the committee during its overseas investigations in 1995.[72] The opinions of judges and lawyers throughout the United States, Canada, the United Kingdom, the Republic of Ireland and Hong Kong—wherever there were common law jurisdictions, proof beyond reasonable doubt, adversary systems, and cross–examination—were in favour of the jury system, for all its imperfections, as a means of dispensing justice to those accused of serious crimes. Accordingly, the committee accepts as its starting point the fundamental proposition that the institution of trial by jury is an important safeguard of the liberties of all people, and that it should be one of the aims of the committee's recommendations to strengthen the institution in the sense of seeking to ensure the continued existence of jury trial as an effective means of protecting the liberties of the subject against the State.

2.19 In formulating its recommendations the committee has been mindful of the English lawyer Blackstone's warning in his work of 1769 (*The Commentaries*) where he stated: [73]

> inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may

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70 (1985) 159 C.L.R. 264, 300-301.

71 ibid., 300-301.

72 See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Final Report*, vol. 2, *Report on Overseas Investigations*, Melbourne, 1996.

73 Sir William Blackstone, *Commentaries on the Laws of England*, (1769), Book IV, p. 344 quoted by Deane J. in *Kingswell*, ibid. 296.

> gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

Since that time there has been a process of erosion which has seen the actual or effective abolition of juries in civil cases in some jurisdictions in recent years,[74] and the abolition of the jury system in Singapore and in the Republic of South Africa in 1969.[75]

Representativeness and the Jury System

2.20 In Issues Paper No. 1 the committee posed as a general proposition that a jury should be broadly representative of the Victorian community. This was supported by almost all of the submissions received on this issue.[76] However, the County Court Judges' Law Reform Committee in its submission commented that 'representation' does not have anything to do with the concept of a judgment of one's peers, the concept only requires that one's peers are drawn from the same legally defined community as the accused.[77]

2.21 This observation highlights the difficulties that are to be encountered in any attempt to identify and give content to the concept of representativeness, a problem which was briefly discussed in Chapter 1.[78] The difficulty was alluded to by Geoffrey Marshall during the 1974 Cropwood Round-Table Conference when he said:[79]

> A difficulty here is that the idea of representation and representativeness contains an ambiguity. In one sense a representative selection is merely a reflection or reproduction on a smaller scale of some larger entity or group. But in another sense, one who is a representative may take himself to have the duty of protecting or supporting the interests of the section or group that he is considered to represent.

2.22 In advancing the general proposition, the committee intends representativeness to be understood in the sense of a representative selection

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74 e.g. in South Australia, *Juries Act 1927*, s. 5; in Québec, *Juries Act* SQ 1976 c. 9, s. 56; in New South Wales, The Courts Legislation (Civil Procedure) Amendment Bill 1994 (lapsed).

75 Mr N. Wood, solicitor, Cape Town, South Africa, *Minutes of Evidence*, 22 May 1995, p. 270.

76 Submission nos. 12, 13, 19, 20, 21, 26, 35, 42, 66, 73, 89, 108, 120, 126 & 129; Mr. J. Artup, Deputy Sheriff (Juries), *Minutes of Evidence*, 12 Dec. 1994, pp. 32–33; Mr J. Bowen, retired Prosecutor for the Queen, *Minutes of Evidence*, 6 Mar. 1995, pp. 166–167.

77 Submission no. 62.

78 Above p. 7.

79 G. Marshall, 'The judgement of one's peers: some aims and ideals of jury trial'. In N. Walker (ed.), *The British Jury System*, Papers presented to the Cropwood Round-Table Conference Dec. 1974, University of Cambridge, Institute of Criminology, pp. 8–9.

or sample of a larger population. Such a proposition does not imply that efforts should be made to ensure that individual juries are representative of the whole Victoria community. This would be logically and administratively impossible to achieve in practice. Rather, the jury system in general should reflect a broad cross-section of people selected from the same legally defined community as the accused. Consequently, systematic exclusion of particular groups within the community should be prohibited.

Recommendation 1

As a general proposition the Victorian jury system should seek to reflect a broad cross-section of the demographic attributes of the Victorian adult population.

Random Selection as a Means of Achieving a Representative Jury

2.23 The best way to obtain a jury which is broadly representative of the community is to use a computer generated method of random selection. The committee does not believe that there are any circumstances where, either by reason of the characteristics of the accused or the victim, or the nature of the offence, a jury which is deliberately designed not to be representative of the community, is justified. As Mr Brind Zichy-Woinarski, QC pointed out in his written submission:[80]

> The jury is supposed to not only represent the community but to fairly represent the community standards and morality. Once you deliberately start "loading" the jury with certain types of people you run the very risk of contaminating these views.

2.24 In most other Australian jurisdictions jurors are randomly selected. The only State which has placed a limitation on the proposition that juries should be broadly representative of the community is South Australia, where the court may, because of the nature of the evidence or issues to be tried, order that there be a jury consisting of men only or of women only. The order may be made after an application by one of the parties or on the court's own motion.[81]

2.25 A number of submissions suggested circumstances where either by reason of the characteristics of the accused or the victim, or the nature of the offence, a jury which is deliberately designed not to be representative of the community is justified. First, it was suggested that there should be equal representation of men and women on juries where the case involves a woman

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80 Submission no. 67.

81 *Juries Act 1927* (SA), s. 60A.

as either the complainant or the accused.[82] Secondly, it was suggested that in trials where the complainant or the accused is from a non-English-speaking background or is an Aboriginal person, measures should be taken to ensure a significant representation from the relevant ethnic group. Thirdly, it was suggested that for complex cases a special educational qualification or level of expertise should be required of jurors.[83]

2.26 However, most submissions and oral evidence supported the use of random selection.[84] The County Court Judges' Law Reform Committee, the Victorian Council of Civil Liberties, the Criminal Bar Association and the Victorian Bar Council observed that if juries were selected based upon the particular characteristics of the accused or the victim there would be 'endless arguments about what is to be "represented" and by whom.'[85] Selecting jurors based upon the particular characteristics of the accused or the victim in order to obtain this form of representativeness is impossible to achieve because the community can be divided up into many groups based on factors such as gender, race, socio-economic background and education.

2.27 The County Court Judges' Law Reform Committee observed that if these problems were to be addressed, the characteristics demanded of jurors would need to be defined in legislation. Even if this were to be done, selecting a jury in this manner would 'inevitably lead to procedural fairness arguments in favour of unlimited questioning of jurors prior to impanelment, and to prolonged "challenge for cause" proceedings.'[86]

2.28 These problems mean that it is not a viable option to design juries to be deliberately unrepresentative of the community in particular cases. Such an approach also illogically assumes that a person's attitudes will be dependent upon characteristics such as gender, race, age and socio-economic factors.

2.29 The committee notes that there has been some support in England for the use of a quota system to ensure a degree of representativeness of ethnic minorities on juries. Both the Royal Commission on Criminal Justice and the Commission for Racial Equality suggested that there should be a quota system which would apply in exceptional circumstances. The former recommended

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82 Submission nos. 13 & 73.

83 Submission nos. 12 & 42.

84 Submission nos. 18, 19, 35, 68, 69 & 120; Mr J. Bowen, loc. cit.

85 Submission no. 62, p. 4.

86 ibid. See also submission no. 120.

that if an accused person believed that the forthcoming trial would not be fair because of the ethnic composition of the jury, and this belief was reasonable given the unusual or special features of the case, then three people from ethnic minorities should be selected as jurors.[87] The Commission for Racial Equality suggested a wider test that all that should be required is that an accused person believes a fair trial is unlikely owing to there being a racial dimension to the case.[88]

2.30 Quite apart from any theoretical objection to the notion that the jury selection process should be deliberately tampered with, the practical problems that would inevitably be involved in operating a quota system leads the committee to conclude that no qualification or limitation should be placed upon the general proposition that juries should be randomly selected from a broadly based cross-section of the adult Victorian community. Further, there are no circumstances where the characteristics of the accused or the victim, or the nature of the offence, would justify selecting a jury which is deliberately designed to be unrepresentative of the community.

Recommendation 2

A computer generated method of random selection is the best way to achieve a representative jury.

Powers of Courts Regarding the Representativeness of Juries

2.31 In Issues Paper No. 1 the committee posed the question: Should courts be given specific statutory powers to discharge juries, and/or to stay proceedings, in circumstances where the jury is considered to be not sufficiently representative of the community? The committee considers that a specific power of the type suggested is unnecessary because the courts have ample discretionary powers to ensure fairness in the conduct of criminal trials.

2.32 There are three ways in which the general power of a court to prevent unfairness may be exercised to affect the composition of a jury. First, in circumstances where the accused person cannot receive a fair and impartial

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87 United Kingdom, The Royal Commission on Criminal Justice, *Report*, (Viscount Runciman, Chairman), HMSO, London, 1993, Cm. 2263, p. 133.

88 ibid.

trial according to law, the court is able to stay proceedings.[89] However, it is unlikely that a court would stay proceedings owing to an unrepresentative jury because the conventional view is that 'by a flexible use of the power to control procedure and by the giving of forthright directions to a jury, a judge can eliminate or virtually eliminate unfairness'.[90] Secondly, a court may use its power to prevent unfairness by standing aside a person called from the panel of jurors in order to ensure a fair and just trial, provided that this is done before the juror is sworn.[91] Thirdly, a judge has the power to discharge the whole jury where there is 'a high degree of necessity' justifying the discharge, for example, if a juror has done or said something untoward.[92]

2.33 The provision of specific statutory powers to discharge juries or stay proceedings in circumstances where the jury is not sufficiently representative of the community was opposed by the majority of submissions received on this issue. The opposition was based predominantly upon problems associated with defining the circumstances in which such a statutory power would be exercised.[93] The three organisations which supported such a provision did not provide detailed reasons for their support.[94]

2.34 The committee accepts that if the proposed statutory power were to be provided, it would be difficult for the court to find a basis for concluding that a particular jury is so unrepresentative of the community as to justify its discharge or to stay proceedings. As noted in the submissions of the Victorian Council of Civil Liberties, the Criminal Bar Association and the Victorian Bar Council, the only information which is disclosed relating to jurors is their

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89 *Dietrich v. R.* (1992) 177 CLR 292, 303 per Mason CJ & McHugh J; *Jago v. District Court (NSW)* (1989) 168 CLR 23, 31 per Mason CJ. See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Issues Paper No. 1*, Melbourne, 1994, pp. 2–3.

90 *Jago v. District Court (NSW)* (1989) 168 CLR 23, 49 per Brennan J.

91 *R. v. Searle* [1993] 2 V.R. 367. See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Issues Paper No. 2*, Melbourne 1995, p. 5.

92 Judge P. R. Mullaly, County Court of Victoria, *Minutes of Evidence*, 10 Apr. 1995, p.229.

93 ibid.; submission nos. 19, 42, 65, 68 & 69.

94 The Australian Council for Educational Administration Inc. while supporting such a statutory power, acknowledged that it would be difficult to imagine a jury that could not represent the Victorian community, see submission no. 18. No reason was given by the Public Policy Assessment Society Inc. for its support, see submission no. 12. The Victorian Secondary Teachers Association suggested that the statutory power should be exercised when there was unequal numbers of men and women on the jury, see submission no. 73.

names and occupations, this information would not provide a sufficient basis for a conclusion as to whether a jury is unrepresentative.[95]

Recommendation 3

The court's powers over juries should not be extended to allow the discharge of a jury or a stay of proceedings on the ground that the jury is considered by the court to be insufficiently representative of the community.

Striking a Balance between Obtaining an Impartial Jury and Promoting Representativeness

2.35 In recommending reforms to the Victorian jury system the committee is mindful of the need to balance two often competing principles: the impartiality of the criminal justice system and the representativeness of the jury system.

2.36 The need for the fact finding tribunal to act fairly and impartially is recognised at common law and by international conventions. Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party,[96] contains a guarantee that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. Although the provisions of the ICCPR are not part of Australian domestic law, they 'may be used by the courts as a legitimate guide in developing the common law'.[97] If it is legitimate for the courts to take cognisance of international conventions in developing the common law then, *a fortiori*, a law reform body should do likewise in considering the need to reform the statute book.

2.37 The reference in the ICCPR to an impartial tribunal raises the issue of how best to ensure the impartiality of juries. 'Impartiality is generally thought to arise from the process of the prejudices of individual members of the jury being cancelled out by the other jurors'.[98] If this is right, then a more representative jury system should promote impartiality by reflecting a greater cross-section of community experience (and prejudice) so that no one view dominates.

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95 Submission nos. 65, 69, & 89.

96 Australia signed the ICCPR on 18 Dec. 1972 and ratified it on 13 Aug. 1980.

97 *Minister for Immigration v. Teoh* (1995) 69 A.L.J.R. 423. See also, *Mabo v. Queensland [No 2]* (1992) 175 C.L.R. 1, 41-43; *Dietrich v. R.* (1992) 67 A.L.J.R. 1, 15 per Brennan J.

98 New Zealand, Law Commission, op. cit., p. 6.

2.38 There is no code or comprehensive and authoritative statement applicable to Victoria as to how impartiality of juries is to be achieved, but the Victorian legal system can be said to rely implicitly on—

a) the random selection of potential jurors from those enrolled to vote, although in practice this does not occur;

b) the rarely used machinery of challenge for cause;[99]

c) the power of the trial judge to make procedural rulings and orders and to give express directions to the jury; and

d) a presumption that jurors, acting in conformity with the instructions given to them by the trial judge, will be faithful to their oaths and render a true verdict in accordance with the evidence.[100]

2.39 In making the specific recommendations contained in the following chapters of this report, the committee believes that by seeking to increase the representativeness of the Victorian jury system, it is also maximising the probability that the criminal justice system (and where relevant the civil justice system) will be served by an impartial fact-finding tribunal.

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99 See *Murphy v. R.* (1989) 167 C.L.R. 94, 99. Peremptory challenges are widely understood to be an attempt to bias the jury more than to eliminate bias.

100 See *R. v. Glennon* (1992) 173 C.L.R. 592, 603 per Mason C.J. & Toohey J.

3. QUALIFICATION AND THE CATEGORIES OF EXCLUSION

3.1 Pursuant to its first term of reference the committee must review and make recommendations on the criteria governing ineligibility for, and disqualification and excusal from, jury service under sections 4 and 5 of the *Juries Act 1967*. Before addressing this it is necessary to decide whether the basic qualification for jury service should be altered.

Basic Qualification for Jury Service

3.2 The approach taken in the *Juries Act 1967* towards qualification and excusal from jury service was largely based upon the 1965 report of the British Departmental Committee on Jury Service which was chaired by Lord Morris.[101] Many of the recommendations contained in that report were adopted in a paper presented to the Victorian Attorney-General by the Secretary and Assistant Secretary of the Law Department in 1967.[102] This paper was relied upon during the drafting of the *Juries Act 1967*.

3.3. In Victoria the qualification for jury service is enrolment as an elector for the Legislative Assembly. This includes people who are aged eighteen years and over, who are Australian citizens, or who were British subjects enrolled to vote on a Victorian, Commonwealth, or Territorial electoral roll before 26 January 1984. However, people of unsound mind, and those convicted of treason, or under sentence for offences punishable by imprisonment for five years or longer are not entitled to vote. Neither are those holding temporary entry permits, or who are prohibited immigrants.[103]

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101 United Kingdom, Departmental Committee on Jury Service, *Report*, (Lord Morris, Chairman), Cmnd 2627, HMSO, London, 1965, (hereafter 'Morris report').

102 Victoria, Law Department, *Jury Service in Victoria: Joint paper presented to the Honourable the Attorney-General by the Secretary and Assistant Secretary to the Law Department*, 20 Jan. 1967, p. 1.

103 *Constitution Act 1975* (Vic.), s. 48 .

3.4 In the other Australian States and Territories and in New Zealand the basic qualification for jury service is also that a person be enrolled as an elector.[104] However, in South Australia, Tasmania and New Zealand there is also an age restriction on jury service. A person must be under 70 years of age in South Australia and under 65 years of age in Tasmania and New Zealand. In New Zealand a person must be over twenty years of age. The South Australian legislation also requires that a person must be a resident.

3.5 Almost all of the submissions and evidence received by the committee supported the current criteria for qualification. Only two changes were suggested—that permanent residents who are not citizens should be qualified for jury service, and that jurors should satisfy a minimum literacy requirement.

3.6 In Canada consideration has been given to removing the requirement of citizenship for qualification for jury service in order to increase the representativeness of juries. This change was recommended in a working paper produced for the Canadian Department of Justice.[105] It was there suggested that the removal of the requirement would promote participation of people from all origins in the shaping of Canadian society, and thereby promote the policy upon which the Canadian Multiculturalism Act is based.[106]

3.7 The requirement of citizenship not only reduces the representativeness of the jury system, it has been argued that it encroaches upon the accused person's right to have a trial by his or her peers.

3.8 The involvement of non-citizens in the jury system has a long tradition dating back to the reign of Edward I (1272–1307) when a special type of jury called a jury *de medietate lingua* could be impanelled. A foreign merchant involved in a civil plea had the right to request that half the inquest be comprised of foreign merchants living in the relevant city, whether or not they were from the same country as the parties in dispute. The other half were to be comprised of local men. In 1355 this form of trial was extended to criminal cases. Later provision was made in civil cases, where the parties in dispute were both foreign merchants, for the jury to be comprised only of foreigners.

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104 *Juries Act 1967* (Vic.), s. 4; *Jury Act 1977* (NSW), s. 5; *Jury Act 1995* (Qld), s. 4; *Juries Act 1927* (SA), s. 11 & 14; *Jury Act 1899* (Tas.), s. 4; *Juries Act 1957* (WA), s. 4; *Juries Act 1967* (ACT), s. 9; *Juries Act 1980* (NT), s. 9. *Juries Act 1981* (NZ), s. 6.

105 D. Pomerant, Department of Justice, Canada, *Working Document, Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases*, Ottawa, 1994, p. vii.

106 ibid., p. 52.

This type of jury was also used in universities and ecclesiastical courts. By the late eighteenth century the jury *de medietate lingua* had fallen into disuse.[107]

3.9 As a matter of principle the committee accepts that there is merit in the contention that many permanent residents have made a sufficient commitment to the community to warrant their inclusion on the jury roll. Moreover, it is the committee's opinion that people should not be required to take out Australian citizenship in order to participate in the administration of justice. Although non-citizens should be encouraged to become Australian citizens, there should be no compulsion or coercion.

3.10 There is a serious practical difficulty in producing a list of permanent residents because no officially verified list of non-citizen permanent residents exists. It would be possible to establish a procedure whereby non-citizens who are permanent residents could apply to the sheriff to be enrolled for jury service. A similar system applies to voter enrolment under the *Local Government Act 1989*.[108] However, experience in Australia and overseas suggests that very few people would avail themselves of such a system. People tend to look for ways to avoid jury service, rather than to become involved voluntarily. For example, a delegation from the committee which visited Los Angeles in June 1995 was told that people in that city deliberately refrained from enrolling to vote so that they could avoid liability for jury service.

3.11 A major issue is whether the increased cost in administering the jury system which would result from the introduction of such a procedure is justified given the few persons who are likely to take advantage of the procedure. After careful consideration, the committee believes that the basic qualification for jury service should include non-citizen permanent residents. However, because of the current administrative difficulties in establishing an accurate database of citizens and non-citizen permanent residents, the committee accepts that for the time being the qualification should remain unaltered.

3.12 The committee believes that the introduction of a literacy requirement as part of the basic qualification for jury service is unnecessary because under the *Juries Act 1967* a person who is unable to read or write, or has an

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107 See R. L. Waechter, 'Jurisprudential and historical aspects of jury service in Victoria' in Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Final Report*, vol. 3, *Report on Research Projects*, Melbourne, 1996.

108 Section 12.

inadequate knowledge of the English language is already ineligible for jury service.[109] If a higher level of knowledge of the English language were required this would cause juries to be less representative of the community as a whole. This requirement would operate to exclude certain groups within the community. Persons from non-English-speaking backgrounds and groups who have been identified as having literacy difficulties would be particularly affected by such a requirement.

3.13 In any event, judges already have a discretionary power to direct jurors to seek to be excused if they have difficulty in reading or writing, and a judge can stand a juror aside of his or her own motion in the interests of justice.[110] A direction concerning literacy was given in the *Grollo* case where important evidence was to be given in written form.[111] Prospective jurors who sought to be excused on this ground were asked whether they were able to read the daily newspaper. In the United Kingdom in the *Maxwell* case a questionnaire was administered to the jury panel partly in order to ascertain literacy levels.[112]

3.14 The effect of introducing an arguably inappropriate language requirement is evident in Hong Kong. There juries consist of a 'cultural, social and political elite'[113] which is not representative of the community. Although the overwhelming majority of people speak Cantonese, and most witnesses give their evidence in that language, the language of the law is English. Consequently, to qualify for jury service a person must have a knowledge of English which is sufficient to enable them to understand the evidence of witnesses, the addresses of counsel and the judge's summing up.[114]

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109 *Juries Act 1967*, s. 4, sch. 3.

110 See *R. v. Searle* [1993] 2 V.R. 367.

111 *R. v. Grollo & Ors.* (County Court of Victoria, Judge Barnett, 11 June 1996), transcript of proceedings, p. 5452.

112 *R. v. Maxwell & Ors.* (Crown Court London, Phillips J, 31 May 1995–20 Jan. 1996), pp. 18–19; F. Gibb, 'Not-guilty verdicts put system back in the dock', *The Times*, 20 Jan. 1996, p. 3.

113 P. Duff, M. Findlay, C. Howarth & C. Tsang-fai, *Juries: A Hong Kong Perspective*, Hong Kong University Press, University of Hong Kong, 1992, p. 57.

114 *Jury Ordinance (Cap. 3*), s. 4.

Recommendation 4

Investigations should take place to determine the administrative feasibility of establishing an accurate database of citizens and non-citizen permanent residents for jury service. In the interim, the basic qualification for jury service—that is, being enrolled as an elector for the Legislative Assembly—should remain unaltered.

Categories of Disqualification

Preliminary Observations

3.15 The object of the jury system is to provide an impartial and competent tribunal to determine factual issues in dispute between the State and the individual and between individuals. Accordingly, the State must seek to ensure, so far as is practicable, the impartiality of the jury system. Past criminal behaviour may indicate that a person is unable or unwilling to bring an unbiased mind to the judgment of a case. Whether this is true for any particular category of criminal behaviour is a matter of perception and can only be measured against a generally accepted community standard.

3.16 Some past criminal behaviour may be such as to raise a reasonable suspicion that a person is unlikely to be a suitable juror in any case, while other past criminal behaviour may render a person unsuitable only in certain cases. The line between the two determines whether the behaviour is such as to justify general disqualification under the Act, or whether the person's exclusion may be left to be determined on a case by case basis. This line should be drawn by the legislature as the elected representatives of the community. The legislature must also determine what past criminal behaviour is such as to justify a lifetime exclusion and what requires some shorter period of disqualification.

3.17 The committee believes that, beyond the prescribed categories of disqualification, the determination on a case by case basis of unsuitability for jury service is properly left to the Crown, which has the means of knowing the circumstances which might give rise to the cause for challenge. The process of jury vetting (discussed more fully in Chapter 5) is necessary in order to inform the Crown Prosecutor of any relevant criminal record, so that an informed decision whether to challenge a potential juror can be made. This approach accords with the conclusions of the Morris committee in the United Kingdom

which observed that a system of disqualification which allowed potential jurors to participate in some cases and not others would be undesirable.[115]

Disqualification by Reason of Bankruptcy

3.18 Schedule 2 of the *Juries Act 1967* lists those persons who are disqualified from jury service in Victoria. Since 1865 persons who are undischarged bankrupts have been disqualified. The only other Australian jurisdiction to disqualify undischarged bankrupts is the Australian Capital Territory.[116]

3.19 This category of disqualification reflects the historical status of an undischarged bankrupt. In the United Kingdom legislation relating to bankruptcy used to focus on fraudulent debtors, so that over time the following characterisation applied:[117]

> Though it is not now a crime, becoming bankrupt involves modifications of status, resulting in certain civil disqualifications and quasi-penal consequences.

However, as several submissions to the committee argued, not all bankrupts should be disqualified from jury service because some are rendered bankrupt through factors beyond their control.[118]

3.20 Criticism of this category of disqualification is not new. During the revision of the *Juries Act* in 1958, the author of an internal working document commented:[119]

> It is with some misgiving that this provision has been retained. It appears to pre-suppose that all bankrupts are dishonest.

3.21 All categories of disqualification, other than that of being an undischarged bankrupt, exclude persons who have committed fairly serious criminal offences. The committee is of the view that in contemporary Australia it is inappropriate to associate undischarged bankrupts with criminals in regard to jury service disqualification.

Recommendation 5

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115 Morris report, p. 44.

116 *Juries Act 1967* (ACT), s. 10.

117 D. M. Walker, *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980, p. 111.

118 This change was recommended by Judge Mullaly of the County Court in submission no. 62. Mr J. Artup, the Deputy Sheriff (Juries), suggested that if declared bankrupts continue to be disqualified then they should be put on a separate list in the questionnaire, see *Minutes of Evidence*, 16 Jan. 1995, p. 52.

119 Victoria, Law Department, op. cit., Appendix A.

Undischarged bankrupts should be eligible for jury service.

Disqualification by Reason of Criminal Conduct

3.22 At present there are three groups of persons who are disqualified by reason of criminal conduct: those disqualified for life, those disqualified for five years from the end of the disqualifying event, and those currently subject to certain court orders. Most of the categories would appear to be justified and appropriate. Nonetheless, in an effort to increase the representative nature of the jury the committee has considered whether any category of disqualification should be abolished or limited.

3.23 In this context, two competing principles need to be balanced:

(a) The desirability of not applying unnecessary restrictions on those who have paid their debt to society.

(b) The need to ensure, so far as is practicable, the impartiality of the jury system.

3.24 In resolving the conflict between these principles two factors need to be borne in mind. First, the opportunity for a person with a criminal record to influence the outcome of a trial has been minimised by the introduction of majority verdicts. Secondly, the Crown's right of challenge, coupled with the provision to the Crown of information derived through jury vetting, means that the likelihood of an unsuitable person serving on a jury is minimised. For these reasons the categories of disqualification should not be drawn too widely.

3.25 The committee recognises that there are some degrees of criminal behaviour which the general community would consider ought to exclude a person from jury service. Despite the small degree of risk that a person with a relevant criminal history could influence the outcome of a trial, the committee accepts as justified a community perception that certain categories of conduct should result in disqualification from jury service. The committee has concluded therefore, that with some modifications the current categories of disqualification should be retained. Several submissions supported the retention of all the categories of disqualification under the *Juries Act 1967*.[120]

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120 Submission nos. 42 & 19; Mr J. Artup, Deputy Sheriff (Juries), op. cit., p. 46.

Lifetime Disqualification

Persons Convicted of Treason

3.26 Convictions for treason are so rare that this category is virtually superfluous. Nonetheless, persons convicted of treason are disenfranchised from electoral enrolment and, since the electoral roll forms the basis for jury selection, consistency requires that this category of disqualification remains.

Recommendation 6

There should be no change to clause 1(a) of Schedule 2 of the* Juries Act 1967 *which disqualifies from jury service any person who has been convicted of treason.

Persons Convicted of an Indictable Offence where the Term of Imprisonment is not less than Three Years

3.27 The Juries Act 1967 provides that any person convicted of an indictable offence or offences and sentenced to imprisonment for not less than three years for that offence, or in the aggregate for those offences, is disqualified from jury service unless granted a free pardon. A category to this or similar effect has existed always in Victoria.

3.28 In the other Australian States and Territories persons who have been convicted of indictable offences and sentenced to a certain period of imprisonment are also permanently disqualified from jury service.[121] The minimum period of imprisonment varies from jurisdiction to jurisdiction. In Queensland a person who has been sentenced to imprisonment or has been convicted of any indictable offence (even if tried summarily) is not eligible for jury service. In New Zealand (as in Victoria) the minimum period of imprisonment is three years, in South Australia and Western Australia two years and in the Australian Capital Territory one year.

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121 *Juries Act 1967* (Vic.), s. 4(2), sch. 2; *Juries Act 1967* (ACT), s. 10; *Jury Act 1977* (NSW), s. 6 & sch. 1; *Juries Act 1980* (NT), s. 10; *Juries Act 1927* (SA), s. 12, *Jury Act 1899* (Tas.), ss. 6 &7, Juries *Act 1957* (WA), s. 5, *Jury Act 1995* (Qld), s. 4(3).

3.29 The Director of Public Prosecutions in his second submission to the committee suggested that disqualification should not be determined by reference to the period of imprisonment, but instead should take into account the nature of the offence committed. In the Director's opinion[122]

> The categories of disqualification under Schedule 2 of the *Juries Act 1967* should remain and be expanded and modified to adequately reflect the seriousness of the crime for which the person was convicted. A large number of indictable offences are now dealt with in Magistrates' Courts and in many cases no term of imprisonment is imposed or alternatively a very low term of imprisonment is imposed. The schedule should not only reflect the period of imprisonment imposed but the type of offence for which a person was convicted.

3.30 The adoption of this approach would be inconsistent with that taken in the other Australian jurisdictions. It would also be in conflict with the findings of the Morris committee, which concluded that the gravity of an offence, for the purpose of disqualification from jury service, should be determined according to the length of the sentence. Any other approach would be 'fraught with many difficulties'.[123] It would be difficult to list all the offences leading to disqualification, because there are such a large number of offences. Referring to the maximum term of imprisonment as a basis for disqualification would not resolve this problem. Moreover, this may result in persons having difficulty in filling out the questionnaire.

3.31 Four options for reform were considered by the committee:

(a) The term of imprisonment upon which permanent disqualification is based could be increased from not less than three years to not less than five years.

(b) The minimum period of imprisonment could remain three years.

(c) The minimum period of imprisonment could be reduced, for example, to two years.

(d) All disqualifications based on convictions could cease to apply after a certain period, for example after between five to ten years.

3.32 Although the first option would be inconsistent with the approach taken in the other Australian jurisdictions, it is logically consistent with the decision to enlarge the jurisdiction of the Magistrates Courts to deal with

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122 Submission no. 135, p. 7.

123 Morris report, pp. 44–45.

certain indictable offences. In relation to indictable offences triable summarily, the maximum penalty a Magistrate can impose is two years for a single offence, and an aggregate of five years for multiple offences.[124] It is arguable that the qualification to serve on a jury should not be removed in circumstances which the government views as insufficiently serious to require trial by judge and jury. A disqualification based on five years is also consistent with the fact noted above that persons under sentence for offences punishable by imprisonment for five years or longer are not entitled to vote.

3.33 Under the second option the minimum period of imprisonment would remain three years. The continuation of this approach is supported by the Deputy Sheriff (Juries), the Victoria Police and the Family Council of Victoria.

3.34 The third option is to reduce the minimum period of imprisonment to two years, as is the case in South Australia and Western Australia, or to one year, as is the case in the Australian Territory, or to any term of imprisonment where the offence is indictable, whether tried summarily or not, as occurs in Queensland.

3.35 Finally, there could be no lifetime disqualifications, rather, all disqualifications based on convictions could cease to apply after a certain period, for example after between five to ten years. This approach is supported by several submissions received by the committee.[125]

3.36 In determining which option to recommend the committee is mindful of the fact that persons who have been imprisoned (or placed on parole) within the last five years are also disqualified from serving on a jury. Another factor which influenced the committee during its deliberations was the extent to which the representativeness of juries would be enhanced by tightening this category of disqualification. The only published data on this matter refers to the number of prisoners in custody at a specific date each year, rather than the total numbers of persons who have been imprisoned for specific periods of time. Nonetheless, the available data provides some indication of the degree to which the representativeness of juries would increase if only persons who have

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124 *Sentencing Act 1991*, ss. 113, 16(5).

125 Submission nos. 68 & 69. The submission from the North Melbourne Legal Service, Fitzroy Legal Service and the Disability Discrimination Law Advocacy Service went further, stating that persons who have served their prison sentence should not be disqualified: submission no. 89.

been imprisoned for at least five years, rather than at least three years, were disqualified permanently from jury service.

3.37 At the 30 June 1995 the total number of persons imprisoned in Victoria was 2468. Of these 1064 or 43% were imprisoned for a period of at least 3 years, while 695 or 28% were imprisoned for a period of at least five years.[126] It can be seen from these figures that the representativeness of the Victorian jury system overall is unlikely to be affected whichever option is adopted.

3.38 On balance, the committee is of the opinion that the current criteria for lifetime disqualification from jury service is appropriate, or rather, its inappropriateness has not been demonstrated to the committee's satisfaction. Accordingly, the committee recommends that there be no change to this category.

Recommendation 7

There should be no change to clause 1(b) of Schedule 2 of the* Juries Act 1967 *which disqualifies from jury service any person who has been convicted of one or more indictable offences and sentenced to imprisonment for a term or terms in the aggregate not less than three years .

Five Year Disqualification

Persons Imprisoned or on Parole within the Last Five Years

3.39 The *Juries Act 1967* disqualifies from jury service any person who within the last five years has been imprisoned or on parole—unless the sentence of imprisonment did not exceed three months or was for non-payment of a fine—unless granted a free pardon. This category of disqualification has been in Victoria since 1967.

3.40 A person will be disqualified from jury service in Victoria, New South Wales, South Australia, Western Australia, Tasmania, the Northern Territory, and New Zealand if they have been imprisoned within a certain period of time. In Victoria, Western Australia, Tasmania and New Zealand this period is five years, although in Tasmania the term of imprisonment must be three months or more. In the Northern Territory the period is seven years, and in South Australia and New South Wales it is ten years.

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126 Victoria, Department of Justice, *The Victorian Prison Service in 1995*, Table of Effective Sentence of Male and Female Prisoners as at 30.6.95. The figures quoted do not include persons who are unsentenced (i.e. on remand).

3.41 In South Australia, persons are also disqualified from service it they were convicted within the last five years of an offence which is punishable by imprisonment or disqualified from holding a driver's licence for more than six months.

3.42 Where a free pardon has been granted a person is not disqualified from jury service in Victoria, the Australian Capital Territory, the Northern Territory, Western Australia and Tasmania.

3.43 Although the introduction of majority verdicts, the Crown's peremptory right of challenge and the practice of jury vetting have weakened the case for retaining the disqualifications listed in this category, the committee believes that they should be retained because of a probable community expectation that these persons have attributes which are incompatible with jury service.

Recommendation 8

There should be no change to clause 2 of Schedule 2 of the* Juries Act 1967 *which disqualifies from jury service for a period of five years any person who has been imprisoned or on parole, except where the total sentence served does not exceed in the aggregate three months, or was incurred as a result of failure to pay a fine or where a free pardon has been granted.

Persons Subject to Certain Court Orders

3.44 In Victoria and Tasmania persons bound by a recognizance where a conviction is recorded are disqualified from jury service. In Victoria persons on a community based order with certain conditions are also disqualified. In Tasmania persons on a probation or community service order are disqualified. In South Australia persons who are on a bond to be of good behaviour are also disqualified. Persons who are subject to a court order, including those on bail, are disqualified from jury service in New South Wales, and in South Australia provided that the alleged offence is punishable by imprisonment.

3.45 Clauses 3 and 4 of schedule 2 of the Victorian *Juries Act 1967* provide that the following persons are disqualified from jury service:

> 3. Any person who is bound by a recognizance entered into after conviction for any offence.
>
> 4. Any person who is subject to a community-based order that includes a condition referred to in section 38 (1) (b) of the *Sentencing Act 1991* made by a court.

3.46 The basis for these categories of disqualification cannot be the seriousness of the offences because the disqualification applies equally to

summary and indictable offences, and it applies regardless of the maximum penalty prescribed for the offence. Rather, it would appear that clauses 3 and 4 of schedule 2 of the *Juries Act 1967* relate to circumstances where a person has been convicted of an offence which is punishable by imprisonment and given a non-custodial sentence which has a temporal component. By 'temporal component' is meant a sanction which cannot be discharged immediately unlike a fine, for example, which can be paid on the day of sentence.

3.47 Section 7 of the *Sentencing Act 1991* lists the types of sentencing orders that a Victorian court can make upon finding a person guilty of a Victorian offence. Federal offences have a different range of sanctions. The only non-custodial sentences which result in a conviction and which have a temporal component are: an intensive correction order, a wholly suspended sentence of imprisonment, a community-based order with a conviction recorded and an adjournment of the hearing on conditions with a conviction recorded.

3.48 The inclusion of a sentencing disposition in schedule 2 cannot depend upon whether or not a conviction results. An order to pay a fine with a conviction recorded and an order to discharge with conviction are not included.[127] Because of their transitory nature it would not be practicable to base a category of disqualification from jury service on either of them.[128]

3.49 Nonetheless, the difference in treatment between the two groupings is anomalous and suggests that clauses 3 and 4 should not be included in the categories of disqualification. Moreover, most people would accept that persons in these categories in general should be permitted to serve on a jury unless there is some specific reason for their exclusion. In such a case, the trial judge of his or her own motion, or the Crown Prosecutor can take action to exclude a person where the interests of justice so require. Accordingly, it is proposed that clauses 3 and 4 of schedule 2 of the Act should be deleted.

3.50 Those groups which were critical of this category of disqualification suggested that its application be limited to recognizance orders which relate to an indictable offence.[129] The Law Institute of Victoria also criticised the five year ineligibility of persons subject to an undertaking, community based order or fine, on the grounds that 'such orders fall at the lower end of the hierarchy

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127 *Sentencing 1991*, s. 7(f) & (h).

128 In the case of a fine the ability to pay determines whether there is a temporal component, but it would be undesirable to base disqualification on a person's ability to pay a fine.

129 Submission no. 68.

of penalties and this should be reflected in the more rapid return of persons subject to these penalties to juror eligibility status.'[130]

Recommendation 9

The category of disqualification which applies to a person who is bound by a recognizance entered into after conviction for any offence should be repealed.

Recommendation 10

The category of disqualification which applies to a person who is subject to a community-based order that includes a condition referred to in section 38(1)(b) of the Sentencing Act 1991 made by a court should be repealed.

New Categories of Disqualification

3.51 In Issues Paper No. 1 the committee asked for comment on whether any new categories of person disqualified from serving as jurors should be added. A number of sentencing dispositions and other court imposed orders have been suggested as follows:

(a) Persons subject to an intensive corrections order or a suspended sentence of imprisonment.

(b) Persons subject to a youth training centre order.

(c) Persons on bail or charged with a criminal offence which has not been determined.

(d) Persons subject to an intervention order under the *Crimes (Family Violence) Act 1987.*

Intensive Corrections Orders and Suspended Sentences of Imprisonment

3.52 In accordance with the provisions of the *Sentencing Act 1991* an intensive correction order and a suspended sentence of imprisonment must be taken to be a sentence of imprisonment for the purposes of all enactments except any enactment providing disqualification for, or loss of, office or the forfeiture or suspension of pensions or other benefits.[131] When the *Juries Act* was enacted in 1967 these forms of disposition did not exist.

3.53 Given the rationale for the various categories of disqualification, the inclusion of persons who have been imprisoned in schedule 2 and the

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130 Submission no. 66, p. 2.

131 *Sentencing Act 1991*, ss. 19(5) & 27(5).

provisions of the *Sentencing Act* equating these forms of disposition with imprisonment, the committee is of the opinion that persons subject to these sanctions for periods exceeding three months should be disqualified for a period of five years from the expiry of the order. This view is supported generally by the Victorian Correctional Services Division of the Department of Justice which suggested that the existing categories of disqualification should be expanded to include, inter alia, persons subject to an intensive correction order and a suspended sentence of imprisonment.[132]

Recommendation 11

The categories of persons disqualified from serving as jurors should be amended to include persons who have been ordered to serve a term of imprisonment by way of intensive correction in the community at any time within the last preceding five years.

Recommendation 12

The categories of persons disqualified from serving as jurors should be amended to include persons who have been ordered to serve a term of imprisonment exceeding three months that is suspended by the court wholly or partly at any time within the last preceding five years.

Youth Training Centre Orders

3.54 A young offender between the ages of 17 and 21 can be ordered to be detained in a youth training centre for a maximum period of 36 months.[133] Given the decrease in the age for electoral enrolment from 21 to 18 years, it is now more likely than it would have been in 1967 for a person who has recently completed a sentence of detention in a youth training centre to be summoned for jury service.

3.55 While the committee recognises and supports the law's concession to youth, and accepts that youthful offenders especially should be allowed to put their former offending into the past, it notes that persons sentenced to detention are often guilty of quite serious criminal conduct. For this reason, the committee is of the view that some period of disqualification from jury service should apply to persons sentenced to detention for periods longer than, six months. The length of the disqualification period is inevitably arbitrary, but the current five years for persons who have been imprisoned or on parole is considered to be too long. Two years seems more reasonable. This view is

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132 Submission no. 33.

133 *Sentencing Act 1991*, ss. 3 & 32.

supported generally by the County Court Judges' Law Reform Committee which recommended that the categories of disqualification should include persons subject to criminal court orders made by the Children's Court.

Recommendation 13

The categories of persons disqualified from serving as jurors should be amended to include persons who have been ordered to serve a period of detention in a youth training centre exceeding six months. The period of disqualification should be for two years after the expiry of the order.

Persons on Bail

3.56 The United Kingdom and Scotland recently introduced legislation to exclude persons on bail from jury service.[134] In the case of the United Kingdom this was done after the Runciman Royal Commission on Criminal Justice recommended such a change to prevent persons sitting on juries when they are on bail for an offence which is similar to that for which the jury may be required.[135] In Scotland the decision was based upon responses received after a Government consultation paper entitled, Juries and Verdicts.[136] The reason for the disqualification of these persons was stated in the Home Office's subsequent report as being that 'they have been accused of committing an offence and are still subject to criminal proceedings and...this might improperly affect their attitude to the proceedings'.[137]

3.57 However, the Faculty of Advocates in Scotland opposed this category of disqualification because, accepting that an accused person is presumed innocent until proven guilty, there is no basis for the presumption that persons on bail would exert an undue influence on jury deliberations.[138]

3.58 In South Australia the *Juries Act 1927* disqualifies a person who has been charged with an offence punishable by imprisonment where the charge has not yet been determined. According to the Victorian Deputy Sheriff (Juries), Mr

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134 Criminal Justice and Public Order Act 1994 (UK), s. 40; Criminal Justice (Scotland) Act 1995, s. 7.

135 United Kingdom, The Royal Commission on Criminal Procedure, *Report*, (Viscount Runciman, Chairman), Cm. 2263, HMSO, London, 1993, p. 132.

136 The Scottish Office, *Improving the Delivery of Justice in Scotland: Juries and Verdicts*, HMSO, Edinburgh, 1993, p. 11.

137 The Scottish Office, *Firm and Fair: Improving the Delivery of Justice in Scotland*, Cm 2600, HMSO, Edinburgh, pp. 15-16.

138 Faculty of Advocates, Edinburgh, 'Observations by the Faculty of Advocates on the Scottish Office Consultation Paper on Jury Verdicts', p. 1.

J. Artup, persons who are on bail and awaiting trial should be disqualified from jury service, because they should not be put in the awkward situation of passing judgment on persons when they are about to face the same system themselves.[139]

3.59 The committee is of the opinion that the presumption of innocence requires that persons on bail and those charged with offences not be disqualified from jury service. There is also a practical problem caused by the annual nature of the jury list. Persons qualified at the start of the cycle may become disqualified during the twelve month period, while disqualified persons may become qualified. Charges can be laid and determined quite quickly.

Recommendation 14

Persons on bail or charged with a criminal offence which has not been determined should continue to be eligible for jury service.

Persons Subject to an Intervention Order under the Crimes (Family Violence) Act

3.60 The submission from the Victoria Women's Council suggested that persons subject to an intervention order under the *Crimes (Family Violence) Act* should be disqualified from jury service.[140]

3.61 The committee considers that such orders should not lead to disqualification because they do not result from a criminal proceeding and they do not constitute a criminal sanction. Proceedings under the *Crimes (Family Violence) Act* are at most quasi-criminal in nature. Such proceedings are not commenced in the same manner as criminal proceedings, their purpose is not to punish but to prevent the occurrence of further conduct of the type alleged, and the burden of proof is the balance of probabilities and not the criminal burden of beyond reasonable doubt.

Recommendation 15

Persons subject to an intervention order under the* Crimes (Family Violence) Act *should continue to be eligible for jury service.

139 Mr J. Artup, op. cit., p. 51.

140 Submission no. 54.

3.62 In addition to providing an entitlement to be excused from jury service for good reason, the *Juries Act 1967* lists those categories of person who are ineligible and those who are able to seek to be excused as of right.[141] The current extensive categories of ineligibility and excusal as of right have significantly reduced the representativeness of the jury system and placed an unjustifiably onerous burden on those who currently have no right of exemption.

3.63 One way in which to increase the pool of persons who may be selected for jury service is to abolish the current extensive categories of ineligibility and excusal as of right in favour of a system which renders all members of the Victorian community, who are not disqualified, liable for jury service regardless of their status or occupation, unless their exclusion is justified by some overriding principle. The committee accepts the following principles:

a. The need to maintain the separation of powers between the executive, legislative and judicial branches of government.

b. The need to ensure, as best as can be, that an accused person receives, and is generally perceived to receive, a fair trial from an impartial tribunal.

c. The need to maintain respect for the justice system.

d. The need to ensure that public health and safety are not adversely affected by the requirements of jury service.

e. The need to provide for special cases where jury service on a particular occasion, or at any time, would cause undue hardship to the person or the public served by the person.

3.64 Principles (a), (b) and (c) are so important to the fair and efficient operation of the jury system that they justify certain persons being ineligible for jury service. The other principles can be accommodated by the application of strict criteria for excusal applied on a case by case basis. This approach would increase the number of persons who are able to serve on juries. In framing the guidelines governing how the overriding principles are to be applied, consideration should be given to the need to encourage people to serve on juries.

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141 *Juries Act 1967*, s. 4, sch. 3 & s. 4, sch. 4.

3.65 The jury system in Queensland was recently reformed to increase the representativeness of juries. The approach taken to exemption from jury service is based on two major reports which recommended that the categories of exemption should be substantially reduced and that there should be only one category of persons who are automatically exempt.[142] Consequently, the *Jury Act 1995* (Qld), which gives effect to these recommendations, adopts an approach similar to that being recommended by the present committee. The Queensland Act provides a short list of persons who are 'not eligible' for jury service, while all others are qualified and liable to serve, unless excused from service by a judge or the sheriff.[143]

3.66 The following persons are not eligible for jury service in Queensland:

- the Governor, a member of Parliament, a person who is or has been a judge, a person who is or has been either a police officer or a correctional officer;
- a person who is not able to read or write the English language;
- a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror;
- a person who has been convicted of an indictable offence, whether on indictment or in a summary proceeding; and a person who has been sentenced to imprisonment.

3.67 In deciding whether to excuse a person from jury service in Queensland a tightly structured criteria is applied.[144] Practice directions are also issued on the procedural requirements for excusal.[145] To justify a person being excused under the criteria, jury service needs to cause either substantial hardship to the person because of the person's employment or personal circumstances; substantial financial hardship to the person; or substantial inconvenience to the public or a section of the public. Where other persons are dependent on the person to provide care, excusal may be justified if the circumstances are such that suitable alternative care is not readily available. A person's state of health

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142 Queensland, Committee to Review Certain Aspects of the Jury Act, *The Report Presented to the Minister for Justice and Corrective Services*, Brisbane, 1992; Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland: Report of the Criminal Procedure Division*, Brisbane, 1993, pp. 3 & 88.

143 *Jury Act 1995*(Qld), ss. 4, 5, & 21.

144 *Jury Act 1995*(Qld), s. 21.

145 *Jury Act 1995* (Qld), s. 19(2).

is also a factor which is to be considered in determining whether or not to excuse a person. The practice directions also govern the circumstances where a person may be permanently excused from jury service.[146]

3.68 The present committee received several submissions which supported the proposal to repeal the existing categories of persons who are able to avoid jury service, in favour of a general obligation to serve with exemption being based on the overriding principles enumerated above.[147] The County Court Judges' Law Reform Committee suggested that there should be 'a widespread obligation to perform jury service linked with discretionary powers of excuse vested, in the first instance, in the Sheriff or deputies but, ultimately, in the Trial Judge'.[148] Other submissions supported a reduction in the number of the categories of excusal as of right and of ineligibility, with some of these categories being redefined to an entitlement to be excused for good reason.[149]

3.69 Those submissions which opposed the committee's suggestion did so either because certain categories of exemption should continue,[150] or because in their view the current system provides a necessary degree of certainty.[151] The committee recognises that it is necessary to provide a degree of certainty in relation to the categories of ineligibility and disqualification from jury service, and for this reason the committee's recommendations maintain these two classifications. However, in the interests of broadening the cross-section of the community from which persons may be selected for jury service, the committee has concluded that the existing categories of ineligibility should be reduced and the category of excusal as of right should be abolished.

Recommendation 16

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146 *Jury Act 1995* (Qld), s. 13.

147 The Office of the Status of Women suggested that there should be detailed guidelines for determining when persons would be excused for good reason, see submission no. 13. The change proposed in issue 3.5 was supported by the County Court Law Reform Committee, the Common Law Bar Association and the Office of the Correctional Services Commissioner, see submission nos. 62, 119 & 133.

148 Submission no. 62.

149 See the discussion in Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Issues Paper No. 1*, Melbourne, 1994, p. 9. See further, submission nos. 89 & 129.

150 The Association of Independent Schools of Victoria opposes any change to the exemption for teachers: submission no. 43. The Institute of Legal Executives supports persons employed within five years of the trial date by the Courts, Law Enforcement Agencies or as barristers or solicitors being ineligible, see submission no. 31.

151 Submission nos. 108 & 132.

The categories of ineligibility and excusal as of right should be repealed in favour of a system which renders all members of the Victorian community, who are not disqualified, liable for jury service regardless of their status or occupation, unless their exemption or excusal is justified by some overriding principle. The overriding principles are:

- ***(a) The need to maintain the separation of powers between the executive, legislative and judicial branches of government.***
- ***(b) The need to ensure, as best as can be, that an accused person receives, and is generally perceived to receive, a fair trial from an impartial tribunal.***
- ***(c) The need to maintain respect for the justice system.***
- ***(d) The need to ensure that public health and safety are not adversely affected by the requirements of jury service.***
- ***(e) The need to provide for special cases where jury service on a particular occasion, or at any time, would cause undue hardship to the person or the public served by the person.***

Recommendation 17

The application of recommendation 16 requires that the existing categories of ineligibility should be reduced.

Recommendation 18

As a consequence of the introduction of a one trial or one day system of jury service, the application of recommendation 16 requires that the categories of excusal as of right should be abolished and replaced with a system of discretionary excusal based on published guidelines.

Categories of Ineligible Persons

3.70 Section 4 of the *Juries Act 1967* in combination with schedule 3 of that Act, declares certain categories of persons to be ineligible to serve as jurors. The categories of ineligibility relate either to a person's current or former occupation or to a perceived difficulty in their serving. Where a person is ineligible due to their occupation, this ineligibility lasts ten years after they cease to be so employed. In reviewing the current categories of ineligibility for jury service, the committee has addressed two main issues: first, whether the category of ineligibility should be for a period of ten years or some lesser period; and secondly, whether all of these categories of persons should remain ineligible for jury service.

3.71 The committee has concluded that a person's ineligibility for jury service should be by reason of his or her current occupation only. People should not be ineligible because of their former occupations. If by reason of a former occupation a person believes that he or she should not serve on a jury, the person should apply to be excused. Moreover, where relevant, a prospective juror's former occupation should be made known to the court before the commencement of the impanelling process so that the Crown and the accused can properly exercise their rights of peremptory challenge or stand aside.

Persons Ineligible by Reason of Current or Former Occupation

Judges

3.72 Item 1(a) of schedule 3 of the *Juries Act 1967* renders ineligible to serve as a juror any person who is or has at any time within the last ten preceding years been a judge of the Supreme or of the County Court or the holder of any other judicial office. A category to this or the like effect has applied always in Victoria.

3.73 Similar provisions are to be found in all Australian jurisdictions. However, so far as retired holders of judicial office are concerned, the period of ineligibility varies from state to state. In Victoria and the Northern Territory ineligibility lasts for ten years after the person ceases to hold office, whereas, in Queensland, Western Australia and New South Wales a lifetime ineligibility applies. Several jurisdictions only prevent persons who are currently in office from serving on a jury: South Australia, Tasmania, the Australian Capital Territory and New Zealand. In Tasmania, the Northern Territory and New South Wales the spouses of judges (and in New South Wales, de facto partners) are also ineligible.

3.74 Some jurisdictions also make magistrates ineligible for jury service: Tasmania (and their spouses), Western Australia (a Stipendiary Magistrate and Special Magistrate or person who held that position within the last five years), the Australian Capital Territory and New South Wales (and their spouses or de facto partners and persons who have been a magistrate).

3.75 The committee has concluded that the continued ineligibility of judges, magistrates and the holders of other judicial offices, while they hold office, is justified because one of the fundamental characteristics of trial by jury is that

the trial be by a jury comprised of lay persons. The Morris committee aptly summarised this position by stating:[152]

> Trial by jury involves a trial by laymen. In order completely to preserve the lay character of jury service, it is essential to avoid having as jurors persons whose work is concerned with the administration of justice and enforcement of the law. Equally, persons with knowledge or experience of a legal or quasi-legal nature might, if on a jury, exercise undue influence on their fellow jurors.

3.76 Consequently, the committee believes that persons who are judges or magistrates should not serve on juries because:

(1) of the need to preserve the lay character of jury service;

(2) the likelihood that a judicial officer will have special knowledge which should not enter into a jury's deliberations;

(3) the likelihood that a judicial officer will have an undue influence on the jury's deliberations in the sense that the lay jurors could be expected to defer to that person's view of the case.

3.77 So far as spouses and defacto spouses are concerned, the committee believes that excusal should be sought on a case by case basis where the prospective juror believes that his or her status may cause difficulties. The committee further believes that prudence dictates that the spouse or de facto spouse of a judicial officer should make this known at the relevant time to the court officers administering the jury system.

Recommendation 19

Any person who is a judge, magistrate or holder of another judicial office should be ineligible to serve as a juror

Justices of the Peace and Bail Justices

3.78 Item 1(i) and item 1(ia) of schedule 3 of the *Juries Act 1967* render justices of the peace and bail justices ineligible to serve as jurors for ten years. Justices of the peace have always been exempt from jury service, while bail justices have been excluded since the office was created in 1989.

3.79 It is probably the case that justices of the peace and bail justices would be included in the expression 'holder of another judicial office' albeit that most of the functions they perform are not of a judicial character. Many lay persons (for example, mayors and shire presidents) perform these functions for a short

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152 Morris report, p. 34.

period in their lives and the committee believes that it is unnecessary to exclude them beyond their period of office. Moreover, the role and duties of justices of the peace have changed considerably since 1967. They no longer sit as members of Courts of Petty Sessions. Consequently, ineligibility should only apply to current holders of office.

Recommendation 20

Any person who is a justice of the peace or a bail justice should be ineligible to serve as a juror.

Legal Practitioners and their Employees

3.80 Items 1(b) and 1(c) of schedule 3 of the *Juries Act 1967* renders ineligible to serve as a juror any person who is or has at any time within the last ten preceding years been a duly qualified legal practitioner or a person 'employed by a duly qualified legal practitioner in connection with the practice of the law'. Duly qualified legal practitioners always have been ineligible for jury service in Victoria, while a category exempting one or other description of their employees has existed since 1890. The basis for these categories of ineligibility was described in 1967 as follows:[153]

> Ineligibility [is] recommended on the basis of legal knowledge and experience possibly having an undue influence on fellow jurors. If this is valid it would apply as much to academic lawyers as to practising lawyers. Accordingly no distinction is made between them.

3.81 The Victorian category is drawn more widely than the equivalent provisions in most of the other Australasian jurisdictions. Practising legal practitioners are ineligible for jury service in New South Wales, South Australia, the Australian Capital Territory, the Northern Territory (where articled clerks are included) and New Zealand. The Australian Capital Territory provision also renders employees ineligible. In Tasmania practising lawyers, and practitioners in the service of the Crown or a State instrumentality, and their staff, and spouses are exempt. In Western Australia the legislation excludes from jury service not only lawyers (whether or not practicing) but also those who have been a lawyer.

3.82 In Queensland the *Jury Act 1995* allows lawyers to serve on juries.[154] This position represents a departure from the position under the *Jury Act 1929,*

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153 Victoria, Law Department, op. cit., Appendix A.

154 *Jury Act 1995* (Qld), s. 4.

which prevented barristers, solicitors, and conveyancers and their clerks from serving on juries.[155] The decision to allow lawyers to serve on juries was inconsistent with the Litigation Reform Commission's recommendation that practising members of the legal profession should be exempt from jury service.[156] During the second reading of the Jury Bill considerable opposition was raised to allowing lawyers to serve. This opposition was largely based on the influence which a lawyer may have on the other members of the jury:[157]

> Certainly theirs is but one voice among a number but, nevertheless, their knowledge would no doubt influence and affect the deliberations of members of the public whose pervious legal knowledge was, at best, very limited and, at worst, non-existent.

The situation in Queensland will change following the enactment of the Jury Amendment Bill 1996.[158] The bill provides that lawyers actually engaged in legal work are not eligible for jury service.

3.83 The submissions received by the committee have adopted different approaches to whether this category of ineligibility should continue to exist and whether an ineligibility period of ten years is justified. According to the County Court Judges' Law Reform Committee legal practitioners should not be ineligible for jury service. Those practitioners involved in criminal trials should seek to be excused or else be challenged.[159] The Law Institute of Victoria also opposed the blanket exemption of legal practitioners from jury service.[160] It regarded the exemption as being historically based on the fact that persons qualified as lawyers in the 1800's were a 'fairly small group with a good network of communication'. This situation has now changed.

3.84 Some submissions were critical of the application of the ten year rule to this category of ineligibility.[161] Several groups recommended that a period of five years should apply.[162] There was considerable support for making

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155 *Jury Act 1929* (Qld), s. 8(1)(e).

156 Supreme Court of Queensland, Litigation Reform Commission, op. cit., p. 8.

157 Queensland, Legislative Assembly 1995, *Debates*, pp. 715 & 731.

158 Jury Amendment Bill 1996, cl. 3. This Bill extends the list of persons who are not eligible for jury service to include: lawyers actually engaged in legal work; persons over the age of 70, unless they elect to serve; and local government mayors or other councillors.

159 Submission no. 62.

160 Submission no. 66.

161 Mr J. Artup, op. cit., p. 52. Submission nos. 65, 68 & 69.

162 Submission nos. 12, 68, 69 & 89.

employees eligible for jury service, especially where they had no contact with the public, or were not involved in litigious work.[163]

3.85 The rationale for preventing lawyers from serving on juries is that these persons, like judges, are an integral part of the justice system and possess specialised knowledge. A jury, as a body of lay persons, is required to reach a fair verdict based on the facts before them. They must apply their common sense, general knowledge and their life experience rather than any expert knowledge gained from a position within the justice system. The information they require in order to determine a case should be imparted to them through the trial process. When faced with difficult legal issues jurors should ask the judge for assistance rather than asking a member of the jury who is a lawyer.

3.86 Moreover, much of the law of evidence has been developed to exclude from the jury material which is irrelevant or which may be unduly prejudicial to the accused. A lawyer's knowledge of the laws of evidence and his or her legal training could lead to prejudicial material, otherwise excluded, being made known to the jury. For example, an experienced lawyer might speculate that a failure on the part of an accused person to call character evidence as part of his or her defence almost certainly means that the accused does not have a good character. Such special knowledge is best not brought into the jury room.

3.87 The committee's deliberations on the exclusion of lawyers from jury service were among its most difficult. There were those who favoured the inclusion of lawyers as is the case in many States of the United States. Others thought that the application of the principles set out in recommendation 16 dictated that lawyers be excluded in the interests of justice and in order to preserve the lay character of the jury.

3.88 As a sensible compromise the committee has concluded that lawyers actually engaged in legal work should be excluded. However, the exclusion should be strictly confined. Qualified legal practitioners who cease to be actually engaged in legal work should not be exempted from jury service. Nor indeed, should non-qualified employees of lawyers be excluded. Rather, persons who believe that their connection with the law could act against the interests of justice should seek to be excused on a case by case basis. The

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163 Submission nos. 12, 54 & 66.

expression 'actually engaged in legal work' is taken from the Queensland legislation.[164]

Recommendation 21

Any person who is a duly qualified legal practitioner actually engaged in legal work should be ineligible to serve as a juror.

Recommendation 22

The category of ineligibility which currently applies to any person employed by a duly qualified legal practitioner in connection with the practice of the law should be repealed.

Ministers of Religion, Monks, Nuns and other Vowed Members of Religious Communities

3.89 Item 1(d) of schedule 3 of the *Juries Act 1967* renders ineligible to serve as a juror any person who is or has at any time within the last ten preceding years been a minister of religion, monk, nun, or other vowed member of a religious community. A category of ineligibility to this or a similar effect has existed in Victoria since at least 1847.

3.90 The special position of ministers of religion has been recognised in other Australian jurisdictions mainly by providing a right of excusal from jury service or through excusal on the grounds of conscientious objection. In the Australian Capital Territory and the Northern Territory ministers of religion are exempt. In New South Wales and Western Australia persons in holy orders, variously described, are excused from jury service as of right. In South Australia a person may be excused on the basis of conscientious objection.[165] In New Zealand a person may be excused by the Registrar from jury service on the basis of religious objection, provided the person is a practising member of a religious sect or order that holds service as a juror to be incompatible with it tenets. A person who objects to jury service for moral or ethical reasons, whether or not of a religious character, may be excused by the judge.[166]

3.91 In submissions to the committee individual churches agreed that some form of exemption should remain, but they differed on the question whether this should be an ineligibility or a right to be excused. A number of religious

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164 See *Jury Act 1995* (Qld), s. 4 as amended by the *Jury Amendment Act 1996* (Qld), s. 3.

165 *Juries Act 1927* (SA), s. 16.

166 *Juries Act 1981*(NZ), s. 15.

bodies, most notably the Roman Catholic Church, were against any change.[167] Several submissions suggested that the ineligibility should be abolished and replaced with a right to be excused for ministers of religion who have pastoral responsibilities.[168] A limited form of exemption was supported by some groups, extending to current full time ministers,[169] or to clergy who are not merely involved in administrative tasks.[170] It was also suggested that the category should be extended to cover pastoral associates and other lay persons who are not currently covered.[171]

3.92 The reason for this category of ineligibility is not easy to discern. Lord Morris in his report thought that 'there are certain special attributes of the position of ministers of religion which make it inappropriate that they should be eligible'.[172] These attributes included the potential for conflicts of interest arising out of their pastoral responsibilities, and difficulty in sitting on criminal cases because 'their calling would incline them to compassion and they might feel it difficult to consider the claims of justice alone'.[173] The same reasoning was adopted by the Secretary of the Victorian Law Department in 1967.[174] The fact that a minister's compassion may conflict with his or her duties as a juror was also raised in a submission by the Baptist Union of Victoria.[175]

3.93 In the view of the Senate of Priests of the Catholic Archbishop of Melbourne 'the most probable reason for ministers of religion being ruled ineligible derives from the separation of executive, legislative and spiritual powers from the judicial power'.[176] The Baptist Union of Victoria believes 'that history has excluded ministers of religion from jury service as not being laypersons in the relevant sense'. Judgment by one's lay peers means 'lay in the dual sense of non legal non clergy'.[177]

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167 Submission nos. 5, 8, 17, 50, 71, 76, 85 & 97.
168 Submission nos. 4, 29, 44, 56, 74 & 75.
169 Submission no. 44.
170 Submission no. 4.
171 Submission no. 97.
172 Morris report, pp. 38-39.
173 ibid., p. 39.
174 Victoria, Law Department, loc. cit.
175 Submission no. 44.
176 Submission no. 97.
177 Submission no. 44.

3.94 It may also be the situation that participating in jury service is 'incompatible with the clerical state'. However, a cannon lawyer who provided a lengthy submission to the committee was unable to conclude that jury service was 'alien to the clerical state'.[178] Nonetheless, requiring ministers of religion to serve on juries could place them in very difficult situations of conflict between their role as ministers and their functions as jurors.[179] This conflict arises because as a central part of their duties members of the clergy receive confidential information and give confidential advice. In a small community the local minister may well have been the recipient of confidential information which bears directly on the case. One submission argued that despite the growth of population in modern times there is a need to preserve 'the public perception of the minister of religion or member of religious order as a person to whom confidences can be readily entrusted'.[180]

3.95 At a practical level, a number of submissions made the point that a minister of religion has a calling which requires twenty-four hour availability to minister to his or her congregation.[181]

3.96 The committee has given this category of ineligibility a great deal of consideration. It concludes that it is no longer necessary for ministers of religion to be singled out as a specific class of ineligibility or to have an automatic right to be excused from jury service. Ministers of religion will usually have knowledge, experience and gifts which would be very useful inside a jury room.

3.97 Later in this report the committee recommends the formulation of guidelines for the exercise of the discretion to excuse a person for good reason. The reasonable application of these guidelines would mean that any minister of religion who believes that jury service is incompatible with his or her clerical duties could seek to be excused on the grounds of conscientious objection. Any minister who has confidential information concerning the case or persons involved in it would be excused on that account. Finally, if the nature of a minister's pastoral or other duties is such that jury service would cause undue hardship, an excuse would be given on this ground.

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178 Paper prepared by Father Tony Kerin for the Senate of Priests of the Catholic Archbishop of Melbourne, appended to submission no. 97.

179 Submission no. 5.

180 Submission no. 71. See also submission no. 44.

181 Submission nos. 8 & 44.

Recommendation 23

The category of ineligibility which currently applies to a minister of religion, monk, nun or other vowed member of a religious community should be repealed.

Persons Employed by the Attorney-General

3.98 Item 1(e) of schedule 3 of the *Juries Act 1967* renders ineligible to serve as a juror any person who is or has at any time within the last ten preceding years been in receipt of a salary provision for which is or was made in the annual appropriations of the Attorney-General. This category has existed in a general form since 1865 and was replaced by a more specific provision in 1967. The specific provision was intended to provide an exemption from jury service for the following persons: the Crown Solicitor and the Public Solicitor and their clerks; Judges of the Supreme and County Courts, Chairmen of General Sessions, Stipendiary Magistrates and ministerial officers of such courts chairmen and magistrates.[182] This category was described as resulting in 'all persons employed or holding appointments within the Law Department' being ineligible for jury service.[183]

3.99 However, the Law Department (now the Department of Justice) has expanded significantly since 1967. Annual public account program payments are now made to seven broad program areas:

(a) the Corporate Services Program;

(b) the Courts and Tribunals Services Program, which also includes the Guardianship and Administration Board, and the Victorian Institute for Forensic Pathology;

(c) the Information Registries Program;

(d) the Correctional Services Division Program, this includes the Victorian Prison Industries Commission;

(e) Police, Emergency Services and Corrections Directorate Program, which includes the Metropolitan Fire Brigades Board and the Country Fire Authority;

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182 Victoria, Law Department, loc. cit.

183 ibid.

(f) the Legal and Statutory Services Program which includes the following reporting entities: the Office of Public Prosecutions, the State Electoral Office and the Office of the Public Advocate; and

(g) the Fair Trading and Business Affairs Program.[184]

3.100 Given the range of organisations which fall within the annual expenditure of the Department, it was suggested that this category of ineligibility should be re-defined in a way which embraces only relevant Department of Justice employees.[185] Adopting this approach would increase the representativeness of juries and promote the first three overriding principles discussed above.

3.101 The approach taken towards this category of ineligibility varies among other Australian jurisdictions. Some provide a long list of persons who are ineligible, even including a spouse of particular employees in that list, as is the case in New South Wales and Tasmania. Other jurisdictions, such as South Australia, Queensland and New Zealand, have endeavoured to keep this category relatively narrow. In South Australia an employee of a government department whose duties are connected with the investigation of offences, the administration of justice or the punishment of offenders is ineligible. In Queensland a person who is or has been a correctional officer or a police officer is not eligible for jury service. In New Zealand officers of the Public Service who are employed in the head office of the Department of Justice, officers of the High Court or District Court, officers of any penal institution and probation officers are not eligible. In Western Australia persons who are not eligible for jury service under this category remain ineligible for five years after they cease the relevant employment.

3.102 With the structure of government changing so frequently, it is difficult to specify a category of ineligibility which will remain accurate and relevant for a long time into the future. Department names change and their functions are often amalgamated with other departments. Exempting all the staff of the amalgamated department may not be justified. A constant amending of the Act every time there is a change in nomenclature, structure or function is an undesirable option.

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184 Victoria, Department of Justice, *Report for the year ended 30 June 1995*, Melbourne, 1995, p. 106.

185 Submission nos. 36 & 62.

3.103 Consequently, the committee concludes that the South Australian model is to be preferred because it restricts this category of ineligibility to only those persons employed in a department of the Government whose duties of office are connected with the investigation of offences, the administration of justice or the punishment of offenders, and does not extend a person's ineligibility beyond what is necessary by reason of their employment. This category is wide enough to include a number of other existing categories of ineligibility which are dealt with in more detail below.

3.104 The South Australian provision applies only while the person performs the specified duties. The same applies in Queensland and Tasmania. In Western Australia the ineligibility lasts for five years. The existing Victorian provision applies for ten years after the person ceases to fall within the category. For the reasons previously stated the committee believes that the ineligibility should only apply while the person holds the relevant office.

Recommendation 24

Any person who is employed in a department of the Government whose duties of office are directly connected with the investigation of offences, the administration of justice or the punishment of offenders should be ineligible to serve as a juror.

3.105 It was noted above that a number of existing categories of ineligibility would be covered by this general exemption. However, the principle that the committee has operated upon is to establish the widest possible eligibility of persons in the Victorian community to serve on juries. Nonetheless, there may be a need to retain some specific classes of ineligibility for the sake of clarity or for some other reason. These classes of ineligibility will be considered in turn in order to determine whether their retention remains justified in the light of Recommendation 23.

Chief Commissioner of Police and Persons Employed Under his or her Direction and Control

3.106 Item 1(f) of schedule 3 of the *Juries Act 1967* renders the Chief Commissioner of Police ineligible to serve as a juror for ten years, while item 1(g) renders persons employed under his or her direction and control ineligible likewise. In Victoria police officers have always been unable to serve on juries. In 1967 the Secretary of the Law Department justified the inclusion of this

category because of 'difficulty which may be encountered in bringing a completely impartial approach to bear on matters submitted to a jury'.[186]

3.107 The Morris committee in 1965 described police officers as having a connection with the administration of law which means that they should not serve on juries. Their exclusion from juries was regarded as being essential to the maintenance of public confidence in the administration of justice.[187]

> If juries are to continue to command public confidence it is essential that they should manifestly represent an impartial and lay element in the workings of the courts. It follows that all those whose work is connected with the detection of crime and the enforcement of law and order must be excluded.

3.108 This approach has been accepted in other Australian jurisdictions and in New Zealand. In Queensland and New South Wales police officers and persons who have been police officers are not eligible. In Western Australia police officers and those who were members within the last five years cannot sit on a jury. Police are ineligible to serve on a jury in South Australia, the Northern Territory and New Zealand. In New Zealand traffic officers are also ineligible. Additionally, in Tasmania and New South Wales the spouses of police officers cannot sit on a jury. New South Wales even excludes de facto partners of police officers.

3.109 Apart from submissions which suggested that everyone should be liable for jury service, no submission suggested that police officers specifically should be included. The Victoria Police in its submission suggested that there should be no change to this category of ineligibility. Having weighed all of the submissions on this issue the committee has concluded that the ineligibility relating to police officers should be retained.

3.110 The committee has considered the Victoria Police as a statutory authority and has concluded that the ineligibility of police officers ought to be achieved by a specific category. For previously stated reasons the ineligibility period should be only while the person holds the relevant office.

Recommendation 25

Any person who is a member of the police force should be ineligible to serve as a juror.

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186 Victoria, Law Department, loc. cit.

187 Morris report, p. 35.

Director-General of Community Services and Persons Employed Under his or her Direction and Control; Honorary Probation Officers

3.111 Item 1(f) of schedule 3 of the *Juries Act 1967* renders the Director-General of Community Services ineligible to serve as a juror for ten years, while item 1(g) renders persons employed under his or her direction and control ineligible likewise. Since 1865 a category to this or the like effect has existed in Victoria. Item 1(h) also renders ineligible for ten years an honorary probation officer.

3.112 The committee notes that the position of Director-General of Community Services has not existed for some years. Currently the functions of this office are performed by the Director of Youth and Family Services in the Department of Human Services. Until recently the function was performed by the Deputy Secretary Community Services within the former Department of Health and Community Services. In 1967 the appropriate officer was the Director General of Social Welfare. This history highlights the futility of basing a category of ineligibility on the title of a position rather than the function performed.

3.113 In 1967 the Law Department recommended that the Director-General of Social Welfare and all persons under his or her direction and control continue to be exempt from jury service. This included Probation officers.[188] The reasoning behind this category was that these persons could find it difficult to be impartial. In 1967 it was decided that honorary probation officers should also be ineligible, because employed probation officers were included within this category of ineligibility.

3.114 The County Court Judges' Law Reform Committee believes that honorary probation officers should not be ineligible, however, if they are involved with a particular accused then they should be excused. This argument can be extended to cover these two categories of ineligibility so that they are no longer necessary.

3.115 Accordingly, the committee concludes that honorary probation officers and persons employed in the field of providing welfare services to the community should no longer be ineligible for jury service. Rather, they should seek to be excused on an individual and case by case basis.

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188 Victoria, Law Department, loc. cit.

Recommendation 26

The categories of ineligibility which currently apply to the Director-General of Community Services, to persons employed under his or her direction and control and to honorary probation officers should be repealed.

Persons Employed under the Direction and Control of the Director-General of Corrections

3.116 Item 1(g) of schedule 3 of the *Juries Act 1967* renders persons employed under the direction and control of the Director-General of Corrections ineligible to serve as a juror for ten years. Persons concerned with the punishment of offenders have always been unable to serve on Victorian juries. The committee notes that the office of Director-General of Corrections no longer exists having been replaced with a Director, Correctional Services.

3.117 The Director, Correctional Services in his submission to the committee suggested that items (e) (g) and (l) of schedule 3 should be replaced with a provision which provides for:[189]

> the exclusion of persons who work in any capacity within a correctional institution/s, are involved in the management of a correctional institution/s, or, as part of their employment or voluntary work, have dealings with prisoners or offenders in a disciplinary, supervisory or supportive capacity.

It was noted that this description would include public and private providers of correctional services.

3.118 The committee believes that a category of ineligibility relating to correctional services officers is justified, but is sufficiently covered by the general category exempting persons employed in a department of the Government whose duties of office are connected with the investigation of offences, the administration of justice or the punishment of offenders.

3.119 However there is a need also to render ineligible for jury service the employees of certain non-government organisations which have assumed some functions previously performed exclusively by government, for example, private prison operators. Those groups which supported the ineligibility of employees of the operators of private prisons did so on the grounds that these persons perform similar tasks to prison officers and therefore should also be ineligible.[190]

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189 Submission no. 33, p. 2.

190 Submission no. 33; Mr J. Artup, loc. cit.

3.120 The committee believes that the specification of the organisations and functions to be encompassed within this category is best left to be determined from time to time as needs arise. Accordingly, there should be provision for the Governor in Council to exempt persons in this category by proclamation published in the *Victoria Government Gazette*.

Recommendation 27

Any person who is employed in a non-government corporation or organisation specified by proclamation published in the* Victoria Government Gazette *whose duties of office are connected with the investigation of offences, the administration of justice or the punishment of offenders should be ineligible to serve as a juror.

Volunteers under the Corrections Act

3.121 Item 1(l) of schedule 3 of the *Juries Act 1967* renders ineligible to serve as a juror any person who is or has at any time within the last ten preceding years been a volunteer within the meaning of the *Corrections Act 1986*. This category of ineligibility has existed since 1986.

3.122 The comments of the Director, Correctional Services regarding this category were noted above. It was suggested also to the committee that Prison Fellowship volunteers should be ineligible for jury service in order to avoid a conflict of interests resulting from these persons tending to be 'privy to matters relating to prisoners on remand or on bail'.[191]

3.123 However, the committee believes that a specific category of exclusion is not justified for volunteers under the *Corrections Act*. In those circumstances where such a person has a conflict of interest, or knowledge of the facts of a case or the accused, or where it is thought that, by reason of his or her work, the person could not bring an impartial mind to the case to be tried, the person could be excused from jury service for good reason. A person may be excused if a judge or the sheriff believes that he or she deals with prisoners in either a disciplinary, supervisory or supportive capacity and is unable to properly and impartially fulfil the duties of a juror.

Recommendation 28

The category of ineligibility which currently applies to a volunteer within the meaning of the* Corrections Act 1986 *should be repealed.

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191 Submission no. 59.

Electoral Commissioner and Persons Employed under the Direction and Control of the Electoral Commissioner

3.124 Items 1(f) and 1(g) of schedule 3 of the *Juries Act 1967* also render the Electoral Commissioner and persons employed under his or her direction and control ineligible to serve as jurors for ten years. The retention of this category is supported by the Electoral Commissioner.

3.125 This category is included because the Electoral Commissioner and his employees are involved in the formation of the jury list from which jurors are selected. It was thought that they should not otherwise participate in the jury system for fear that their involvement might give the appearance of a conflict of interest.[192] However, the process of jury list compilation from the State electoral roll is now totally computerised and there is virtually no scope for any tampering with the roll. Moreover, officers of the State Electoral Commission are not excluded from voting, even though they are responsible for maintaining the State electoral roll. Consequently, there appears to be no reason to include these officers as a specific category of exclusion.

Recommendation 29

The category of ineligibility which currently applies to the Electoral Commissioner and any person employed under his or her direction and control should be repealed.

Court Reporters

3.126 Item 1(j) of schedule 3 of the *Juries Act 1967* renders ineligible to serve as a juror any person who is or has at any time within the last ten preceding years been employed as a Government shorthand writer or court reporter or in connection with any court recording service. Court reporters have been ineligible for jury service in Victoria since 1967. In South Australia persons employed in the administration of the courts or the recording or transcription of evidence are not eligible.

3.127 Several submissions suggested that it is unnecessary to make court reporters ineligible for jury service because persons involved in criminal matters could be excused.[193] Nonetheless, the committee accepts that ineligibility for court reporters is desirable because their work means that they

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192 Dr G. Lyons, State Electoral Commissioner, *Minutes of Evidence*, 13 Feb. 1995, pp. 132–133.

193 Submission nos. 12 & 62.

are often acquainted with court personnel and members of the legal profession, and have special knowledge concerning the administration of justice. They may be influenced by this knowledge if they sat on a jury.[194] For previously stated reasons the ineligibility applies only while the persons falls within the category.

3.128 It has been suggested that this category should be extended to cover Hansard reporters and subeditors.[195] However, the committee does not believe that this extension is necessary, because they are not employed in connection with court proceedings. Hansard reporters who are also court reporters would be ineligible in any event.

Recommendation 30

Any person who is employed as a court reporter or in connection with any court or tribunal recording service should be ineligible to serve as a juror.

Ombudsman and Officers of the Ombudsman

3.129 Item 1(k) of schedule 3 of the *Juries Act 1967* renders ineligible to serve as a juror any person who is or has at any time within the last ten preceding years been an officer of the Ombudsman, whereas, the Ombudsman and the Acting Ombudsman have a right to be excused under item 19 of schedule 4. This has been the situation since 1983. The office was created in 1973. In New South Wales the Ombudsman and Deputy Ombudsman are ineligible for jury service. The Ombudsman is also ineligible for jury service in the Northern Territory. The Commonwealth Ombudsman is in effect ineligible by reason of a general provision exempting senior Commonwealth employees.

3.130 The retention of this category, and its extension to cover the Deputy Ombudsman (Police Complaints) as a separate statutory appointment, is supported by the Victorian Ombudsman.[196] The rationale for this category is that officers of the Ombudsman may interview accused persons during their work. This concern is strengthened because, according to the Ombudsman, 'this office now allocates a major proportion of its resources to dealing with complaints against Police and still deals with many complaints from prisoners'.[197]

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194 Submission no. 34.

195 Submission no. 14.

196 Submission no. 49.

197 ibid.

3.131 The committee accepts that from time to time jury service by the Ombudsman and Deputy Ombudsman and their officers may cause problems of the kind envisaged, however, the committee believes that these concerns can be addressed without the retention of a category of ineligibility for officers of the Ombudsman. Rather, officers should seek to be excused on an individual and case by case basis as problem circumstances arise. This proposal has received support from the County Court Judges' Law Reform Committee.[198]

Recommendation 31

The category of ineligibility which currently applies to an officer of the Ombudsman should be repealed.

Recommendation 32

The category of right to be excused which currently applies to the Ombudsman should be repealed.

Persons Ineligible by Reason of Perceived Practical Difficulties in their Serving

Persons with Disabilities

3.132 Under item 2 of schedule 3 of the *Juries Act 1967* the following categories of persons with disabilities are ineligible for jury service:

(a) a person who is unable to see hear or speak;

(b) a person who is intellectually disabled and eligible for services under the *Intellectually Disabled Persons' Services Act 1986*;

(c) a person who is a patient within the meaning of the *Mental Health Act 1986*; and

(d) a person who is a represented person within the meaning of the *Guardianship and Administration Board Act 1986*.

The committee also notes that persons of unsound mind are not qualified to vote and their names should not appear on the electoral roll.

3.133 These categories in effect assume that certain groups of people are incapable of performing the functions of a juror. A similar approach has been taken in some other Australian jurisdictions. New South Wales, Queensland, South Australia and Tasmania provide that persons who have a physical or mental disability that makes them incapable of carrying out the duties of a

198 Submission no. 62.

juror are ineligible. Legislation in Western Australia, the Australian Capital Territory and the Northern Territory appears to assume that persons who are blind, deaf or dumb are incapable of serving and should be excluded from jury service.[199]

3.134 There is a need to recognise that the ability of persons with certain disabilities to carry out the functions of a juror may be affected by the availability of facilities and support. For example, in relation to deaf persons it has been suggested that they could serve on juries if they were provided with the appropriate support, such as a sign language interpreter, or through the use of recent technological advances.[200] The Victorian Deaf Society and the Human Rights and Equal Opportunity Commission have suggested that ineligibility for deaf persons should cease.[201]

3.135 Similar comments have been made in relation to people with a sight impairment. Several submissions suggested that it may not be necessary to exclude persons with a sight impairment (other than where there is a very low level of sight), because there are methods available to improve vision and the ability to view exhibits.[202]

3.136 The Human Rights and Equal Opportunity Commission suggested that these categories of ineligibility should be replaced with a rule that persons not reasonably capable of performing the duties of a juror are excluded. Consistent with this approach the category should be reworded to acknowledge that ineligibility should only occur if a person is incapable of receiving information even with reasonable assistance.[203]

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199 *Juries Act 1927* (SA), s. 13; *Jury Act 1977* (NSW), s. 6, sch. 2; *Juries Act 1967* (ACT), s. 10; *Juries Act 1980* (NT), s. 11, sch. 7; Juries Act 1899 (Tas.), sch. I, s. 7; Juries Act 1957 (WA), s. 5, sch. 2.

200 Submission nos. 26, 79 & 130.

201 Submission nos. 20 & 26. The Disability Discrimination Law Advocacy Service stated that people with disabilities should not be ineligible for jury service, see submission no. 90.

202 Submission nos. 26 & 86.

203 Submission no. 86.

3.137 Ineligibility based on the inability to communicate, rather than the existing approach, is also supported by the Human Rights and Equal Opportunity Commission. Since discrimination as it affects jury service is often indirect, the Commission believes that there should also be a general statement in the *Juries Act* to the effect that 'jury service is to be conducted on the basis of non-discriminatory community representation, subject to specific provisions in the Act'.

3.138 It was suggested to the committee that a new category of ineligibility should be introduced in order to cover persons with impaired cognitive function and intellectually disabled clients of the Department of Health and Community Services.[204] This position would recognise that persons with acquired brain injury that causes physical limitations only are able to serve on a jury, unless to do so would cause undue hardship.

3.139 Several submissions suggested, either generally or in relation to specific groups, that categories of persons ineligible to serve as jurors by reason of perceived practical difficulties in their serving be redefined as categories of person with a right to be excused from serving as jurors.[205] Other submissions opposed this change.[206] The Human Rights and Equal Opportunity Commission believed that this approach would be undesirable because persons who are reasonably capable of serving would be expected to seek excusal to save others from making any necessary adjustments.

3.140 The committee has concluded that persons should only be ineligible for jury service if their physical, intellectual or mental disability or disorder makes them incapable of effectively performing the functions of a juror. This approach also makes it unnecessary to amend the *Juries Act* whenever there is a change to legislation governing people with disabilities.

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204 Submission nos. 26 & 86.

205 Submission nos. 13, 30 & 70. Blind persons should be redefined in this manner according to the National Federation of Blind Citizens of Australia and the Royal Victorian Institute for the Blind.

206 Submission nos. 12, 19, 26 & 42.

Recommendation 33

The current specific categories of ineligibility from jury service relating to persons with mental, intellectual and physical disabilities should be repealed in favour of a general category which renders ineligible a person who has a physical, intellectual or mental disability that makes the person incapable of effectively performing the functions of a juror.

Inability to Read and Write and Inadequate Knowledge of the English Language

3.141 Since 1890 a person who is unable to read or write has been ineligible to serve on a jury in Victoria. Those persons with an inadequate knowledge of the English language have been ineligible since 1967. The basis for this category of ineligibility is that important evidence may be in a document form so jurors need to be able to read. Moreover, it is often useful for jurors to take notes of important evidence as it is given.

3.142 The committee has concluded that these categories are justified, but they could be simplified by one broader category which renders ineligible persons who are not able to read or write the English language.

Recommendation 34

A person who is not able to read or write the English language should be ineligible for jury service

Categories of Entitlement to be Excused as of Right

Redefining the Categories of Excusal as of Right

3.143 The *Juries Act 1967* allows a large range of persons to seek to be excused as of right from jury service.[207] Many of these categories have been in existence in one form or another for over 150 years. In the following list the figures in square brackets indicate the earliest year this or a similar category of exemption existed in Victoria. Where two dates appear this indicates that an earlier general provision has been replaced by a later more specific exemption. Imperial and New South Wales legislation applicable in Victoria earlier than 1847 included many of these categories.

(a) Members of the Governor's household and the Official Secretary to the Governor. [At least since 1847]

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207 *Juries Act 1967* , s. 4.

(b) The permanent heads of all State Government Departments. [At least since 1847, 1956]

(c) Commissioners, members and secretaries of all statutory corporations. [1907, 1956]

(d) Members of the Public Service Board, the Police Service Board and the Teachers' Tribunal. [1967]

(e) The Auditor General. [At least since 1847, 1967]

(f) Medical Practitioners [At least since 1847], Dentists [1887] and Pharmacists [At least since 1847].

(g) School Teachers. [At least since 1847]

(h) Masters and crews of trading vessels. [At least since 1847]

(i) Pilots holding a licence under the *Marine Act 1988*. [At least since 1847]

(j) Airline pilots and crews regularly engaged on international flights. [1967]

(k) Members and Officers of the Legislative Council [1847] and the Legislative Assembly [1865].

(l) Mayors, presidents, councillors, town clerks and secretaries of municipalities. [At least since 1847]

(m) Persons over the age of sixty-five. [1956. The age of sixty applied at least since 1847–1956]

(n) Pregnant women. [1975]

(o) Persons who are required to undertake the full-time care of children or persons who are aged or in ill-health. [1975]

(p) Persons who are so physically handicapped as to be unable to perform the duties of jurors without undue hardship. [1847 Blind persons were specifically exempted from jury service from 1890 to 1958]

(q) Persons who reside more than 32 kilometres from the court-house at which they would be required to serve. [30 miles in 1847; 25 miles in 1865; 20 miles in 1890; 32 kms in 1973]

(r) Persons who hold current certificates of entitlement to be excused as of right on account of lengthy jury service. [1956]

(s) The Ombudsman and the Acting Ombudsman. [1983]

3.144 The structure adopted in the *Juries Act 1967* mirrors the recommendations made by the Morris committee in England in 1965. That committee recommended that the categories of 'exemption from jury service' should be abolished, and instead there should be categories of ineligibility, which reflect the interests of the proper administration of justice; categories of disqualification; and categories of excusal as of absolute right, which would be introduced in order to allow people to decline to serve on juries where they perform a function which is particularly important to the community.[208]

3.145 Through this recommendation the Morris committee hoped to increase the representativeness of the English jury system by providing a mechanism whereby, persons who were previously absolutely exempt from jury service could elect to serve on juries on particular occasions when they were able to, while retaining a right to opt out if they were so minded.[209]

3.146 However, the Victorian experience has been that persons who have a right to be excused from jury service almost always exercise the right. An examination of the responses to nearly 10,000 questionnaires received by the sheriff's office in March, April and May 1996 has revealed that 30% of those responding claimed a right to be excused. This compares with less than 1% who were disqualified, 19% who were ineligible and 9% who sought a short term excusal or deferral. Just over 40% of persons responding were liable and available for jury service.

3.147 It can be seen from these figures that the categories of a right to be excused are the main cause of under-representation within the jury system. The relative frequency of each category of excuse is shown in the table below. The figures are expressed as a percentage of the total number of persons who sought to be excused as of right.

Persons over the age of 65	50%
Pregnant women	4%
Persons who are required to undertake the full-time care of children or persons who are aged or in ill health	21%

208 Morris report, p. 34.

209 ibid.

Persons who are so physically handicapped as to unable to perform the duties of jurors	7%
Persons who reside more than 32 km from the court-house at which they would be required to serve	6%
Occupational exemptions	12%

Of the occupational exemptions, doctors, dentists and pharmacists accounted for 3%, while school teachers represented 9%. Only 13 people claimed to be excused by reason of any other occupational categories.

3.148 The high level of persons claiming to be excused as of right, to some extent, may be caused by the structure of the questionnaire sent to prospective jurors which lists the categories of 'right to be excused' and asks:

> Read the list at left. If you wish to claim exemption for the time being and fall within one of the classes listed write "YES" in the box at right and state below which class applies to you.

This procedure could be said to encourage people to simply write "YES" in the box without giving much thought as to whether they should claim the exemption. The higher excusal rate may also be caused by a general community attitude that jury service is inconvenient and is to be avoided if at all possible. These matters are considered later in chapter six.

3.149 So far as the current categories of the right to be excused are concerned, the committee believes that a number should be abolished or modified in order to increase the representativeness of the jury system. Any adverse effects that this is likely to have on the members of the former categories of excusal will be ameliorated to a large extent by three factors:

(a) the introduction of a one trial or one day jury pool system;

(b) the redesignation of some categories of excusal as of right to categories of ineligibility;

(c) new guidelines for the exercise of the discretion to excuse for good reason on a case by case basis.

3.150 This approach has received considerable support in submissions received by the committee. Some submissions recommended that the categories of persons entitled to be excused as of right should no longer be dealt with in this way instead, they should be assessed against a criteria laid down in regulations under which jury service is excused only for good

reason.[210] Other submissions supported the narrowing of the categories of excusal as of right with greater reliance being placed on seeking excusal for good reason based on a person's individual circumstances.[211]

Obsolete Categories

3.151 The committee accepts the advice of the Public Service Commissioner that the Public Service Board, the Police Service Board and the Teacher' Tribunal have all been abolished and that item 4 of schedule 4 should be deleted.[212]

Recommendation 35

The category of right to be excused which purports to apply to members of the Public Service Board, Police Service Board and Teachers' Tribunal should be repealed.

Occupational Categories

Governor, the Official Secretary to the Governor, Members and Officers of the Parliament

3.152 The committee has concluded that the Governor and the Official Secretary to the Governor, Members of Parliament and some officers of the Parliament should no longer be excusable as of right but should be ineligible for jury service.

3.153 According to the County Court Judges' Law Reform Committee, these categories are justified by the doctrine of the separation of powers and associated concepts based on the independence of the three tiers of government from each other.[213] Moreover, the Governor on the advice of the Executive Council exercises the royal prerogative of pardon. For this reason the committee has recommended that these persons should be ineligible for jury service.

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210 Submission nos. 12 & 66.

211 Submission nos. 54, 55, 57, 65, 68 & 89.

212 Submission no. 10.

213 The County Court Law Reform Committee also recommended that the following categories of person should be entitled to excusal for this reason: the permanent heads of all State Government Departments, the Auditor General, Members and Officers of the Legislative Council and the Legislative Assembly and the Ombudsman and Acting Ombudsman. See submission no. 62.

3.154 Many Members of Parliament are willing to serve on juries and may even want to serve. The committee seriously considered the removal of this ineligibility. However, in conformity with the principles set out in recommendation 16, particularly the need to maintain the separation of powers between the executive, legislature and judicial branches of government, the committee has concluded that this exemption should remain.[214]

3.155 The committee accepts the submissions of the Clerk of the Legislative Council and the Clerk of the Legislative Assembly that the ineligibility should continue to include Officers of the Parliament.[215] 'The basis on which the privilege [of Parliament] is extended to officers is "in order that they may freely attend to their parliamentary duties".'[216] However, the exemption should only extend to certain senior officers whose attendance is necessary for the proper functioning of the Parliament. These are: the Clerks of each House, the Usher of the Black Rod and the Serjeant-at-Arms.

Recommendation 36

The category of right to be excused which currently applies to the Governor and the Official Secretary to the Governor should be redesignated as a category of ineligibility.

Recommendation 37

The category of right to be excused which currently applies to Members of Parliament should be redesignated as a category of ineligibility.

Recommendation 38

The category of right to be excused which currently applies to Officers of the Legislative Council and Officers of the Legislative Assembly should be redesignated as a category of ineligibility, but should only apply to the Clerks of both Houses of the Parliament, the Usher of the Black Rod and the Serjeant-at Arms.

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214 As the Clerk of the Legislative Assembly noted in his submission (no. 8), the exemption 'stems from the Privilege of Parliament' and, in the words of *Erskine May's Parliamentary Practice* (21st ed., p. 69), is justified by the fact that 'the House cannot perform its functions without unimpeded use of the services of its Members'. In 1826 the House of Commons resolved that it is 'amongst the most ancient and undoubted privileges of Parliament that no Member shall be withdrawn from his attendance on his duty in Parliament to attend any other court' (*Erskine May's Parliamentary Practice*, 21st ed., p. 101).

215 Submission nos. 11& 15.

216 Submission no. 15 quoting *Erskine May*, op. cit. p. 102.

Other Occupational Groups

3.156 Despite general support for a reduction in the numbers of persons entitled to claim exemption from jury service, many of the submissions made on behalf of professional bodies opposed any change to a category affecting their profession. This was particularly the case in relation to registered medical practitioners, dentists, pharmacists and teachers.[217]

3.157 The Association of Independent Schools of Victoria argued for the retention of the right to be excused for school teachers on the grounds that:[218]

> The nature, role and objectives of the teaching profession would be considerably disrupted if teachers were not exempt from Jury Service and the operation of schools would be disrupted with the possible absence, on short notice, of teaching staff.

3.158 To like effect were submissions from the Catholic Education Office, the Victorian Catholic Schools Association, the Victorian Secondary Teachers Association and the Federated Teacher's Union of Victoria, all of which argued that jury service by a teacher would cause disruption to an education program and would disadvantage the students in that teacher's care.[219] The FTUV argued that 'any change to the present entitlement for teachers to be excused from jury duty would only exacerbate an already difficult situation in government schools'.[220] Indeed, the Association of School Councils of Victoria and the Australian Council for Educational Administration both argued for an extension of this category to include non-teaching staff in schools.[221]

3.159 Some professional groups which are currently not exempt sought an extension of the existing categories of excusal as of right to cover their members.[222] The Australian College of Midwives Inc. (Vic Branch) argued that nurses and midwives in private practice should be excused as of right from jury service because they might be significantly financially disadvantaged if they participated and they might also have difficulty rescheduling their work. The Nurses Board of Victoria also sought exemption for nurses.[223] The Australian Physiotherapy Association[224] and the Australian Psychological

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217 Submission nos. 9, 18, 21, 43, 46, 52, 53, 73, 77, 83, 84, 91 & 109.

218 Submission no. 43. See also submission nos. 52 & 125.

219 Submission nos. 46, 73, 77 & 83.

220 Submission no. 46.

221 Submission nos. 7 & 18.

222 Submission nos. 6, 7, 18, 22, 25, 45, 57, 61 & 79.

223 Submission no. 6.

224 Submission no. 22.

Society[225] wanted their members to be exempted. The Victorian Ambulance Services' Association submitted that its members should be exempt because it is not in the community's best interest to reduce the availability of operational ambulance employees for rostered duty, especially at smaller metropolitan and rural stations. The Australian Dental Association sought an exemption for 'key personnel in the health area', including dental nurses and receptionists.[226]

3.160 By contrast, the Chief Fire Officer on behalf of the Metropolitan Fire Brigades Board said that jury service 'does not place a significant impost on the organisation'.[227] He expressed the commendable sentiment that:

> Historically Jury Service has been perceived as a community responsibility. Being part of and serving the community is a desirable outcome provided the operational readiness to serve the wider community is not placed in jeopardy, but given the existing criteria it is believed this will not be the case.

3.161 While the concerns of the organisations mentioned, and others, have been given careful consideration, the committee is of the opinion there their validity in certain individual cases does not justify excusal as of right for all persons in a particular profession. Considerations of the kind raised are more appropriately dealt with on an individual basis through the application of the criteria for excusal for good reason on a particular occasion.

Recommendation 39

The categories of a right to be excused relating to the following occupational groups should be repealed:

- ***(a) The permanent heads of all State Government Departments.***
- ***(b) The Commissioners, members and secretaries of all statutory corporations.***
- ***(c) The Auditor-General.***
- ***(d) Medical practitioners, dentists and pharmacist registered under certain specified Acts.***[228]
- ***(e) Masters and teachers in State schools or schools registered under the* Education Act 1958.**
- ***(f) Masters and crews of trading vessels.***
- ***(g) Pilots holding a licence under the* Marine Act 1988.**

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225 Submission no. 57.

226 Submission no. 91.

227 Submission no. 16.

228 *Medical Practice Act 1994*; *Dentists Act 1972*; *Pharmacists Act 1974*.

(h) Airline pilots and crews regularly engaged on international flights.

(i) Mayors, presidents, councillors, town clerks and secretaries of municipalities.

Categories of Excusal as of Right Based on Grounds of Personal Hardship

3.162 Schedule 4 entitles a number of categories of persons to claim excusal from jury service on various grounds relating to perceived personal hardship. These categories are:

(a) Persons aged over 65 years. (item 14)

(b) Pregnant women. (item 15)

(c) Persons who are required to undertake the full-time care of children or of persons who are aged or in ill-health. (item 15A)

(d) Persons who are so physically handicapped as to be unable to perform the duties of jurors without undue hardship. (item 16)

(e) Persons who reside more than 32 kilometres from the court-house at which they would be required to serve. (item 17)

Persons aged over 65 years

3.163 In Victoria and New South Wales persons over the age of 65 years are excused as of right from jury service. In South Australia, Tasmania and New Zealand a person must be under a certain age in order to qualify for jury service—70 years of age in South Australia and 65 years of age in Tasmania and New Zealand. Western Australia, the Australian Capital Territory and the Northern Territory exempt people over a certain age—65 years of age in Western Australia and 60 years of age in the Australian Capital Territory and the Northern Territory. In Queensland the capacity of older persons to sit on juries is not limited in any way. However, if enacted the Queensland Jury Amendment Bill 1996 will result in persons over the age of 70 years being ineligible for jury service, unless they elect to be eligible.[229]

3.164 Many of the submissions to the committee favoured the removal of the automatic exemption from jury service for persons aged over 65 years.[230] The

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229 Clause 3.

230 Submission nos. 54, 62, 86, 89, 128 & 129. Mr M. Kennedy, Assistant Jury Coordinator of the Supreme Court, suggested to the committee that persons aged between 65 and 72 years should opt to serve, and then at 72 years should be automatically exempt, see

provision of an automatic exemption from jury service for persons aged 75 years and over with persons aged 70 to 74 having a right to be excused was supported by several submissions.[231] It was also suggested that persons who are over a specified age should be eligible for jury service, but be entitled to apply for an exemption, either permanently or for a limited period of time.[232]

3.165 Several submissions regarded the existence of a special provision relating to age alone as being unnecessary because the legislation already excludes people who are unable to serve because of illness, mental or physical disability.[233] The Council on the Ageing provided three additional reasons for opposing such a provision. First, people's abilities are related in only a minor way to their age. Secondly, juries should be reflective of the community and older people should be included in the same proportion as they occur in the population. Thirdly, the older age range is likely to cover a greater proportion of people retired from the work force who may have more time available, and who have retired from occupations which had earlier exempted them from jury service.[234]

3.166 The committee accepts that there is much force in the submission from the Council on the Ageing. However, the committee also notes that the most common complaint received by the sheriff is from older people who receive questionnaires too frequently. The Deputy Sheriff (Juries) has commented that: 'the receipt of jury notices by elderly people is often the cause of a great deal of distress to them or their family'.[235] Moreover, as noted earlier, persons over the age of 65 years account for 50% of all persons claiming a right to be excused from jury service. A survey conducted by the committee of 17,345 persons summoned for jury service in 1994 shows that only 525 or 3% were aged over 65 years. Of these 241 or 1.4% were aged 70 years or over—151 were aged between 70 and 74, 63 between 75 and 79, 22 between 80 and 84 and 5 between 85 and 89. The oldest person who actually served on a jury was aged 83, while the oldest person who attended for jury service was aged 87.

Minutes of Evidence, 16 Jan. 1995, p. 69. There was support for the current position in submission nos. 66, 100 & 120.

231 Submission nos. 108, 119 & 126.

232 Submission nos. 76, 86 & 132.

233 Submission nos. 86 & 128.

234 Submission no. 128.

235 J. Artup, 'Selection of jury rolls', memorandum dated 14 Sept. 1992.

3.167 Largely for the reasons advanced by the Council on the Ageing, the committee believes that an upper age limit should not apply to jury service. However, in order to reduce inconvenience and anxiety, persons aged 70 years and over should be entitled to elect to have their names removed from the jury list. A notice including a form of election should be included on the questionnaire sent to prospective jurors. Persons aged 70 years and over should be able to elect to remain on the jury list or to have their names removed from the jury list. Failure to return a notice of election should be deemed to constitute an election to have one's name removed. Generally, an election should be once and for all. However, a person whose name has been removed from a jury list should have a right to apply to the sheriff to have his or her name reinstated on the roll from which future jury lists will be compiled.

3.168 The committee recognises that such a system will increase the administrative burden of operating the jury system. However, the system is technically feasible. The computer generated random sort conducted by the State Electoral Commissioner would be programmed to select persons regardless of their age unless their name was 'tagged'. The tag would be attached to a name by the State Electoral Commissioner upon receiving advice from the sheriff that a person had either elected, or was deemed to have elected, to have their name removed from the roll for the purposes of jury service. The Electoral Commissioner could also provide the sheriff with a list of persons aged 70 years and over whose names appear on the jury list. This would assist the sheriff to assess the number of persons who should be sent questionnaires for a particular panel.

Recommendation 40

There should be no upper age limit for jury service. Persons aged 70 years and over should be entitled to elect not to be eligible for selection for jury service.

Pregnant Women and Carers

3.169 These categories were inserted in the *Juries Act* in 1975 when the category of excusal as of right on account of being a woman was repealed. They are responsible for excusing a large number of women from jury service and thereby result in the jury pool being under representative of females.

3.170 The gender balance for persons aged 18 years and over living in the Melbourne Jury District is 48.5% male to 51.5% female, whereas, a survey

conducted by the committee of 17,345 persons summoned for jury service in the Melbourne Jury District in 1994 shows that 53.3% were male, 45.4% female and 1.3% unknown. It has been estimated by the committee that at any given time about 53,000 women are pregnant in Victoria[236], while 78% of full-time carers are woman. Finally, the committee notes that of those persons claiming to be excused as of right 4% were pregnant women and 21% were carers.

3.171 The abolition of these categories is supported by a number of submissions to the committee.[237] Several submissions have suggested that there should be excusal as of right for women who are close to giving birth.[238]

3.172 The committee recognises that a person should not be required for jury service where to do so will impose an unreasonable burden on the person or those being cared for by the person. However, it should not be too easy to claim an exemption from jury service. Most women in the early stages of pregnancy would have no difficulty in serving on a jury in a relatively short trial. Persons caring for school age children or an elderly parent may well be able to make arrangements to perform jury service for a few days.

3.173 Consequently, the committee has concluded that these categories should be abolished. Persons who are unable to perform jury service because of the hardship it will cause them or the persons they are responsible for, can seek to be excused on an individual basis.

Recommendation 41

The categories of right to be excused relating to pregnant women and persons who are required to undertake the full-time care of children or persons who are aged or in ill-health should be abolished.

Physically Handicapped Persons

3.174 The abolition of this category of right to be excused flows from the creation of a new category of ineligibility which renders ineligible a person

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236 1993 confinements 63,172 + foetal deaths [20 weeks or 400 gms] 423 + estimated miscarriages under 20 weeks (10-15% of all other pregnancies) = 70,000–73,000÷75% = 52500–54750.

237 Submission nos. 62 & 89.

238 Submission nos. 68, 69 & 132.

who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror.[239]

Recommendation 42

Consistent with recommendation 33 the current category of right to be excused relating to 'persons who are so physically handicapped as to be unable to perform the duties of jurors without undue hardship' should be abolished.

Persons who Reside Outside a 32 Kilometre Radius

3.175 It has always been accepted that it is unreasonable to expect people to travel long distances to perform jury service. Before 1865 thirty miles was the specified distance. At this distance a person in 1865 could not be expected to commute on a daily basis between the court-house and his home. Of course, in those days only men who held a certain property qualification were qualified for jury service. They could be expected to arrange overnight accommodation in the court town. In 1865 the distance was reduced to twenty-five miles, in 1890 to twenty miles and in 1973 to thirty-two kilometres. Thus, with a minor change to allow for metrication, a twenty mile radius for excusal from jury service has existed for over one hundred years.

3.176 The committee has estimated that of 2.9 million persons enrolled to vote for the legislative assembly, over 25% of voters do not live within 32 kilometres of a court town. It is not surprising therefore that the committee received several submissions which supported either an extension of the distance[240] or the total abolition of this category of excusal as of right.[241]

3.177 Consequently, the committee has concluded that improvements in transportation since 1890 justify an increase in the distance which should form the basis for excusal from jury service. It has concluded that persons who live more than 50 kilometres from the court-house in Melbourne should be able to claim an exemption from jury service. Given the benefit it would have to widening representativeness in provincial and rural areas, the committee believes that a 100 kilometres radius should apply outside the Melbourne jury district. The committee has taken into account that most people have a car or are within reasonable access to public transport. These distances essentially represent about one hour's drive, and in view of the one trial or one day

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239 See recommendation 31.

240 Submission nos. 54 & 76.

241 Submission nos. 62, 68, 69 & 89.

system, this is not an unreasonable requirement. Persons who cannot travel these distances without undue hardship could claim to be excused under the guidelines set out later in this chapter.[242]

Recommendation 43

Persons may claim an exemption from jury service if they reside more than 50 kilometres from the court in metropolitan Melbourne or 100 kilometres outside metropolitan Melbourne.

Certificates of Exemption

3.178 Under section 13(4) of the *Juries Act 1967* a court may determine to grant a certificate of exemption for up to ten years to jurors who have attended for a lengthy period. Item 18 of schedule 4 entitles persons who hold current certificates of exemption on account of lengthy jury service to be excused as of right from further jury service.

3.179 The Morris committee in England in 1965 recommended that persons who have served on a jury within the last five years should not be required to serve again.[243] In making this recommendation the committee stressed that it would be unusual for a person to be called for jury service more than once, and that many people would not be summoned for jury service at all.[244]

3.180 There was considerable support for the retention of this category of exemption among submissions made to the committee.[245] Several submissions favoured the provision of certificates of exemption for persons who have attended for jury service, with those who have served on a jury being granted an exemption for a longer period than would otherwise be the case.[246] Some submissions also suggested that jurors who have served for a lengthy period of time, for example over 16 weeks, should be entitled to an exemption for life.[247]

3.181 The committee believes that a provision allowing for the exemption of people who attend for jury service or who serve as jurors for a prescribed period would ensure that the burden of jury duty is spread more evenly among the community. This will also remove one of the biggest causes of

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242 At pp. 83–84.

243 Morris report, p. 108.

244 ibid.

245 Submission nos. 12, 42, 62, 68 & 69.

246 Submission nos. 100, 119 & 132; Mr J. Artup, op. cit., p. 57.

247 Submission nos. 68, 69 & 77.

compliant made to the sheriff's office with respect to jury service; namely, persons receiving questionairres too frequently.

3.182 When determining the period of time for which an exemption based on past attendance is to be granted, the desirability of granting an exemption must be balanced against the need to ensure that the representativeness of the jury rolls is not adversely affected. According to the Deputy Sheriff (Juries), people who attend for jury service in metropolitan Melbourne could be excused for a period of either three or five years without this affecting the randomness or representativeness of the jury list.[248] In country areas this period may need to be two or three years, because a longer period of time may not ensure the representativeness of the rolls.[249] For example, the Kerang jury district as presently defined has only 7,643 adult residents on the electoral roll who reside within 32 kilometres of the court-house.

3.183 The effect on the representativeness of the jury list of providing an exemption from jury service for five years for persons who have served on a jury where the trial lasted over five days, can be gathered from statistics as to the number of trials which lasted more than five days. In 1995 of a total of 280 County Court criminal jury trials, 122 lasted over five days. In the Supreme Court of 50 criminal jury trials, 33 lasted more than five days.[250]

3.184 Given the need to ensure the representativeness of the jury list, particularly in country areas, the committee has concluded that persons who attend for jury service should be exempt from further service for a period of three years. Persons who actually serve on a jury where the trial lasts more than five days should be exempt for a period of five years.

3.185 Where jurors have been involved in lengthy, particularly demanding or stressful trials, there was support in the submissions for the provision of a discretion for judges to extend the period of exemption.[251] The committee accepts that there is a need to make provision for judges to exercise a discretion to grant an exemption from jury service for longer periods of time in these circumstances.

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248 Mr J. Artup, loc. cit.

249 ibid.

250 These statistics were provided by the Victorian Department of Justice, Courts and Tribunal Service Division, Criminal Trial Listing Directorate.

251 Submission no. 119.

3.186 There have been a number of very long trials in Victoria in recent years, one lasting twenty-two months[252] and another seventeen months.[253] It can be argued strongly that a lifetime exemption should apply to persons serving on trials of this length. The committee believes that the ten year upper limit on certificates of exemption is somewhat arbitrary, and it would be better to allow the court an unfettered discretion to determine what is reasonable in a particular situation. Consequently, the committee believes that the Act should impose no upper limit on the exercise of the discretion to grant a certificate of exemption.

Recommendation 44

A person who holds a current certificate of exemption on account of lengthy jury service should be able to claim an exemption from further jury service for such period as the court determines.

Recommendation 45

Any person attending for jury service should be entitled to a certificate of exemption for three years. Persons who have served on a jury for a trial lasting more than five days should be exempt from jury service for five years.

Recommendation 46

The trial judge should have a discretion to grant exemption for longer periods in special circumstances.

Recommendation 47

There should be no statutory maximum period for which a court may grant a certificate of exemption.

Entitlement to be Excused for Good Reason

3.187 The *Juries Act* currently provides limited categories of circumstances which may give rise to an entitlement to be excused for good reason. Under sections 11(3) and 13 a person may claim to be excused from serving as a juror by reason of illness or incapacity or any other matter of special urgency or importance, during the whole or any part of the period for which the jury list is current. Such a claim is to be submitted in writing in the first instance to the sheriff, or later, either in writing or orally to the sheriff or to the court at which

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252 In *R. v. Grimwade & Ors.*, County Court, Judge Cullity, the jury was impanelled on 11.2.91 and returned a verdict on 17.12.92.

253 In *R. v. Higgins*, County Court, Judge Strong, the jury was impanelled on 1.11.91 and returned a verdict on 26.3.93.

the person would be required to serve. There is provision for an appeal to the court from a decision of the sheriff refusing to grant a claim.

3.188 In addition to a person's entitlement to be excused for good reason, under section 13(3) where it appears to the court to be just and reasonable so to do, the court may determine that a person shall not serve as a juror during the whole or any part of the current sittings of the court.

3.189 Experience shows that many people seek to be excused, because lengthy jury service would cause them significant financial hardship. Others are excused on the basis that physical conditions of jury service are too onerous for them. The present practice is for the sheriff to excuse under this category persons who have been impanelled as jurors on trials in the preceding three years or, in the case of persons who have served on more than one occasion, in the preceding five years. This practice does not apply to those who are summoned and attend for jury service but who do not serve on a jury.

3.190 The committee believes that the criteria governing excusal for good reason should be generally known and consistently applied. The best way this can be achieved is for guidelines to be established. These guidelines should reflect two overriding principles—the need to ensure that public health and safety are not adversely affected by the jury system, and the need to provide for special cases where jury service on a particular occasion, or at any time, would cause undue hardship to the person or the public served by the person.

3.191 Section 21(1) of the Queensland *Jury Act 1995* contains a number of guidelines which are based on the recommendations of the Queensland Litigation Reform Commission,[254] and which may serve as a useful model. The section provides that in deciding whether to excuse a person from jury service the sheriff or judge must have regard to the following:

(a) Whether jury service would result in substantial hardship to the person because of the person's employment or personal circumstances. The committee believes that 'personal circumstances' should include the distance the person needs to travel to the court-house and the means of transport available to the person.

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254 Supreme Court of Queensland, Litigation Reform Commission, op. cit., pp. 6–7.

(b) Whether jury service would result in substantial financial hardship to the person. The committee believes that the words 'or his or her employer' should be added.

(c) Whether jury service would result in substantial inconvenience to the public or a section of the public.

(d) Whether others are dependent on the person to provide care in circumstances where suitable alternative care is not readily available.

(e) The person's state of health.

3.192 The committee believes that to this list should be added one further ground for excusal:

(f) Whether in the opinion of the sheriff or judge there are factors personal to the prospective juror which would justify excusal on the grounds that he or she may be unable to properly and impartially fulfil the duties of a juror.

This last criterion is intended to cover a situation where by reason of previous involvement with the criminal justice system or some other substantial reason a person feels unable to perform the functions of a juror.

Recommendation 48

Guidelines for the exercise of the discretion to excuse a person from jury service for good reason should be developed by the judges of the Supreme and County Courts and be published as a practice direction.

Conscientious Objection

3.193 In Issues Paper No. 1 the committee asked whether there should be a category of entitlement to be excused as of right which exempts persons who have a conscientious objection to serving as jurors on moral, ethical or religious grounds.

3.194 A number of jurisdictions have specific provisions governing conscientious objection to jury service. In South Australia a person may be excused on the basis of conscientious objection.[255] In New Zealand a person may be excused by the Registrar from jury service on the basis of religious objection, provided the person is a practising member of a religious sect or

255 *Juries Act 1927* (SA), s. 16.

order that holds service as a juror to be incompatible with it tenets. A person who objects to jury service for moral or ethical reasons, whether or not of a religious character, may be excused by a judge.[256] In the United Kingdom a provision has been recently inserted into schedule 1 to the Juries Act 1974 which provides that 'a practising member of a religious society or order the tenets or beliefs of which are incompatible with jury service' shall be excusable as of right.[257] The committee notes also that in 1984 the New South Wales Law Reform Commission recommended that conscientious objection should be added as a ground for claiming an exemption as of right.[258] However, this recommendation was never implemented.

3.195 Many submissions to the committee strongly supported the inclusion of a specific provision allowing persons to be excused from jury service on the basis of conscientious objection.[259] Submissions by the Christian Science Committee on Publication[260], the Victorian Christadelphian Committee for Matters of State,[261] and members of 'a worldwide Christian fellowship known as Brethren' were given particular attention.[262] A number of churches adopted the view that jury service is an important civil duty and would not conflict with the tenets of their religion.[263] Submissions which opposed a specific category of exemption argued either that there was not a religious basis for such a right according to the tenets and practices of their particular church, or that there would be the prospect of abuse by persons lacking a genuine conscientious objection.[264]

3.196 The committee agrees with the comments made in one submission that 'it has always been part of the rule of law in this country that an individual's right to a sincerely held moral, ethical or religious conviction will be upheld'.[265] A number of submissions referred the committee to examples in

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256 *Juries Act 1981*(NZ), s. 15.

257 Criminal Justice and Public Order Act 1994 (UK), s. 42.

258 New South Wales Law Reform Commission, Community Law Reform Program—Sixth Report, *Conscientious Objection to Jury Service*, Sydney, 1984, p. 48.

259 Submission nos. 12, 17, 29, 41, 50 & 73. Several private citizens also supported the introduction of such a category of excusal.

260 Submission no. 29.

261 Submission no. 50.

262 Submission nos. 41 & 78.

263 e.g. submission no. 17.

264 Submission nos. 4, 42 & 44.

265 Submission no. 29, p. 3.

Commonwealth and State legislation where conscientious objection is recognised. A good example is section 274(a) of *The Constitution Act Amendment Act 1958* which in effect provides that 'an honest belief on the part of an elector that abstention from voting is part of his religious duty' is a 'valid and sufficient excuse' for not voting.

3.197 The committee readily accepts the view that persons 'who sincerely hold such beliefs as would preclude them from properly serving as jurors are entitled to have those beliefs respected by the community at large'.[266] The committee would not countenance impressing people into jury service against their firmly held religious beliefs. The question, however, is not whether to exempt persons on this ground, but rather, how best this is achieved. The alternatives are either a specific statutory exemption or discretionary excusal on an individual basis.

3.198 The committee has been concerned that any exemption should not be abused by those who do not have an honestly held conscientious objection, but who wish merely to avail themselves of an easy escape from the inconvenience of jury service. The committee adopts the observations of the Baptist Union of Victoria which said:[267]

> we do not believe it is appropriate to enshrine an exemption for "conscientious objection" as a specific category for fear that it will draw attention to it in an unhelpful manner. Persons with what we take the liberty of calling genuine conscientious objection will pursue their need to be excused whether or not the current Act is changed...
>
> We would not support a vague category of exemption written into the legislation that might encourage one who would not otherwise think to beg excuse to claim "conscientious objection". Surely this would create greater administrative burden for the Sheriff's office. We suggest that there is no satisfactory wording that would place a "conscientious objection" exemption above the prospect of abuse.

3.199 Accordingly, the committee has concluded that a specific category of exemption on the grounds of conscientious objection should not be provided for in the *Juries Act*. However, in conformity with recommendation 48 there should be a guideline for the exercise of the discretion to excuse for good reason which covers the situation of a conscientious objector. Such a guideline could be worded as follows:

> Persons able to establish to the satisfaction of the sheriff or a judge by proof on oath, by affidavit, statutory declaration or otherwise that they

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266 ibid.

267 Submission no. 44.

> hold such moral, ethical or religious convictions or beliefs as to render them unfit or unsuitable for jury service should be excused from such service.[268]

Recommendation 49

Guidelines for the exercise of the discretion to excuse a person from jury service for good reason should include excusal on the grounds of conscientious objection to jury service.

Civil Juries

3.200 Under section 5 of the *Juries Act 1967* no person engaged in the business of liability insurance or employed in any capacity by a person or company carrying on the business of liability insurance, otherwise than as an agent, shall serve as a juror on any civil inquest. This category of ineligibility was first introduced into Victorian law in 1956.[269] A number of submissions argued in favour of the abolition of this category of ineligibility;[270] only one submission sought its retention.[271]

3.201 The category was presumably introduced in an effort to prevent juries becoming tainted with knowledge about insurance and insurable risk. The committee believes that the fact of insurance is quite well known in the community and that a judge's direction to disregard matters relating to insurance will be acted upon by the jury. In its submission on this issue the Law Institute of Victoria said:[272]

> Introduction of this rule in 1956 suggests that it may have arisen at a time when it was assumed civil juries knew little of insurable risk. This should not be assumed today. The ban is insupportable on any acceptable ground.

The committee agrees and recommends that this category of ineligibility should be repealed.

Recommendation 50

The present ineligibility for persons employed in the liability insurance industry should be repealed.

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268 The committee is indebted to the author of submission no. 29 for this formulation.

269 *Juries Act 1956* (Vic.), s. 8. See also *Juries (Amendment) Act 1957* (Vic.), s. 2.

270 Submission nos. 12, 20, 28 & 66.

271 Submission no. 89.

272 Submission no. 66.

Commonwealth Exemptions

3.202 Under the laws of the Commonwealth a number of Commonwealth officers and employees are exempt from jury service in State courts on the grounds that they are employed in connection with the administration of justice or that their exemption is justified on the basis of public need or due public administration. These exemptions are contained in the *Jury Exemption Act 1965 (Cwlth)* and the *Jury Exemption Regulations 1987 (Cwlth)*.

3.203 Owing to the fact that the place of residence of most of those exempted under the Commonwealth legislation is probably somewhere other than Victoria; these exemptions are unlikely to significantly affect the representativeness of Victorian juries. Nonetheless, some categories are worth recording here:

a. Senators and members of the House of Representatives.

b. Justices, officers and employees of all federal courts and many federal tribunals.

c. Senior Commonwealth public servants (Senior Executive Band 3 and above).

d. Officers and employees of the Commonwealth Attorney-General's department and the Office of the Commonwealth Director of Public Prosecutions, whose duties involve the provision of legal professional services.

e. Members of the permanent Defence Forces and members of the Reserve Forces rendering continuous full time service.

f. Members and most other employees of the Australian Federal Police Force, the National Crime Authority, the Australian Protective Service, the Australian Bureau of Criminal Intelligence, the Australian Police Staff College and the National Police Research Unit.

3.204 As at December 1995 the number of staff in Commonwealth agencies paid by the pay centre in Victoria was 23,519 permanent staff and 2,292 temporary staff.[273] These statistics do not, however, provide an accurate reflection of the total number of relevant persons, because some of these persons may not be physically located in Victoria, even though they are paid by the Victorian pay centre. Moreover, these figures do not include Commonwealth employees who are not employed under the *Public Service Act* or who work for statutory authorities.[274] In any event, many of these Commonwealth employees would not be able to claim exemption from jury service.

3.205 Nonetheless, the committee is of the view that there are far too many categories of exemptions under Commonwealth law and the continued existence of many of them is not justified. Although their impact on the representativeness of the Victorian jury system cannot be ascertained, the committee has concluded that the Victorian Attorney-General should request her Federal colleague to conduct a review of these exemptions. A similar recommendation was made by Queensland's Litigation Reform Commission in 1994.[275]

Recommendation 51

The Victorian Attorney-General should request that the Federal Attorney-General take note of the committee's recommendations and order a review of Commonwealth exemptions from jury service with a view to substantially reducing the number of persons who are exempt under Commonwealth law.

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273 Correspondence to the committee from R. Leon, Senior Government Counsel, Courts and Tribunals Branch, Civil Law Division, Commonwealth Attorney-General's Department, 28 Aug. 1996.

274 ibid.

275 Supreme Court of Queensland, Litigation Reform Commission, op. cit., pp. 5–6.

4. JURY DISTRICTS, JURY LISTS AND THE PRESELECTION OF JURORS

Introduction

4.1 The compilation of jury lists and the preselection of jurors form part of a process set out in the *Juries Act 1967*. It facilitates the availability of eligible persons for jury service in civil and criminal trials. The overall process, whereby persons whose names appear on the electoral roll for the Legislative Assembly find themselves in a jury pool awaiting selection, is divisible into five stages. These stages are:

Stage 1	jury district formation.
Stage 2	jury list compilation.
Stage 3	preselection of jurors.
Stage 4	jury panel preparation.
Stage 5	summoning of jurors.

The first three stages of the process will be discussed in this chapter. Stages 4 and 5 and the issue of jury vetting will be considered in the next chapter.

Jury District Formation

4.2 A jury district is proclaimed for each Supreme Court and County Court town—that is, the city of Melbourne and every place where sittings of the Supreme Court or County Court are held. At present the Supreme Court has sittings at Ballarat, Bendigo, Geelong, Hamilton, Horsham, Melbourne, Mildura, Sale, Shepparton, Wangaratta and Warrnambool. In addition to these locations the County Court also sits at Bairnsdale, Kerang and Morwell.[276]

4.3 The *Juries Act 1967* declares each jury district to comprise certain specified Legislative Assembly electoral districts or the subdivisions thereof.[277] In the event of changes to the electoral districts or the addition of new court towns, the Governor in Council proclaims the changed or additional jury district. However, as a matter of practice, the Electoral Commissioner defines a

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276 Victoria, Department of Justice, *Law Calendar 1996*, Melbourne, 1996, pp. 16, 19–21.

277 s. 7; schs. 5 & 6.

jury district as that area which as nearly as possible falls within a radius of 32 kilometres of the Supreme or County Court town it serves.[278]

4.4 Jury districts are defined in the other Australian jurisdictions in different ways. In New South Wales the jury districts for the Supreme Court and District Courts are comprised of the electoral districts or part of the districts as determined and notified by the sheriff from time to time.[279] In Tasmania there is a jury district for the Supreme Court at Hobart and for each other place where the court is held.[280] In Western Australia the jury district consists of the whole or such part(s) of such Assembly district(s) as the Governor determines and declares.[281] In Queensland the jury district is defined by regulation.[282] In South Australia, there are three jury districts: the Adelaide Jury District, the Northern Jury District and the South-Eastern Jury District. They consist of the subdivisions declared by the Governor by proclamation.[283] In the Northern Territory there are two jury districts, Darwin and Alice Springs.[284]

4.5 In Victoria a large number of people do not live within any jury district (as they are actually determined by the Electoral Commissioner). The committee has estimated that of the approximately 2.9 million persons enrolled to vote for the Legislative Assembly, over 25% of voters do not live within 32 kilometres of a court-house. Thus, a significant number of Victorians are never likely to be required to perform jury service.

4.6 This problem could be addressed by extending the radius defining the jury districts or by dividing the whole State of Victoria into jury districts. In the submissions received there was considerable support for the proposal to extend the radius defining the jury districts, with most groups favouring a radius of 50 kilometres.[285] The submissions which opposed an extension of the radius did so on the ground of hardship caused by excessive travel.[286] Many of

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278 See *Juries Act 1967* (Vic.), s. 8(4).

279 *Jury Act 1977* (NSW), s. 9.

280 *Jury Act 1899* (Tas.), s. 8.

281 *Juries Act 1957* (WA), s. 10.

282 *Jury Act 1995* (Qld), s. 7.

283 *Juries Act 1927* (SA), s. 8.

284 *Juries Act 1980* (NT), s. 19.

285 Submission nos. 35, 54, 62, 76 & 129; Mr J. Artup, Deputy Sheriff (Juries), *Minutes of Evidence*, 16 Jan. 1995, p. 62.

286 Submission nos. 19, 73, 81 & 82.

the submissions supported the proposal to divide the whole State into jury districts.[287] It was suggested that if this method is adopted it should be accompanied by payments to jurors for the additional travel involved.[288]

4.7 Either of these approaches would increase the number of people available for jury service and thereby reduce the likelihood of persons being summoned for jury service on a number of occasions. There have been several complaints to the Victorian Ombudsman regarding persons being summoned for jury service several times. In 1988 the Ombudsman responded to these complaints by recommending that this problem should be addressed.[289]

> If as I am advised by some complainants that they serve a number of times on a jury within a short space of time, it does seem to me, notwithstanding the fairness of the obvious integrity of the system, that they do suffer an injustice compared to those who never serve.

4.8 In order to address the problem of people being summoned for jury service a number of times, the Ombudsman suggested that the questionnaire sent to potential jurors should include a question as to whether a person has served on a jury within the last five years.[290] Where this has been the case, the person should have the option of being excused from jury service.[291] Consistent with this recommendation, the questionnaire now states that there is an exemption on this occasion from jury service for persons who have been impanelled as a juror on a trial in the past three years or on more than one occasion in the past five years.

4.9 According to His Honour Judge Jones of the County Court of Victoria, this problem is yet to be adequately addressed in country towns, where the jury is drawn from too small a group.[292] In country towns some people may serve on a jury too often. This encourages a culture to develop in relation to the approach taken to particular types of case, for example, there may be a general reluctance to convict for sexual offences.

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287 Submission nos. 68, 69, 89, 101 & 132.

288 Submission nos. 69, 108 & 132.

289 Victoria, *Annual Report of the Ombudsman for the Year Ended 30th June 1988*, p. 69.

290 ibid.

291 ibid.

292 His Honour was on a panel which discussed the future of the jury system in New Zealand and Australia during the 15th Australian Institute of Judicial Administration Conference, Wellington, 20–22 Sept. 1996.

4.10 Accordingly, the committee has concluded that the whole State of Victoria should be divided into jury districts so that every habitation falls within at least one jury district. This measure would not only lead to an increased number of persons being potentially available for jury service, but it would reduce the likelihood of a person serving a number of times. The problem of persons who reside in two overlapping jury districts is addressed below.

4.11 If the whole state is divided into jury districts it is likely that there would be an increase in the number of people who seek to be excused. The Deputy Sheriff (Juries) has suggested that this would be particularly the case in relation to parents who have to take children to school and therefore cannot leave home before 8.30 a.m.[293] However, the committee believes that the resulting increase in the numbers of persons who can potentially serve on juries would justify the administrative inconvenience caused by processing additional requests for excusal.

Recommendation 52

The whole State of Victoria should be divided into jury districts in a manner which ensures that all persons liable for jury service are included in at least one jury district.

Hardship Caused by Long Distance Travel

4.12 The committee believes that the most appropriate way to address any hardship which may arise from dividing the whole State into jury districts is to allow persons who live a long distance from the court-house at which they would be required to serve to claim an exemption from jury service. The committee received several submissions on what distance should justify a claim for exemption. Several submissions opposed the granting of an exemption as of right for persons residing more than 32 kilometres, because most people have access to public transport or motor vehicles and an additional allowance could be paid to reimburse travelling costs and the cost of accommodation.[294] It was suggested that there should be a right to be excused for persons who live more than 50 to 100 kilometres from the court,[295] or at a distance which prevents effective jury service.[296]

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293 Mr J. Artup, op. cit., pp. 62 & 64.

294 Submission no. 68.

295 Submission nos. 101, 108 & 132; Mr J. Artup, op. cit., 16 Jan. 1995, p. 63.

296 Submission no. 66.

4.13 The committee recommended earlier in this report that people may seek to be excused from jury service if they reside more than 50 kilometres from the court-house in Melbourne or 100 kilometres outside metropolitan Melbourne.[297] This should ensure that persons who live a long distance from a court-house do not suffer substantial hardship or inconvenience.

Defining Jury Districts

4.14 There are a number of ways in which jury districts could be defined. In increasing order of size these options are as follows:

(a) census collection districts (CCD)

(b) postcode areas

(c) local government areas (LGA)

(d) State electoral subdivisions

(e) Legislative Assembly electoral districts

(f) Legislative Council electoral provinces

These options were presented for comment in Issues Paper No. 1.

4.15 The State Electoral Office (SEO) has advised the committee that when dividing the whole State into jury districts the existing sets of codes on the habitation records maintained as part of the State Roll System (SRS) should be used. This is preferable to inventing a new set of boundaries which would cause administrative problems. Each SEO habitation record includes the codes for CCD, Electoral District and Province, Local Government Area, Postcodes and Jury District.

4.16 Of the above options, the SEO favours the use of census collection districts.[298] The office opposed the use of postcode boundaries for two reasons: first, they are not kept as a separate boundary attribute and secondly, they change quite frequently.[299] The Australian Electoral Commission has suggested that a departure from the use of CCDs could cause technical difficulties.[300]

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297 Recommendation 43 on p. 80 above.

298 Dr C. Drury, State Electoral Office, *Minutes of Evidence*, 13 Feb. 1995, p. 129.

299 ibid.

300 Submission no. 121.

4.17 However, support was expressed in several submissions for the use of Legislative Assembly electoral districts, or a combination of electoral sub-divisions.[301] The use of Legislative Assembly electoral districts provides a more appropriate method for defining jury districts than the CCD because it is not dependent upon the manner in which the Australian Bureau of Statistics defines the census districts.

4.18 The committee believes that inasmuch as the SEO maintains Legislative Assembly electoral districts as a separate boundary attribute, there should be no practical difficulty in the use of this alternative. The initial jury district boundaries should be proclaimed by the Governor in Council on the recommendation of the Electoral Boundaries Commission[302] which should consult with the Supreme Court Sheriff. The proclamation should be published in the *Victoria Government Gazette* .

Recommendation 53

For administrative purposes jury districts should be based on Legislative Assembly electoral districts.

Recommendation 54

***The initial jury district boundaries should be proclaimed by the Governor in Council on the recommendation of the Electoral Boundaries Commission which should consult with the Supreme Court Sheriff. The proclamation should be published in the* Victoria Government Gazette.**

Changes to Jury Districts

4.19 Jury districts and Legislative Assembly electoral districts are not immutable, and therefore, a specific person or body should be responsible for recommending to the Governor in Council when and what new or changed jury districts should be proclaimed.

4.20 The committee was concerned to discover that the 1990–1991 redivision of Legislative Assembly electoral districts was not reflected in changes to the jury districts as listed in schedules 5 and 6 of the *Juries Act 1967*. For example, the jury district which serves the court-house at Ballarat purports to consist of certain subdivisions of the electoral districts of Ballarat North and Ballarat South. However, since the 1990–1991 redivision there have been no such electoral districts; effectively they were replaced by Ballarat East and Ballarat

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301 Submission nos. 12, 62 & 66.

302 See *Electoral Boundaries Commission Act 1982* (Vic.), s. 3.

West. This redivision was not carried through into the schedule to the *Juries* Act. The same oversight has meant that the electoral districts of Altona, Bayswater, Eltham, Mill Park and Mordialloc are not included in the Melbourne jury district, although, it appears that jurors are regularly summoned from these areas.

4.21 In the committee's opinion the task of recommending to the Governor in Council when and what changes are required to jury districts should be performed by the Electoral Boundaries Commission in consultation with the Supreme Court Sheriff.

Recommendation 55

The Electoral Boundaries Commission in consultation with the Supreme Court Sheriff should be responsible for recommending to the Governor in Council what new or changed jury districts should be proclaimed.

Overlapping Jury Districts

4.22 Some jury districts overlap, even at a 32 kilometre radius. This raises the following issues.

(a) How should overlapping jury districts be dealt with?

(b) Should persons who live in more than one jury district be liable for jury service at each court town? If not, how should their liability be determined?

4.23 Increasing the size of jury districts will increase the likelihood that jury districts will overlap. This is particularly so with the Melbourne and Geelong jury districts and in Gippsland where there will be an overlap between Sale and Bairnsdale, and between Morwell and Sale. One solution to overlapping jury districts would be to code potential jurors according to the nearest court town so that they are in one jury district only. This approach received considerable support from the submissions.[303] The alternative is to allow potential jurors to choose the town for which they should be liable for jury service.[304]

4.24 The committee has concluded that a person should only be liable for jury service in one jury district, and that therefore jurors should be coded according to the court town which is nearest to their place of residence. Where

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303 Submission nos. 68, 69 & 92.

304 Mr J. Artup, op. cit., p. 68.

this cannot easily be determined, the State Electoral Commissioner should have a discretion to allocate the person to such jury district as the State Electoral Commissioner considers appropriate.

Recommendation 56

Where a person resides within two or more overlapping jury districts the person should be allocated to the jury district which serves the court town nearest the person's place of residence. Where this cannot be easily determined, the State Electoral Commissioner should have a discretion to allocate the person to such jury district as the State Electoral Commissioner considers appropriate.

Jury List Compilation

4.25 Under existing legislation the sheriff has responsibility for the administration of the jury system. The sheriff notifies the State Electoral Commissioner of the number of persons required for jury service in each jury district. Under the Act the notification is for the ensuing six to fifteen months. In practice jury lists are compiled for a fifteen month period.[305]

4.26 The Electoral Commissioner then initiates a computer generated random selection from the relevant electoral rolls of the required number of people within each jury district and notifies the sheriff accordingly. The list generated becomes the jury list for each jury district. The jury lists are extracted by drawing a 32 kilometre radius around each court-house and compiling lists of the Australian Bureau of Statistics Census Collector Districts (CCD) that fall in each of the radii so drawn.[306]

4.27 In most Australian jurisdictions the jury list is prepared by the sheriff by a process of random selection from the electoral rolls for the relevant electoral districts.[307] In South Australia the jury list is prepared by the sheriff with the assistance of the Electoral Commissioner.[308] Western Australia has a similar system to Victoria, whereby the sheriff notifies the Electoral Commissioner of the number of jurors required and the Electoral Commissioner prepares the jury lists by a process of random selection.[309]

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305 *Juries Act 1967* (Vic.), s. 8; Mr J. Artup, op. cit., 12 Dec. 1994, p. 4.

306 Dr C. Drury, op. cit., p. 124.

307 See *Juries Act 1967* (ACT), s. 19; *Jury Act 1977* (NSW), ss. 10, 11 & 12; *Juries Act 1980* (NT), s 21; *Jury Act 1995* (Qld), ss. 10 & 16; *Jury Act 1899* (Tas.), s. 9.

308 *Juries Act 1927* (SA), ss. 20 & 23.

309 *Juries Act 1957* (WA), s. 14.

4.28 In a number of jurisdictions the sheriff (or Electoral Commissioner) has the power to exclude disqualified and exempt persons from the process of random selection.[310] In South Australia those persons who live more than 150 kilometres from the court are notified if their name has been selected for inclusion in the annual jury list. If they wish to remain on the list they must make a written request to the sheriff within one month of the notice.[311] In Tasmania the sheriff is expressly required to refrain, as far as is practicable, from selecting the name of any person known to him or her to have served previously as a juror, provided that there are other persons who have not served.[312]

4.29 In Victoria the jury list remains in force for such period of time, between six and fifteen months, as is notified to the Electoral Commissioner by the sheriff. If all names on the list have been exhausted then a request is made for supplementary jury lists. At present jury lists remain valid for fifteen months.

4.30 A fifteen month cycle minimises the likelihood of any one person repeatedly being required to perform jury service over a short space of time. However, by the end of the period the information contained in the jury list (particularly addresses) becomes out of date. A recent study by the sheriff's office reveals that twelve to thirteen months into the fifteen month cycle about 7% of questionaries are returned undelivered. A more frequent jury list should decrease the number of people who fail to respond to questionnaires. Moreover, by the end of the period the absence of persons aged eighteen and nineteen, who have enrolled for the first time during the term of the jury list, may affect the representativeness of the panel.

4.31 In South Australia, Western Australia and the Northern Territory the list is current for one year.[313] In New South Wales jury rolls were prepared every three years,[314] until the *Jury Amendment Act 1996* was passed, which requires that the interval be not more than 12 months.[315] In the Australian

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310 *Juries Act 1967* (ACT), s. 19; *Juries Act 1980* (NT), s. 21; *Jury Act 1899* (Tas.), s. 9.

311 *Juries Act 1927* (SA), s. 23.

312 *Jury Act 1899* (Tas.), s. 9.

313 *Juries Act 1927* (SA), s. 20; *Juries Act 1957* (WA), s. 14(3); *Juries Act 1980* (NT), s. 21(1).

314 *Jury Act 1977* (NSW), s. 10.

315 *Jury Amendment Act 1996* (NSW), s. 12. This provision works in conjunction with section 15A which requires the sheriff to cull from the jury roll for the time being in force for a district particulars of each person who has been included on the roll for 15 months (or a period no greater than 2 years fixed by regulations).

Capital Territory the jury list is prepared at least every four years. In Queensland practice directions may be issued on how often a fresh list of prospective jurors is to be prepared for each district.[316] In Tasmania a new jury list is prepared as soon as practicable after the prescribed date, that is, such a date as is prescribed from time to time.[317]

4.32 In Victoria the problems encountered with outdated information could be minimised by up-dating the jury list to take account of the work done by the SEO in up-dating the State Roll System (SRS). The SRS is a computerised habitation based system used by the SEO to maintain the Victorian electoral roll.

4.33 The SRS is updated using a number of methods. The SEO receives weekly update data from the Australian Electoral Commission. This data includes non-enrolment changes such as, street name and street number changes, census collector district coding, and corrections to the roll. Monthly update tapes are received from the Registrar of Births, Deaths and Marriages which ensures that the names of deceased electors are removed as quickly as possible. The Australian Electoral Commission also screens elector records to remove these names and this information is applied to the SRS. Every two months VicRoads supplies the SEO with names and addresses of new young Victorian drivers (aged 18 to 21 years). They are sent enrolment packages which encourage them to enrol to vote. Around 40% of people respond to these packages. Additionally, the Australian Electoral Commission's records are updated by using two-yearly door knocks, people filling out electoral enrolment forms and people asking if they are on the roll prior to an election.

4.34 In order to improve the accuracy of the jury list, it was suggested that it should be compiled quarterly.[318] This would help to avoid the situation where a jury notice is sent to an old address ten months after the person has notified the SEO of a change of address. It would also assist the electoral office to up-date the SRS more frequently by receiving advice regarding mail which is returned to the sheriff undelivered, and it would reduce the likelihood of deceased persons being summoned. Finally, it would help to ensure that persons aged 18 and 19 are better represented in the jury list. The Deputy

316 *Jury Act 1995* (Qld), ss. 13 & 14.

317 *Jury Act 1899* (Tas.), ss. 9 & 11.

318 Dr C. Drury, op. cit., p. 131.

Sheriff (Juries) supported a change to a three monthly jury list and even suggested that a six to eight week cycle may be feasible.[319]

4.35 The committee has concluded that the jury list should be compiled on a three monthly basis in order to promote the general representativeness of the jury system, particularly by increasing the representation of 18 and 19 year olds.

Recommendation 57

The jury list should be compiled on a three monthly basis.

4.36 In order to assist the SEO in obtaining the current residential addresses of tenants, the brochure supplied to tenants by the Office of Fair Trading and Business Affairs should be altered to include within its list of 'Moving Tips' reference to notifying the SEO of a change of address. The relevant part of the brochure would then read as follows:[320] 'Notify people of your change of address including **the State Electoral Office**, bank, motor vehicle registration, post office and organisations that you are a member of.'

Improvements to the Process of Jury List Compilation

4.37 In Issues Paper No. 1 the committee raised the issue of what improvements could be made to the process of jury list compilation. It was suggested that additional information could be included in the jury list.

4.38 Two sets of computer linked information are currently maintained by the SEO in connection with the State Roll System (SRS)—one record for each enrolled voter and a habitation record for each habitation. The elector record contains, name, residential and postal addresses, the SRS and Australian Electoral Commission identification numbers, date of birth, codes relating to special enrolment categories (such as silent voters), and a change identifier disclosing the date that the record was last changed and who made the change.[321]

4.39 The habitation record is used to show where each elector is currently living or has lived since the SRS came into operation. The habitation record

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319 Mr J. Artup, op. cit., p. 65.

320 Department of Justice, Office of Fair Trading and Business Affairs, brochure entitled 'Tenants'.

321 Dr C. Drury, op. cit., p. 120.

contains the name of the habitation (which is particularly relevant in rural areas), the address of the habitation, the type of habitation, a unique identification number and the codes showing the geographic areas such as CCD and the electoral areas such as state, district, province and federal division. The habitation record also contains a change identifier. Where a habitation falls within a jury district, this is also coded.[322]

4.40 According to the SEO additional information could be stored on the computer in order to assist the sheriff's office in compiling the jury list and in monitoring the representativeness of the list. For example, information could be sorted in a way which provides the sheriff with particular groupings, such as the number of electors within a specific age group.

4.41 The SEO is also willing to consider tagging elector records with the last date they were summoned for jury service so as to avoid an elector who has been summoned being selected again for another jury list until after a specified time has elapsed. This procedure would ensure that when subsequent jury lists are compiled they are drawn from those who have not yet been selected. Several submissions supported this proposal.[323]

4.42 The SEO is also prepared to tag elector records to indicate disqualified or ineligible status or whether a certificate of exemption has been granted.[324] If the relevant status ceases to apply then the records could be un-tagged. This would require close liaison between the SEO and the sheriff's office to ensure that the records remain current and accurate. If such a system could be introduced it would greatly reduce the administrative burden on the sheriff's office in processing questionnaires received from disqualified and ineligible persons.

4.43 These measures are supported by the committee because they have the potential to greatly enhance the quality and usefulness of the jury list. However, the Law Reform Committee is not in a position to recommend that any particular course of action be adopted. The formation of a committee, with representatives from all interested parties and chaired by a senior judge, may be the best way to take these matters further.

Recommendation 58

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322 ibid.

323 Submission nos. 68 & 69.

324 Dr C. Drury, op. cit., p. 130.

A committee should be established under the chairmanship of a senior judge and with representatives from the State Electoral Commission, the Supreme Court Sheriff 's office and any other interested and relevant body, to investigate how the accuracy and utility of the jury list can be improved.

Preselection of Jurors

4.44 For the purpose of determining the qualification and liability of persons to serve as jurors the legislation requires the sheriff to send a questionnaire by post to as many persons selected at random from the jury list as are thought necessary.[325] The questionnaire asks questions directed towards establishing the qualification and liability for jury service of the recipient.

4.45 The Act requires the sheriff or his or her officers to take the questionnaires, together with a list of recipients, to a post office. The person in charge of the post office must check the names and addresses on the questionnaires against the names and addresses on the list and forward the questionnaires through the post.

4.46 On receipt of a duly completed questionnaire from any person, the sheriff must determine the qualification and liability of the person to serve as a juror. The sheriff bases this determination on the answers given in the questionnaire, together with any current certificate of exemption[326] and any written material submitted by the person. The sheriff must record in respect of all persons whether they are liable, disqualified, ineligible, excused as of right, or excused for good reason. The persons recorded as liable to serve as jurors are the persons from whom the sheriff must from time to time select when preparing panels of persons from which to strike juries.[327] At present only about 30% of persons sent questionnaires are liable and available for jury service.

4.47 The sheriff must give written notice to any person qualified and liable to serve as a juror and whose claim to be disqualified, ineligible or entitled to be excused as of right has not been accepted. Any person aggrieved by such determination may appeal against it within seven days to the Supreme or County Court.

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325 *Juries Act 1967* (Vic.), s. 10.

326 See ibid, s. 13(4).

327 ibid, ss. 13 & 20.

4.48 In order to be excused as of right from serving as a juror during the currency of the jury list, a person must submit any claim in reply to the questionnaire.[328] However, a person recorded as liable for service as a juror may, before being required by a summons to attend in any court for jury service, apply in writing to the sheriff to be excused for good reason, provided the reason did not exist at the date when the questionnaire was returned.

Improving the Process of Preselection

4.49 According to the Deputy Sheriff (Juries) the rate of people who fail to respond to the questionnaires is high, especially towards the end of the roll when it reaches 16%–17%. Half of these people have an excuse, and the remaining half either say they can serve or never reply. Further follow-up by the sheriff's office is limited by the availability of resources. The Deputy Sheriff (Juries) has indicated to the committee that ideally a second follow-up notice should be sent to people who do not respond to the first reminder letter and that the police or sheriff's officers should personally contact those persons who still fail to respond.[329]

4.50 The manner in which questionnaires are sent out may also reduce the representativeness of juries, because, according to the Aboriginal and Torres Strait Islander Commission, a significant number of Aboriginal and Torres Strait Islander people live in remote communities and may not receive regular mail services.[330] The committee would be surprised if this was a significant problem in Victoria, however, the matter should be looked into.[331]

4.51 In evidence to the committee the State Electoral Commissioner indicated that his office would like to be provided by the sheriff's office with information regarding persons on the jury list who do not reside at the addresses for which they are enrolled, so that the accuracy of the State Roll System can be improved.

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328 ibid, s. 12.

329 Mr J. Artup, op. cit., 16 Jan. 1995, p. 67.

330 See submission no. 58.

331 See the discussion of this problem in A. Falk, *Gender issues, multiculturalism and the Victorian jury system*, in Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Final Report*, vol. 3, *Report on Research Projects*, Melbourne, 1996.

Recommendation 59

A committee should be established under the chairmanship of a senior judge and with representatives from the State Electoral Commission, the Supreme Court Sheriff 's office and any other interested and relevant body, to investigate how the process of juror per-selection can be improved, and ways in which information can be shared which will improve the accuracy and utility of the State Roll System.

Enforcement of Fines for Failure to Return Questionnaires

4.52 A person who receives a questionnaire directed to them must complete it and return it to the sheriff within seven days—failure to do so is punishable by a fine not exceeding $100. Wilfully making an untrue or misleading statement in completing a questionnaire is punishable by a fine not exceeding $200.[332] These fines are at the lowest range of the sentencing hierarchy and are dealt with summarily.[333]

4.53 The response rate to questionnaires varies depending upon how recently the jury list was compiled. About twelve to thirteen months into the fifteen month cycle about 16%–17% of persons sent questionnaires do not respond initially. Ultimately, about 4%–5% never respond. However, prosecutions are rare because of the cost involved.

Quantum of Fines

4.54 The maximum quantum of fines in Victoria is far less than in some other Australian jurisdictions. In Queensland, for example, failure to complete the questionnaire or knowingly making a false response carries a maximum penalty of $1000 or two months imprisonment.[334] In New South Wales, a fine of $1000 applies for making of a false representation to the sheriff in order to evade jury service.[335] Nonetheless, the Victoria Police are of the view that the quantum of fines in Victoria is adequate.[336]

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332 *Juries Act 1967* (Vic.), s. 65(1).

333 *Sentencing Act 1991* (Vic.), s. 109.

334 *Jury Act 1995* (Qld), s 18.

335 *Jury Amendment Act 1996* (NSW), ss. 61 , 62 & 62A.

336 Submission no. 42.

4.55 The committee has concluded that some increase in the quantum of maximum fine is justified. Jury service is an important civil obligation, the significance of which is not reflected by the current penalty. As the Deputy Sheriff (Juries) warns, there is a danger that the current level of fine could encourage people to believe that they can buy their way out of jury service.[337]

Recommendation 60

The maximum fine for the offences of failing to return a questionnaire, and for wilfully making an untrue or misleading statement in a questionnaire should be increased to 5 penalty units and 10 penalty units respectively.

Method of Enforcement of Fines

4.56 Fines imposed under the *Juries Act* could be enforced by the application of the Penalty Enforcement by Registration of Infringement Notice (PERIN) system.[338] Under this procedure if a penalty remains unpaid after an infringement notice has been served, a courtesy letter is sent. If the penalty remains unpaid, an enforcement order is registered with the PERIN court registrar and this is deemed to be a court order and subject to the normal enforcement regime.

4.57 The use of the PERIN system has been heralded by the Victorian Auditor-General as an initiative which increases the effectiveness and efficiency of the enforcement system and strengthens case management.[339]

> PERIN currently handles in excess of 400 000 cases annually, of which less than 2 per cent proceed to a court hearing. Prior to PERIN, these infringements would have required separate hearings in the wider Magistrates' Court. This enhanced framework for the handling of cases has resulted in substantial cost and time savings to the Court and the agencies responsible for the issue of infringements and offenders.

4.58 New South Wales recently adopted a similar procedure to that being considered by the committee. An amendment was passed to the *Jury Act 1977(NSW)* to allow fines to be enforced through the use of penalty notices.[340]

4.59 The use of infringement notices makes enforcement easier because punishment is imposed without the expense of a trial. Additionally, there are strong economic reasons for using the system.[341]

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337 Mr J. Artup, op. cit., p. 68.

338 The procedure is set out in *Magistrates' Court Act 1989* (Vic.), sch. 7.

339 Victoria, Auditor-General, *Report on Ministerial Portfolios*, May 1995, Melbourne, p. 131.

340 *Jury Amendment Act 1996* (NSW), s. 66.

341 R. Fox, 'On punishing infringements', (1995) 13(2) *Law in Context* 7, 9.

> The mode of punishment is primarily fiscal. The monetary returns may exceed the costs of enforcement and thus return a profit to the enforcement agency...The imposition and enforcement of the penalty is supported by high technology which allows automation of and increased efficiency in the detection of offences and in the processing of offenders.

4.60 However, the desirability of achieving these benefits must be balanced against the corresponding removal of many of the safeguards which exist for individuals under the criminal law.[342] The increasing use of the infringement notice system has met with strong criticism from some commentators.[343]

> The checks and balances which provide the accountability of the system and protect the individual against the risk of arbitrary punishment are being weakened. The ability to detect crime from a distance without any apparent human intervention and the capacity to exact penalties demanded by computer without the need for any face to face human contact raise legitimate anxiety that the infringement notice system is a key element in the increasingly dehumanised criminal justice system.

4.61 The use of the PERIN procedure was opposed by several organisations on the grounds that it is unduly harsh and unfair because it could lead to potential jurors being imprisoned without having appeared before a court.[344] This could occur where a person defaults on the payment of the fine after 28 days from notice of the enforcement order.[345]

4.62 Moreover, according to the Deputy Sheriff (Juries) people who fail to respond to the questionnaires should be given an opportunity to explain the reason for their failure because many of them would probably assert that they had not received the questionnaire.[346] He suggested that people who claim not to have received the form should sign a statutory declaration which could be placed on the rear of the infringement notice. Such a procedure would encourage the computerisation of the issuing of infringement notices and courtesy letters. This means that it may be necessary to enact legislative provisions which allow for individual mitigating circumstances to be taken into account.[347]

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342 ibid., p. 23.

343 ibid., p. 31.

344 Submission no. 89, which was a joint submission from the North Melbourne Legal Service, the Fitzroy Legal Service and the Disability Discrimination Law Advocacy Service. See also *Magistrates Court Act 1989* (Vic.), s. 99 & sch. 7, cll. 6 & 8.

345 *Magistrates Court Act 1989* (Vic.), s. 99 & sch. 7, cl. 8.

346 Mr J. Artup, op. cit., p. 65.

347 This measure is recommended by Prof. R. Fox in *Criminal Justice on the Spot*, Australian Institute of Criminology, Canberra, 1995 , p. 288.

4.63 Concerns regarding the application of the PERIN procedure must be considered in light of the fact that a person who is subject to it has consented in effect to its application, because the person has the option of declining to be dealt with under the system. The procedure set out in section 99 and schedule 7 of the *Magistrates Court Act 1989* is an alternative to commencing proceedings against a person for a prescribed offence and is not mandatory. A person may chose to have the matter referred to a court for determination. This choice may be made either after the receipt of the courtesy letter or after receiving an enforcement order.[348]

4.64 There are three major benefits for an individual who choses to be dealt with under the PERIN system.[349] First, an enforcement order does not result in the person being regarded as having been convicted for an offence. Secondly the person is not liable to further proceedings. Thirdly, payment under the order is not an admission of liability for the purpose of any civil action or proceeding which may arise from the same circumstances. To provide a monetary incentive for persons being dealt with under the PERIN system, the penalty should be lower than that usually given when the offence is successfully prosecuted before the court.[350] In the case of offences against the *Juries Act* it could be say 25% of the maximum penalty.

4.65 Several submissions to the committee supported the application of the PERIN procedure to offences under the *Juries Act 1967*. Support for this measure was given because it would 'facilitate the enforcement of penalties for failure to comply with notices under the *Juries Act 1967*, which are not presently enforced because of the cost involved'.[351]

4.66 The committee has concluded that the benefits which would flow from the use of the PERIN system outweigh the general arguments against its use. This decision has taken into account the fact that individuals may chose not to be dealt with under the PERIN system. The sheriff's office should have responsibility for sending out courtesy letters and issuing certificates for the registration of infringement penalties.

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348 *Magistrates Court Act 1989* (Vic.), s. 99 & sch. 7, cll. 3(6) & 10(6).

349 *Magistrates Court Act 1989* (Vic.), s. 99 & sch. 7, cl. 9.

350 R. Fox, *Criminal Justice on the Spot*, pp. 270 & 288.

351 Submission nos. 42 & 63.

Recommendation 61

***Provision should be made for persons who fail to complete juror questionnaires and who also fail to respond to follow-up letters to be issued with infringement notices. These should be combined with enforcement provisions similar to the PERIN procedure set out in section 99 and schedule 7 of the* Magistrates' Court Act 1989.**

5. JURY PANEL PREPARATION AND SUMMONING JURORS

5.1 This chapter is concerned with jury panel preparation and the summoning of jurors. Jury vetting, which takes place at the jury panel preparation stage, is also reviewed. Before discussing these matters, the possible introduction of a one trial or one day system for jury service.

One Trial or One Day Systems of Jury Service

5.2 The committee during its inquiry considered the issue of the length of time persons must attend for jury service when they do not actually serve as a juror in a trial. In Victoria the jurors in the jury panel, who are not excused, are the jurors to try all issues in both civil and criminal trials at the sittings to which they are summoned.[352] In practice, persons summoned and attending for jury service attend the relevant court-house for two or three days unless impanelled as members of a jury, in which case, they are to attend as required until discharged by the trial judge.

5.3 The current system creates uncertainty as to the length of time a person will be required for jury service, because they may be selected for a jury on the third day of attendance.[353] Most people do not like having to come back on the second and third days. A lot of judges—either of their own accord or after being persuaded by barristers—are reluctant to impanel a jury on the third day because they feel they are getting off to a bad start with the jury. Barristers may seek an adjournment in order to have a fresh panel which has not been picked over. According to the Deputy Sheriff (Juries) there are sufficient people on the current roll to allow for one day pools.[354] Persons who are not selected on that day should be able to leave.

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352 *Juries Act 1967* (Vic.), s. 26.

353 Mr J. Artup, Deputy Sheriff (Juries), *Minutes of Evidence*, 12 Dec. 1994, p. 14.

354 ibid., p. 12.

5.4 It was suggested that potential jurors who are not selected in the morning should be allowed to leave and return later in the afternoon. This would break-up the long hours of waiting to be selected.[355]

5.5 In the United States, the length of jury service is determined by the courts, provided that it is not greater than a statutory maximum of thirty days within any two year period.[356] A number of United States courts have experimented with a one trial or one day system of jury service. This system requires jurors to appear only one day as part of a jury pool. Jurors who are impanelled for a trial on that day serve on that case and are then discharged. Those who are not impanelled for a trial are dismissed at the end of the day. People who attend for jury service, whether impanelled or not, receive a certificate exempting them from further liability for periods varying from two to seven years, depending upon the size of the potential juror population.[357]

5.6 The one trial or one day scheme is considered to be 'the single most effective way of reducing the burden of jury service'[358] and reflects a growing trend in the United States to reduce the length of jury service. In 1994 the system was used in about 33% of jurisdictions in the United States.[359] The scheme makes it possible for people who cannot afford to be absent from work for long periods, or who have other commitments which exclude them from performing lengthy jury service, to serve for just a few days. The United States experience has been that 'a short term of [jury] service results in fewer requests for postponement and makes it easier for courts to justify strict enforcement proceedings'.[360]

5.7 The Queensland Litigation Reform Commission in 1993 decided not to recommend the adoption of a one trial two day attendance system for jurors, because of 'perceived cost implications and operational difficulties'.[361] The

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355 Submission no. 105.

356 United States Code, Title 28 (Judiciary and Judicial Procedure), §1866(e).

357 New York, *The Jury Project: Report to the Chief Judge of the State of New York*, pp. 23-24.

358 ibid., p. 23.

359 The Citizens Economy and Efficiency Commission, *The Management of Juries within Los Angeles County*, Dec. 1994, p. 27.

360 New York, op. cit., p. 24.

361 Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland: Report of the Criminal Procedure Division*, Brisbane, 1993, p. 13.

commission considered that many of the benefits inherent in this system could be achieved by excusing jurors for part of the sittings.[362]

5.8 Several organisations supported the introduction of the one trial or one day system as a means of allowing more people to serve on juries by reducing the disruption caused by jury service.[363] Although this system would reduce the burden of jury service on professionals, concern was expressed about the effect of jury service where the trial is long. According to the Australian Dental Association (Victoria Branch) if jury service was for a lengthy trial it could seriously affect the viability of a dentist's practice.[364]

5.9 Those submissions which opposed the introduction of the one trial or one day system did so either without specifying the grounds for their objection or for the reason that its use is unnecessary.[365] Mr Justice O'Bryan of the Victorian Supreme Court said that he had[366]

> devised and used stratagems to ensure a representative jury is available for a longer than normal trial and I do not consider the "one trial or one day jury service" system is necessary.

5.10 Evidence given to the committee suggests that the introduction of a one trial or one day pool system would increase the administrative workload of the sheriff's office.[367] Nonetheless, its potential to lessen the burden of jury service, which should lead to greater community involvement, makes it an attractive option for reform. The introduction of such a system would also make it harder to justify many of the current categories of exemption and the range of excuses from jury service. In the committee's opinion the use of this system would increase the number and categories of people available for jury service and thereby increase the representativeness of the jury system.

5.11 The introduction of the proposed system would make it unnecessary to allow potential jurors who are not selected in the morning to leave and return at a specified time in the afternoon.[368]

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362 ibid.

363 Submission nos. 100, 109 & 119.

364 Submission no. 109.

365 Submission nos. 35, 108 & 111. According to the Women's Action Alliance the present period of three days to remain available for selection is acceptable (submission no. 35).

366 Submission no. 111.

367 Mr J. Artup, Deputy Sheriff (Juries), *Minutes of Evidence*, 16 Jan. 1995, p. 67.

368 This approach was suggested by E. Dexter, private citizen, 31 Jan. 1996, see submission no. 105.

5.12 The committee has concluded that the introduction of a one trial or one day jury service system would have substantial advantages The use of this system would promote the representativeness of juries and reduce the inconvenience experienced by persons summoned for jury service.

Recommendation 62

A system of one trial or one day jury service should be introduced.

Recommendation 63

Consistent with recommendation 45, a one trial or one day system should incorporate a provision exempting a person who attends for jury service from further jury service for three years.

Jury Panel Preparation

5.13 The proper officer of each court advises the sheriff of the likely number of persons required to attend for jury service at the respective courts. Acting on this advice, the sheriff must prepare lists of persons selected at random from the list of persons liable for jury service. This list is the jury panel for the sittings of each court in each jury district.[369]

5.14 In the event that the panel size as advised to the sheriff appears to be greater than the number required, the sheriff may, before or after the issue of summonses but before the attendance of the jurors, reduce the number of jurors by a process of random selection.[370] The sheriff may also randomly select additional persons from the jury list where the number of persons listed as liable for jury service is insufficient to complete the panel.[371]

5.15 In Issues Paper No. 1 the committee raised the issue whether there is any way in which the jury panel preparation process could be improved.[372] It was suggested to the committee that the copy of the jury panel should include not only the name and address of potential jurors, but also their date of birth.[373] This would assist the Chief Commissioner of Police in checking for the names of disqualified persons on the panel.

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369 *Juries Act 1967* (Vic.), s. 20.

370 ibid., s. 20A.

371 ibid.

372 p. 28.

373 Submission no. 62.

Recommendation 64

Jury panels should include the dates of birth of the prospective jurors.

Jury List Vetting

5.16 In Issues Paper No. 2 the committee discussed the current practice regarding jury vetting.[374] In accordance with the Act the sheriff must forward a copy of every jury panel to the Chief Commissioner of Police who shall make such inquiries as he or she considers necessary as to whether any person whose name appears on such panel is disqualified from jury service under the Act. The Chief Commissioner of Police must report the result of those inquiries to the sheriff.[375]

5.17 In addition to these statutory procedures, for many years the Chief Commissioner of Police has provided the Director of Public Prosecutions with a list of persons in each panel who have non-disqualifying criminal convictions, findings of guilt and even acquittals, which, in the Chief Commissioner's opinion, might make them unsuitable to serve as jurors in criminal trials. The solicitors who instruct prosecutors at trials routinely receive copies of these lists which assists the Crown in exercising its right of peremptory challenge. However, neither accused persons nor their legal representatives receive copies of these lists.

5.18 In *R. v. Su & Ors.* the Victorian Court of Appeal thought that jury vetting 'has existed in this State for some 40 years at least'.[376] In fact, it appears that some form of police vetting of jury lists has a far longer history. Judge Mullaly of the Victorian County Court provided the committee with a copy of a note dated 13 October 1890 addressed to the Crown Solicitor from a police sergeant. The note, which is headed 'Re objections to jurors re attached jury panel', shows that it was the practice at that time to forward copies of jury panels to police stations where the names were read out at a muster of police officers. The writer reports:[377]

> I beg to report that the attached jury panel was duly read at muster on this 13th inst. but no objection was taken to any of the jurors' names on it.

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374 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Issues Paper No. 2*, Melbourne, 1995, pp. 42–44. See also, Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Issues Paper No. 1*, Melbourne, 1994, p. 27.

375 *Juries Act 1967* (Vic.), s. 21.

376 *R. v. Su & Ors.* (Supreme Court of Victoria, Court of Appeal, 15 Dec. 1995), p. 20.

377 See Judge P. Mullaly, County Court of Victoria, *Minutes of Evidence*, 10 Apr. 1995, p. 226.

5.19 Judicial opinion varies as to the merits of this practice. According to O'Bryan and Marks JJ. in the Victorian Full Court decision in *R. v. Robinson* this long established practice is lawful and not unfair.[378] Indeed, they considered it to be desirable in order to avoid selecting jurors who 'although not unqualified from serving ... might be so affected by prejudice as not to be an indifferent juror'. In so holding they declined to follow Vincent J.'s decision in *In the Trial of D*.[379] In that case His Honour concluded that the obligation of the Crown to act fairly, and to be seen to be acting fairly, was inconsistent with the practice of jury vetting.[380]

5.20 In his dissenting judgment in *Robinson* Nathan J. said that the practice should stop because he regarded it as being 'incompatible with the fair and random operation of the jury system'. His Honour expressed the opinion that:[381]

> If the legislature had intended to disqualify such a wide class of persons, it would have done so in explicit terms. To do so by way of the D.P.P.'s bureaucratic process, is not merely inconsistent with the Act, it intrudes upon the fundamental right and obligation of electors to become jurors. It is a process which vets prospective jurors, contrary to the principle of random selection.

5.21 In the recent decision in *R. v. Su & Ors.* the Victorian Court of Appeal referred to the Crown's 'traditional role as the guardian of due process' and continued:[382]

> However, as we point out hereunder, that role has involved the Crown in seeking to ensure that a jury, which is empanelled to try a cause, comprises persons who are indifferent to the cause which they are empanelled to try. The role cannot be adequately performed unless the Crown is in receipt of information which bears upon that task.

Later the court further emphasised this point:[383]

> Because of the role which the Crown adopts in criminal trials, [the right to challenge without cause] is exercised in the interests of securing a jury which is indifferent to the cause to be tried. But, as we have said, the Crown cannot be expected to exercise its right to achieve that object without knowledge which informs the exercise of the right. It is to that end that the practice of providing information of "non-disqualifying convictions" to the prosecution has developed.

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378 [1989] V.R. 289.

379 [1988] V.R. 937.

380 ibid., 947.

381 ibid., 307.

382 ibid., p. 28.

383 ibid., p. 32.

The committee notes that *Su* is currently on appeal to the High Court on this and other grounds.

5.22 The committee has paid attention to this debate and has noted particularly that in *Robinson* the majority observed that: 'Should the practice [of jury vetting] now be regarded as unfair it is a matter the legislature could easily remedy'.[384] This passage was quoted with approval by the court in *R. v. Su & Ors.*, where Their Honours added: 'It cannot be suggested that the practice is one with which the legislature is ... unfamiliar'.[385]

5.23 In *Robinson*, and again in *Su*, Victoria's highest court has thrown down the gauntlet to the legislature to determine whether good public policy demands that jury vetting in relation to non-disqualifying criminal convictions be abolished. The question for the committee is whether it should recommend that this course of action be followed.

5.24 Recent reviews of jury service in New South Wales and Queensland have opposed the practice of jury vetting. The New South Wales Law Reform Commission in 1986 concluded that jury vetting, even in relation to prospective jurors with disqualifying convictions, was undesirable because it offends the principle of random selection.[386] The Commission also criticised the practice as lacking openness and therefore being liable to misuse.[387]

5.25 In Queensland opposition to the practice was expressed in the Litigation Reform Commission's report on *Reform of the Jury System in Queensland*.[388] The Commission's approach was based on the evidence contained in the Criminal Justice Commission's report into the selection of the jury in the Bjelke-Petersen trial.[389] As a result of these reports, Queensland has introduced the following measures which predominantly seek to prevent jury vetting by the defence.

(a) A list of the persons summoned for jury service must, on request, be given to the lawyer representing a party. This includes

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384 [1989] V.R. 289, 299.

385 *R. v. Su & Ors.* (Supreme Court of Victoria, Court of Appeal, 15 Dec. 1995), p. 29.

386 New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, Report LRC 48, Sydney, 1986, p. 46.

387 ibid.

388 Supreme Court of Queensland, Litigation Reform Commission, op. cit., p. 21.

389 ibid.; Queensland, Criminal Justice Commission, *Report by the Honourable W. J. Carter QC on his Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke–Petersen*, Brisbane, 1993.

information which identifies persons who have been instructed to attend. The request can be made no earlier than 4.00 p.m. on the business day immediately before the trial. After the jury is selected the copies of the list must be returned to the sheriff. It is an offence to release information contained in the list to other persons.[390]

(b) Questioning of persons summoned for jury service (or other persons) is prohibited, unless authorised by the Act or by a judge.[391]

(c) If one party obtains information which may show that a person is unsuitable then it must be disclosed to the other party as soon as practicable.[392]

5.26 Additionally, the Queensland legislation allows the sheriff to exclude persons whom he or she knows to be not qualified, and reasonable inquiries may be made for this purpose. Similarly, in New South Wales the sheriff has the power to obtain information from the Commissioner of Police for the purposes of determining whether a person is liable for jury service.[393]

5.27 The committee sought submissions on the issue of whether there should be jury vetting beyond what is necessary to ensure that persons disqualified from jury service do not serve on juries. Several submissions argued that the Chief Commissioner of Police should confine himself or herself to the statutory function and that the practice of supplying lists to the prosecution should cease.[394] Judge Hassett of the Victorian County Court described the practice of jury vetting as being wrong in principle because the prosecution has material which is not available to the accused, and it is based on the false principle that a person who has been dealt with for a criminal offence will be 'anti-prosecution'.[395]

5.28 However, a number of submissions supported the current practice of jury vetting for non-disqualifying convictions.[396] Many of these submissions

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390 *Jury Act 1995* (Qld), s. 30.

391 *Jury Act 1995* (Qld), s. 31.

392 *Jury Act 1995* (Qld), s. 35.

393 *Jury Amendment Act 1996* (NSW), s. 75B.

394 Submission nos. 62, 126 & 132; Mr J. Artup, Deputy Sheriff (Juries), op. cit., p. 46.

395 Submission no. 123.

396 Submission nos. 19, 108, 111, 112 & 135.

gave examples of convictions which may not disqualify a person under the *Juries Act 1967* but would justify a challenge by the prosecution. According to the Director of Public Prosecutions, prosecutors exercise their discretion to challenge or stand aside in the following manner:[397]

> Standing aside a potential juror would normally occur when there is a rational nexus between the prior conviction and the nature of the trial upon which the juror may be called to adjudicate. The Crown Prosecutor would have concluded that such a juror would be unlikely to give a true verdict according to the evidence and in the interests of justice that juror should be "challenged".

5.29 The Director of Public Prosecutions gave the following example of a situation where a person would be unsuitable for jury service:[398]

> An obvious example of this situation arising is when a juror has been convicted of dangerous driving or exceeding .05 and perhaps speeding but has not been sentenced to a term of imprisonment. He or she is then eligible to serve on a jury in a culpable driving trial, involving the death of a motorist or a pedestrian. If the Crown lose the right to challenge on the basis of this "non-disqualifying" conviction that person will undoubtedly take his or her place in the jury box for the culpable driving trial.

5.30 The committee has concluded that although it is for the Parliament through legislation to define the categories of persons who are considered unsuitable for jury service by reason of past criminal behaviour, jury vetting of non-disqualifying criminal convictions is necessary in order to protect the integrity of the jury system. However, it should be kept to a minimum. There is a need to ensure that persons who are unsuitable for jury service in particular cases because of non-disqualifying criminal convictions do not sit on juries. The committee accepts that persons may be unsuitable for jury service where there is a logical nexus between the prior conviction and the nature of the offence to be tried.

5.31 It is important to note that the committee's conclusion relates to non-disqualifying criminal convictions. Persons with findings of guilt which did not result in a conviction being recorded and persons considered 'unsuitable' for jury service, but who have no criminal record, should not be the subject of vetting. Information concerning persons in these categories should not be provided to the Crown. This view was supported by the Victorian Criminal Justice Coalition.[399]

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397 Submission no. 93.

398 Submission no. 93 & 135.

399 Submission no. 39.

Recommendation 65

Vetting of jury lists to detect disqualified persons and persons with non-disqualifying criminal convictions should continue.

Should the Defence have Access to this Information?

5.32 Many of the submissions received by the committee expressed concern that the defence does not have access to the results of jury vetting. It was suggested that further particulars of juror occupation and prior convictions should be available to both sides prior to the trial.[400] It could be argued also that, because the trial judge has a discretion to stand aside a prospective juror in the interests of justice, he or she should be provided with the information obtained from jury vetting.

5.33 The Victims of Crime Assistance League suggested that lists of persons available for impanelment as jurors should be available to witnesses and victims who are to be called in a trial.[401] Some submissions gave qualified support to allowing the defence to have access, with such access being limited to the stage when the jury is being impanelled.[402] Submissions which opposed access for the defence did so on the grounds that it may encourage jury tampering.[403]

5.34 To address the concerns expressed in several of the submissions the committee has concluded that information obtained from jury vetting should be provided to the trial judge prior to the commencement of the impanelling process. The defence with leave of the trial judge should also have access to this information at the impanelment stage.

5.35 The Director of Public Prosecutions has acknowledged that: [404]

> logically, a judge in many ways is the obvious person to make the decision [to stand-aside a prospective juror] because he [or she] is in the middle, but as a matter of practicality it is better staying where it is.

5.36 The main reason for the Director of Public Prosecution's opposition to the proposal to give trial judges a discretion to stand aside potential jurors based on their criminal record is that the Crown is regarded as being better

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400 Submission nos. 66, 68, 69, 89 & 133.

401 Submission no. 38.

402 Submission no. 42.

403 Submission nos. 19, 62 & 93.

404 Mr G. Flatman, QC, Director of Public Prosecutions, *Minutes of Evidence*, 29 July 1996, p. 37.

placed to carry out this function.[405] The Crown has a better understanding of the case at this stage than the judge who has limited material before him or her. However, in the committee's opinion, detailed knowledge of the case is not necessary for a judge to exercise the discretion to stand aside a prospective juror who may be unsuitable because of a non-disqualifying criminal conviction. Moreover, as noted earlier, the trial judge has a discretion to stand aside a prospective juror in the interests of justice, and the judge already plays a critical role in dealing with applications to be excused from jury service.

5.37 The committee believes that its approach to these issues represents the appropriate balance between the need to respect jurors' privacy while allowing jury vetting in certain cases. Equal access to information regarding potential jurors for all parties would, in the committee's opinion, promote the perception that the impanelling process is being carried out in an impartial and even-handed manner.

Recommendation 66

Information obtained from jury vetting should be provided to the trial judge prior to the commencement of the impanelling process.

Recommendation 67

The defence should also have access to information obtained from jury vetting at the impanelment stage with leave of the trial judge.

Who Should Carry Out the Jury Vetting Function?

5.38 The committee during its inquiry raised the issue of who should carry out the jury vetting function. Most groups which responded to this issue stated that this task should be given to the sheriff.[406] The Deputy Sheriff (Juries) supported this measure on the grounds that it would make the process more secure because there would be no need to provide details of the panel to the police.

5.39 However, several submissions favoured the retention of the function by the Chief Commissioner of Police.[407] The Chief Commissioner was regarded as the most appropriate person to carry out the function, because he or she maintains the relevant records, and it was claimed that to allow another person

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405 ibid., p. 36.

406 Submission nos. 108, 126, 129 & 132; Mr J. Artup, Deputy Sheriff (Juries), op. cit., p. 66.

407 Submission nos. 19, 42 & 62.

to carry out the task would increase the risk of a breach of privacy. The Victoria Police also advised that the sheriff lacks the facilities to do the relevant checks and does not have access to the relevant data base.[408]

5.40 The administration of juries is an integral part of the system of justice which is dispensed, and to a large extent controlled, by the courts. It is for this reason that a court officer, the sheriff of the Supreme Court, is responsible for the management of the jury system. The police force is part of the investigating and prosecuting arm of government, and although the committee in no way doubts the competence or integrity of the officers who carry out the jury vetting function, the committee believes that this function ought to be conducted by the sheriff.

5.41 It is understandable that in years gone by the Chief Commissioner of Police alone would have had access to the information necessary to carry out the vetting of jury lists. However, in the computer age it should not be difficult for the Victoria Police to provide on-line access to the relevant database to the sheriff's office.

Recommendation 68

The jury vetting function should be carried out by the sheriff.

5.42 It was suggested to the committee that the current practice of jury vetting is inadequate because it relates only to convictions recorded in Victoria. No interstate checking for disqualifying convictions is carried out.[409] The national names index is not checked during jury vetting because a $25 fee is charged per name checked. This fee applies because the information is provided not for the purposes of policing. However, the committee was told that other states carry out interstate checks as part of their jury vetting. It may be possible that a special rate can be negotiated.[410] The committee was advised by the manager of the Records Section of Victoria Police that deciding whether the fee would remain in the case of international checks is a matter for the international exchange and the Police Information Board of Control Review.

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408 Submission nos. 42 & 112.

409 Mr J. Frigo, Victoria Police, *Minutes of Evidence*, 29 July 1996, p. 38.

410 Mr P. Donelly, Victoria Police, *Minutes of Evidence*, 29 July 1996, pp. 3, 17–18 & 38–39.

5.43 At a public hearing into jury vetting held by the committee, which was attended by the Mr G. Flatman, QC (the Director of Public Prosecutions), Mr R. Reid (Crown Prosecutor), Mr David Grace, QC and officers of the Victoria Police and the sheriff's office, there was general agreement regarding the need to extend jury vetting to include interstate and international criminal convictions.[411]

Recommendation 69

Jury vetting should be extended to include all known convictions, including interstate and international convictions, if practicable.

Informing Potential Jurors About the Jury Vetting Process

5.44 The committee has considered whether there is a need to inform potential jurors about the jury vetting function and related matters. Information could be provided to the public about the jury vetting process in the form of published guidelines governing the procedures used by the body which performs this function, and by including in the questionnaire sent to prospective jurors a statement that a person's criminal record may be checked for disqualifying and non-disqualifying convictions.

5.45 According to the Deputy Sheriff (Juries) there is a need to explain to potential jurors the manner in which the Crown exercises its right to peremptory challenge because persons who are challenged owing to non-disqualifying criminal convictions may be embarrassed by the process.[412] The Deputy Sheriff (Juries) also stated that potential jurors should be informed at the questionnaire stage of the possibility of being challenged owing to prior convictions.[413]

5.46 Consistent with the need to make the jury vetting process more open and accountable, the committee has concluded that steps should be taken to explain the process to the public.

5.47 During the public hearing on jury vetting, the committee was advised by the Victoria Police that occasionally errors can occur in its records, such as where one of two brothers has a past conviction and the wrong brother is

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411 Public hearing *Minutes of Evidence*, 29 July 1996, p. 17.

412 Mr J. Artup, Deputy Sheriff (Juries), op. cit., p. 46; Mr J. Artup, Deputy Sheriff (Juries), *Minutes of Evidence*, 29 July 1996, pp. 35–36.

413 Mr J. Artup, Deputy Sheriff (Juries), *Minutes of Evidence*, 16 Jan. 1995, p. 46.

recorded as having been convicted.[414] A person who believes that his or her disqualification from jury service was based on such an error may seek to have the record corrected. The Victoria Police has a procedure in place which allows persons to request access to their full criminal record. A prescribed fee applies. Information concerning jury vetting which is provided to prospective jurors should contain notice of this procedure.

Recommendation 70

The sheriff should publish guidelines for his or her procedures in performing the jury vetting function.

Recommendation 71

The questionnaire sent to prospective jurors should include advice concerning the jury vetting process and the correction of criminal history records.

Summoning of Jurors

5.48 Following completion of each panel, the sheriff must issue a summons to every juror named therein.[415]

5.49 Not less than ten days before the day on which jurors are to attend, the sheriff must take the summonses, together with a copy of the jury panel, to a post office. The person in charge of the post office must check the names and addresses on the summonses against the names and addresses on the jury panel, and forward the summonses to their recipients.

5.50 The Act contains a power in the Attorney-General to direct that summonses to jurors be served by the sheriff or by a member of the police force, in which case a list known as a summons list completed.[416]

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414 Mr P. Donelly, Victoria Police, op. cit., p. 47.

415 *Juries Act 1967* (Vic.), s. 23.

416 ibid., ss. 24 & 25.

Improving the Summoning Process

5.51 The committee in its first issues paper raised the issue of whether there was any manner in which the process of summoning jurors could be improved. It was suggested to the committee that the summons should be received at least ten working days before the potential jurors are required to attend the court.[417] This would allow people to give adequate notice when applying for leave from work. In New South Wales the *Jury Amendment Act 1996* introduced such a requirement; the jury summons must be served at least seven days before the time specified in it for attendance at court.[418]

5.52 In Victoria, the jury questionnaire states that potential jurors will be advised approximately ten days prior to the day on which they are required to commence jury service.

5.53 The failure to provide adequate notice for people attending for jury service increases the likelihood that applications for excusal would be more readily granted to persons in responsible jobs.[419] Consequently, there is a skewing of the persons who serve on juries, especially in long trials. One way to alleviate this problem would be to provide ample notice so that potential jurors can arrange their affairs.

5.54 The committee believes that a period of time longer than ten working days is necessary to allow potential jurors to arrange their affairs, especially where the trial is going to be a lengthy one. If ample time is allowed for persons to arrange leave from work or to make other necessary arrangements, then it is less likely that jury service would place an onerous burden upon them and that they would seek to be excused. This measure, together with the introduction of a one trial or one day system of jury service, and improvements to the conditions for jurors discussed in the next chapter, should increase the numbers of people who are able to serve on juries without experiencing undue hardship.

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417 Submission no. 77.

418 *Jury Amendment Act 1996* (NSW), s. 26.

419 Justice C. Simpson (Supreme Court of New South Wales), 'The future of the jury system in New Zealand and Australia', paper presented to 15th Australian Institute of Judicial Administration Conference, Wellington, 20–22 Sept. 1996.

Recommendation 72

A policy document should be developed which sets out minimum notice periods for jury service. In general people should be given not less than four weeks notice and where a jury pool is to be summoned for a particularly lengthy trial there should be a longer period of notice.

A One Step Jury Pre-selection and Summoning Process

5.55 In New South Wales a review of the current process of jury pre-selection and summoning was carried out recently by Andersen's Consulting.[420] This study found that considerable savings could be made by implementing a one-step process for jury roll creation and summoning. This could be done by combining the questionnaire and summoning process. Potential jurors who receive a summons are advised to apply to be exempted if they fall within any of the categories of ineligibility or disqualification. This measure has not been adopted in New South Wales. It represents a drastic departure from the existing system and would be difficult to administer in a way which ensures compliance.

5.56 Despite Andersen's Consulting having acknowledged the need for a system to promote compliance, they have recommended only random checking. David Lennon, the New South Wales sheriff, summarised the manner in which such a system of checking would work:[421]

> To supervise this self excusing program, which as your realise is based on a person's honesty and integrity, the consultants have suggested the need to establish a Compliance Section. Officers from this section will randomly check applications and a relatively serious penalty is recommended...for false applications.

5.57 In addition to the problem of ensuring compliance with the categories of disqualification, ineligibility and limitations on the ability to claim an exemption, there is also the problem of persons easily evading jury service because compliance is only checked in a random fashion. The savings resulting from this process must be balanced against the cost of implementing the system and the cost of processing claims for exemption. The committee has concluded that a one step jury roll creation and summoning process should not be adopted in Victoria.

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420 Cited in D. Lennon (sheriff of NSW), 'Changes to the NSW jury system', paper presented to 4th Biennial National Sheriff's Conference, Brisbane, 3–5 July 1995, p. 14.

421 ibid.

6. IMPROVING COMMUNITY ATTITUDES TO JURY SERVICE & OTHER MATTERS

Improving the Community's Attitude Towards Jury Service

6.1 The Law Reform Committee has received much evidence which shows that jury service has been a rewarding experience for people, despite their initial reservations about participating. It may be the case that negative attitudes towards jury service are partly based on a lack of knowledge of what is involved. For this reason, the importance of jury service should be brought to the attention of the community through the school education system and other methods of publicity.

6.2 The committee is concerned that there may be a community attitude that although jury service is an important civil function many people do not want to be inconvenienced by it. This is evident from the propensity of people to avail themselves of any category of exemption, and who fail to respond to the juror questionnaire. This attitude was also evident in the many submissions which either recommended the retention or expansion of existing categories of exemption. Indeed, only one group was happy to have their exemption removed.

6.3 Negative attitudes towards jury service are common in other jurisdictions. In Los Angeles, for example, of the almost 4 million juror questionnaires mailed in financial year 1994–95, 36% did not respond and required follow-up.[422] In the United Kingdom in 1965 the Morris committee commented on the problem, but the committee also observed that many people had found jury service to be a rewarding experience:[423]

> Jury service is viewed by some as an onerous and unwelcome duty, and by others as a precious and inalienable right, but we have been told that those who start their service holding the former opinion often end up holding the latter.

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422 California, Blue Ribbon Commission on Jury System Improvement, *Final Report*, 1996, p. 22.

423 United Kingdom, Departmental Committee on Jury Service, *Report*, (Lord Morris, Chairman), Cmnd 2627, HMSO, London, 1965, (hereafter 'Morris report'), p. 7.

Community Education Programs

6.4 In order to promote the importance of jury service within the community three educational projects have been developed by the Victorian Law Foundation.[424] A video has been produced which is to be screened to potential jurors in jury pool rooms. It explains the role of the jury and the impanelment process. The video, which is limited in its scope by reason of its intended usage, should be extended so that it can be made available to schools and public libraries for community education regarding the jury system. Alternatively, a new video should be produced for this purpose.

6.5 Another recent initiative of the Victorian Law Foundation is a pilot course which has been designed to educate adults on citizenship. It has been prepared with the assistance of community centres and the Council of Adult Education. This pilot project should be encouraged.

6.6 Work has also commenced on a schools kit which deals in part with the rights and responsibilities of citizenship, including the role of juries. The Civics Expert Group in 1994 identified the need to introduce a course on citizenship for school students when it suggested the introduction of a civics component into the existing area of *Studies of Society and Environment*.[425] As a consequence, the Curriculum Corporation is now developing a set of sample teaching materials on civics and citizenship in order to provide teaching strategies for use in schools. The materials will be used during consultations with key curriculum officers in Australia to identify the course needs for each State and Territory.[426] It is intended that these materials will include reference to the jury system as part of the legal system, and they will emphasise that jury service is an important responsibility of citizenship.[427] The committee believes that the work of the Victorian Law Foundation and the Curriculum Corporation should be encouraged.

6.7 At present there is no compulsory school subject which is designed to equip students for the responsibilities of citizenship. As part of the *Natural and*

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424 These projects are outlined in a letter to the committee dated 12 Sept. 1996 from Annie Woodger, Deputy Director of the Victorian Law Foundation.

425 A. Ruby, 'What just happened?' in Civics and citizenship education, (1996) 22(1) *Unicorn Journal of the Australian College of Education*, Special Issue, p. 7.

426 K. Boston, 'Civics and citizenship: priorities and directions' in Civics and citizenship education, (1996) 22(1) *Unicorn Journal of the Australian College of Education*, Special Issue, p. 87.

427 Telephone conversation on 2 Oct. 1996 with Ms S. Ferguson of the Curriculum Corporation.

Social Systems sequence of *Studies of Society and Environment* there is a unit entitled 'the Australian Citizen', which is taught at level 6 (years 9 and 10). One of the focus questions addressed in this unit is: 'What are the rights and responsibilities of 18 year olds?'. The course advice provided to teachers of this unit does not mention the obligation of performing jury service as one of the matters which should be discussed during the course.[428] This is not to say that individual teachers do not cover this topic in any event. However, even if the importance of jury service is addressed in this unit, it is not compulsory. A school is free to choose whether it is taught as part of that school's curriculum.[429]

6.8 The committee is aware that there are competing demands for particular subject matter to be dealt with during the limited time that is available within the school curriculum. However, the committee strongly believes that the education system has a responsibility to properly prepare school students for adult life. This preparation should include the responsibilities of citizenship including the performance of jury service.

6.9 Accordingly, the committee's view is that a common curriculum unit should be developed on citizenship for use in Victorian schools, and it is the further view of the committee that this is a subject to which every student at year 9 or year 10 level should be exposed. It should include general information concerning the operation and importance of the jury system and the obligation to perform jury service. The work of the Victorian Law Foundation and the Curriculum Corporation should be of great assistance in facilitating this objective.

6.10 In addition to these measures, brochures outlining the function, operation and importance of the jury system, and the role of juries and the conditions of jury service should be distributed to potential jurors and members of the public. They could be made available through court-houses, police stations, post offices, public libraries and citizen advice centres.

6.11 Interactive computer screens should be provided in jury pool rooms so that prospective jurors can access information concerning the justice system

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428 The committee is aware that the jury system is covered extensively in *Legal Studies* which is a VCE subject.

429 Telephone conversation on 29 Oct. 1996 with Dr J. Andrews, Project Leader, *Studies of Society and Environment*, Department of Education.

during the hours they often spend waiting. This material should be placed on the Internet for general community use.

Recommendation 73

A common curriculum unit should be developed on citizenship for use in Victorian schools. This is a subject to which every student at year 9 or year 10 level should be exposed, and it should include general information concerning the operation and importance of the jury system and the obligation to perform jury service.

Recommendation 74

The community should be educated regarding the importance of jury service through adult education on citizenship, the distribution of brochures on jury duty and the establishment of top quality information sources in jury pool rooms and via the Internet.

A Courts Charter

6.12 The New South Wales Jury Task Force recently concluded that the community should be educated about the importance of jury service and that acceptance of the importance of participating should not be taken for granted. It regarded such an approach as being necessary to encourage people to participate in jury service and to 'counter any public perception that the courts take the community's role in the justice system for granted'.[430]

6.13 The need to avoid taking jurors' participation for granted was emphasised by the Western Australian sheriff, Mr Colin Macphail, at the National Sheriffs Conference in 1995 when he said:[431]

> A while ago I adopted a policy of treating jurors as "guests of the Court" - It was a first step towards customer focusing and last year we actually surveyed our jurors to find out whether our service was acceptable and more importantly could it be improved. This has led to changes in our work practices and, more importantly, in our attitude.

6.14 Several jurisdictions have developed the concept that court users, which include jurors, should be treated as guests of the court. In Western Australia there is a *Justice Charter* which sets out standards for customer service.[432] In Queensland a *Courts Charter* has been compiled for the registries of the

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430 New South Wales, Jury Task Force, *Report*, Sydney, 1993, p. 11.

431 C. Macphail (sheriff of WA), 'The juror as a customer', paper presented to the 4th Biennial National Sheriff's Conference, Brisbane, 3–5 July 1995, p. 7.

432 ibid., p. 120.

Supreme, District and Magistrates Courts.[433] This charter, inter alia, requires the staff of the registries to strive to minimise inconvenience to members of the public called for jury service. England and Wales, and Scotland have introduced courts charters which specifie the level of service court users may expect from court staff.[434] These changes represent positive steps towards improving the way jurors are treated and consequently, the community's attitude to jury service.

6.15 The participation rate could also be increased by improving the conditions of jury service. The introduction of a one trial or one day system, as recommended by the committee, should go some way towards achieving this end. Nonetheless, the committee recommends further improvements.

Recommendation 75

The possibility of compiling and publishing a Courts Charter which, among other things, lays down minimum standards for the service provided to court users, including jurors, should be further investigated.

Improving the Conditions of Jury Service

Remuneration

6.16 In Issues Paper No. 1 the committee raised the question whether the remuneration paid to jurors was adequate.[435] In Victoria persons summoned and attending for jury service (whether they actual serve or not) are paid compensation at the rate of $36 per day for the first six days and $72 per day thereafter up to the end of twelve months. After twelve months the rate increases to $144 per day. Additionally, jurors who reside outside the Melbourne jury district are eligible for a travel allowance of 38 cents for each kilometre travelled in excess of eight kilometres.[436]

6.17 Jurors are entitled to remuneration or an allowance according to a statutory scale in every Australian State and Territory.[437] In the Australian

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433 4th Biennial National Sheriff's Conference, Brisbane, 3–5 July 1995, p. 132.

434 See, Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Final Report*, vol. 2, *Report on Overseas Investigations* , Melbourne, 1996.

435 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Issues Paper No. 1*, Melbourne, 1995, p. 12.

436 Juries Regulations 1992 (Vic.), r. 8.

437 *Juries Act 1967* (Vic.), s. 50; *Jury Act 1977* (NSW), s. 72; *Jury Act 1995* (Qld), s. 63; *Juries Act 1927* (SA), s. 70; *Jury Act 1899* (Tas.), s. 61; *Juries Act 1957* (WA), s. 62; *Juries Act 1967* (ACT), s. 51; *Juries Act 1980* (NT), s. 60.

Capital Territory a person impanelled as a juror may apply for the payment of expenses associated with jury service in certain circumstances.[438] In Tasmania jurors are paid travelling expenses, which are assessed according to the shortest practicable distance by road from their residence to court.[439]

6.18 In Victoria an employee within the meaning of the *Employee Relations Act 1992* who has been summoned as a juror and who has attended court is entitled to be reimbursed by his or her employer an amount equal to the difference between the amount of compensation paid under the *Juries Act* and the amount of pay he or she would have been entitled to receive **in respect of his or her ordinary hours of work** had he or she not been summoned as a juror.

6.19 The Workplace Relations and Other Legislation Amendment Bill 1996 (Cwlth), which is presently before the Australian Senate, provides a minimum condition of employment relating to jury service for employees (other than casual employees) who are covered by certified agreements and Australian workplace agreements. The condition states:[440]

> Where an employee is absent from work because of jury service the employer shall pay an amount to the employee no less than the difference between—
>
> —**the amount that would have been payable under the agreement had he or she not been absent from work** (emphasis added); and
>
> —the amount payable by the court to the employee for jury service.

The condition applies to employees undertaking approved apprenticeships or traineeships.

6.20 It will be observed that the Commonwealth provision seeks to put the employee in the same financial position he or she would have been in but for jury service, whereas, the Victorian provision only compensates employees in respect of pay for ordinary hours of work. In the committee's opinion the Commonwealth provision is fairer to employees and should be adopted in Victoria. The Employment Law Services of Bendigo pointed out in its submission:[441]

> [The Victorian] system provides significant deficits for many employees as it stands. Employees in industries which work outside Monday – Friday hours either take a

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438 *Juries Act 1967* (ACT), s. 51A.

439 *Jury Act 1899* (Tas.), s. 64.

440 Proposed Workplace Relations Act 1966 (Cwlth) new s. 170XN.

441 Submission no. 137.

> reduction, frequently significant, in their take home pay, or they sit for the time in court and then return to work for all hours outside court sitting hours to ensure they receive their penalty rates...[This] provides a significant barrier to performing jury service for some individuals.
>
> As an example the average salary in nursing includes between 30–50% in penalty payments. Many families could not afford to lose that level of income, especially over any significant period of time.

The Deputy Sheriff (Juries) has advised the committee that he regularly excuses people for this reason.

6.21 Many other submissions received by the committee recommended that remuneration and the physical conditions of jury service should be improved in order to encourage a greater number of people to participate in the system.[442] A tougher approach was suggested towards employers who discourage employees from attending for jury service.[443] It was also suggested that there could be insurance against income loss caused through jury service, with this being specified as a part of income protection packages.[444]

6.22 The committee has concluded that the current system of remuneration for jury service is inadequate and it recommends that the payment system be restructured.

6.23 By reason of the committee's recommendations to increase the size of jury districts and to increase the distance which qualifies for excusal, a travelling allowance should be paid to all persons, regardless of where they reside, for each kilometre travelled in excess of eight kilometres. A zone system could be introduced which specifies an allowance for each zone increasing with distance. The allowance should be based on Royal Automobile Club of Victoria estimates of the cost of running a small family car. If it is technically feasible, the jury list provided by the State Electoral Office to the sheriff should indentify each person's zone.

6.24 The committee believes that the financial burden of jury service should be borne by the community as a whole rather than individuals and businesses,

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442 Support was given in the following submissions for improvements to both the remuneration and physical conditions of jury service: submission nos. 12, 42, 54, 55, 68, 69 & 89. Several submissions by private citizens also recommended improvements to remuneration and the physical conditions of jurors. The following submissions referred to the need to improve remuneration for jurors (without referring to physical conditions): submission nos. 51, 66, 73, 91, 108 & 126.

443 Submission no. 126.

444 Submission no. 66.

particularly small businesses. Consequently, the compensation paid to persons summoned and attending for jury service should be increased to a daily figure based upon the average weekly salary. The increased cost of funding the jury system which would result from the implementation of this structure, could be partially offset by the fines raised under the *Juries Act* and by an increase in the fees payable by a party for a jury in a civil proceeding.[445] Persons paid more than the average wage would have the difference made up by their employers.

6.25 The Deputy Sheriff (Juries) observed that juries in long trials are particularly unrepresentative because people are unable to be away from their occupations for six to eight weeks or even months.[446] The committee's recommendations should go some way towards addressing this problem.

Recommendation 76

The financial burden of jury service should be borne by the community as a whole rather than individuals and businesses, particularly small businesses.

Recommendation 77

The payment system for persons summoned and attending for jury service should be restructured as follows—

(a) An allowance should be paid to all persons, regardless of where they reside, for each kilometre travelled in excess of eight kilometres.

(b) Compensation at a daily rate approximately equivalent to the average weekly salary should be paid for each day or part thereof.

Recommendation 78

The* Juries Act 1967 *should contain a minimum condition of employment relating to jury service equivalent to that provided for in the Workplace Relations and Other Legislation Amendment Bill 1996 (Cwlth).

Physical Conditions

6.26 Many submissions identified the need to improve facilities which are available for jurors in order to enable persons who are physically handicapped

445 See Juries Regulations 1992 (Vic.), r. 7.

446 Mr J. Artup, Deputy Sheriff (Juries), *Minutes of Evidence*, 12 Dec. 1994, p. 33.

to participate in jury service.[447] An additional allowance may need to be provided to cover the cost of travelling to a court-house for persons with a physical disability.[448] The submissions also suggested that facilities should be made available to accommodate the needs of people with full-time care responsibilities, for example, by providing child care facilities at major court-houses.[449]

6.27 The committee believes that the design of new court buildings and the refurbishment of existing buildings should incorporate provision for disabled persons and should provide child care facilities. This approach is consistent with the views expressed by the Courts and Tribunals Services Division of the Victorian Department of Justice, which advised that a design guide for future court facilities should identify and prioritise improvements which ensure that facilities meet the needs of court users, including jurors. The need for adequate child care facilities is also being promoted by the Victorian Bar Council, which has provided information and assistance through its Child Care Facilities Committee to the project engineer working on the new Federal Court complex.[450] Mr J. Artup, the Deputy Sheriff (Juries), also said that the provision of child care facilities should be considered when designing new court buildings.[451]

6.28 Several submissions recommended that in order to ensure that jurors are treated appropriately a number of initiatives should be introduced. A separate entrance and lift should be provided for jurors, so that they do not come into contact with accused persons, witnesses or lawyers. The committee's delegation which travelled overseas to study the operation of the jury system in other common law jurisdictions, was most impressed with the design of new court buildings in Vancouver and Montréal. Four separate traffic flows are provided for judges, jurors, prisoners and the public which necessitates different entrances, corridors, lifts and waiting areas.

6.29 There is also a need to provide adequate common rooms and refreshment rooms for jurors and comfortable jury rooms which provide

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447 Submission nos. 13, 26, 62, 90 & 129; Mr J. Artup, Deputy Sheriff (Juries), *Minutes of Evidence*, 16 Jan. 1995, p. 53.

448 Submission no. 26.

449 Submission no. 13.

450 Victorian Bar Council, *Annual Report for the Year Ended 30th June, 1996*, p. 38.

451 *Minutes of Evidence*, 16 Jan. 1995, p. 56. See also pp. 53 & 55.

sufficient space.[452] The committee notes that a number of improvements to juror facilities have already been made and others are planned for the future. Facilities such as those recently provided at 436 Lonsdale Street should be encouraged.

6.30 The committee has concluded that improvements to court facilities are necessary in order to allow more persons to serve who could not otherwise participate in jury service.

Recommendation 79

Future court buildings and the refurbishment of existing buildings should be designed to take account of the needs of jurors, especially those with physical disabilities and those who would benefit from the provision of child minding facilities.

Other Matters

6.31 During the course of this inquiry a number of matters arose which are not encompassed within the committee's terms of reference. Nonetheless, the committee is of the view that these matters should be drawn to the Government's attention.

Should the Crown's Right to Peremptory Challenge be Replaced with a Right to Stand Aside?

6.32 Three methods exist for a party to prevent a prospective juror from taking his or her place on the jury during the impanelling process: the peremptory right of challenge, the challenge for cause procedure and the Crown's former right to stand aside. Presently, the Crown and each accused have a right of peremptory challenge. A peremptory challenge is an objection to a prospective juror for which no reason need be given.[453] A person who is ineligible or disqualified may be challeged for cause. A challenge for cause may also be made where the juror is suspected of actual bias. In Victoria a challenge for cause is determined by the trial judge[454] and will only be granted if a sufficient foundation in fact is provided; a mere suspicion of possible bias is not enough.[455]

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452 Submission nos. 68 & 69.

453 *CCH Maquarie Dictionary of Law*, 2nd. ed., CCH, Sydney, 1993, p. 28.

454 *Juries Act 1967*, s. 38.

455 *Murphy v. R.* (1989) 167 C.L.R. 94.

6.33 In Victoria before to the *Juries (Amendment) Act 1993* came into operation the Crown had the right to stand aside a prospective juror without having to show cause. The difference between standing a juror aside and a peremptory challenge is that if the jury panel is exhausted before the required number of jurors is selected, the cards of those who were stood aside are returned to the ballot box and are redrawn. Thereafter the Crown may not stand aside but may only challenge for cause.[456]

6.34 The right of peremptory challenge has a major impact on the representativeness of the jury system. Its use tends to make juries less representative of the community. The right of peremptory challenge was abolished in England in 1988[457] following a recommendation of the Roskill Fraud Trials Committee that they should be abolished in relation to fraud trials.[458] A more general move for their abolition arose after what was thought to be their inappropriate use in the Cyprus secrets trial. In that case the nine defendants essentially pooled their peremptory challenges after their legal representatives had discussed how they were to be used to the best effect. This tactic was said by the Government to be an inappropriate manipulation of the jury system and to have led to unjustified acquittals.[459]

6.35 Recently there has been a discernible trend in Australian jurisdictions to limit the number of peremptory challenges. In Victoria in 1993 the Government enacted the *Juries (Amendment) Act* which reduced the number of peremptory challenges in criminal inquests from eight to a formula which gives an accused six, five or four peremptory challenges depending upon the number of accused who are standing trial. In the same Act the Crown's right to stand aside jurors (which was unlimited until the pool was exhausted) was abolished. The Crown now has the same number of peremptory challenges as the accused.[460] Additional challenges are allowed if the Crown and the accused agree. At the time of introducing the amendment Mr S. J. Plowman, on behalf of the Attorney–General, said:[461]

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456 See *Juries Act 1967* (Vic.), s. 33 as it stood prior to the 1993 amendment.

457 Criminal Justice Act 1988 (U.K.), s. 118.

458 United Kingdom, Fraud Trials Committee, *Report* (Lord Roskill, Chairman), HMSO, London, 1986, pp. 130–131.

459 Interview conducted by the Law Reform Committee Delegation with Michael Hill, QC in London on 4 July 1995. See also, 33 *Halsbury Statutes of England*, pp. 139–140.

460 *Juries (Amendment) Act 1993* (Vic.), s. 6.

461 Victoria, Legislative Assembly 1993, *Debates*, vol. 7, p. 1157.

> The question of peremptory challenges does not simply reflect a desire to generate cost savings. Rather it goes to the fundamental notion of the jury as a body which represents and reflects the broad spectrum of community attitudes and perspectives. It has been suggested that the use of the challenges can, particularly in multi-header trials where a number of accused can aggregate their challenges, lead to distortions in the representative nature of the jury.

6.36 Traditionally the Crown has no right of peremptory challenge, however, in recent years many Australian jurisdictions and New Zealand have given the Crown a right of peremptory challenge equivalent to that of an accused person. The number of peremptory challenges available to the Crown varies. In New South Wales and South Australia three peremptory challenges are allowed,[462] in the Northern Territory and New Zealand there are six,[463] while in the Australian Capital Territory, Queensland and Western Australia eight challenges are permitted.[464] In the United States each side has between ten and twenty peremptory challenges depending on the nature of the offence.[465]

6.37 In addition to a right of peremptory challenge in the Crown, some jurisdictions continue to allow the Crown to stand aside potential jurors. In the Australian Capital Territory, the Northern Territory, New Zealand and Western Australia the court can order any juror to stand aside at the request of the Crown. In New Zealand the Judge may stand aside jurors on the application of a party (including the accused) with the consent of any other opposing party. A direction to stand aside may also be given by the Judge on his or her own motion where this is considered to be in the interests of justice. In the Northern Territory the Crown can apply for an order to stand aside a maximum of six jurors, while in Western Australia the limit is four. There is no limit on the Crown's right to request the court to stand aside jurors in the Australian Capital Territory.[466]

6.38 The committee accepted evidence from the Victorian Director of Public Prosecutions to the effect that the Crown's right to peremptorily challenge

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462 *Jury Act 1977* (NSW), s. 42, *Juries Act 1927* (SA), s. 61.

463 *Juries Act 1980* (NT), s. 44; *Juries Act 1981* (NZ), s. 24. In New Zealand if there are two or more accused the Crown has twelve peremptory challenges. In the Northern Territory in cases involving a capital offence, which is one carrying a penalty of life imprisonment such as murder, twelve jurors may be challenged, see *Juries Act 1980* (NT) , ss. 6, 44.

464 *Juries Act 1967* (ACT), s. 34; *Jury Act 1995* (Qld), s. 42; *Juries Act 1957* (WA), s. 38.

465 See e.g. California, Trial Jury Selection and Management Act, s. 231.

466 See *Juries Act 1967* (ACT), s. 33; *Juries Act 1980* (NT), s. 43; *Juries Act 1981* (NZ), s. 27; *Juries Act 1957* (WA), s. 38.

potential jurors should be replaced with a right to stand aside.[467] At a public hearing held into the practice of jury vetting the Director said:[468]

> We see a huge danger in the development of the peremptory challenge for the Crown. When the Crown has legislatively gained the right to make a peremptory challenge it might actually use it. That is moving a long way from the concept of juries as they are in this country and towards the approach of jury empanelling that is taken in other countries: a body of experts seeking to advise on how to empanel favourable juries. We do not think that is what it is all about and suggest that it would be a bad step for this country to go that way.

6.39 The Director regards the ability of the Crown to peremptorily challenge jurors as inconsistent with the need to maintain public confidence in the fairness of the process. Prosecutors must not be seen to be challenging potential jurors for tactical reasons in order to obtain a favourable jury. Rather, in fulfilling its 'traditional role as the guardian of due process'[469] the Crown should only stand aside a prospective juror in the interests of justice. The committee believes that the distinction between a peremptory right of challenge and a right in the Crown to stand aside a prospective juror is important and should be re-introduced.

6.40 As noted earlier, another important distinction between a right of peremptory challenge and a power to stand aside is that if the jury pool is exhausted those persons who were stood aside return to the pool and become available for selection. If the Crown then wishes to exclude them from the jury, it must show cause.

6.41 A need to return to the old system of the Crown standing aside jurors, rather than using peremptorily challenges, was demonstrated in the case of *R. v. Anderson*.[470] After a juror had been discharged because of knowledge of the principal witness, the court was faced with the problem that there was an insufficient number of potential jurors to form a panel after allowing the Crown and the accused to exhaust their rights of peremptory challenge. Because of the exercise of these challenges, the panel was exhausted before a twelfth juror could be chosen.[471] Problems of this kind are more likely to arise in small country towns where the panel of potential jurors may be reduced because someone knows the accused or one of the witnesses. Had the Crown

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467 Mr G. Flatman, QC, Director of Public Prosecutions, op. cit., pp. 26–27.

468 ibid., p. 5.

469 *R. v. Su & Ors.* (Supreme Court of Victoria, Court of Appeal, 15 Dec. 1995), p. 28.

470 *R. v. Anderson* (Supreme Court of Victoria, Court of Appeal, 14 Mar. 1996).

471 ibid., p. 4.

merely stood aside the potential jurors instead of challenging them, they would have returned to the pool and been available for selection.

Recommendation 80

A right in the Crown to stand aside prospective jurors should be substituted for the right in the Crown of peremptory challenge.

Guidelines for Standing Aside by the Crown

6.42 In *R. v. Su & Ors.* the Victorian Court of Appeal acknowledged that there may be a need for guidelines governing the exercise of the Crown's right to peremptory challenge (or stand aside). After noting the practice in the United Kingdom where guidelines for the exercise of the Crown's right to stand aside have been promulgated by the Attorney-General,[472] the court observed:[473]

> it may well be that the time has arrived for the introduction of similar guidelines in this State, if only to ensure that the Crown's newly possessed right of peremptory challenge is used for legitimate and not capricious purposes.

6.43 The Victorian Office of Public Prosecutions has accepted that it may be appropriate for the Director of Public Prosecutions to issue guidelines published in the Government Gazette on the exercise of this discretion.[474] There is already a procedure for the exercise of peremptory challenges which is contained in the organisation's *Office Manual*.[475] However, this procedure is contained in an internal document and is not readily available to members of the public. The manual provides:[476]

> Prospective jurors should not be challenged for the purpose of selecting a particular type of jury by reference to such considerations as age, occupation, sex or ethnic origin. Nor should the right to peremptory challenge be exercise arbitrarily or capriciously. The question in every case is whether the individual is unfit for any reason to serve as a member of the jury.

6.44 The Commonwealth Director of Public Prosecutions has published guidelines to assist prosecutors in exercising their discretion to peremptorily

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472 See *Attorney-General's Guidelines on Exercise by the Crown of its Right to Stand-by* (1989) 88 Cr. App. R. 123.

473 *R. v. Su & Ors.* (Supreme Court of Victoria, Court of Appeal, 15 Dec. 1995), p. 32.

474 Submission no. 93.

475 Mr G. Flatman, QC, Director of Public Prosecutions, op. cit., p. 35.

476 Extract from the Office Manual of the Office of Public Prosecutions.

challenge or stand aside jurors[477] and, as noted above, in the United Kingdom there are also published guidelines promulgated by the Attorney-General on the exercise by the Crown of its right to 'stand-by'.[478]

6.45 The committee has concluded that there is a need for accessible guidelines governing the Crown's right to stand aside (or peremptorily challenge) prospective jurors.

Recommendation 81

The Director of Public Prosecutions should publish guidelines on the exercise of the Crown's right to stand aside (or to peremptorily challenge, in the event that this is retained).

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477 Commonwealth, Director of Public Prosecutions, *Annual Report 1987–1988*, AGPS, Canberra, 1988, pp. 188–192.

478 *Attorney-General's Guidelines on Exercise by the Crown of its Right to Stand-by* (1989) 88 Cr. App. R. 123.

APPENDIX A LIST OF SUBMISSIONS

No.	*Date of Submission*	*Name*	*Affiliation*
1	2 November 1994	confidential	
2	11 November 1994	Mr S. G. Whitty	citizen
3	11 November 1994	Ms D. L. Duthie	citizen
4	16 December 1994	Mr D. G. Stolz	Lutheran Church of Australia—Victorian District
5	15 December 1994	Rev A. W. Davies	Assemblies of God in Australia—Victoria, Tasmania Conference
6	20 December 1994	Ms Leanne Raven	Nurses Board of Victoria
7	20 December 1994	Mr Barry Rust	The Association of School Councils in Victoria Inc.
8	21 December 1994	Mr Joseph AD Bowes	Apostolic Church (Australia)
9	21 December 1994	Mr Peter Carter	Royal Australasian College of Surgeons
10	22 December 1994	Mr Denis Sanders	Acting Public Service Commissioner
11	5 January 1995	Mr J. G. Little	Parliament of Victoria, Legislative Assembly
12	7 January 1995	Mr Alex Proudfoot	The Public Policy Assessment Society Inc.
13	12 January 1995	Ms Kathleen Townsend	The Department of the Prime Minister and Cabinet
14	11 January 1995	Ms Maggie Sutherland	Victorian Parliamentary Debates
15	16 January 1995	Mr A. V. Bray	Parliament of Victoria, Legislative Council
16	16 January 1995	Mr J. R. Godfredson	Metropolitan Fire Brigades Board

No.	*Date of Submission*	*Name*	*Affiliation*
17	16 January 1995	Mr N. E. Devenish	Seventh-day Adventist Church (Victoria Conference)
18	17 January 1995	Mr Neil Lennie	Australian Council for Educational Administration Inc.
19	18 January 1995	Mr James Bowen	Family Council of Victoria, Legal Committee
20	19 January 1995	Mr David Hall	Victorian Deaf Society
21	20 January 1995	Mr S. H. P. Marty	Pharmacy Board of Victoria
22	20 January 1995	Ms Jennifer Lake	Executive Director, Australian Physiotherapy Association
23	16 December 1994	Ms Geraldin Wilson	Institute of Professional Secretaries (Australia), Victorian Division
24	19 January 1995	Mr C. A. Barry	Acting State Electoral Commissioner
25	20 January 1995	Ms Margery Priestley	Australian College of Midwives Incorporated (Victoria Branch)
26	20 January 1995	Mr Tom McKnight	Human Rights and Equal Opportunity Commission
27	23 January 1995	Dr Carlyle Perera	Department of Health and Community Services
28	16 January 1995	Mr W. H. Witford	citizen
29	17 January 1995	Ms S. C. Dawbarn	solicitor
30	19 January 1995	Ms Aileen McFadzean	National Federation of Blind Citizens of Australia Ltd.
31	19 January 1995	Miss Roz Curnow	The Institute of Legal Executive (Victoria)
32	23 January 1995	N. E. Renton	N E Renton & Associates
33	19 January 1995	Mr John Van Groningen	Department of Justice, Correctional Services
34	19 January 1995	Ms Andrea Weber	citizen
35	24 January 1995	Mrs Noelle Sullivan	Women's Action Alliance

No.	*Date of Submission*	*Name*	*Affiliation*
36	23 January 1995	Mr Rhys Maggs	State Emergency Services Victoria
37	23 January 1995	Ms Lyn Gunawan	citizen
38	24 January 1995	Mr Melvyn Bennett	Victims of Crime Assistance League Inc.
39	24 January 1995	Rev Peter Norden	Victorian Criminal Justice Coalition
40	25 January 1995	Mr Andrew Tsindos	Victorian Bush Nursing Association
41	16 January 1995	Mr K. R. Grimshaw & Mr M. R. Nipper	Brethren
42	20 January 1995	Asst. Comr. P. E. Driver	Victoria Police, Corporate Policy, Planning & Review Department,
43	24 January 1995	Ms Fiona Ogilvy-O'Donnell	Association of Independent Schools of Victoria Inc.
44	27 January 1995	Rev John Simpson	Baptist Union of Victoria
45	30 January 1995	Ms M. B. Wilson	Veterinary Board of Victoria
46	31 January 1995	Mr Peter Lord	Federated Teachers' Union of Victoria
47	2 February 1995	Ms C. Benjamin, A.M.	Court Network
48	4 February 1995	Mrs Joy P. Ring	citizen
49	6 February 1995	B. W. Perry	Acting Ombudsman, Victoria
50	7 February 1995	Bro P. Slip	Victorian Christadelphian Committee for Matters of State
51	1 February 1995	Mr David Edwards	Victorian Employers' Chambers of Commerce and Industry
52	7 February 1995	Dr F. G. Donaldson	Association of Heads of Independent Schools of Australia
53	23 January 1995	Mr Maurice V. Sheehan	Pharmacy Guild of Australia
54	9 February 1995	Ms Carmel Morfuni	Victoria Women's Council

No.	*Date of Submission*	*Name*	*Affiliation*
55	10 February 1995	Dr A. T. Rose	Royal Australian College of General Practitioners
56	9 February 1995	Rev J. P. Haldane-Stevenson	citizen
57	16 February 1995	Ms Ann Sanson	Australian Phsychological Society Ltd.
58	13 February 1995	Ms Lois O'Donoghue, CBE, AM	Aboriginal and Torres Strait Islander Commission
59	16 February 1995	Mr Barrie L. Sutton	Prison Fellowship of Australia
60	17 February 1995	Mrs Barbara Rozenes	citizen
61	15 February 1995	Mr Geoffrey M Coffey	Victorian Amburlance Services' Association
62	23 February 1995	Chief Judge G. Waldron & Judge P. Mullaly	County Court Judges' Law Reform Committee
63	25 January 1995	Mr John Gidley	Department of Justice, Courts and Tribunals Services Division
64	27 February 1995	Ms Lyn Gunawan	citizen
65	27 February 1995	Mr Garrie J. Moloney	Victorian Council for Civil Liberties Inc.
66	28 February 1995	Mr Roderick Smith	Law Institute of Victoria
67	28 February 1995	W. Brind Zichy-Woinarski, Q C	Victorian Bar
68	28 February 1995	Mr Remy de Weil	Criminal Bar Association
69	6 March 1995	Mr David J. Habersberger, QC	Victorian Bar Council
70	7 March 1995	Mr Douglas Kent	Royal Victorian Institute for the Blind
71	1 March 1995	Fr Peter Norden	Melbourne Catholic Social Services
72	6 March 1995	Mrs Fay D'Arcy	citizen
73	9 March 1995	Susan Hopgood	Victorian Secondary Teachers' Association

74	9 March 1995	Mr Robert Johnson	Uniting Church in Australia, Synod of Victoria

No.	*Date of Submission*	*Name*	*Affiliation*
75	20 March 1995	Sr Leonie Mayne	St Joseph's Provincialate
76	14 March 1995	Rev David W. Brownless	Wesleyan Methodist Church of Australia
77	28 March 1995	Ms Regina Rowan	Victorian Catholic Schools' Association
78	30 March 1995	Mr G. H. Sangster & Mr P. R. Stevens	Brethren
79	31 March 1995	Jennifer Richards	Australian Association of Speech and Hearing
80	31 March 1995	Mr P. T. Babie	Melbourne University, Faculty of Law
81	27 March 1995	Mr Michael Flinn	Victorian Independent Education Union
82	22 March 1995	confidential	
83	6 April 1995	Rev T. M. Doyle	Catholic Education Office
84	30 March 1995	Mr Philip Graves	Australian College of Paediatrics
85	18 April 1995	Archbishop F. Little	Roman Catholic Archbishop of Melbourne
86	April 1995	Dr John Paterson	Department of Health and Community Services
87	24 April 1995	Mr L. E. & Mrs B. J. Sketcher	citizen
88	2 May 1995	Ms Maria Bohan	Carers Association Victoria Inc.
89	3 May 1995	Ms Joanne Kerr	North Melbourne Legal Service
90	May 1995	Ms Fiona Hayes	Disability Discrimination Law Advocacy Service
91	24 May 1995	Mr Garry Pearson	Australian Dental Association
92	29 May 1995	Dr G. P. Lyons	State Electoral

			Commissioner

No.	*Date of Submission*	*Name*	*Affiliation*
93	13 June 1995	Mr G. Flatman, QC, Mr P. A. Coghlan, QC, Mr R. Read, & Mr P. Wood	Director of Public Prosecutions, Chief Crown Prosector, Crown Prosectutor & Office of Public Prosections, Victoria
94	3 July 1995	Mr John Gidley	Department of Justice, Courts and Tribunal Services Division
95	24 July 1995	Mr Philip Graves	Australian College of Paediatrics
96	28 August 1995	Mr John Goodman	citizen
97	30 August 1995	Fr Paul A. Stuart	Senate of Priests of the Archbishop of Melbourne
98	19 September 1995	Mr Damian Murphy	Victorian Bar
99	2 January 1996	Mr Andrew Crisp	citizen
100	25 January 1996	Miss Roz Curnow	Institute of Legal Executives
101	26 January 1996	Mr Alex Proudfoot	The Public Policy Assessment Society Inc.
102	30 March 1996	Mrs L. A. Ritchie	citizen
103	29 January 1996	Mr F. A. Garner	citizen
104	31 January 1996	Mr Martin Vink	citizen
105	29 January 1996	Ms Elizabeth A Dexter	citizen
106	29 January 1996	Mr Stephen Screaton	citizen
107	30 January 1996	Mr Eric L. Hayes	citizen
108	31 January 1996	Judge Michael Strong	County Court of Victoria
109	2 February 1996	Mr Garry Pearson	Australian Dental Association
110	7 February 1996	Mr Brendan Meehan	citizen
111	8 February 1996	Mr Justice Norman O'Bryan	Supreme Court of Victoria
112	9 February 1996	Asst. Comr. P. E. Driver	Victoria Police, Corporate Policy, Planning & Review Department
113	9 February 1996	Mr E. S. Blain	Jury Association Australia

114	7 February 1996	Mr E. C. Batt, M	Magistrates' Court Victoria

No.	*Date of Submission*	*Name*	*Affiliation*
115	12 February 1996	Dr. C. Sotiropoulos	citizen
116	9 February 1996	Confidential	citizen
117	12 February 1996	Mr Darryl Towers	citizen
118	10 February 1996	confidential	citizen
119	8 February 1996	Mr D. A. Kendall, QC	Common Law Bar Association
120	9 February 1996	Brig. John P. A. Deighton	Returned & Services League Of Australia
121	13 Febuary 1996	R. Bell	Australian Electoral Commission
122	12 February 1996	J. Henderson	Better Hearing Australia, Victoria Branch
123	12 February 1996	Judge J. T. Hassett	County Court of Victoria
124	10 February 1996	Lyn Gunawan	citizen
125	12 February 1996	Mr David Robertson	Association of Independent Schools of Victoria Inc.
126	22 February 1996	Mr Ross Gordon	Victoria Legal Aid
127	27 February 1996	Mr Ivan Himmelhoch	Victorian Bar
128	26 February 1996	Ms Shirley Horne, AM	Council on the Ageing (Vic.)
129	4 March 1996	Ms Liz Curran	Federation of Community Legal Centres
130	4 March 1996	Ms Sue Austin	Australian Association of Speech & Hearing
131	4 March 1996	Mr Douglas I Hornsey	citizen
132	18 March 1996	Mr John Wadsley	Victorian Bar
133	20 March 1996	Mr John Van Groningen	Department of Justice, Correctional Services
134	25 April 1996	Ms Betty Hayes	citizen
135	14 May 1996	Mr G. Flatman, QC, Mr P. A. Coghlan, QC, Mr R. Read, & Mr P. Wood	Director of Public Prosecutions, Chief Crown Prosector, Crown Prosectutor & Office of Public Prosections, Victoria

136	26 July 1996	Mr K. Trotter	citizen
137	23 October 1996	Ms Leigh Svendsen	Employment Law Services

APPENDIX B LIST OF WITNESSES

Hearings held during the 52nd Parliament

No.	*Date of Hearing*	*Witness*	*Affiliation*
1	12 December 1994	Mr J. Artup Mr M. Kennedy	Deputy Sheriff (Juries), Supreme Court of Victoria Assistant Jury Coordinator, Supreme Court of Victoria
2	16 January 1995	Mr J. Artup Mr M. Kennedy	Deputy Sheriff (Juries), Supreme Court of Victoria Assistant Jury Coordinator, Supreme Court of Victoria
3	30 January 1995	Assoc Prof M. Findlay Mr D. Anton	Director, Institute of Criminology, University of Sydney. Lecturer in Law, University of Melbourne
4	13 February 1995	Dr G. Lyons Dr C. Drury } Mr P. Strickland } Dr P. Ammirato } Mr P. Babie	Electoral Commissioner, Victoria State Electoral Commission, Electoral Rolls Branch Lecturer in Law, University of Melbourne
5	6 March 1995	Mr J. Bowen	Prosecutor for the Queen (retired)
6	10 April 1995	His Honour Judge P. Mullaly	Chairman, Law Reform Committee, County Court of Victoria

7	1 May 1995	Mr R. van de Wiel Mr G. Gronow } Mr A. McMonnies } Mrs C. Bartlett }	Criminal Bar Association Law Institute of Victoria
8	22 May 1995	Mr N. Wood Mr R. Wood	Solicitors, Cape Town, South Africa

No.	*Date of Hearing*	*Name*	*Affiliation*
9	11 September 1995	Ms M. Latham Mr M. L. Sides, QC	Director, Criminal Law Review Division, New South Wales Attorney-General's Department Senior Public Defender, New South Wales
10	16 October 1995	Mr A. Perkins Mr S. Dunstan } Ms J. Paulin }	Partner, Meredith Connell and Company, Solicitors, Auckland, New Zealand Ministry of Justice, Wellington, New Zealand

Hearings held during the 53rd Parliament

No.	*Date of Hearing*	*Name*	*Affiliation*
1	11 July 1996	The Honourable James Guest	former Chairman, Law Reform Committee
2	29 July 1996	Mr G. Flatman, QC Mr R. Read Ms J. Atkinson	Director of Public Prosecutions; Crown Prosecutor; and Manager, Policy and Research, Office of Public Prosecutions
		Mr D. Grace, QC	Chairman, Criminal Law Section, Law Institute of Victoria
		Mr T. Button Mr J. Artup	Deputy Sheriff (Operations) and Deputy Sheriff (Juries), Department of Justice
		A/C G. Brown } Mr J. Frigo } Mr P. Donelly }	Victoria Police

Extract from Minutes of a Meeting of the Law Reform Committee held on Monday, 14 October 1996

Question— That recommendation 14, as amended, stand part of the Report— put.

The Committee divided. (Mr Perton in the Chair)

AYES, 5	**NOES, 2**
Mr N. Cole	Mr F. Andrighetto
Hon C. Furletti	Mr A. Paterson
Hon M. Gould	
Mr P. Loney	
Mr J. Thwaites	

And so it was resolved in the affirmative.