



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT
JURY SERVICE

(LRC 107-2013)

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Law Reform Commission

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LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 180 documents (Working Papers, Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

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President:

Mr. Justice John Quirke
Former Judge of the High Court

Full-time Commissioner:

Finola Flanagan, Barrister-at-Law

Part-time Commissioner:

Marie Baker, Senior Counsel

Part-time Commissioner:

Donncha O'Connell, Lecturer in Law

Part-time Commissioner:

Thomas O'Malley, Barrister-at-Law

LAW REFORM RESEARCH STAFF

Director of Research:

Raymond Byrne BCL, LLM (NUI), Barrister-at-Law

Legal Researchers:

Joseph Harrington LLB (Ling Franc) (Dub), BCL (Oxon), Barrister-at-Law

Colm Kitson BCL (NUI), LLM (QUB), Barrister-at-law

Kate McGovern LLB (Dub), LLM (Edin), Barrister-at-Law

Roz O'Connell BA, LLB (NUI), LLM (Dub)

Emma Roche-Cagney BCL (Clinical) (NUI), LLM (NUI)

Denise Roche BCL (Int), Solicitor

ACCESS TO LEGISLATION RESEARCH STAFF

Project Manager:

Alma Clissmann BA (Mod), LLB, Dip Eur Law (Bruges), Solicitor

Assistant Project Manager:

[Vacant at time of writing]

Legal Researchers:

Aileen O'Leary BCL (NUI), LLM (NUI), AITI, Solicitor

Morgan Harris LLB (UKC), Barrister-at-Law

ADMINISTRATION STAFF

Head of Administration:

Ciara Carberry

Executive Officer:

Deirdre Bell

Staff Officer:

Annmarie Cowley

Clerical Officers:

Ann Browne

Joe Cooke

Liam Dargan

Legal Information Manager:

[Vacant at time of writing]

PRINCIPAL LEGAL RESEARCHERS FOR THIS REPORT

Donna Lyons LLB (Dub), LLM (NYU), Attorney-at-Law

Jane O'Grady BCL, LLB (NUI), LPC (College of Law)

CONTACT DETAILS

Further information can be obtained from:

Head of Administration
Law Reform Commission
35-39 Shelbourne Road
Ballsbridge
Dublin 4

Telephone:

+353 1 637 7600

Fax:

+353 1 637 7601

Email:

info@lawreform.ie

Website:

www.lawreform.ie

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Mr Brian Battelle, Courts Service
Dr John Bosco Conama, Centre for Deaf Studies, Trinity College Dublin
Ms Elfrieda Carroll, Sign Language Interpreting Service
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Ms Patricia Casey, County Registrar
Ms Marian Chambers Higgins, County Registrar
Dr Mark Coen, School of Law, Trinity College Dublin
Ms Niamh Connolly, NCBI
Ms Evelyn Conway, Sign Language Interpreting Services
Mr John Coyle, Courts Service
Ms Miriam Delahunt, Barrister-at-Law
Mr Robert Eager, Solicitor
Dr Claire Edwards, University College Cork
Mr Michael Farrell, Senior Solicitor, Free Legal Advice Services
Mr Remy Farrell, SC
Dr Eilionoir Flynn, NUI Galway
Ms Julianne Gillen, Deafhear
Mr James Hamilton, former Director of Public Prosecutions
Dr Conor Hanly, School of Law, NUI Galway
Ms Gillian Harold, University College Cork
Ms Liz Harrigan, Northern Ireland Courts and Tribunals Service
Ms Elizabeth Howlin, Office of the Director of Public Prosecutions
Dr Niamh Howlin, Queen's University Belfast
Ms Geraldine Hurley, Courts Service
Mr Matthias Kelly, QC, SC
Mr Des Kenny, National Council for the Blind of Ireland
Ms Lorraine Leeson, Centre for Deaf Studies, Trinity College Dublin
Mr Brendan Lennon, DeafHear
Ms Sarah Lennon, Inclusion Ireland
Mr Pat McCarthy, Blind Legal Alliance
Mr Justice Patrick McCarthy, judge of the High Court
Mr Justice Bernard McCloskey, former Chair, Northern Ireland Law Commission
Mr Tony McGillicuddy, Barrister-at-Law
Mr Dominic McGreahan, Irish Deaf Society
Ms Lianne Meagher Reddy, Legal Research Intern, Law Reform Commission
Mr Martin Moore, Jurisdictional Redesign Division, Northern Ireland Department of Justice
Mr Liam Mulholland, Office of the Director of Public Prosecutions
Mr Fintan Murphy, County Registrar
Ms Úna ní Raifeartaigh, SC
Ms Betty O'Leary, Barrister
Ms Caroline O'Leary, Sign Language Interpreting Services
Mr Charles O'Mahony, Law Faculty, NUI Galway
Ms Margaret O'Neill, Courts Service
Mr Michael O'Neill, Garda Síochána Ombudsman Commission
Mr Damien Owens, Deafhear
Mr Eddie Redmond, Irish Deaf Society
Mr Noel Rubotham, Courts Service
Ms Susan Ryan, County Registrar
Mr Fintan Sheerin, Trinity College Dublin

Mr Richard Shine, Department of Social Protection
Mr Robbie Sinnott, Blind Legal Alliance
Mr James Wallis, Department of Social Protection
Ms Maria Walls, National Federation of Voluntary Bodies

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INTRODUCTION

A Background

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*¹ and follows the publication of the Commission's *Consultation Paper on Jury Service*.² The Report, like the Consultation Paper, involves an examination of the law concerning how individuals are selected for jury service and related matters, currently set out in the *Juries Act 1976* (as amended).

2. Since the publication of the Consultation Paper, the Commission has received submissions from a broad cross-section of interested parties, and the Commission also held further consultative meetings during 2011 and 2012. The Commission expresses sincere thanks to all those who made submissions on this project and who participated in the consultative meetings. The submissions received, and the material generated through the meetings, have been considered by the Commission in the preparation of this Report, which contains the Commission's final recommendations on this project. The submissions and consultative meetings reinforced the view of the Commission that there is a need for wide-ranging reform of this area of law.

B Scope of the Report

3. The general scope of this Report remains broadly the same as in the Consultation Paper, namely, how people are selected for jury service and related matters. This includes: the process of jury selection based on the electoral register and the use of ICT; whether qualification for jury service should be extended beyond Irish citizenship; jury challenges; capacity and competence to carry out the functions of a juror; the categories of persons who are ineligible for jury service; persons who are excusable as of right from jury service; deferral of jury service; disqualification from jury service arising from criminal convictions; jury tampering; juror misconduct, including independent investigations such as internet searches; juror expenses; lengthy and complex jury trials; and empirical research on the jury process.

4. The Commission accepts that, notwithstanding the breadth of the project, it does not encompass all aspects of the law concerning juries. Without attempting to set out a complete list, the Commission notes that the project does not include discussion of: the organisation of jury districts; the respective roles of the judge and jury; whether juries are sent home or sequestered during cases; jury deliberations; the unreasoned verdict; majority jury verdicts; or jury nullification. While each of these matters is of importance, and may merit separate examination, the Commission emphasises that they fall outside the scope of this project and Report.

5. Bearing in mind the scope of the project, the Commission has approached this Report with a number of overlapping concerns in mind. Firstly, the Commission must have regard to the importance of the jury in the court system in Ireland, in particular that Article 38.5 of the Constitution of Ireland makes jury trial mandatory for most serious criminal offences.³ Second, as the Supreme Court emphasised in *de*

¹ *Report on Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 1.

² *Consultation Paper on Jury Service* (LRC CP 61-2010). This is referred to as the Consultation Paper in the remainder of this Report.

³ Since jury trial in criminal matters is mandated by Article 38.5 of the Constitution (subject to the exceptions for non-jury courts, discussed in Chapter 7 below) the Commission's analysis in this Report places particular importance on the need to ensure that jury trial in criminal cases continues to meet relevant constitutional and international human rights requirements. In addition to jury trial in criminal matters, juries continue to be used in a small number of civil cases, notably in defamation proceedings (the *Defamation Act 2009* retaining juries in High Court defamation actions only) as well as in inquests held under the *Coroners Act 1962* (the *Coroners Bill 2007*, which is currently before the Oireachtas, proposes to retain inquest juries). The *Juries Act 1976* applies to juries summoned in civil cases and in inquests. Section 30 of the 1976 Act also refers to a jury empanelled under a commission *de lunatico inquirendo* under section 12 of the *Lunacy Regulation (Ireland) Act 1871*. This type of jury (discussed in paragraph 7.07, below) will become obsolete assuming that the proposed *Assisted Decision-Making (Capacity) Bill* (to be published in 2013), which will repeal the 1871 Act, is

Burca v Attorney General,⁴ the process for selection of juries must, under the Constitution, be broadly representative of society. Third, the Commission has taken into account that, since the decision in the *de Burca* case, a number of international human rights instruments have brought new dimensions to a contemporary analysis of jury trial. Fourth, the Commission has borne in mind the need to reinforce public confidence in jury deliberations, including the need to prevent any interference with juries and to prevent any misconduct by jurors. In Chapter 1, the Commission discusses in more detail the specific matters and principles that flow from the analysis of constitutional and international human rights.

6. As to the actual nature of jury service, the Commission agrees with the analysis of Walsh J in the *de Burca* case that jury service is not an enforceable individual right, but should be more accurately described as a duty that falls on members of the population of the State. Nonetheless, the Commission considers that jury service should be valued and supported to the greatest extent possible by the State, and that any proposed reforms to the legislative framework should also have regard to the principles set out in Chapter 1.

7. The Commission now turns to provide a brief overview of the Report.

C Outline of the Report

8. In Chapter 1 of the Report, the Commission examines the key principles of jury trial as they relate to jury service. The chapter begins by outlining the constitutional provisions related to the jury system in Ireland, together with a brief overview of the development of the modern jury. The chapter emphasises the changes to the legislative provisions on jury selection and jury service in the 20th century, notably those leading to the enactment of the *Juries Act 1976*, which contains the current law on jury selection and jury service. The Commission then turns to discuss the key principles related to jury service that are relevant to the subject-matter of this Report, in particular those derived from the Constitution and international human rights instruments. The Commission concludes the chapter by setting out a summary of these key principles that are relevant to the detailed analysis in the succeeding chapters of the Report.

9. In Chapter 2, the Commission examines the jury selection process and also considers whether to extend qualification for jury service to persons other than Irish citizens. The Commission first examines the process for jury selection, which is currently based on the register of Dáil Éireann electors, and explores whether any viable alternative jury source list might be considered and also discusses the role played by technology in the process. The Commission then considers whether qualification for jury service should be extended to persons other than Irish citizens, particularly in the light of significant increases in recent years in the percentage of the population of the State who are non-Irish citizens. This discussion relates to a number of key principles set out in Chapter 1, in particular whether the current jury pool can continue to be regarded as broadly representative of the community and related principles as to whether expansion of the jury pool to non-Irish citizens would affect the fairness of jury trials.

10. In Chapter 3, the Commission examines jury challenges, that is, objections made to jurors after they have been drawn from the panel of potential jurors but before they have been sworn as jury members. The *Juries Act 1976* currently provides for two types of challenge: challenges without cause shown, sometimes referred to as peremptory challenges, which involve objections made without putting forward a stated reason; and challenges for cause shown, that is, objections based on putting forward a specific reason. The 1976 Act permits each participant in a criminal or civil trial to make seven challenges without cause and, because of this, in practice there are very few occasions in which challenges for cause are made. The Commission examines the two types of challenge by reference to comparable processes in other jurisdictions and then sets out its final recommendations.

11. In Chapter 4, the Commission discusses three matters related to the capacity or competence of potential jurors to carry out their functions as jurors. The Commission first discusses the eligibility of prospective jurors whose physical capacity may require reasonable accommodation to serve on juries.

enacted. The Bill also proposes to implement the key recommendations in the Commission's 2006 *Report on Vulnerable Adults and the Law* (LRC 83-2006).

⁴ [1976] IR 38, discussed in detail at paragraph 1.18ff, below.

The Commission then considers candidate jurors whose mental ill-health may affect their competence to carry out jury duty. The Commission then discusses the separate question as to whether a person's decision-making capacity may affect his or her competence in this respect. The Commission also examines the issue of linguistic capacity and communication. In respect of each of these areas, the Commission notes that one of the guiding principles set out in Chapter 1 of particular relevance is that, in order to meet the requirements of the Constitution concerning a fair trial and comparable provisions in international human rights instruments, jurors should have certain minimum standards of personal capacity and competence, which may require reasonable support and accommodation that do not involve a disproportionate or undue burden.

12. In Chapter 5, the Commission examines the extent to which specific categories of persons should be regarded as ineligible for jury service and to what extent other categories of person may be excused from service. The Commission examines the current categories of persons who are ineligible for jury service, which comprises the President of Ireland, a specific list of persons connected with the administration of justice (including judges, lawyers in practise and members of the Garda Síochána) as well as members of the Defences Forces. The Commission then examines the group of persons who may be excused as of right from jury service, including health care professionals (such as doctors, nurses and veterinary surgeons), civil servants, ordained clergy and teachers. The Commission discusses whether this approach to excusal should be replaced with a general provision on excusal for good cause, which is currently available to any person who does not come within the category of persons who are ineligible or excusable as of right. The Commission also discusses proposals for deferral of jury service to complement the provisions on excusal for good cause.

13. In Chapter 6, the Commission examines the provisions in the *Juries Act 1976* on disqualification of persons from jury service primarily because they have been convicted of certain offences. The Commission then discusses the link between disqualification and the approach taken to expunging criminal records under a spent convictions regime. The Commission also discusses the related process of vetting jury lists to identify persons who are disqualified.

14. In Chapter 7, the Commission examines jury tampering and considers possible reforms aimed at preventing it. This issue concerns the principle, discussed in Chapter 1, that the right to a fair trial requires a jury that is independent and unbiased. The Commission discusses the relevant common law and statutory offences that deal with jury tampering. The Commission also discusses the extent to which non-jury courts have been used to address jury tampering. The Commission then considers the concern expressed that the provisions in the *Juries Act 1976* that permit access to jury lists may, indirectly, facilitate jury tampering.

15. In Chapter 8, the Commission examines to what extent current law is sufficient to deal with the risk of juror misconduct, in particular the risk that a juror may engage in independent investigations, such as searching for information about the case on the internet or visiting a crime scene alone. This involves the application of two principles discussed in Chapter 1, the right to a fair trial and that the jury must be unbiased. The Commission discusses whether the juror's oath to arrive at a verdict "according to the evidence" is sufficient to prevent such misconduct and a related issue, to what extent the publicity surrounding a case could affect the fairness of a trial.

16. In Chapter 9, the Commission examines to what extent juror remuneration and expenses could assist in supporting and encouraging jury service. In Chapter 1, the Commission points out that jury service is correctly described as a civic duty rather than a right but it is nonetheless important that jurors should be encouraged to perform this civic duty and that any disadvantage should be minimised as far as possible. In this Chapter, the Commission examines the current position on remuneration before setting out its final recommendations on this aspect of jury service.

17. In Chapter 10, the Commission examines the challenges posed for jurors in complex or lengthy trials where they are presented with information such as DNA evidence in a murder trial or financial information in a fraud trial. Allied to the complexity of the information presented is that such trials may also extend to months rather than days or weeks. The Commission examines whether non-jury trials or special juries should be used in cases of complexity or in lengthy trials and concludes that before considering these and thereby creating another exception to the general right in Article 38.5 of the Constitution to jury trial, other procedural solutions should first be considered. The Commission therefore

discusses three procedural alternatives, namely, the selection of more than 12 jurors, the use of assessors and the provision of specific information in written form to assist juror comprehension. In this respect the Commission addresses, in particular, the principle discussed in Chapter 1 that in order to ensure the right to a fair trial, jurors should have certain minimum standards of personal capacity and competence, which may require reasonable support and accommodation.

18. In Chapter 11, the Commission examines whether provision should be made for empirical research into the functioning of the jury system and, if so, to what extent. The Commission examines the current position on the secrecy of jury deliberations in Ireland, which is one of the key principles discussed in Chapter 1. The Commission discusses comparative approaches to this question, before setting out its final recommendations concerning the benefits and scope of empirical research.

19. Chapter 12 contains a summary of recommendations made by the Commission.

20. The Appendix contains a draft *Juries Bill* to implement the recommendations in the Report and to consolidate the other provisions currently contained in the *Juries Act 1976*.

CHAPTER 1 KEY PRINCIPLES OF JURY TRIAL AND JURY SERVICE

A Introduction

1.01 In this Chapter the Commission examines the essential components of jury trial that are relevant to the subject-matter of this Report. In Part B, the Commission outlines the constitutional provisions related to the jury system in Ireland, together with a brief overview of the development of the modern jury.¹ The Commission focuses on legislative changes to the law on jury selection and jury service during the 20th century, leading to the enactment of the *Juries Act 1976*, which contains the current law on jury selection and jury service. The Commission then turns in Part C to discuss the key principles related to jury service, in particular those derived from the Constitution and international human rights instruments. The Commission concludes the chapter by setting out a summary of these key principles.

B Jury trial in the Constitution and background to the enactment of the *Juries Act 1976*

1.02 Court hearings involving a jury, whose members are drawn from the general community, are a distinctive feature of common law legal systems, of which Ireland is one. Indeed, Article 38.5 of the Constitution of Ireland contains a general mandatory requirement that, subject to specific exceptions,² “no person shall be tried on any criminal charge without a jury.” This means that, in general, major criminal cases tried on indictment, such as murder and robbery, must involve a jury trial. Thus, in Ireland’s court system, the jury’s role in criminal cases is of major importance because its members have the power to decide that a person is either guilty or not guilty of serious crimes. At one time, juries in Ireland were also used in many civil cases, including in personal injuries actions,³ but they are now used in very few civil cases, the most common being High Court defamation claims.⁴ Because of the central role juries play in the administration of justice, notably in criminal trials, the basis on which persons are qualified and eligible for jury service, and the process for the selection of juries are, equally, of great importance to ensure that there is continued public confidence in the jury system.⁵

1.03 The general right to a jury trial in Article 38.5 of the Constitution forms part of the more general right in Article 38.1 that “[n]o person shall be tried on any criminal charge save in due course of law.” The

¹ For a more detailed discussion of the historical development of the jury system, see the Consultation Paper, Chapter 1.

² The specified exceptions are: (a) Article 38.2, which allows for summary trials (in the District Court) for minor criminal offences; (b) Article 38.3, which allows, on specified conditions, non-jury trials in Special Criminal Courts for major criminal offences; and (c) Article 38.4, which allows for trial by military tribunals for offences against military law and to deal with a state of war or armed rebellion. In Chapter 7, below, the Commission discusses the extent to which special criminal courts have been used to deal with the risk of jury tampering.

³ The *Courts Act 1988* abolished the right to have High Court personal injuries actions decided by a jury.

⁴ The *Defamation Act 2009* retained juries for High Court defamation actions.

⁵ The Commission also notes that juries are also empanelled for inquests held under the *Coroners Act 1962* and that the *Coroners Bill 2007*, which is currently before the Oireachtas, proposes to retain inquest juries. The *Juries Act 1976* applies to juries summoned in civil cases and in inquests. Section 30 of the 1976 Act also refers to a jury empanelled under a commission *de lunatico inquirendo* under section 12 of the *Lunacy Regulation (Ireland) Act 1871*. This type of jury (discussed in paragraph 7.07, below) will become obsolete if the proposed *Assisted Decision-Making (Capacity) Bill* (scheduled to be published in 2013), which proposes to repeal the 1871 Act, is enacted.

phrase “due course of law” echoes the “due process” clause in the US federal Constitution, and Kelly has noted that:

“Article 38.1 has been interpreted to embrace a range of both procedural and substantive rights, the content of which has been influenced by common law tradition, the European Convention on Human Rights and the case law of the European Court of Human Rights, United States constitutional practice, international agreements, and, not least, the views of the Irish judiciary as to what constitutes minimum standards of procedural and substantive justice in criminal trials.”⁶

1.04 In this respect, therefore, the current constitutional position afforded to juries can only be fully understood against the historical development of jury trial, to which the Commission now turns.

(1) Early History and Development of Jury Trial

1.05 The exact origins of the jury remain unclear, but the concept of 12 persons being nominated to determine whether specific persons had committed a crime has been traced to about the year 1000 AD,⁷ and it therefore appears to have predated the arrival of the common law in England.⁸ The jury was initially referred to as the “jurata”, which translates as “a group of persons who have taken an oath or are sworn,” and the jurors its “juratores.” This was because, in the institution’s infancy, 12 jurors were primarily empanelled from the neighbourhood as witnesses, and occasionally as expert witnesses. Therefore, jurors provided factual evidence and information about local customs, and also testified as to their own knowledge of the circumstances surrounding the crime and any knowledge held about the accused.⁹ The development of jury trial in Ireland was very similar to its development in England and Wales. Therefore, the English common law, which included the right to jury trial, gradually replaced the system of Brehon law in existence in Ireland, so that by the 17th Century, the common law tradition had a firm hold throughout the island.¹⁰

1.06 Until the middle of the 17th century, juries who ignored the judge’s directions or who acquitted the accused in spite of convincing evidence pointing to his or her guilt were at risk of harsh punishments. *Bushell’s Case* put an end to this practice in 1670. There, the jury acquitted two defendants in the face of overwhelming evidence and were fined as a result. The foreman of the jury, William Bushell, refused to pay, and was imprisoned. Vaughan CJ found that juries would serve no meaningful purpose if they were obliged to follow the judge’s interpretation of the facts, and this view then gave rise to the common law principle that the jury’s decision on questions of fact was unassailable.¹¹ *Bushell’s case* thus established the modern concept of the jury as the independent fact-finder, subject to directions from the judge on questions of law.

1.07 The 18th and 19th centuries in Ireland, complete with their many experiences of violence and sectarian conflict, gave rise to unique challenges for the institution of the jury. This was a time of intimidation of both jurors and witnesses, widespread antipathy towards the Crown and close community

⁶ Hogan and Whyte (eds) *Kelly: The Irish Constitution* 4th ed (Lexis Nexis: Butterworths, 2003) at 1042 (citations omitted).

⁷ Walker *Oxford Companion to Law* (Oxford University Press 1980) at 686, refers to an ordinance of King Ethelred II (c.1000 AD) which provided that “the reeve and 12 senior thegns should go out and present, on oath, all whom they believed to have committed any crime.”

⁸ See Morgan (ed) *Forsyth History of Trial by Jury* (J. Cockcroft 1875) at 2-5. Prior to the establishment of jury trials, guilt or innocence in criminal matters was determined by either oaths of compurgators, or trial by ordeal. See Williams *The Proof of Guilt: A Study of the English Criminal Trial* 3rd ed (Hamlyn Lectures Seventh Series, Stevens and Sons 1963) at 24.

⁹ Seldon *Law and Lawyers in Perspective* (Harmondsworth 1987) at 74. See also, Devlin *Trial by Jury* (Hamlyn Lectures Eighth Series, Stevens & Sons 1966) at 8.

¹⁰ Jackson, Quinn, O’Malley “The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past” in Vidmar (ed) *World Jury Systems* (Oxford University Press 2000).

¹¹ Hostettler *The Criminal Jury Old and New: Jury Power from Early Times to the Present Day* (Waterside Press 2004) at 70-72.

ties between jurors and accused, which combined to create serious difficulties in securing convictions. As a consequence, the authorities employed various tactics to secure the convictions of criminals.¹² Jury trial was suspended for a host of offences, and where the use of juries was unavoidable, the Crown exercised its right to “stand by” jurors,¹³ transferred cases to alternate venues, employed “special jurors”,¹⁴ and reduced charges in an effort to persuade accused individuals to plead guilty. The use of the prosecution’s right to ask potential jurors to stand by was particularly controversial and frequently led to accusations of jury packing. However, the controversy surrounding jury packing was reduced by the enactment of the *Juries (Ireland) Act 1871* which implemented a system of alphabetical rotation and thereby limited the discretion of the sheriff in empanelling the jury.¹⁵

1.08 The defence was also in a position to influence the composition of the jury through the frequent use of the right to peremptorily challenge up to 20 jurors in felony cases, and up to 6 in misdemeanour cases, with the result that, despite the strenuous efforts of the Crown, conviction rates remained low. Therefore, during periods of intense unrest, jury trial was suspended entirely and a number of special courts were established in their place.¹⁶ Against this background, it may not be surprising that the right of an accused to trial with a jury in serious criminal cases is now enshrined in Article 38.5 of the Constitution of Ireland.

(2) Juries Act 1927

1.09 In Ireland, the *Juries Act 1927*, which consolidated into a single Act the pre-1922 legislation on juries, including the *Juries (Ireland) Act 1871*, set out the key provisions on jury selection and jury service until it was replaced by the *Juries Act 1976*, discussed below. Eligibility for jury service under the *Juries Act 1927* largely followed the model in the *Juries (Ireland) Act 1871*, and was thus decided on the basis of occupation of land set at a specified rateable value. The 1927 Act provided that Irish citizens aged 21 or upwards and under 65 who were on the electoral register, and who possessed the relevant rating qualification, were eligible for jury service.

1.10 The 1927 Act also provided that women should not be liable for jury service, even if they met the property-owning requirement (which was, at that time, unlikely) unless they themselves made an application to serve. From the late 19th century, while the women’s movement had often linked the argument for the right to vote with extension of jury service for women, universal suffrage was conceded in many States before universal jury service for women. Many Parliaments in common law states rejected the idea that women should sit on juries. Two main arguments were made in this respect: firstly, that women (especially married women) should not be required to serve on juries where this would conflict with their duties at home;¹⁷ and, second, that the features of certain criminal trials (notably those involving sexual offences) would be too onerous for women of a certain (delicate) temperament.¹⁸

¹² Howlin “Controlling Jury Composition in Nineteenth-Century Ireland (2009) 30 *Journal of Legal History* 227.

¹³ The right to “stand by” is discussed at paragraphs 3.02 and 3.06, below.

¹⁴ “Special jurors” were wealthy men in the community who were generally employed in trials relating to political or agrarian offences. See Johnston “Trial by Jury in Ireland 1860-1914” (1996) 17 *Journal of Legal History* 270, at 271.

¹⁵ Jackson, Quinn, O’Malley “The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past” in Vidmar (ed) *World Jury Systems* (Oxford University Press 2000) at 286.

¹⁶ *Ibid* at 287.

¹⁷ This view prevailed, although as a minority view, into the 1960s in Ireland in the Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, 1965), discussed below.

¹⁸ See the discussion in Walker, “Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898-1957” (2004) 11:4 *E Law: Murdoch University Electronic Journal of Law*, available at <http://www.murdoch.edu.au/elaw/issues/v11n4/walker114.html>

1.11 It was not until the arguments of the “first wave” of the women’s movement (in Ireland, groups such as the Irish Housewives Association)¹⁹ were gradually accepted in the second half of the 20th century that legislation was enacted in a majority of common law states providing for equality for women in terms of jury selection processes. In Ireland, as discussed below, this argument had been accepted in 1965 in Ireland by the Committee on Court Practice and Procedure, and when the Oireachtas ultimately enacted the *Juries Act 1976* in response to the Supreme Court decision in *de Burca v Attorney General*,²⁰ discussed below, this also became the position in the State.

(3) 1965 Reports of the Committee on Court Practice and Procedure on Juries

1.12 By the early 1960s, there were growing concerns in a number of countries, including Ireland, about the limited pool from which juries were being drawn. This coincided with the emergence of the “first wave” of the women’s movement. Against this emerging background of calls for sexual equality across a range of areas (which included calls for equal pay and for freedom and choice in sexual and reproductive health), in 1965 the Committee on Court Practice and Procedure²¹ published two Reports concerning juries, one on jury service generally and the other on jury challenges. The Commission discusses the recommendations made in these Reports in detail in the succeeding chapters of this Consultation Paper, but provides a brief overview here.

1.13 In its *Report on Jury Service*²² the Committee recommended fundamental reform of the selection system in the *Juries Act 1927*. In connection with the property qualification, the Committee noted that there had been a “great social revolution” since the enactment of the 1871 Act, notably “universal adult suffrage and universal education.”²³ The Committee also accepted that the property qualification had the effect that, as was the position in England at that time (before the enactment of the English *Juries Act 1974*), the jury was not representative of the country as a whole but tended to be “predominantly male, middle-aged, middle-minded and middle class.”²⁴ The Committee therefore concluded that the property qualification was “no longer appropriate in present-day [1965] circumstances”²⁵ and that the electoral register should be the basis for jury selection in future, largely because it is “revised annually and can be readily used for the purpose.”²⁶

1.14 As to the effective exclusion of women from jury service under the 1927 Act, the Committee, by a 9-3 majority, recommended – in response in particular to submissions from women’s representative groups²⁷ – that women should no longer be exempt from jury service. The majority “accept[ed] the view that women should have equal rights and duties with men in this matter [and that women’s] presence on juries will result in a more balanced view being taken of cases in general.”²⁸

¹⁹ See, for example, Connolly “Durability and Change in State Gender Systems: Ireland in the 1950s” (2003) 10:1 *European Journal of Women’s Studies* 65.

²⁰ [1976] IR 38.

²¹ The Committee had been established in 1962, in the aftermath of the publication of the Minister for Justice’s *Programme of Law Reform* (Pr 6379, 1962).

²² Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, March 1965). The Committee was chaired by Walsh J.

²³ *Ibid* at 10.

²⁴ *Ibid* at 11, quoting Devlin *Trial by Jury* (8th series Hamlyn Lectures 1966) at 20.

²⁵ *Ibid*.

²⁶ *Ibid* at 12.

²⁷ The Irish Countrywomen’s Association and the Irish Housewives Association had each made written and oral submissions to the Committee: *ibid* at 20 and 21.

²⁸ Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, March 1965) at 12. In a Note of Dissent, the three members in the minority made comments that would be difficult to support in a modern society – and which were clearly not shared by the nine members of the Committee in the majority. Noting that jury service might require a married woman to serve on a jury until seven or eight in the evening, the minority commented: “If a married woman returns to her home at seven o’clock in the evening

1.15 The Committee also recommended that the exemptions in the 1927 Act for civil servants, local government employees, and other specific categories of employees were no longer justifiable.²⁹ In taking this approach, the Committee took into account that, in place of exemptions, a discretion to exclude in a limited group of cases would ensure that civil and public servants urgently needed by Government departments or State bodies would not be required to serve.

1.16 The Committee's second 1965 Report on juries was a brief *Report on Jury Challenges*.³⁰ In this Report, the Committee concluded that the then-existing arrangements in the *Juries Act 1927* for challenging without cause had operated satisfactorily. In view, however, of the Committee's recommendations concerning the extension of jury service in its *Report on Jury Service*, the Committee recommended that the system should be extended and that joint challenges be abolished. The Commission discusses this in detail in Chapter 3, below.

(4) 1965 Report on Jury Service in England

1.17 At the same time as the Committee on Court Practice and Procedure was examining jury service in Ireland, a virtually identical exercise was being carried out in England, culminating in the 1965 *Report of the Departmental Committee on Jury Service*.³¹ The impetus for the establishment of the Departmental Committee was the growing concern that, as was also the case at that time under English law, women were effectively excluded from jury service because of the property qualifications applicable. Indeed, private members Bills had been proposed in the UK Parliament in 1962 to provide for jury service by women, which reflected the growing number of common law countries which had already legislated, or were in the process of legislating for, this.³² The Departmental Committee had been established in November 1962, and it is worth noting that the Committee on Court Practice and Procedure, in the course of preparing its *Second Interim Report on Jury Service*, had been in contact with members of the English Departmental Committee.³³ The 1965 Report of the Departmental Committee made extensive recommendations for reform of the law, and these were ultimately implemented in the English *Juries Act 1974*.

(5) *de Burca v Attorney General and the Juries Act 1976*

1.18 The recommendations made in 1965 by the Committee on Court Practice and Procedure had not been acted on when, in 1971, two members of the Irish Women's Liberation Movement (IWLM),³⁴ Máirín de Burca and Mary Anderson, were arrested outside Dáil Éireann³⁵ and charged with obstructing a

and finds an irate husband and three hungry children waiting for her, we think it unlikely that they will accept the importance of jury service as a convincing excuse." Committee on Court Practice and Procedure, *Second Interim Report Jury Service*, pp.18-19, Note of Dissent by Mr Justice John Kenny, Mr Dermot P Shaw and Dr Juan N Greene.

²⁹ Committee on Court Practice and Procedure, *Second Interim Report Jury Service* (Pr.8328, March 1965) at 13.

³⁰ Committee on Court Practice and Procedure, *Fourth Interim Report Jury Challenges* (Pr.8577, November 1965). This was published in a single publication with its *Third Interim Report Jury Trial in Civil Actions*, the *Third Interim Report* running at 1-48, and the *Fourth Interim Report Jury Challenges* at 51-55.

³¹ Cmnd 2627, 1965. The Committee had been chaired by the English judge Lord Morris of Borth-y-Gest. The Morris Committee published its Report after the Committee on Court Practice and Procedure had completed its Reports.

³² See, for example, Cornish "Report of the Departmental Committee on Jury Service" (1965) 28 MLR 577.

³³ Committee on Court Practice and Procedure, *Second Interim Report Jury Service* (Pr.8328, March 1965) at 6. The *Second Interim Report* was completed in March 1965, which preceded the publication of the English Departmental Committee Report.

³⁴ The IWLM was one of the "second wave" women's organisations that had emerged in many countries in the emerging feminist movement of the 1950s and 1960s.

³⁵ The IWLM was engaged in a protest inside the grounds of Leinster House, where the Houses of the Oireachtas sit, objecting to the refusal by the Government to allow a Second Stage debate on a *Family*

police officer in the due execution of his duty, contrary to section 38 of the *Offences Against the Person Act 1861*.³⁶ Having pleaded not guilty, they both elected to have the charges tried with a jury and were sent forward for trial in the Circuit Criminal Court.

1.19 While awaiting trial, they began proceedings, *de Burca v Attorney General*,³⁷ challenging the constitutionality of the provisions in the *Juries Act 1927* which restricted jury service to certain categories of property owners and which, in effect, excluded women. The effect of the case was that any work on the implementation of the recommendations made in 1965 by the Committee on Court Practice and Procedure was put on hold, at least publicly and pending the outcome.

1.20 Just before the case was heard in the High Court, the *Report of the Commission on the Status of Women*³⁸ was published, which recommended that a great deal of legislation be enacted concerning sexual equality, for example in the area of employment equality, in particular in the light of Ireland's membership of the European Economic Community (now the European Union), which began in January 1973. The Report also reiterated the recommendation made in 1965 by the Committee on Court Practice and Procedure that women should be qualified and liable for jury service on the same terms as men.³⁹

1.21 In *de Burca*, in the High Court Pringle J dismissed the plaintiffs' case, but, on appeal, the Supreme Court held that the restrictions on jury service in the 1927 Act were in breach of the Constitution, and the Court therefore declared the 1927 Act unconstitutional. Before the Supreme Court decision, in July 1975 the Government had already introduced into the Oireachtas⁴⁰ the *Juries Bill 1975*, which was largely based on the recommendations in the 1965 Reports and modelled on the English *Juries Act 1974*. Following the Supreme Court decision in December 1975, the 1975 Bill was quickly enacted by the Oireachtas, with minor changes, as the *Juries Act 1976*.

1.22 It was noted during the Oireachtas debates on the 1976 Act that the rating restriction in the 1927 Act had "excluded all men, however well educated, who did not happen to have landed property; and in practice women hardly ever served on juries."⁴¹ In 1963, the last year for which figures were readily available before the enactment of the *Juries Act 1976*, only 84,000 persons were eligible for jury service.⁴² In the ten years up to 1974 only nine women were recorded as having applied for jury service and of these only five were called for service and only three actually undertook jury service.⁴³

1.23 The *Juries Act 1976* implemented most of the recommendations made in 1965 by the Committee on Court Practice and Procedure, but its enactment was, of course, accelerated by the decision of the Supreme Court in *de Burca v Attorney General*. In terms of detailed content, it is also clear that (with some exceptions) the English *Juries Act 1974* was the legislative model used for the 1976 Act.

Planning Bill 1971 which had been introduced by then-Senator Mary Robinson and which proposed to remove the severe restrictions on the importation of contraceptives in section 17 of the *Criminal Law Amendment Act 1935*. In *McGee v Attorney General* [1974] IR 284, the Supreme Court held that the restrictions in section 17 of the 1935 Act were in breach of the plaintiff's right to marital privacy. The availability of contraceptives in the State was, ultimately, legislated for in the *Health (Family Planning) Acts 1979 to 1995*.

³⁶ The fact that their arrests occurred in the context of protests by the IWLM was not referred to in the judgments in *de Burca v Attorney General* [1976] IR 38. In a number of the judgments, they were referred to as citizens of Ireland and, in the High Court, Pringle J added ([1976] IR 38,43): "Miss de Burca is a secretary and Miss Anderson is a journalist."

³⁷ [1976] IR 38.

³⁸ *Report of the Commission on the Status of Women* (PrI.2760, December 1972).

³⁹ *Ibid* at 183-185.

⁴⁰ See Vol.82 *Seanad Éireann Debates*, 30 July 1975, *Juries Bill 1975* First Stage.

⁴¹ Vol 287 *Dáil Éireann Debates* col.1850 (*Juries Bill 1975*, Second Stage, 12 February 1976), available at: <http://historical-debates.oireachtas.ie/D/0287/D.0287.197602120003.html>.

⁴² *Ibid*.

⁴³ *Ibid*.

1.24 The key eligibility criterion for jury service currently set out in section 6 of the *Juries Act 1976* is that a person must be a citizen of Ireland aged at least 18, who has registered his or her name on the electoral roll for general elections. In addition, the 1976 Act contains two grounds on which categories of persons must be excluded from consideration for jury service. Firstly, section 7 (and Schedule 1, Part 1) of the 1976 Act contains a list of *ineligible* persons, including the President of Ireland, practising solicitors and barristers and members of the Defence Forces. Second, section 8 of the 1976 Act states that certain convicted persons are *disqualified* from jury service. Section 9 (and Schedule 1, Part 2) of the 1976 Act then contains a list of persons (including members of either House of the Oireachtas, religious ministers, doctors, nurses, university lecturers and students) who may be *excused* from jury service automatically (as of right). Section 9 of the 1976 Act contains a general discretion to excuse a person from jury service.

1.25 Sections 20 and 21 of the 1976 Act deal with the process by which qualified potential jurors can be rejected by the parties involved in a court case, in a criminal trial the prosecution and the defence. This is referred to as challenging, and section 20 of the 1976 Act allows up to 7 challenges for each party “without cause,” that is, without having to give any reason, often referred to as “peremptory challenges.” Section 21 allows an unlimited number of challenges “for cause”, that is, by showing that the potential juror is unsuitable because, for example, he or she knows one of the parties and may, as a result, be biased or perceived as being biased. Section 29 of the 1976 Act requires an employer to pay the salary of any employee during jury service.

1.26 While, in general terms, the 1976 Act provided for jury selection from the electoral roll for general elections, section 6 of the 1976 Act, as enacted, had limited this to persons under the age of 70. In addition, Schedule 1 to the 1976 Act had included in the category of ineligible persons “[a] person who because of insufficient capacity to read, deafness or other permanent infirmity is unfit to serve on a jury.” The ageist and offensive nature of these two provisions have, since then, been dealt with by amendments made to the 1976 Act in the *Civil Law (Miscellaneous Provisions) Act 2008*.⁴⁴ These amendments by the Oireachtas recognised that the 1976 Act, as originally enacted, had clearly fallen behind the essential standards of representativeness which are to be expected in the early 21st century.

C The Essential Components of Jury Service and Key Principles

1.27 The Commission now turns to examine in detail the essential components of jury service in Ireland, in particular those related directly to this Report. The Commission examines these by reference to the analysis in the *de Burca* case, as well as more recent decisions and relevant international human rights instruments. These key elements are: the nature of jury service, the representative nature of juries, based on random selection from a pool of potential jurors; juries as impartial and independent; the jury as independent fact-finder, guided by the judge on matters of law; the requirement of juror ability or competence; and the extent of the secrecy of jury deliberations.

(1) Jury service as a duty

1.28 In the *de Burca* case, Walsh J described jury service as follows:⁴⁵

“It surely follows from the constitutional obligation to have jury trial that jury service is an obligation that must fall upon such members of the population as the State, by its laws validly enacted under the Constitution, designates as being the persons liable for such duty or qualified for such duty.”

1.29 The Commission agrees with the analysis of Walsh J that jury service is not correctly described as involving an enforceable individual right; it can more accurately be described as involving a duty that falls on members of the population of the State. Nonetheless, the Commission considers that jury service should be valued and supported to the greatest extent possible by the State, and that any reforms of the current legislative framework should, equally, have regard to this.

⁴⁴ See Chapter 4, below.

⁴⁵ [1976] IR 38, 66.

(2) Representative Nature of Juries: Random Selection from a Pool of Potential Jurors

1.30 Representativeness encompasses the concepts of random selection and independence. This means that juries are intended to be composed of a representative cross-section of the community, which is ensured through the process of random selection from a pool of potential jurors, and which thereby promotes the independent nature of the jury, and society's participation in the institution. In *de Burca v Attorney General*⁴⁶ Henchy J described the jury as a group of people:

“who, chosen at random from a reasonably diverse panel of jurors from the community, will produce a verdict of guilty or not guilty free from the risks inherent in a trial conducted by a judge or judges only, and which will therefore carry with it the assurance of both correctness and public acceptability that may be accepted from the group verdict of such a representative cross-section of the community.”

1.31 Referring to the effective exclusion of women from jury service, Henchy J stated in *de Burca* that:⁴⁷

“Whatever may have been the position at common law or under statute up to recent times, it is incompatible with the necessary diffusion of rights and duties in a modern democratic society that important public decisions such as voting, or jury verdicts involving life or liberty, should be made by male citizens only. What is missing in decisions so made is not easy to define; but reason and experience show that such decisions are not calculated to lead to a sense of general acceptability, or to carry an acceptable degree of representativeness, or to have the necessary stamp of responsibility and involvement on the part of the community as a whole.”

1.32 Griffin J noted in *de Burca* that an accused is not entitled to:⁴⁸

“a jury which is tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant or to the nature of the charges to be tried, provided that the jury be indiscriminately drawn from those eligible in the community for jury service... It might happen that a jury drawn by lot would include no women or, indeed, no men; but that would not invalidate the jury.”

1.33 When the Northern Ireland Court Service carried out a public consultation between 2008 and 2010 on widening the jury pool under the *Juries (Northern Ireland) Order 2006*⁴⁹ it noted that the “vast majority of respondents agreed with the overall objective of widening the jury pool to ensure that it is fully representative of society.”⁵⁰

1.34 A related issue of representativeness in the State concerns Article 8 of the Constitution. Article 8.1 provides that the Irish language as the national language is the first official language of the State and Article 8.2 provides that the English language is recognised as a second official language. (The Irish

⁴⁶ [1976] I.R. 38, 74.

⁴⁷ [1976] IR 38, 77.

⁴⁸ [1976] IR 38, 82 (citation omitted). To the same effect, see Law Reform Commission of Western Australia *Selection, Eligibility and Exemption of Jurors: Discussion Paper* (Project No. 99, September 2009) at 14.

⁴⁹ Northern Ireland Courts Service, *Widening the Jury Pool: Summary of Responses* (2010), available at www.courtsni.gov.uk.

⁵⁰ *Ibid* at 9 and 12. That consultation process was carried out just before the devolution of justice matters to the Northern Ireland administration. At the time of writing, the Northern Ireland Department of Justice has indicated that it does not intend to proceed with proposals, discussed in that consultation process, to reform the categories of persons who are disqualified from or ineligible for jury service or who are excusable as of right: see Northern Ireland Department of Justice, *The Upper Age Limit for Jury Service in Northern Ireland: A Consultation* (2011), at paragraph 3.5, available at www.dojni.gov.uk. The Department has stated that it intends to proceed to legislate on one matter discussed in that process, raising the upper age limit for jury service of 65 years in the 1996 Order: see *The Upper Age Limit for Jury Service in Northern Ireland: Report of the Consultation* (2012), also available at www.dojni.gov.uk. The upper age limit of 65 in the *Juries Act 1976* was repealed by section 64 of the *Civil Law (Miscellaneous Provisions) Act 2008*: see paragraph 1.26, above.

language version of Article 8.2 provides: “[g]lactar leis an Sacs-Bhéarla mar theanga oifigiúil eile.”) In *MacCarthaigh v Éire*,⁵¹ while the Supreme Court reiterated the importance of the representative nature of the jury, it rejected the argument that, in conducting a trial through the Irish language, the right to jury trial included the right to a jury composed of individuals with an adequate knowledge of the Irish language.

1.35 The issue of racial representativeness arose in the English case *R v Smith*.⁵² The defendant, a black man, had been charged with assaulting a white man outside a night club. He was tried by, and convicted by, an all-white jury. He argued that the selection procedures under the English *Juries Act 1974* were incompatible with the right to a fair trial in Article 6 of the European Convention on Human Rights (ECHR). The English Court of Appeal dismissed his appeal against conviction. The Court referred to the case law of the European Court of Human Rights (ECtHR), including *Sander v United Kingdom*,⁵³ in which a juror had made a racist remark about the defendant, which was reported to the trial judge, who allowed the trial to proceed. The ECtHR held that, in these circumstances, the defendant’s right to a fair trial under Article 6 of the ECHR had been breached. In *R v Smith*, the Court of Appeal noted that the legitimacy of the jury system or the procedure by which juries are selected had not been questioned in *Sander* by the ECtHR. The Court also added that “[n]othing arose in the present case to suggest that the members of the jury were not performing their duty, in accordance with their oath, to try the case impartially.” The Court rejected the argument that a fair-minded and informed observer would regard it as unfair that the defendant was tried by a randomly selected all-white jury or that the trial could only be fair if members of the defendant’s race were present on the jury. The Court therefore concluded that the defendant’s trial was not in breach of Article 6 of the ECHR. The Court added:⁵⁴

“It was not a case where a consideration of the evidence required knowledge of the traditions or social circumstances of a particular racial group. The situation was an all too common one, violence late at night outside a club, and a randomly selected jury was entirely capable of trying the issues fairly and impartially. Public confidence is not impaired by the composition of this jury.”

1.36 Thus, representativeness means that the panel of potential jurors from which a jury is selected should reflect the composition of society, but it does not mean that the resulting jury actually chosen for a specific case will do so. In general terms, a jury of 12 men or of 12 women, or an all-white jury, would be permissible, provided the jury panel from which they were selected was representative. This general approach is subject to the requirement of impartiality to which the Commission now turns.

(3) Impartial and Independent Nature of Juries

1.37 The Victorian Law Reform Commission has stated that maximising the representativeness of juries should “promote impartiality by reflecting a greater cross-section of community experience (and prejudice) so that no one view dominates.”⁵⁵ Nonetheless, jury representativeness and impartiality are distinct concepts.⁵⁶ In this respect, jury partiality or bias can be divided into two main categories: interest prejudice (having a pecuniary or personal interest in outcome of case) and specific prejudice (having attitudes about specific issues which prevent the juror from rendering a verdict with an impartial mind).

1.38 In *The People (Attorney General) v Singer*,⁵⁷ a complex fraud trial arising from an alleged “Ponzi” or pyramid investment scheme, it emerged that the foreman of the jury had been an investor in the defendant’s scheme. The Court of Criminal Appeal therefore set the conviction aside for this reason (among others):

⁵¹ [1999] 1 IR 186. See also *Ó Maicín v Éire* [2010] IEHC 179.

⁵² [2003] EWCA Crim 283.

⁵³ (2001) 31 EHRR 44, discussed further below, in the context of impartiality, at paragraph 1.40.

⁵⁴ *R v Smith* [2003] EWCA Crim 283, paragraph 40.

⁵⁵ Victorian Law Reform Commission *Jury Service in Victoria* (Final Report, Volume 1, 1996) at 24.

⁵⁶ In *Thiel v Southern Pacific Co*, 328 US 217, at 227 (1946) the US Supreme Court noted: “[t]rial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.”

⁵⁷ [1975] IR 408 (decided in 1961).

“The whole purpose of jury-trial is third-party judgment, judgment by indifferent persons... The victim is not to be thought of as indifferent, and his presence on the jury manifestly offends against the concept of fair trial – the essence of which is third party judgment – however honestly he should strive to discharge his duty as juror.”⁵⁸

1.39 The question of bias was also considered in *People (DPP) v Tobin*,⁵⁹ a trial for rape and sexual assault, during which it came to light that one juror had experienced sexual abuse in the past. On receiving assurances regarding the impartiality of the juror from the foreman of the jury, the trial judge elected to take no further action.⁶⁰ The conviction was set aside by the Court of Criminal Appeal, which noted:

“a reasonable and fair-minded observer would consider that there was a danger, in the sense of a possibility, that the juror might have been unconsciously influenced by his or her personal experience and, for that reason, the appellant might not receive a fair trial. Moreover, even jurors without similar experience of sexual abuse might well be influenced by sympathy for a fellow juror who had suffered, at the hands of another, the type of abuse with which the accused was charged.”⁶¹

1.40 The test of reasonable apprehension of bias set out in the *Tobin* case is also found in the case law of the ECtHR on the right to a fair trial by an impartial tribunal in Article 6 of the ECHR. In *Sander v United Kingdom*⁶² a juror made a racist remark about the defendant, which was reported to the judge, but he did not discharge the jury because they signed a note disowning any racist remarks made. The jury convicted the defendant. The ECtHR accepted that the personal impartiality of jurors must be presumed until there is proof to the contrary, as is the case for judges.⁶³ Nonetheless, the ECtHR concluded that the defendant’s Article 6 rights had been violated because an objective observer might have doubts about the impartiality of the jury in that specific case. The Court found that the nature of the remarks was such that a direction by the trial judge to ignore them was not sufficient to undo the damage caused.

1.41 Jury impartiality, however, does not require that individual jurors should rid their minds of all opinions, beliefs, and other life experiences when undertaking their role. Thus, juror impartiality and independence involves judgment by persons who have no direct involvement in the trial or who, from an objective standpoint of the reasonable observer, would not be regarded as partial or biased; but the concept of impartiality also assumes judgment by persons of independence, with opinions and beliefs and other experience of the realities of living in today’s society.⁶⁴

⁵⁸ [1975] IR 408, 414.

⁵⁹ [2001] 3 IR 469.

⁶⁰ Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* 4th ed (Lexis Nexis: Butterworths, 2003) at 1082.

⁶¹ [2001] 3 IR 469,479.

⁶² (2001) 31 EHRR 44.

⁶³ *Ibid* at paragraph 25.

⁶⁴ The American sociologist Robert Blauner, commenting on the trial in 1968 of the Black Panther leader Huey Newton for the manslaughter of a Californian police officer, stated: “The kingpins of the trial-by-jury system – the impartial juror, the representative panel, and the challenge method – are filled with ambiguities and at war with one another. It is possible that the legal fiction of the ‘impartial’ juror should be disposed of as a ‘cultural lag’ hopelessly out of tune with reality. A juror without any significant biases relevant to a case... growing out of a confrontation between a black militant and a white policeman would have to be a person of apathy, ignorance, even stupidity, or at least someone who is not living in today’s social world.” Quoted in Harry, Elmer and Barnes *The Story of Punishment* 2nd ed (Patterson Smith Publishing Co, 1972), at 97. The jury in Newton’s first trial, and the juries in two subsequent trials, failed to reach a verdict, and the prosecution ultimately decided not to proceed to a fourth trial.

(4) Jury as independent fact-finder, guided by the judge on matters of law

1.42 In *O'Callaghan v Attorney General*,⁶⁵ the Supreme Court stated:

“The purpose of trial by jury is to provide that a person shall get a fair trial, in due course of law and be tried by a reasonable cross section of people acting under the guidance of the judge, bound by his directions on law, but free to make their findings as to the facts. The essential feature of a jury trial is to interpose between the accused and the prosecution people who will bring their experience and common sense to bear on resolving the issue of guilt or innocence of the accused.”

1.43 Thus, the judge ensures that proper procedures are observed, determines matters of law such as the admissibility of evidence and directs the jury on the legal principles and rules they are to observe. Nonetheless, reflecting the view taken in the 17th Century in *Bushell's Case*, the jury are the independent arbiters of all disputed issues of fact and, in particular, the issue of guilt or innocence. Thus, while a judge might very well consider that, on the evidence presented in a specific case and the law to be applied by the jury, the accused should be convicted, nonetheless it would not be appropriate for the judge to direct the jury to bring in a guilty verdict. In *The People (DPP) v Davis*,⁶⁶ the Supreme Court thus held that a judicial direction requiring the jury to return a verdict of murder was an unconstitutional usurpation of the jury's function.

(5) Juror Ability or Competence

1.44 In the *de Burca*⁶⁷ case Walsh J stated that the Constitution “does not preclude the Oireachtas from enacting that prospective jurors should have certain minimum standards of ability or personal competence without which jury trial might fail to serve as an essential part of the administration of the criminal law.” The Law Reform Commission of New Zealand has stated that one of the four goals of jury selection is competence: “individual jurors should be competent in the sense that they are mentally and physically capable of acting as jurors in the trial.”⁶⁸

1.45 Competence also encompasses the effectiveness of the jury as a fact-finding tribunal.⁶⁹ The New South Wales Law Reform Commission has argued that a jury system that is “broadly representative” has the benefit of producing more competent juries “because of the diversity of expertise, perspectives and experience of life that is imported into the system.”⁷⁰

1.46 The Law Reform Commission of Western Australia commented that “[i]t is perhaps self-evident that individual jurors should be competent in the sense that they are mentally and physically capable of acting as jurors in the trial.”⁷¹ Article 13 of the 2006 UN Convention on the Rights of Persons with Disabilities (“UNCRPD”), which, at the time of writing, Ireland has signed but not ratified, provides that States Parties are required to ensure effective access to justice for persons with disabilities on an equal basis with others. The UNCRPD defines reasonable accommodation as: “necessary and appropriate

⁶⁵ [1993] 2 IR 17, 25. In *Sparf v United States*, 156 US 51 (1895) the US Supreme Court stated (at 102): “Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared as to the facts as they, upon their conscience, believe them to be.”

⁶⁶ [1993] 2 IR 1. See also Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* 4th ed (Lexis Nexis: Butterworths, 2003) at 1223.

⁶⁷ [1976] IR 38, 67. Similarly, in *The State (DPP) v Walsh* [1981] IR 412, at 438, Henchy J referred to the essential purpose of jury trial as entrusting issues of fact to “a body of impartial, competent and representative” persons.

⁶⁸ Law Commission of New Zealand *Juries in Criminal Trials* (Report 69, February 2001) at 55.

⁶⁹ Law Reform Commission of Western Australia *Selection, Eligibility and Exemption of Jurors: Discussion Paper* (Project No. 99, September 2009) at 16.

⁷⁰ New South Wales Law Reform Commission *Jury Selection* (Report No. 117, 2007) at 11.

⁷¹ Law Reform Commission of Western Australia *Selection, Eligibility and Exemption of Jurors: Discussion Paper* (Project No. 99, September 2009) at 16. Citations omitted.

modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁷² While the State is not at present bound by the provisions of the 2006 UNCRPD, it has indicated that it will ratify the Convention in the near future, and the Commission therefore considers that it should have regard to the Convention, including the principle of “reasonable accommodation.” The Commission agrees with the Law Reform Commission of New South Wales that: “fairness of the trial takes precedence over the potential rights of a prospective juror. However, prospective jurors should not be lightly excluded from an important civic duty. It is important to ask whether the administration of justice is adversely affected by denying the contribution that some in the community would be willing and able to make, and whether thereby the representativeness of the jury is compromised.”⁷³

1.47 In summary, the Oireachtas is entitled to stipulate that jurors must have a minimum level of ability and personal competence in order to ensure the effectiveness of the jury as a fact-finding tribunal and, therefore, the right to a fair trial. Juror competence is reinforced by having a broadly representative pool from which to select jurors, and such competence may require the provision of reasonable accommodation, as set out in the 2006 UNCRPD.⁷⁴

(6) General Secrecy of Jury Deliberations

1.48 In *de Burca v Attorney General*,⁷⁵ Walsh J commented that “the jury should be free to consider their verdict alone without the intervention or presence of the judge or any other person during their deliberations. I think it also imports an element of secrecy.” This was emphasised again by the Supreme Court in *O’Callaghan v Ireland*,⁷⁶ in which O’Flaherty J stated that the “deliberations of a jury should always be regarded as completely confidential” and therefore that the “deliberations of a jury should not be published after a trial.”

1.49 The principle of jury secrecy thus relates to ensuring that there is no interference with the deliberations of the jury, reinforcing the independence of the jury.⁷⁷ It does not preclude, for example, members of the jury from disclosing inappropriate behaviour in the jury room, such as the racist comments referred to in *Sander v United Kingdom*.⁷⁸

(7) Summary of Key Principles

1.50 In conclusion, the Commission considers that the following key principles arise from the discussion in this Chapter.

- 1) Jury service is more accurately described as a duty which falls upon members of the population of the State rather than as a right of an individual in the State.
- 2) Juries should be selected from a pool or panel broadly representative of the community, having regard to the provisions on criminal trials in Article 38.1 and 38.5 of the Constitution of Ireland.
- 3) Jury representativeness refers not to the actual jury selected but rather to the pool or panel of persons from which juries are selected.
- 4) Jury legislation may validly exclude certain persons from the jury pool or panel, provided this does not infringe specific constitutional provisions.

⁷² Article 2 of the UNCRPD.

⁷³ Law Reform Commission of New South Wales *Blind or Deaf Jurors* (Report 114, September 2006).

⁷⁴ See further the discussion in Chapter 4, below.

⁷⁵ [1976] IR 38, 66.

⁷⁶ [1993] 2 IR 17, 26.

⁷⁷ See further the discussion in Chapter 11, below, in the context of empirical research.

⁷⁸ (2001) 31 EHRR 44, discussed above at paragraphs 1.35 and 1.49.

- 5) Historical restrictions on, or effective exclusions of, groups from the jury pool or panel do not necessarily meet current constitutional requirements for representative juries.
- 6) Restricting the jury pool to property owners, and the effective exclusion of women from the jury pool, is not constitutionally permissible, even though it was historically a feature of juries legislation.
- 7) While the panels need not, as a constitutional requirement, match exactly the community at any given time, they should be reviewed to determine whether the general jury pool from which persons are being selected for jury service no longer reflect the community as a whole.
- 8) Jurors should be both impartial and independent (and appear to be so, using an objective test) in carrying out their functions, in accordance with the requirements of the Constitution and comparable international human rights instruments concerning a fair trial.
- 9) The jury is as independent fact-finder, bound by the judge's directions on matters of law, but free to make their findings as to the facts in a case, including on the guilt or innocence of a person in a criminal trial.
- 10) In order to meet the requirements of the Constitution concerning a fair trial and comparable provisions in international human rights instruments, jurors should have certain minimum standards of personal capacity and competence, which may require reasonable support and accommodation that do not involve a disproportionate or undue burden.
- 11) The jury should be free to consider their verdict in secrecy in the sense that they do so without the intervention or presence of the judge or any other person during their deliberations; but this does not preclude certain disclosures, for example, inappropriate behaviour in the jury room.

1.51 The Commission considers that these principles are of relevance to the detailed discussion of the specific matters addressed in the remaining chapters of this Report.

CHAPTER 2 JURY SELECTION AND EXTENDING QUALIFICATION FOR JURY SERVICE

A Introduction

2.01 In this Chapter the Commission examines the jury selection process and also considers whether to extend qualification for jury service to persons other than Irish citizens. In Part B, the Commission examines the process for jury selection, which is currently based on the register of Dáil Éireann electors, and explores whether any viable alternative jury source list might be considered and also discusses the role played by technology in the process. In Part C, the Commission considers whether qualification for jury service should be extended to persons other than Irish citizens, particularly in the light of significant increases in recent years in the percentage of the population of the State who are non-Irish citizens. This discussion relates to a number of key principles set out in Chapter 1, in particular whether the current jury pool can continue to be regarded as broadly representative of the community and related principles as to whether expansion of the jury pool to non-Irish citizens would affect the fairness of jury trials.

B Jury Selection Process in Ireland

(1) *The register of Dáil electors as the jury source list*

2.02 Section 6 of the *Juries Act 1976*¹ provides that every Irish citizen aged 18 years or upwards and who is registered in the register of Dáil Éireann electors for that jury district (in effect, the Dáil electoral register for the county or city in question) is “qualified and liable to serve as a juror” in that jury district. In 1965 the Committee on Court Practice and Procedure, in its *Report on Jury Service*, concluded that the electoral register should be the basis for jury selection, largely because it is “revised annually and can be readily used for the purpose.”² Section 6 of the 1976 Act thus involved the belated implementation of that recommendation and was, more immediately, the legislative response to the decision in *de Burca v Attorney General*.³

2.03 The *Irish Nationality and Citizenship Act 1956*, as amended, provides that every person born on the island of Ireland before 1 January 2005 is entitled to be an Irish citizen. Since 1 January 2005 the citizenship of such a person is dependent on the citizenship of their parents at the time of birth or the residency history of one of the parents prior to the birth. A person who fulfils certain conditions may also apply to the Minister for Justice and Equality for Irish citizenship through the naturalisation process under the 1956 Act. The requirements for obtaining naturalisation include residence in Ireland for at least 5 years and being of good character. The vast majority of applicants for citizenship through naturalisation are permanently resident in Ireland.

2.04 As discussed in detail below in Part C, there has been a significant increase in the number of non-Irish citizens living in Ireland since the enactment of the *Juries Act 1976* and this demographic transformation raises the question as to whether the current jury selection pool remains representative of Irish society.

2.05 Under the *Electoral Act 1992*, as amended, Irish citizens may be registered to vote at every election to Dáil Éireann on the register of Dáil electors. Irish citizens may also be registered to vote at

¹ As amended by section 54 of the *Civil Law (Miscellaneous Provisions) Act 2008*, which removed the upper age limit of 70 years in section 6 of the 1976 Act as enacted.

² Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, 1965) at 12.

³ [1976] IR 38: see Chapter 1, above.

referendums to amend the Constitution, and for European Parliament and local elections.⁴ British citizens who are ordinarily resident in the State when the electoral register is prepared may vote at Dáil elections and also at European Parliament and local elections. Other EU citizens who are ordinarily resident in the State when the electoral register is prepared may vote at European Parliament and local elections.⁵ Non-EU citizens who are ordinarily resident in the State may vote at local elections only.⁶ It is notable that while British citizens may vote at elections to Dáil Éireann they are not qualified for jury service because section 6 of the *Juries Act 1976* provides that Irish citizenship is also a prerequisite for jury service.

2.06 Each county council and city council, as the electoral registration authority for its area, must compile an annual register of Dáil electors. In order to be eligible for inclusion on the register of electors, a person must (a) be at least 18 years of age on the day that the register comes into force, which is 15 February of each year, and (b) have been ordinarily resident in the State on 1 September in the year preceding the coming into force of the register.⁷

2.07 The Commission notes that the current arrangements for the preparation and maintenance of the register of electors have been criticised. The 2008 Report of the Joint Oireachtas Committee on the Environment, Heritage and Local Government, *The Future of the Electoral Register in Ireland and Related Matters*,⁸ acknowledged that there were problems with the completeness of data held in the register of electors and with its accuracy. The Joint Committee recommended the establishment of a national office to ensure the continuous registration of eligible persons and the revision of the existing register onto a centralised IT database.⁹ Also in 2008, the Department of the Environment published a *Preliminary Study on the Establishment of an Electoral Commission in Ireland*,¹⁰ which set out in some detail the functions of an Electoral Commission, including those identified in the Oireachtas Committee's report. The establishment of an Electoral Commission remains government policy, and legislative proposals to do so are planned.¹¹

2.08 The Consultation Paper noted that the proposed establishment of an Electoral Commission on a statutory basis, and consequent improvements to the register of electors, would increase its reliability, including as the basis for jury selection.¹²

2.09 In all parts of the United Kingdom, the electoral register remains the source for jury lists. A national Electoral Commission has been in place for some time in the United Kingdom and while this has not been a panacea for all deficiencies in the electoral register it appears to have provided a focus for its

⁴ Section 8 of the *Electoral Act 1992*, as amended.

⁵ Section 9 of the *Electoral Act 1992*, as amended.

⁶ Section 10 of the *Electoral Act 1992*, as amended.

⁷ Section 11 of the *Electoral Act 1992* (and Schedule 2), as amended. A person whose birthday falls after the closing date for applications but on or before polling day can be included in the supplement to the register of electors.

⁸ Joint Committee on the Environment, Heritage and Local Government *The Future of the Electoral Register in Ireland and Related Matters* (First Report, A8/0417 April 2008), available at www.oireachtas.ie.

⁹ *Ibid* at 18.

¹⁰ Sinnott, Coakley, O'Dowd and McBride, *Preliminary Study on the Establishment of an Electoral Commission in Ireland* (2008), available at www.enviro.ie. This study took as its starting point (at 7) that the government was, at that time, committed to the establishment of an Electoral Commission.

¹¹ See *Programme for Government 2011-2016* at 20 (commitment to establish Electoral Commission), available at www.taoiseach.ie, and Department of the Environment, Community and Local Government, *Statement of Strategy 2011-2014*, at 8 and 25 (legislative proposals to establish Electoral Commission to be developed), available at www.enviro.ie.

¹² Consultation Paper, at paragraphs 2.47-2.48.

ongoing review so that improvements are put in place to ensure the accuracy of the data held on the register.¹³

2.10 In all Australian jurisdictions, the national electoral register is the primary source list for jury selection. A number of law reform bodies have considered the issue. For example, the Law Reform Committee of Victoria recommended that investigations should be undertaken “to determine the administrative feasibility of establishing an accurate database of citizens and non-citizen permanent residents for jury service.”¹⁴ The Committee recommended that, in the interim, enrolment as an elector for the Legislative Assembly should continue to be the requirement for qualification.

2.11 New Zealand also uses the national electoral register and the Māori electoral rolls as the lists from which to issue jury summonses.¹⁵ The Electoral Enrolment Centre of New Zealand, the organisation responsible for maintaining the electoral rolls, also draws up jury lists annually. The *Juries Act 1981*, as amended,¹⁶ provides that jury lists are supplied by the Chief Registrar of Electors to the Registrar of the Court on a regular basis.

2.12 The Commission considers that the issue of the extent to which persons over 18 are registered to vote and remain on the electoral register – and therefore remain qualified for jury service – is beyond the scope of this project and is more suitable for consideration in the context of reform of electoral law generally (including the proposed establishment of an Electoral Commission) rather than in the context of the law on jury service.¹⁷

(2) The Public Services Card as a possible juror source list

2.13 The Commission is conscious that, in other jurisdictions, the electoral register remains the most common source for jury selection but that other sources are also used, such as telephone directories, vehicle driver and vehicle owner databases. In the Consultation Paper, the Commission considered the possibility of using supplemental source lists to enhance the representativeness of the jury pool,¹⁸ but queried the usefulness of such a project, particularly in light of the administrative costs involved, and ultimately provisionally recommended that jury lists should not be supplemented or cross-checked with other lists.¹⁹ The Commission considers that, in the Irish setting, alternative databases present many difficulties in terms of their scope and reliability for the purposes of jury selection. The Commission has therefore confined its review of an alternative to the electoral register to the rollout of the Public Services Card (PSC) and it turns now to assess the viability of the PSC for that purpose.

¹³ It was recognised in 2012 that the accuracy of the electoral register in Northern Ireland remains in need of improvement: see *Continuous Electoral Registration in Northern Ireland* (Electoral Commission, 2012) available at www.electoralcommission.org.uk.

¹⁴ Parliament of Victoria, Law Reform Committee *Final Report: Jury Service in Victoria* (1996), at recommendation 4.

¹⁵ Section 6 of the *Juries Act 1981*. Section 82 of the New Zealand *Electoral Act 1993* provides that it is mandatory for those qualified to vote in New Zealand to enrol on the register.

¹⁶ By the *Juries Amendment Act 2000*.

¹⁷ A similar view was expressed in the Scottish Government Report *The Modern Scottish Jury in Criminal Trials* (Scottish Government, 2008): “It is important to note that the juror ‘pool’ itself is drawn from the electoral register, on whose completeness and accuracy the Scottish Court Service depends. This raises a wider issue of electoral representation and the need to minimise the number of those who forego the right to vote and who are alienated from the rights and duties of citizenship. These matters are however beyond the scope of this paper.”

¹⁸ For a fuller discussion of this, including a comparative analysis, see the Consultation Paper at paragraphs 2.57 to 2.61.

¹⁹ Consultation Paper at paragraphs 2.62.

2.14 The *Social Welfare Consolidation Act 2005*²⁰ provides that the PSC, which is based on the Personal Public Service Number (PPSN), is to be used as a unique identifier that enables a person to access public services, notably at present social welfare payments. There are approximately 3 million adults in Ireland to whom a PPSN has been issued. The Department of Social Protection, in conjunction with other Government Departments, has developed the specifications for the PSC under the Standard Authentication Framework Environment programme (SAFE). In 2010, a contract was agreed with a service provider and the process of rolling out PSCs began in 2011.²¹ In 2012, the Department of Public Expenditure and Reform indicated that the PSC was being introduced in an “accelerated fashion” under the Government’s public service reform plan.²² In 2011, approximately 5,000 persons had been issued with a PSC and, by the beginning of 2013, this had increased to 100,000.²³ It would appear that, even with the accelerated rate of rollout in 2012, it will take some time for PSCs to be issued to all 3 million adults in the State.

2.15 The PSC provides a higher assurance of identity than its forerunner, the PPSN. In addition, it is envisaged that, as its name suggests, the PSC would not be restricted to accessing social welfare benefits but could also be used in the context of a range of public services, such as the ability to track an individual’s health information throughout the health system (in the form of the Unique Health Identifier under the proposed *Health Information Bill*²⁴), the EU driver’s licence or the public travel card. While the PPSN was issued only to those individuals born in Ireland, working in Ireland or receiving a social welfare benefit in the State, the PSC, by providing a much wider range of social services, may in time capture a much broader proportion of the resident population in Ireland. The PSC could thus eventually be used by a range of public bodies to identify an individual for the provision of e-government or online services.²⁵

2.16 The Commission acknowledges that the development of the PSC could in time provide a viable alternative to the electoral register as a basis for juror selection. The Commission notes that this would primarily be a matter for the Courts Service to determine in the context of the ongoing development of its IT strategy, and in conjunction with the Department of Social Protection. This would also be subject to relevant requirements of the *Data Protection Acts*, and would be subject to the proposed *Data Sharing Bill*²⁶ which is broadly intended to encourage sharing of information across public service bodies subject to suitable safeguards. The Commission also notes below the intention of the Courts Service to streamline the electoral register data for the jury selection system.²⁷

2.17 For the present, the Commission is satisfied that current arrangements for jury selection through the electoral register remain suitable. The Commission notes that in the United Kingdom, Australia and New Zealand the electoral registers remain the basis on which jury lists are prepared. The Commission also notes in this respect that, as discussed above, ongoing steps to ensure the accuracy of the electoral register are being put in place, including through the proposed establishment of an Electoral Commission. These are likely to affect current arrangements in another important respect. As discussed below, the current county-based process for the annual revision of the electoral register carries over into

²⁰ See in particular section 262 of the 2005 Act, as amended, for the type of information that may be stored on the card. It is unlikely that fingerprint data will be entered on the PSC: see Duncan, “Fingerprint unlikely to be added to public services ID card” *The Irish Times* 1 March 2012.

²¹ See Dáil Debates 10 May 2011: <http://debates.oireachtas.ie/dail/2011/05/10/00035.asp>.

²² Edwards, “Public services cards to be distributed widely in 2012” *The Irish Times* 10 February 2012.

²³ Vol. 789 *Dáil Debates* at 546-547 (Written Answer, Minister for Public Expenditure and Reform, 23 January 2013).

²⁴ See Government Legislation Programme, Spring Session 2013 (January 2013), Section B, item 38 (publication expected in 2013), available at www.taoiseach.ie.

²⁵ Edwards, “Public services cards to be distributed widely in 2012” *The Irish Times* 10 February 2012.

²⁶ See Government Legislation Programme, Spring Session 2013 (January 2013), Section C, item 96 (no publication date specified), available at www.taoiseach.ie.

²⁷ *Courts Service ICT Strategy Statement 2011-2014* (March 2012) at 11.

the jury selection process, which is also primarily county-based. In the event that the ongoing maintenance of the electoral register is transferred from local authorities to the proposed Electoral Commission, it would appear sensible that this centralised national process would equally carry over into the jury selection process. Indeed, as also discussed below, this would appear consistent with current developments in the Courts Service through the Combined Court Offices project, which include planned arrangements to integrate ICT into the jury selection process and the proposal to develop a central jury management system.

2.18 *The Commission recommends that the register of electors should continue to be the source from which jury panels are drawn. The Commission notes that the proposed establishment of an Electoral Commission could further facilitate steps to ensure the accuracy of the register of electors.*

(3) The provisions on jury selection in the Juries Act 1976

2.19 Section 10 of the *Juries Act 1976* provides that each electoral registration authority, that is, each county council and city council, must deliver copies of the relevant register of Dáil electors to the County registrar for that county or city as soon as practicable after each such register is published. Section 11 of the 1976 Act provides that the County registrar must draw up a panel of jurors from the register using a procedure of random or other non-discriminatory selection.

2.20 As enacted, section 11 of the 1976 Act had provided that the jury panel was to be drawn up “for each court” in the jury district but, as amended by section 55 of the *Civil Law (Miscellaneous Provisions) Act 2008*, it now provides that the jury panel is to be drawn up for “one or more courts within a jury district”. This allows a county registrar the discretion to continue to form separate panels for the Central Criminal Court (High Court) and the Circuit Criminal Court or to form a single jury panel for both courts. This facilitates sittings of the Central Criminal Court outside Dublin. Section 11, as amended, also facilitates a single panel being summoned to the Criminal Courts of Justice complex in Dublin, which opened in 2010 and which houses in a single location jury trial in the Central Criminal Court and the Dublin Circuit Criminal Court.

2.21 Section 11 of the 1976 Act also provides that the county registrar must omit persons from the jury panel whom he or she knows or believes not to be qualified as jurors. This would currently include persons whom the county registrar is aware are disqualified from jury service arising from a criminal conviction as a result of sending the jury panel to the Garda Central Vetting Unit, which is to be renamed the National Vetting Bureau of the Garda Síochána when the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* comes fully into force.²⁸

2.22 Section 12 of the 1976 Act provides that each county registrar must ensure that a written summons in the prescribed form²⁹ is served on every person selected as a candidate juror, requiring him or her to attend as a juror at a court or other specified place.³⁰ The summons must be accompanied by a notice (the J2 notice or form) informing the candidate juror of the effect of certain provisions in the 1976 Act.³¹ The specified provisions are those on: qualification for jury service (section 6 of the 1976 Act: discussed in this Chapter), ineligibility (section 7: see Chapters 4 and 5, below), disqualification (section 8: see Chapter 6, below), excusal from jury service (section 9: see Chapter 5, below) and offences by jurors (sections 35 and 36: see Chapter 8, below).

²⁸ The Commission discusses in Chapter 6, below, disqualification from jury service arising from a criminal conviction and the related issue of vetting jury panels.

²⁹ See the *Jury Summons Regulations 1976* (SI No.56 of 1976).

³⁰ Section 12(1) of the 1976 Act, as amended by section 56 of the *Civil Law (Miscellaneous Provisions) Act 2008*. The 2008 Act inserted “or other specified place” to facilitate, for example, jurors being called in a purpose-built jury reception area such as exists in the Criminal Courts of Justice complex in Dublin, which opened in 2010.

³¹ Section 12(2) of the 1976 Act.

2.23 Section 13 of the 1976 Act³² provides that a jury summons may be sent by post or delivered by hand. It also provides that, in a prosecution for non-attendance for service by a juror, a certificate by the county registrar that the summons was either posted or, as the case may be, delivered by hand, shall be evidence of the facts so certified.

2.24 Section 14 of the 1976 Act provides that where it appears to a judge that a jury will or may be incomplete, the judge may require any persons (where they are qualified and liable to serve) to be summoned by the county registrar to make up the number needed. In that case the judge must specify the area from which persons may be summoned and the method of summons, whether by written notice or otherwise. Section 15(2) of the 1976 Act provides that this power may be exercised after balloting has begun under section 15 and if so the judge may dispense with balloting for persons summoned under section 14.

2.25 Section 15(1) of the 1976 Act provides that the selection of persons empanelled as jurors must be by balloting in open court.

2.26 Section 15(3) provides that before the selection of jurors begins the judge must “warn the jurors present that they must not serve if they are ineligible or disqualified” and of the penalty under section 36 of the 1976 Act for doing so. Section 15(3) also provides that the judge must also state that any person who is selected on the ballot must, if the person (a) knows that he or she is not qualified to serve or (b) is in doubt as to whether he or she is qualified or (c) may have an interest in or connection with the case or the parties, communicate the fact to the judge either orally or otherwise as the judge may direct or authorise.

2.27 Section 15(4) provides that the foreman must be chosen by the jurors and that this must be done at such time as the judge may direct or, in the absence of a direction, before the jury bring in their verdict or before they make any other communication to the judge.

(a) Overview of current jury selection and empanelling procedure

2.28 The electoral register provided annually to a county registrar under section 10 of the 1976 Act, in effect the electoral register for a county or city in question, is usually divided by the relevant court county office into groups, and jury lists are drawn up on a random and cyclical basis from these groups. The total number of jury summonses issued annually in the State is in the region of 100,000. Each Courts Service county office draws up a jury panel for its own local county business. In terms of volume, the Dublin Courts Service jury office issues the most jury summonses annually, about 50,000 in total, as it is responsible for summoning jurors for the Central Criminal Court (which sits primarily in Dublin), the Dublin Circuit Criminal Court as well as the High Court in Dublin for civil cases requiring a jury (the most common being for defamation claims). The persons summoned from the jury panel are asked in the J2 notice that accompanies the jury summons issued under section 12 of the 1976 Act to indicate by reply whether they are ineligible, disqualified or excusable as of right and these are then not called for jury service. Jurors who are otherwise qualified and eligible are also invited in the J2 form to indicate whether they are willing to serve on a jury or whether they wish to be considered for excusal for a specific reason. Where a candidate juror puts forward a reason for being excused, these are initially considered by the jury office.

2.29 A study carried out in 1993³³ correctly noted that the aim of the jury selection process is to issue the minimum number of summonses to achieve an adequate supply of jurors. The study noted that, firstly, there is an administrative cost attached to issuing jury summonses: the number of staff required increases as the number of summonses issued increases and more time is required to handle queries and deal with follow-up documentation. It also noted that there is a cost to individual members of the public and the economy from the allocation of time from other activities to jury service. Therefore, the system seeks to ensure that there is the closest possible match between the number of jurors required to serve and the number of summonses issued.

³² As amended by section 57 of the *Civil Law (Miscellaneous Provisions) Act 2008*.

³³ Department of Finance, Analysis and Operations Research Section *The Irish Jury Selection System* (Report Number 3/93, June 1993) at 9. The study examined Dublin, Cork and Limerick Circuit Courts,

2.30 The 1993 study found that there was an attrition rate of between 60% and 70% of these summoned for jury service, that is, that between 30% and 40% of those summoned were available for jury service. The Commission has confirmed in its discussions with consultees in 2012 that this attrition rate of between 60% and 70% remains in place at the time of writing.³⁴ The Commission understands that the attrition rate can be broken down as follows. For about 10% of issued summonses, the summons is returned because for example the person has left the address or is deceased. A further 10% of persons who are summoned do not attend on the date specified in the summons. Another 20% to 25% are within the lists of persons who are excusable as of right, ineligible for jury service or disqualified arising from a criminal conviction. A further 20% to 25% are qualified and eligible to serve but are excused on the basis of the discretion to do so under the 1976 Act: the most common reasons for allowing a discretionary excusal are that the person is a full-time carer, has a medical procedure that cannot be postponed, work commitments (in particular where the person is self-employed) or because holidays have been booked.

2.31 For these reasons, the Courts Service issues a number of jury summonses that assumes that up to 70% of those summoned for service will, for these varying reasons, not be available to serve on a jury. The Courts Service accepts that one of the effects of this high attrition rate is that even though a person is called for jury service, he or she may not actually serve because usually more people than necessary are called. Potential jurors are required to return to court every day, whether or not they are sworn on to a jury, unless otherwise directed by the court. Since it is not always possible to forecast when a particular case will start or how long it will last, a potential juror may sometimes have to wait at court for what may seem like an unnecessarily long time. The Courts Service notes that “[e]very effort is made by the court staff to see that the jurors are not kept waiting and to release, as soon as possible, those people not likely to be required to serve on a jury on a particular day.”³⁵

2.32 The 1993 study also indicated that, from a sample of attendance rates for jury service, in Dublin, 6% of those issued with summonses were prosecuted for non-attendance, whereas the figure stood at 2% in Cork and 6% in Limerick. The study recommended that the prosecution rate should be increased on the basis that this low level of prosecution would not discourage non-attendance and it also recommended that the level of fines under the 1976 Act be increased.³⁶ The maximum fine for non-attendance under section 34 of the 1976 Act was increased from £50 (€63.49) to €500 by section 60 of the *Civil Law (Miscellaneous Provisions) Act 2008*, which came into force on 1 January 2009.³⁷ It appears, however, that between 2009 and 2012 there were no prosecutions for non-attendance under section 34 of the 1976 Act.³⁸

(b) The role of ICT in the Jury Selection Process in England, Wales and Northern Ireland

2.33 The Commission turns to examine to what extent the very large attrition rate of potential jurors and the consequent requirement for potential jurors to attend court on a number of days without being called, could be ameliorated, in particular through Information and Communications Technology (ICT).

2.34 In England and Wales, random selection of jurors from the electoral register has been done by computer since 1981,³⁹ and since 2001 a Central Juror Summoning Bureau has operated the juror summoning process for the whole of England and Wales. A random list of potential jurors is generated by

³⁴ To the same effect see Gallagher, “State turns blind eye to dodgers of jury duty” *Irish independent*, 22 July 2012, available at www.independent.ie.

³⁵ See Courts Service website: www.courts.ie/courts.ie/library3.nsf/pagecurrent/C747C1365EEC126F8025704400518E7A?opendocument&I=en

³⁶ Department of Finance, Analysis and Operations Research Section *The Irish Jury Selection System* (Report Number 3/93, June 1993) at 12.

³⁷ *Civil Law (Miscellaneous Provisions) Act 2008 (Commencement) Order 2008* (SI No.274 of 2008).

³⁸ See Gallagher, “State turns blind eye to dodgers of jury duty” *Irish independent*, 22 July 2012, available at www.independent.ie.

³⁹ Vidmar *World Jury Systems* (Oxford University Press, 2000) at 70.

computer from the electoral register. This is designed to overcome the deficiencies of the former local-based system, principally in securing a better match between the number of jurors summoned and the workload of each court, in providing better communication with potential jurors and accommodation of their needs, and in bringing greater consistency to the treatment of their applications for excusal or deferral. The computer system generates summonses and letters confirming dates for service.⁴⁰ The 2001 Auld *Review of the Criminal Courts of England and Wales* noted that the Central Juror Summoning Bureau computer system is linked to police criminal records to enable automatic checks on any convictions of potential jurors that would disqualify them from jury service.⁴¹

2.35 In Northern Ireland, the Electoral Office supplies on a yearly basis a jury list of randomly selected electors to the Northern Ireland Courts and Tribunal Service (NICtS).⁴² The Electoral Office uses a computer-based system similar to that employed in England and Wales to develop the annual jury list. Until 2007, separate jury lists were prepared for each of the 7 County Court Divisions in Northern Ireland. In 2007, a centralised Jury Management Team was established in the NICtS, which is broadly comparable to the English Central Juror Summoning Bureau. Since 2007, the annual jury list is sent to the Jury Management Team, which manages the process of sending out jury notices for the 7 County Court Divisions. The Commission notes that in a 2010 study of the Northern Ireland jury selection process⁴³ the attrition rate was found to be about 33%, that is, less than half the current rate in the State. It is important to note in this respect that the list of ineligible persons and those excusable as of right in the *Juries (Northern Ireland) Order 1996* closely corresponds to the comparable list in the *Juries Act 1976*. The 2010 study also noted that the number of jurors called for jury service had been reduced each year since the centralised Jury Management Team had been established in 2007 and that this had had at least three positive effects: by comparison with previous years a higher proportion of those called for jury service, 51%, had actually served on a jury (those who were summoned and actually served on a jury were more likely to report that they had a positive experience of the justice system by comparison with those called but who did not serve); the reduction in the numbers called remained consistent with the efficient and effective running of jury trials; and the administrative costs of the jury selection process had been reduced by 15% by comparison with previous years.⁴⁴

(c) ICT and Jury Selection in Ireland

2.36 The present system of jury selection relies heavily on paper and the postal service, as well as in-person communication, rather than being primarily dependent on ICT.⁴⁵ The Commission understands that, at present, there is no e-mail communication with candidate jurors. The website of the Courts Service includes a section on jury notices, which informs candidate jurors in cases where they are not required for attendance at a particular location.⁴⁶

⁴⁰ Lord Justice Auld *A Review of the Criminal Courts of England and Wales* (Home Office, 2001) at 141, available at www.criminal-courts-review.org.uk.

⁴¹ On disqualification, see Chapter 7, below.

⁴² See Article 4 of the *Juries (Northern Ireland) Order 1996*.

⁴³ *Management of Jurors: An inspection of the management of jurors by the Northern Ireland Courts Service* (Criminal Justice Inspection Northern Ireland, 2010), available at www.cjini.org. The study made a number of recommendations to improve further the jury management system, and these also took into account the results of a questionnaire-based survey of jurors which formed part of the study. The Commission discusses the issue of juror research in Chapter 11, below.

⁴⁴ *Ibid* at 8-9.

⁴⁵ See the Courts Service website: www.courts.ie/courts.ie/library3.nsf/pagecurrent/F981B883EFAFC7458025704400475EA4?opendocument&I=en.

⁴⁶ See the Courts Service website: www.courts.ie/courts.ie/library3.nsf/WebPageCurrentWeb/ac0b137360478c078025714500396557?OpenDocument&Start=1&Count=1000&Expand=1.

2.37 The then Director of Public Prosecutions suggested in 2010 that developments in technology ought to render unnecessary and redundant the process of physically assembling hundreds of people in a court room each morning to select 12 jurors, which he described as “a waste of citizens’ time.”⁴⁷ A number of submissions received by the Commission suggested that more effective use of technology could improve the current system for summoning and empanelling jurors. These suggestions included the use of an ICT system at the initial summoning stage of selecting a jury panel from the electoral register, the use of e-mail and texting to notify summoned jurors of the date for attending court initially (and any changes to this) and the creation of a live website listing all cases in progress and any attendant delays.

2.38 The Commission fully appreciates that the Courts Service has been to the forefront in the use of ICT to enhance the important public services which it delivers. The Courts Service has noted that, in general terms, technological advances have reduced back-office tasks and freed up staff to fill posts in frontline services. It pointed out that, in 2011, 65% of family law maintenance receipts and 92% of family law maintenance payments were paid electronically, and over 26% of fines were paid online. Its website received over 2 million visits in 2011, with over 30% being first time visitors.⁴⁸

2.39 The Courts Service also accepts that the use of ICT would enhance the efficiency of jury selection procedures, and that this may be combined with the plans to complete the roll-out of the Combined Court Office model to a single identified location in each county.⁴⁹ The Combined Court Office project, which follows from the provision for combined court offices in the *Courts and Court Officers Act 2009*, is intended to eliminate duplication of activities, facilitate the maintenance of appropriate frontline services, allow more flexibility in opening times and allow staff access to an increased range of expertise.⁵⁰ Among the proposals in the Courts Service’s ICT Strategy Statement 2011-2014 is the establishment of a Central Jury Management system.⁵¹ This would consist of an interactive or online jury system that could reduce the possibility of delay in jury selection, and which would include the use of scanners and barcodes for juror attendance.⁵² It is also the intention of the Courts Service to streamline the electoral register data take-on for the jury selection system.⁵³ The Commission welcomes these developments and the ongoing commitment, within available resources, to apply ICT to the jury selection process. The positive findings from the 2010 study of the centralised Jury Management Team in Northern Ireland, discussed above, suggest that such developments would assist in further improving the efficiency and effectiveness of the jury selection process and also enhance the positive experience of those called for jury service.

2.40 *The Commission commends the ongoing commitment of the Courts Service to enhance the efficiency of jury selection procedures through the use of ICT resources and through its proposal to establish a central Jury Management system, which has the potential of leading to a higher proportion of those summoned for jury service actually serving on a jury, to enhancing further the efficient and effective running of jury trials and to reducing the administrative costs of the jury selection process.*

C Extension of Qualification for Jury Service to Persons Other than Irish Citizens

2.41 In this Part, the Commission discusses whether qualification for jury service should be extended to persons other than Irish citizens, particularly in the light of the significant increase in the

⁴⁷ Comments of James Hamilton, then Director of Public Prosecutions, when he launched the Commission’s Consultation Paper, 29 March 2010: see “DPP calls for more efficient system for selecting juries,” *The Irish Times*, 30 March 2010.

⁴⁸ Courts Service *Annual Report 2011* at 7 and 17, available at www.courts.ie.

⁴⁹ *Courts Service Strategic Plan 2011-2014: Delivering Service, Transformation and Value* at 3-5, available at www.courts.ie.

⁵⁰ Courts Service *Annual Report 2011* at 7.

⁵¹ *Courts Service ICT Strategy Statement 2011-2014* at 2, available at www.courts.ie.

⁵² *Ibid* at 5.

⁵³ *Ibid* at 11.

percentage of the population of the State who are non-Irish citizens. This discussion focuses on some key principles discussed in Chapter 1, namely, that jury panels should be broadly representative of the community having regard to the provisions on criminal trials in Article 38.1 and 38.5 of the Constitution of Ireland, and that while the panels need not, as a constitutional requirement, match exactly the community at any given time, they should be reviewed to determine whether the general jury pool from which persons are being selected for jury service no longer reflect the community as a whole. The Commission begins by reviewing comparative developments in jury qualification. Following this, the Commission reviews the submissions received on the provisional recommendations made in the Consultation Paper, and then sets out its final recommendations for reform of the law on qualification for jury service.

(1) England, Wales and Scotland

2.42 In England, Wales and Scotland non-British citizens have been entitled to sit on juries since the enactment of the *Juries Act 1870*, section 8 of which provided that “aliens” who were resident in Britain for 10 years were qualified for jury service. It is notable that the *Juries (Ireland) Act 1871*, which in most other respects was modelled on the 1870 Act, provided in section 7 that “aliens” were disqualified from jury service in Ireland.

2.43 Section 1 of the *Juries Act 1974* now provides that persons who are registered as parliamentary or local government electors are eligible for jury service in the Crown Court (where most criminal jury trials are held) and the High Court (for civil jury trials, now confined primarily to defamation trials, as in Ireland). For this purpose a “local government elector” is defined as a citizen of the UK, a British Commonwealth citizen, a citizen of the Republic of Ireland or a “relevant” citizen of the European Union (a citizen of an EU Member State other than the UK or Ireland).

2.44 As already noted, section 8 of the *Juries Act 1870* had required that a non-British citizen be domiciled in Britain for 10 years in order to be qualified for jury service. The 1965 *Report of the Departmental Committee on Jury Service*⁵⁴ recommended that the 10 year rule be replaced by a 5 year residency requirement, and this was implemented in section 1 of the 1974 Act, which requires that the parliamentary or local government elector must have been ordinarily resident in the United Kingdom, the Channel Islands, or the Isle of Man for any period of at least 5 years since the age of 13. In 2001, the *Auld Review of the Criminal Courts of England and Wales* received a number of submissions calling for reform of the residency requirements but ultimately considered that there was “no compelling case for change.”⁵⁵

(2) Northern Ireland

2.45 The *Juries (Northern Ireland) Order 1996*⁵⁶ provides that every person who is aged between 18 and 65 and is registered as an “elector” is qualified for jury service.⁵⁷ The 1996 Order defines “elector” for this purpose as “a local elector” as defined in the *Electoral Law Act (Northern Ireland) 1962*.⁵⁸ The definition of local elector in the 1962 Act was repealed and replaced by the definition of local elector in section 1 of the *Elected Authorities (Northern Ireland) Act 1989*. Section 1 of the 1989 Act, as amended,⁵⁹ provides that a person is entitled to vote as an elector at a local election in Northern Ireland if on the date of the poll he or she is a citizen of the UK, a Commonwealth citizen, a citizen of the Republic of Ireland or a “relevant” citizen of the European Union (a citizen of an EU Member State other than the UK or Ireland). This definition is identical to the definition that applies in England and Wales. In addition, the person must be registered in the register of local electors, and for this purpose the 1962 Act provides that the person

⁵⁴ Cmnd 2627, 1965 (the Morris Committee), discussed at paragraph 1.17, above.

⁵⁵ *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001) at 143-145.

⁵⁶ SI 1996 No.1141 (N.I. 6). The 1996 Order replaced the *Juries Acts (Northern Ireland) 1871 to 1974*.

⁵⁷ Article 3 of the 1996 Order. This is subject to those individuals who are ineligible or disqualified from jury service: see Chapters 4 to 6, below.

⁵⁸ Article 2 of the 1996 Order.

⁵⁹ By the *Representation of the People Act 2000*, Schedule 3.

must have been resident in Northern Ireland for three months to qualify for registration on the electoral lists.⁶⁰

2.46 The Northern Ireland Court Service carried out a public consultation between 2008 and 2010 on *Widening the Jury Pool*,⁶¹ which examined a number of specific areas under which the Northern Ireland jury pool could be extended. Given that the 1996 Order already provides for a very wide definition of qualified “electors” which includes non-British citizens, the focus of that consultation was on other aspects of widening the jury pool, such as amending the list of ineligible persons, persons excusable as of right and persons disqualified from jury service arising from criminal convictions. These aspects are discussed in Chapters 4 to 6, below.

(3) Australia

2.47 All Australian jurisdictions require citizenship as an element of eligibility for jury service. A number of law reform bodies in Australia have considered extending eligibility to non-Australian citizens, but the position remains unchanged at the time of writing.⁶²

(4) New Zealand

2.48 In New Zealand, section 6 of the *Juries Act 1981*, as amended,⁶³ provides that individuals who are registered as electors are qualified and liable to serve as jurors. In New Zealand, eligibility to vote in elections not only extends to citizens but also to permanent residents, who have “at some time resided continuously in New Zealand for a period of not less than one year.”⁶⁴ The *Electoral Act 1993* provides for the mandatory enrolment of those eligible to vote, including permanent residents, on the register of electors (failure to do so being a criminal offence).⁶⁵

2.49 New Zealand uses the national electoral register and the Māori electoral rolls as the lists from which to issue jury summonses.⁶⁶ The Electoral Enrolment Centre of New Zealand, the organisation responsible for maintaining the electoral rolls, also draws up jury lists annually. The *Juries Act 1981*, as amended,⁶⁷ provides that jury lists are supplied by the Chief Registrar of Electors to the Registrar of the Court on a regular basis. The system of processing lists and administering summonses is computerised, which renders the process increasingly more efficient.⁶⁸

⁶⁰ *Electoral Law Act (Northern Ireland) 1962*, as amended.

⁶¹ Northern Ireland Courts Service *Widening the Jury Pool: Summary of Responses* (2010) at 12-13, available at www.courtsni.gov.uk. As noted in paragraph 1.33, above, that consultation process was carried out just before the devolution of justice matters to the Northern Ireland administration and, at the time of writing, the Northern Ireland Department of Justice has indicated that it intends to proceed to legislate on one matter only discussed in that process, raising the upper age limit for jury service of 65 years in the 1996 Order. Nonetheless, the views expressed in that consultation process on the others matters canvassed remain of value in the context of the preparation of this Report.

⁶² The citizenship requirement has been retained, for the most part, for its practical advantages, rather than on a principled basis. For a fuller discussion of these considerations, see the Consultation Paper, at paragraphs 2.30 to 2.36.

⁶³ Amended by the *Juries Act 2000*.

⁶⁴ Section 74(1) of the *Electoral Act 1993*.

⁶⁵ Section 82 of the *Electoral Act 1993*.

⁶⁶ Section 6 of the *Juries Act 1981*. As noted above, by virtue of Section 82 of the *Electoral Act 1993*, it is mandatory for those qualified to vote in New Zealand to enrol on the register.

⁶⁷ By the *Juries Amendment Act 2000*.

⁶⁸ Law Commission of New Zealand *Juries in Criminal Trials* (Report 69, 2001) at 57 to 58.

(5) United States

2.50 Citizenship is a requirement for service as a juror in the United States, and indeed, many believe that one of the key functions of jury service is to educate citizens about democracy.⁶⁹

(6) Consultation Paper Recommendations

2.51 In the Consultation Paper, the Commission noted that there has been a significant increase in the number of non-Irish citizens living and working in Ireland since the enactment of the *Juries Act 1976*.⁷⁰ The Commission also noted that extending jury selection to non-Irish citizens would significantly broaden the pool of candidate jurors and would have the positive effect of aligning juror panels with contemporary society.⁷¹ Thus, the Consultation Paper provisionally recommended that jury panels be based on the register of electors for Dáil, European and local elections since non-Irish citizens are eligible to vote in local elections.

2.52 The Consultation Paper also provisionally recommended that non-Irish citizens drawn from the register of electors should satisfy the 5 year residency eligibility requirement for Irish citizenship in order to qualify for jury service, and that such individuals must be capable of following court proceedings in one of the official languages of the State, Irish or English.⁷²

2.53 As noted above,⁷³ the Consultation Paper also emphasised the importance of the principles of representativeness and inclusiveness in drawing up jury lists, and provisionally recommended that (a) jury panels should be based on the register of electors for Dáil, European and local elections; (b) non-Irish citizens drawn from the register of electors should satisfy the five year residency eligibility requirement for Irish citizenship in order to qualify for jury service, and (c) non-Irish citizen jurors must be capable of following court proceedings in one of the official languages of the State, Irish or English.⁷⁴

(7) Submissions and Final Recommendations

(a) Extending qualification for jury service to reflect recent changes in Irish population

2.54 The Commission notes that the question of extending eligibility for jury service beyond the current position by which eligibility is confined to Irish citizens who are registered on the Dáil electoral register – which amounts to a potential pool of about 3 million adults – is related to two of the key principles set out in Chapter 1. These are: that the pool or panel should be broadly representative of the community; and that, while the panels need not, as a constitutional requirement, match exactly the community at any given time, they should be reviewed to determine whether the general jury pool has, over time, begun to shrink to such an extent that the persons being selected for jury service no longer reflect the community as a whole.

2.55 The Commission acknowledges that there have been significant changes in this respect in the population of the State in the 10 years from 2002 to 2011. These changes have been greatly influenced by the fact that many citizens of the 27 Member States of the European Union are free, under EU law, to live and work in the State; and that, in addition, many other non-Irish citizens formed part of a large pattern of inward migration to the State prior to the global economic downturn of recent years. The Central Statistics Office (CSO) has published a breakdown of the relevant figures derived from the April 2011 Census.⁷⁵ The following Table⁷⁶ indicates the breakdown by nationality.

⁶⁹ Vidmar (ed) *World Jury Systems* (Oxford University Press, 2000) at 117.

⁷⁰ Consultation Paper at paragraph 2.24.

⁷¹ Consultation Paper at paragraph 2.50.

⁷² *Ibid* at paragraph 2.55 to 2.56. This recommendation is now dealt with in the section on capacity below at paragraphs 4.84ff.

⁷³ See paragraph 2.41, above.

⁷⁴ Consultation Paper at paragraphs 2.55 to 2.56.

⁷⁵ Central Statistics Office, *Profile 6: Migration and Diversity* (October 2012), available at www.cso.ie.

⁷⁶ *Ibid*, at 7, Table A.

Table

Population of Non-Irish nationals in Ireland by nationality, 2002, 2006 and 2011

| Nationality | 2002 | 2006 | 2011 | Change 2002-2011 | % change |
|------------------------|----------------|----------------|----------------|-------------------------|-----------------|
| Poland | 2,124 | 63,276 | 122,585 | 120,461 | 5,671.4 |
| UK | 103,476 | 112,548 | 112,259 | 8,783 | 8.5 |
| Lithuania | 2,104 | 24,628 | 36,683 | 34,579 | 1,643.5 |
| Latvia | 1,797 | 13,319 | 20,593 | 18,796 | 1,046.0 |
| Nigeria | 8,969 | 16,300 | 17,642 | 8,673 | 96.7 |
| Romania | 4,978 | 7,696 | 17,304 | 12,326 | 247.6 |
| India | 2,534 | 8,460 | 16,986 | 14,452 | 570.3 |
| Philippines | 3,900 | 9,548 | 12,791 | 8,891 | 228.0 |
| Germany | 7,216 | 10,289 | 11,305 | 4,089 | 56.7 |
| USA | 11,384 | 12,475 | 11,015 | - 369 | 3.2 |
| China | 5,842 | 11,161 | 10,896 | 5,054 | 86.5 |
| Slovakia | 297 | 8,111 | 10,801 | 10,504 | 3,536.7 |
| France | 6,363 | 9,046 | 9,749 | 3,386 | 53.2 |
| Brazil | 1,087 | 4,388 | 8,704 | 7,617 | 700.7 |
| Hungary | 409 | 3,440 | 8,034 | 7,625 | 1,864.3 |
| Italy | 3,770 | 6,190 | 7,656 | 3,886 | 103.1 |
| Pakistan | 2,939 | 4,998 | 6,847 | 3,908 | 133.0 |
| Spain | 4,436 | 6,052 | 6,794 | 2,358 | 53.2 |
| Czech Republic | 1,103 | 5,159 | 5,451 | 4,348 | 394.2 |
| South Africa | 4,185 | 5,432 | 4,872 | 687 | 16.4 |
| Other non-Irish | 45,348 | 77,217 | 85,390 | 40,042 | 88.3 |
| Total non-Irish | 224,261 | 419,733 | 544,357 | 320,096 | 142.7 |

2.56 Thus, in 2011, there were 544,357 non-Irish nationals living in Ireland, representing 12% of the total population in the State. This was an increase of 124,624 since the previous Census in 2006 (when non-Irish nationals represented 5.8% of the total population) and an increase of 320,096 since the 2002 Census. The CSO figures indicate that 12 nations with over 10,000 residents accounted for 74.4% of all non-Irish nationals in 2011. A further 34 nations with between 1,001 and 10,000 residents accounted for another 20.6% per cent of the non-Irish nationals in Ireland. There was an increase of the number of non-Irish families with children, which increased from 41% of all households in 2006 to 50% in 2011. It is clear that these figures indicate a significant increase in the number of non-Irish nationals living in Ireland between 2002 and 2011 and who have established more than a temporary connection with the State. The percentage of non-Irish nationals with children indicates a significant presence in Irish society over and above residency. These non-Irish citizens therefore form an important part of contemporary Irish society.

2.57 This demographic transformation in the population of the State between 2002 and 2011 reinforces the Commission's view expressed in the Consultation Paper that the jury selection pool in the *Juries Act 1976* is not representative of contemporary Irish society, given that a high number of long-term residents in the State, who are not Irish citizens, are not qualified for jury selection under the 1976 Act. Indeed, there was general consensus in the submissions received and during the consultation process that, because only Irish citizens are qualified to serve as jurors under the *Juries Act 1976*, the current

qualification criteria for jury service do not produce jury pools or panels that are broadly representative of the community in Ireland.

2.58 The Commission notes that just over 3 million Irish citizens over the age of 18 are eligible to vote in general elections and are, therefore, qualified for jury service under the *Juries Act 1976*. The Commission also notes that over 112,000 UK citizens live in the State and are eligible to vote in general elections under the *Electoral Acts* but are not qualified to serve on juries. By contrast, Irish citizens are eligible to vote in general elections in the UK, and are qualified to serve on juries there, including in Northern Ireland. The Commission also notes that a further 100,000 adults, EU citizens and non-EU residents, are registered on the local election register. Taking account of these indicative numbers, the Commission notes that, if these adults were eligible for jury service, in the region of 200,000 additional persons, representing much of the non-Irish citizen population changes since 2002, would be available for jury service.

2.59 The Commission considers that the exclusion of this very large group of people from potential jury service is difficult to reconcile with the key principles set out in Chapter 1, in particular that the pool or panel should be broadly representative of the community; and that, while the panels need not, as a constitutional requirement, match exactly the community at any given time, they should be reviewed to determine whether the general jury pool has, over time, begun to shrink to such an extent that the persons being selected for jury service no longer reflect the community as a whole. In addition, having regard to the general view expressed during the consultation process, the Commission sees no reason to depart from the views expressed in the Consultation Paper concerning the extension of qualification for jury service to non-Irish citizens and residents who are registered to vote at elections in the State. The Commission also notes that such a reform would mirror arrangements already in place in the United Kingdom, including Northern Ireland, as well as in comparable common law jurisdictions referred to above.

(b) Eligibility for jury service and length of residency

2.60 The Commission notes that the issue of whether eligibility for jury service should be connected to a person's length of residency in the State is not simply a crude matter of excluding those who have recently arrived in Ireland. Rather, it derives from the key principles set out in Chapter 1. These include the requirement that in order to meet the provisions of the Constitution concerning a fair trial, and of comparable provisions in international human rights instruments, jurors should have certain minimum standards of personal capacity and competence. In addition, in the specific context of criminal trials, which is the most common use of jury trials in Ireland, the Commission notes the importance of the specific provisions on criminal trials in Articles 38.1 and 38.5 of the Constitution. Another important principle of relevance is that jury pools should be representative of the community, and this connotes a knowledge of and close connection with society rather than mere residency. The Commission also recalls a related general principle, namely, that jury service is a duty which falls upon members of the population of the State rather than a right of an individual in the State.

2.61 The Commission also notes that, in the course of a trial, evidence may often arise that involves important details of local knowledge and culture which may not be familiar to a person who is newly arrived in the State and which may require a period of social interaction with the local and national community. In addition, complex evidence is often presented that would require a high level of linguistic competence in the English language, through which the vast majority of trials are conducted in Ireland. The Commission accepts that there are likely to be a number of non-Irish nationals who will meet these requirements. It is nonetheless important to emphasise that length of residency is likely to be an important indicator of this aspect of juror competence, and which underpins a crucial aspect of the Constitution and of international human rights instruments, namely, that a person has a right to a court hearing that can be described as applying standards of fair procedures.⁷⁷

2.62 During the consultation process, there were differing views as to what residency period would be required in order to deem a non-Irish citizen eligible for jury service. Many of those who made submissions and with whom the Commission engaged considered that the five months period set out in

⁷⁷ See also the discussion of competence in Chapter 4, below.

the *Electoral Acts* in order to be registered to vote at local elections was too short a period. The Commission also notes that there was no clear consensus as to what would be an appropriate period, and the suggested periods ranged from 1 year to 5 years. It was also suggested that the type of residency rather than the simple fact of residency might need to be considered, for example, drawing a distinction between asylum seekers, those with leave to remain, and those with permanent residency. A number of consultees acknowledged the difficulty of verifying length of residency and of assessing a candidate juror's level of linguistic competence.

2.63 The Commission has concluded that a suitable length of residency requirement should be in place to ensure that jury trials meet the requirements of the Constitution, and of comparable provisions in international human rights instruments, concerning the right to a fair trial. The Commission has also had regard in this respect to the specific provisions on criminal trials in Articles 38.1 and 38.5 of the Constitution. The Commission acknowledges that, bearing in mind that it has recommended that jurors will continue to be selected from the electoral register, it would be difficult to ensure that those initially selected for jury service from the electoral roll meet a residency requirement. In this respect, the Commission notes that it would be for each summoned potential juror to consider and reflect on whether he or she is eligible to serve. This would not, however, be unique to this specific requirement of jury service; a similar issue arises, for example, in connection with competence, discussed in Chapter 4, below. As the discussion above of the attrition rate of jurors indicates, the current process for selection of potential jurors from the electoral list involves the practical reality that a percentage of those summoned are not qualified, are ineligible or are otherwise disqualified from jury service. The Commission therefore notes that, both under the existing provisions of the *Juries Act 1976* and under the reform proposals made by the Commission in this Report, there would remain a number of areas where it is primarily a matter for the potential juror to inform the court that he or she is not qualified or eligible for jury service and therefore wishes to be excused from jury service. In that context, the inclusion of a residency requirement would be consistent with this.

2.64 The Commission has concluded that, while there is no specific period after which it can be said that all persons would be competent to serve on any jury dealing with any matter, a period of 5 years would be a suitable period of time to indicate that the person has become part of the community and would therefore be competent to carry out the functions of a juror, which is also the indicative time period related to applying for citizenship through naturalisation. The Commission emphasises that it remains a matter for each potential juror to determine whether he or she is competent to carry out the duty of jury service and that, on being summoned for jury service, if he or she has any doubt to inform the court of this. This approach is consistent with the Commission's analysis of competence in Chapter 4 of the Report.

2.65 *The Commission recommends that, in addition to the current position under which Irish citizens who are registered to vote as Dáil electors in a jury district are qualified and liable to serve on juries, the following persons should also be qualified and liable to serve: every citizen of the United Kingdom aged 18 years or upwards who is entered in a register of Dáil electors in a jury district; and every other person aged 18 years and upwards who is entered in a register of local government electors in a jury district.*

2.66 *The Commission also recommends that a non-Irish citizen referred to in paragraph 2.65 must, in order to be eligible for jury service, be ordinarily resident in the State for 5 years prior to being summoned for jury service.*

CHAPTER 3 JURY CHALLENGES

A Introduction

3.01 In this Chapter, the Commission examines jury challenges, that is, objections made to jurors after they have been drawn from the panel of potential jurors but before they have been sworn as jury members. The *Juries Act 1976* currently provides for two types of challenge: challenges without cause shown, sometimes referred to as peremptory challenges, which involve objections made without putting forward a stated reason; and challenges for cause shown, that is, objections based on putting forward a specific reason. The 1976 Act permits each participant in a criminal or civil trial to make seven challenges without cause and, because of this, in practice there are very few occasions in which challenges for cause are made. In Part B, the Commission discusses challenges without cause shown (peremptory challenges) and, in Part C, challenges for cause. In both Parts, the Commission examines the two types of challenge by reference to comparable processes in other jurisdictions and then sets out its final recommendations.

B Challenges Without Cause Shown: Peremptory Challenges

(1) Current Law in Ireland

3.02 Section 20(2) of the *Juries Act 1976* provides that, in every criminal trial involving a jury, the prosecution and each accused person may challenge 7 jurors without cause shown. Similarly, section 20(1) provides that, in every civil trial involving a jury, each party may challenge 7 jurors without cause shown. The challenge is generally made immediately before the juror steps up to swear the juror's oath.¹ Section 20(3) of the 1976 Act provides that whenever a juror is lawfully challenged without cause shown, he or she shall not be included in the jury.² This does not mean that the person is excused from jury service; where a person is challenged, he or she returns to the jury panel and may very well be selected again in the balloting procedure and may, therefore, be liable to serve on another jury if he or she is not challenged.

3.03 The 1976 Act contains no equivalent of section 59 of the *Juries Act 1927*, which had included the prosecution's right to "stand by" jurors in criminal cases, that is, to object to a juror without cause subject to the juror being retained for selection for a later trial if required. In that respect, the 1976 Act now places the prosecution and defence in a criminal trial on the same footing as far as challenges are concerned.³ In practice, in criminal trials, challenges are often exercised by the solicitor for the defence and for the prosecution, though counsel may also be involved in some instances.⁴ This contrasts with the position in the United Kingdom, where the Commission understands that counsel are more often involved in jury challenges.

3.04 No reasons are provided for the challenge without cause, nor do they involve any questioning of the potential juror; hence their peremptory nature. As such, they reflect "a subjective assessment of the

¹ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 835.

² This implemented the recommendations in the 1965 Report of the Committee on Court Practice and Procedure *Jury Challenges* (Pr.8577, November 1965): see the discussion in Chapter 1, above, and in the Consultation Paper, paragraph 6.03.

³ This implemented a minority view of the then President of the District Court in the 1965 Report of the Committee on Court Practice and Procedure *Jury Challenges*: see the Consultation Paper at paragraph 6.04.

⁴ Walsh *Criminal Procedure* (Thompson Round Hall Dublin 2002) at 835.

likely attitude of the juror to the challenger's case, based on matters such as: age, sex, appearance, address or employment."⁵

(2) Comparative Approaches to Challenges Without Cause

(a) United Kingdom

3.05 During the 20th century and early years of the 21st century, the entitlement to make challenges without cause in the United Kingdom was, over time, reduced and, ultimately, abolished. In England and Wales, in 1948 the number of permissible peremptory challenges was reduced from 20 to 7,⁶ and section 12(1) of the *Juries Act 1974* retained the number at 7 (as already noted, this was also adopted in the *Juries Act 1976*). The number was reduced to 3 by section 43 of the *Criminal Law Act 1977*, and the right of peremptory challenge was abolished entirely in England and Wales by section 118(1) of the *Criminal Justice Act 1988*⁷ and in Scotland by the *Criminal Justice (Scotland) Act 1995*.

3.06 In Northern Ireland, peremptory challenges were abolished in 2007 by section 13 of the *Justice and Security (Northern Ireland) Act 2007*, which amended the *Juries (Northern Ireland) Order 1996*. This change formed part of a number of related changes made to the 1996 Order in the 2007 Act in order to implement proposals in a 2006 Consultation Paper published by the UK Government⁸ to support the reintroduction of jury trial in Northern Ireland, thus replacing the non-jury Diplock courts that had been in place since the early 1970s in Northern Ireland. The 2006 Consultation Paper had concluded that the return of jury trial should be accompanied by the abolition of peremptory challenges in order to prevent any appearance of biased selection procedures.⁹

3.07 Notwithstanding the abolition of peremptory challenges, the Crown retains the right to "stand by," which involves sending the juror back into the jury pool or panel, from where he or she could be called again if the pool runs out of potential jurors. Thus, Article 15(4) of the *Juries (Northern Ireland) Order 1996* provides that the judge may at the request of the Crown, but not of a private prosecutor, order any juror to "stand by" until the panel has been used in full. There is no limit on the number of candidate jurors which may be challenged in this way. After the abolition of the peremptory challenge, the Attorney General for England and Wales issued guidelines on the use of the "stand by" procedure,¹⁰ which state that it should only be used on the basis of clearly defined and restrictive criteria: (a) to remove a juror in a terrorist or security case in which the Attorney General has authorised a check of the jury list or (b) where the juror is "manifestly unsuitable" and only if the defence agrees, for example, where a juror for a complex case would not be competent because of literacy issues.

(b) United States

3.08 All jurisdictions in the United States have some system of peremptory challenges in place.¹¹ Counsel for both parties are permitted to question jurors prior to empanelment. There is support both

⁵ Walsh *Criminal Procedure* (Thompson Round Hall Dublin 2002) at 835.

⁶ Section 35 of the *Criminal Justice Act 1948*, which replaced section 29 of the *Juries Act 1825* (under which 20 challenges without cause were permitted in felony cases).

⁷ Emmins and Scanlan *Blackstone's Guide to the Criminal Justice Act 1988* (Blackstone, 1988) at 172. The authors noted that the peremptory challenge had been under scrutiny in the period immediately preceding the enactment of the 1988 Act. By way of example, they refer to a 1986 case, in which eight RAF men were tried on charges under the English *Official Secrets Act*. It had been argued that counsel for the accused had agreed in advance to peremptorily challenge certain individuals with the intention of constructing a jury of young males on the basis that older men who may have served in the armed forces would be unsympathetic to the defendants.

⁸ *Replacement Arrangements for the Diplock Court System: A Consultation Paper* (Northern Ireland Office, 2006).

⁹ See also paragraph 7.32, below, on the related changes introduced in 2007 that restricted access to jury lists in Northern Ireland in order to guard against potential tampering in the jury selection process.

¹⁰ See Archbold *Criminal Practice and Procedure* (2011), paragraphs 4-250 and 4-251, Appendix A-265.

¹¹ Vidmar (ed) *World Jury Systems* (Oxford University Press, 2000) at 112.

judicially and academically for the abolition of peremptory challenges.¹² Some States have reduced the number of peremptory challenges available to each party.¹³

3.09 As is the case in many jurisdictions, peremptory challenges are used in the United States as a means of influencing the composition of the final 12 members of the jury. Thus, in a 1992 Massachusetts trial of a Catholic priest for blocking access to abortion clinics, the prosecution used peremptory challenges to eliminate prospective jurors with Irish Catholic-sounding surnames, on the assumption that ethnicity and religion would control jurors' perspectives.¹⁴ The conviction was overturned on the basis that this had violated the defendant's right to a jury drawn from a representative cross-section of society.

3.10 In *Swain v Alabama*¹⁵ the US Supreme Court found that the systematic use of peremptory challenges could violate the Equal Protection Clause of the US federal Constitution. In *Batson v Kentucky*¹⁶ a majority of the US Supreme Court found that, once the defendant raises a prima facie case of racial discrimination with respect to peremptory challenges, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Furthermore, race-based challenges by the defendant are also prohibited. In *JEB v Alabama*¹⁷ the Court went further and held that excluding jurors through the use of peremptory challenges on the basis of gender also violated the Equal Protection Clause. Blackmun J stated:

“All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.”

3.11 The emphasis here is on (a) the rights of prospective jurors, (b) the need to prohibit any injustice one or other party might suffer as a result of an unrepresentative jury, and (c) the damage caused to public confidence in the justice system by racially discriminatory practices in jury selection.¹⁸

(c) Canada

3.12 Section 634 of the Canadian Criminal Code provides that where an accused is charged with high treason or first degree murder, the prosecutor and the accused are each entitled to 20 peremptory challenges. Where the sentence for the offence charged exceeds five years, the prosecution and defence are each entitled to 12 peremptory challenges. In all other cases, both parties are entitled to 4 peremptory challenges each. In the case of a joint trial, Article 634 provides that “the prosecutor is entitled to the total number of peremptory challenges available to all the accused.”

(d) Australia

3.13 All Australian states and territories have some right of peremptory challenge available.

3.14 In New South Wales, each party is entitled to three peremptory challenges. The New South Wales Law Reform Commission has recommended that the right of peremptory challenge be retained,¹⁹ but suggested that the mechanism should be continually monitored and abolished if it is considered that it

¹² See the Consultation Paper at paragraph 6.18.

¹³ See Council for Court Excellence District of Columbia Jury Project, *Juries for the Year 2000 and Beyond* (1998), cited in Vidmar *World Jury Systems* (Oxford University Press, 2000) at 111.

¹⁴ Abramson *We, the Jury* (Harper Collins, 1994) at 242, referring to Nealon “Conviction Overturned of Priest Who Blocked Boston Abortion Clinic” *Boston Globe* 1 March 1994 at 19.

¹⁵ 380 US 202 (1965).

¹⁶ 476 US 79 (1986).

¹⁷ 511 US 127 (1994).

¹⁸ O'Malley *The Criminal Process* (Thomson Reuters: Round Hall 2009) at 824.

¹⁹ New South Wales Law Reform Commission *Report on Jury Selection* (No. 117, 2007) at 118.

does not serve any legitimate purpose.²⁰ The *Jury Amendment Act 2010* did not change the position in New South Wales with respect to peremptory challenges.

3.15 In Victoria the three methods that exist to challenge a candidate juror are: challenge for cause, peremptory challenge, and the Crown's right to stand aside.²¹ The Parliament of Victoria Law Reform Committee in its Final Report on jury service in 1996 recommended that the right of the Crown to stand aside prospective jurors should be substituted for a right to peremptorily challenge.²² The Committee also recommended that the Director of Public Prosecutions should publish guidelines on the use of peremptory challenges by the Crown.²³ Sections 38 and 29 of the *Juries Act 2000* now provide that the Crown may stand aside between 4 and 10 potential jurors per accused, depending on how many accused have been arraigned in the trial. Each accused is entitled to challenge peremptorily between 4 and 6 candidate jurors, depending on how many accused have been arraigned in the trial.

(e) New Zealand

3.16 Section 17 of the *New Zealand Juries Amendment Act 2008* provides that, in every case tried by a jury, each party may challenge without cause 4 jurors. When two or more persons are being tried together, the prosecution may challenge without cause a maximum of 8 jurors.

3.17 Under section 24 of the *Juries Act 1981*, as amended by the *Juries Amendment Act 2008*, the prosecution and defence are each entitled to 4 peremptory challenges. Where there are two or more defendants, the Crown is entitled to a total of 8 challenges without cause.

3.18 Under section 27 of the 1981 Act, a trial judge can direct individuals to stand by until all other jurors are called and challenged, and this power does not appear to be limited to any particular number of potential jurors.

3.19 In its *Report on Juries in Criminal Trials*,²⁴ the New Zealand Law Commission recommended that the mechanism be retained. The Commission also recommended the introduction by the prosecution of guidelines explaining the bases on which it is or is not appropriate to use the peremptory challenge. The *Juries Amendment Act 2008* allowed for the retention of peremptory challenges, but did not refer to a system of guidelines for their use.

(f) Hong Kong

3.20 In Hong Kong, section 29 of the *Jury Ordinance*, provides that both the defence and prosecution are entitled to challenge up to 5 candidate jurors without cause. The prosecution is entitled to "stand by" candidate jurors. In Hong Kong, the court has considerable discretion in excluding persons from jury service during the trial, prior to the verdict. The Law Reform Commission of Hong Kong considered the area in 2008 but did not recommend any reform.²⁵

(3) Consultation Paper Recommendations

3.21 The Consultation Paper outlined a number of arguments both against peremptory challenges and also in favour of their retention.

3.22 The arguments listed against peremptory challenges included the following: peremptory challenges have the potential to cause juror frustration and humiliation,²⁶ the challenge is inherently

²⁰ New South Wales Law Reform Commission *Report on Jury Selection* (No. 117, 2007) at 175.

²¹ The right to stand aside exists in four Australian jurisdictions: Tasmania, Western Australia, the Australian Capital Territory, and the Northern Territory.

²² Parliament of Victoria Law Reform Committee *Final Report: Jury Service in Victoria* (1996) recommendation number 80.

²³ Parliament of Victoria Law Reform Committee *Final Report: Jury Service in Victoria* (1996) recommendation number 81.

²⁴ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69, 2001).

²⁵ Law Reform Commission of Hong Kong *Consultation Paper on Criteria for Service as Jurors* (2008).

²⁶ Consultation Paper at paragraph 6.36.

arbitrary,²⁷ it is inefficient,²⁸ such challenges do not give rise to representative juries and provide scope for discrimination,²⁹ they can be exploited by potential jurors,³⁰ the challenge for cause is a sufficient alternative to meet the needs of justice,³¹ and it is an ineffective tool in excluding biased jurors.³²

3.23 Abramson has commented on the position in the United States:³³

“Lawyers often use their peremptory challenges on the basis of some suspicion that young or old, rich or poor, white-collar or blue-collar, Italian or Irish, Protestant or Jewish jurors will be favourable to the other side. The effect of such peremptory challenges may be to lessen the representative nature of the jury actually seated. Why should lawyers be able to undermine the cross-sectional nature of the jury at all? Such a question forces us to explore, at a more philosophical level, what theory of representation we are trying to practice when we reform juries to be cross sections of the community.”

3.24 Commenting on jury systems more widely, Vidmar notes:

“Critics of the peremptory challenge argue that not only does the challenge permit, and perhaps even encourage, invidious discrimination against potential jurors, it causes jurors to become ‘frustrated and cynical about the justice system.’”³⁴

3.25 In the Irish setting, it has been suggested that “[i]ts arbitrary nature is just the sort of thing which brings the law into disrepute, especially in the eyes of those who have given of their time to act as jurors.”³⁵

3.26 In favour of the peremptory challenge, the Consultation Paper noted the following arguments: the challenge for cause is not a sufficient alternative to the peremptory challenge in meeting the needs of justice,³⁶ the accused is afforded some degree of control over the composition of the jury,³⁷ the challenge can assist in securing a representative jury,³⁸ and the peremptory challenge ensures that competent and impartial jurors are selected.³⁹

3.27 As already noted, a number of law reform agencies have recommended the retention of peremptory challenges. For example, the New Zealand Law Reform Commission has noted that:

“One advantage which peremptory challenges have over challenges for cause is that the latter are more demeaning, as counsel must publicly articulate their reasons for asserting a juror’s unsuitability. Prior to empanelling, some judges explain to the jurors the peremptory challenge process and tell them that the reasons for challenge are not to be regarded as personal. This

²⁷ *Ibid* at paragraph 6.37.

²⁸ *Ibid* at paragraph 6.38.

²⁹ Consultation Paper at paragraphs 6.39 to 6.40.

³⁰ *Ibid* at paragraph 6.41.

³¹ *Ibid* at paragraph 6.42.

³² *Ibid* at paragraph 6.43.

³³ Abramson *We, the Jury* (Harper Collins 1994) at 11-12.

³⁴ Vidmar *World Jury Systems* (Oxford University Press 2000) at 111.

³⁵ Coen “Elephants in the Room: The Law Reform Commission’s Consultation Paper on Jury Service – Part II” (2010) 20(4) *Irish Criminal Law Journal* 101.

³⁶ Consultation Paper at paragraph 6.43.

³⁷ *Ibid* at paragraphs 6.45 to 6.46.

³⁸ *Ibid* at paragraph 6.47.

³⁹ *Ibid* at paragraph 6.48.

takes most of the sting out of peremptory challenges, and the Commission would endorse this practice.”⁴⁰

3.28 The New Zealand Law Reform Commission also noted that peremptory challenges provide the accused with a measure of control over the composition of the jury that will judge him or her, and that if the opportunity to challenge in such a manner were to be removed, the accused may hold a sense of grievance or injustice as a result.⁴¹

3.29 On balance, the Consultation Paper provisionally recommended that peremptory challenges be retained.⁴² It provisionally formed the view that a reduction from 7 peremptory challenges to 5 may be appropriate, but ultimately invited submissions as to whether the number should be reduced.⁴³

3.30 The Commission did not consider that the development of statutory, enforceable guidelines on the use of peremptory challenges would be a useful reform as there would be no clear basis upon which to monitor compliance with the guidelines.⁴⁴ The Commission did consider, however, that guidelines may be useful in assisting prosecuting counsel in making a decision on whether it is appropriate to peremptorily challenge, and therefore provisionally recommended that the Director of Public Prosecutions should develop guidelines on when it is appropriate to use them.⁴⁵

(4) Submissions, further consultation and Final Recommendations

3.31 The submissions received by the Commission, and its further consultations with interested parties, reflected a wide diversity of views on peremptory challenges. Some consultees favoured abolition, others suggested a reduction in the number and others urged retention of the current number of peremptory challenges. From a procedural point of view, it was noted that fewer individuals might have to be summoned for jury service if the number of challenges were reduced.

3.32 As to the practice of challenges, consultees noted that, in general, both sides in a criminal trial ordinarily use between 3 and 5 challenges each, but that in some instances all 7 challenges are used by both the prosecution and defence. A number of consultees acknowledged that the use of peremptory challenges has the potential to undermine the principles of representativeness. It was suggested by some that conservatively dressed individuals, who may be linked to a certain social class, are frequently or always challenged peremptorily, but other consultees considered that this was not necessarily their experience. Equally, it was noted that in some instances, there might be a preference by one side for a jury comprising a majority of women or, as the case may be, a majority of men. It was also noted that, as both sides were entitled to the same number of challenges, any apparent preference for, or dislike of, a person on grounds of his or her social class or sex by one side would be cancelled out through the exercise of peremptory challenges by the other side. Consultees therefore noted that, in practice, any attempt by either side to use all their peremptory challenges to achieve a specific “balance” was unlikely to achieve this aim. Consultees accepted that they had been involved in trials involving a jury comprising 12 women and (reflecting the invariable position before the *de Burca* case and the enactment of the *Juries Act 1976*) a jury comprising 12 men. The Commission reiterates, as already noted in Chapter 1, that a jury of 12 women or a jury of 12 men is perfectly permissible; jury representativeness requires that the panel or pool from which a jury is selected should be broadly representative of the community, not that the jury actually chosen is broadly representative. In addition, the Commission notes that, in practice, the process of peremptory challenges generally results in juries that reflect the panel or pool from which they emerge.

3.33 Consultees acknowledged that the process of peremptory challenge could cause embarrassment for a potential juror if not handled suitably; and the Commission notes that, as pointed out

⁴⁰ Law Reform Commission of New Zealand *Juries in Criminal Trials* Report 69 (2001) at paragraph 226.

⁴¹ Law Reform Commission of New Zealand *Juries in Criminal Trials* Report 69 (2001) at paragraph 229.

⁴² Consultation Paper at paragraph 6.52.

⁴³ *Ibid* at paragraph 6.53.

⁴⁴ *Ibid* at paragraph 6.57.

⁴⁵ *Ibid* at paragraphs 6.57 and 6.58.

in Chapter 1, while jury service is correctly described as a duty rather than a right, it should be valued and supported to the greatest extent possible by the State. Consultees noted that trial judges usually explained that the use of peremptory challenges did not involve any personal slight on a potential juror, and it was agreed that it would be appropriate that the procedure be explained clearly and, as far as practicable, in a consistent manner.

3.34 Consultees noted that, by contrast with the position in the past when the prosecution had the additional power to “stand by”, the current law dealt with both sides equally (with the arguable exception of the minority of trials involving multiple defendants, referred to below). Indeed, it was noted that the operation of peremptory challenges in practice meant that a potential juror was not completely shut out from being considered for jury service; a juror who is challenged peremptorily remains part of the jury panel and may be selected again through the balloting procedure and, if no objection is made, may serve on a different jury. Consultees noted that this often occurred in practice in the context of court areas such as Dublin where more than one jury was required from the panel summoned for jury service.

3.35 As to peremptory challenges in multiple-defendant trials, consultees did not favour allowing the prosecution to have the total number of peremptory challenges available to all the accused (the position in Canada, but not the approach taken in any other jurisdiction reviewed).

3.36 Having considered this matter again in preparing this Report, the Commission accepts that, as summarised above, a number of valid arguments can be made both for the abolition of, and retention of, peremptory challenges. In arriving at a final conclusion and recommendation, the Commission remains of the view as expressed in the Consultation Paper that, on balance, the arguments in favour of retaining peremptory challenges outweigh those in favour of their abolition. The Commission notes in this respect that the peremptory challenge process as it operates in practice in Ireland has the effect that juries are broadly representative of the pool or panel from which they are selected (and the Commission emphasises that this is a separate matter from the issue discussed in Chapter 2 as to whether the pool or panel as currently constituted should be expanded). The Commission has also taken into account that, in the majority of common law jurisdictions reviewed for this project, the concept of peremptory challenge has been retained, including after extensive consideration by law reform agencies. In this respect, the Commission agrees with the views expressed by the New Zealand Law Reform Commission that the retention of peremptory challenges affords the accused some degree of control over the composition of the jury, that, in practice, it is consistent with securing a representative jury, and that it also ensures that competent and impartial jurors are selected.

3.37 The Commission also agrees that, when suitably explained, the process of peremptory challenge has an advantage over the process of challenges for cause (discussed in Part C, below), which can be more demeaning because the solicitor or counsel must publicly articulate their reasons for asserting a juror’s unsuitability. The Commission also notes that the complete abolition of peremptory challenges could lead to lengthy pre-trial selection of jurors, based on detailed questioning of candidate jurors, which in itself could be intrusive and demeaning, as well as involving additional trial costs.

3.38 As to whether the number of peremptory challenges should be reduced, the Commission has concluded that no clear case has been made for this and that, therefore, it is more appropriate to retain the current law. This includes concluding that there should not be a different rule for the minority of trials involving multiple defendants. The Commission notes that its consultative process has revealed a good qualitative understanding of the operation of peremptory challenges in practice. The process could, perhaps, benefit from future empirical research, which the Commission discusses more generally in Chapter 11, below; and the Commission considers that the ongoing application in practice of peremptory challenges, and any future reform of this area, could beneficially be preceded by such research. The Commission has also concluded that no convincing case has been made for statutory guidance on the criteria to be used for peremptory challenges, but, equally, that the courts should continue to provide clear and consistent guidance to the effect that the use of peremptory challenges does not involve any personal slight on a potential juror, and that the Director of Public Prosecutions could consider whether general guidance would be suitable for inclusion in the *Guidelines for Prosecutors*.⁴⁶

⁴⁶ Director of Public Prosecutions, *Guidelines for Prosecutors* (Revised, November 2010), available at: http://www.dppireland.ie/filestore/documents/GUIDELINES_-_Revised_NOV_2010_eng.pdf.

3.39 *The Commission recommends that the current law in the Juries Act 1976 on challenges without cause shown (peremptory challenges) should be retained. The Commission also recommends that the courts should continue to provide clear and consistent guidance to the effect that the use of peremptory challenges does not involve any personal slight on a potential juror and that the Director of Public Prosecutions consider whether general guidance on challenges without cause shown would be suitable for inclusion in the Director’s Guidelines for Prosecutors.*

C Challenges for Cause Shown

(1) Current Law in Ireland

3.40 Challenges for cause shown are rarely used in Ireland. This is because of the availability for both sides of 7 challenges without cause shown (peremptory challenges), which the Commission has discussed in Part B.

3.41 Section 21(2) of the *Juries Act 1976* provides that “any number of jurors” may be challenged for cause shown by both the prosecution and each accused. Similarly, section 21(1) of the *Juries Act 1976* provides that “any number of jurors” may be challenged for cause shown by any party. Section 21(3) of the 1976 Act provides that it is for the trial judge to decide, as he or she “shall think proper”, if the challenge ought to be upheld. Section 21(4) of the 1976 Act provides that, where the challenge is upheld, the challenged juror shall not be included in the jury.

3.42 The 1976 Act does not prescribe in detail the procedure applicable to a challenge for cause.⁴⁷ The challenge must generally be made before the juror has begun to take the oath, but the judge would appear to have discretion to permit a challenge to be made if the juror has already started to take the oath.⁴⁸ A challenge for cause cannot be made after the jury has been sworn in, even if information grounding cause only becomes available at that stage.⁴⁹

3.43 The 1976 Act does not specify what constitutes “cause” for the purpose of this type of challenge. In this respect, Walsh states:

“Clearly, this will be satisfied by any of the factors which render the juror ineligible to serve. Beyond that there is less certainty. Presumably a juror will be excluded if the party making the challenge is able to put forward cogent reasons why the juror might not discharge the obligations of jury service fairly and impartially. This presupposes something more than a subjective assessment of the juror’s likely attitude to the challenger’s case based on criteria such as age, sex, social status etc. In order to succeed, it is likely that the challenger will have to be able to point to matters personal to the individual which would call into question his or her capacity to function as a capable and impartial juror in the individual case, as distinct from cases generally or cases of any particular category.”⁵⁰

3.44 Walsh suggests that much of the issue turns on the concept of bias:

“The common law authorities suggest that some apparent or actual bias is necessary in order to challenge a juror successfully. If, for example, a juror had expressed hostility to one side or other, was related to or had a material connection with one of the parties or had expressed a wish as to the outcome of the case it is likely that he or she would be excluded. If a jury member is a victim of the offence charged against the accused, he or she should clearly be excluded. It is unlikely, however, that a juror could be challenged successfully on more objective grounds such as, for example, having a past criminal record, being the former victim of a similar crime, being related to a police officer, being a member of a particular ethnic community or having a particular religious

⁴⁷ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 837.

⁴⁸ *Ibid* at 837, referring to the English case *R v Harrington* (1976) 64 Cr App R 1.

⁴⁹ *Ibid* at 837-838, referring to the English case *R v Morris* (1991) 93 Cr App R 102 to the effect that the appropriate course of action in such circumstances would be to apply to the judge to exercise his or her discretion to discharge the juror.

⁵⁰ Walsh *Criminal Procedure* (Thomson Round Hall Dublin 2002) at 835-836.

belief. Having prior knowledge of the case may be more problematic. Generally, the mere fact that a juror has read, heard or seen previous media coverage of the case will not be sufficient in itself to satisfy cause. Nevertheless, cause may be shown where the nature of that coverage is such that it would prevent the juror from trying the case impartially.”⁵¹

3.45 In some jurisdictions, it has been held that a sufficient foundation must be laid before a challenge for cause will be entertained.⁵² This is not the case in Ireland and, indeed, in *The People (Attorney General) v Lehman (No.2)*⁵³ the Court of Criminal Appeal held that the trial court had acted appropriately in refusing to permit defence counsel to question each juror on whether he had read newspaper reports of the proceedings. Similarly, in *The People (Attorney General) v Singer*⁵⁴ the Court of Criminal Appeal held that the defendant was not permitted to question a juror in order to determine whether he was an investor in the defendant’s investment scheme.⁵⁵

“In the absence of knowledge on the applicant’s part that the juror was an investor and claimant in the liquidation it is clear he could not have discovered his incapacity. The trial judge could not allow jurors to be questioned before challenge with a view to enquiring whether they were investors and claimants in the liquidation: see *The People (Attorney General) v Lehman (No.2)*... Moreover for an accused to challenge for cause without information and to call the juror as a witness in support of such challenge in the hope of obtaining proof would amount to an abuse of the process of the Court.”

3.46 In the *Singer* case, it transpired that the foreman of the jury had been an investor in the defendant’s scheme and the Court of Criminal Appeal overturned the defendant’s conviction on the basis of the apparent bias of the juror.⁵⁶

3.47 The only information available to parties as of right, in advance of the potential challenge for cause being exercised, is the jury panel accessible under section 16(1) of the 1976 Act. The panel includes the names and addresses of panel members as shown on the Dáil register of electors. The notice accompanying the jury summons asks the recipient to inform the county registrar of his or her occupation, and where this information is communicated it is also available to anyone inspecting the panel list. As Walsh notes:

“Apart from these meagre pieces of information the prosecution and defence must rely on their own devices to dig up information which they can use to mount effective challenges to individual panel members.”⁵⁷

3.48 The prosecution has the advantage of Garda assistance in sourcing such information. In 1978 the Minister for Justice noted that:

“to enable it to exercise its statutory right of challenge, including challenge with showing cause, the prosecution may take steps to inform itself of any matters which it considers relevant to prospective jurors. In practice this means that the prosecution can look to the Garda Síochána for assistance in making inquiries.”⁵⁸

⁵¹ Walsh *Criminal Procedure* (Thomson Round Hall, 2002) at 836. Walsh cites *R v O’Coigley* (1798) 26 St Tr 1191, *The People (Attorney General) v Singer* [1975] IR 408 (decided in 1961) and the English case *R v Ford* [1989] QB 868.

⁵² *R v Chandler (No. 2)* [1964] 2 QB 322; *R v Kray* (1969) 53 Cr App R 412; *R v Sanders* [1995] 3 NZLR 545.

⁵³ [1947] IR 137.

⁵⁴ [1975] IR 408 (decided in 1961).

⁵⁵ *Ibid* at 414-5.

⁵⁶ See paragraph 1.38, above.

⁵⁷ Walsh *Criminal Procedure* (Thomson Round Hall, 2002) at 843.

⁵⁸ 309 *Dáil Debates* 1538, 22 November 1978. Available at: debates.oireachtas.ie/dail/1978/11/22/00012.asp.

3.49 In *The People (DPP) v McCarthy*⁵⁹ a juror was challenged for cause based on a claim that a family member of the juror had a criminal conviction. On appeal, it was argued that some sort of jury vetting had taken place in order for such information to have been unearthed. The Court of Criminal Appeal, rejecting this argument, held that the 1976 Act made no provision for jury vetting but that it provided an entitlement to inspect the panel of jurors by virtue of section 16 of the 1976 Act. The Court noted that it was not aware of any authorities which would prohibit reasonable enquiries to be made.

3.50 Notwithstanding this, the current position is that there is no inherent jurisdiction to permit the advance questioning of jurors as to their state of knowledge of the accused or the case in question for the purposes of ascertaining whether a challenge for cause ought to be exercised.⁶⁰ Therefore, the often lengthy pre-trial challenge procedure in both civil and criminal trials in the United States is not a feature of jury trials in this country.

3.51 Indeed, in *Director of Public Prosecutions v Haugh*⁶¹ the Director of Public Prosecutions successfully challenged an order made by the first respondent trial judge concerning a questionnaire which had been prepared for distribution in the pending trial of an accused with the intention of determining the influence that pre-trial publicity of the case had had on candidate jurors. The High Court found that the distribution of such a questionnaire would constitute an unacceptable interference with the normal rules concerning jury selection both under the Constitution and within the terms of the 1976 Act. The High Court held that any potential prejudice amongst jurors could be dealt with through the provision of appropriate directions by the trial judge. Walsh has noted that the courts are extremely reluctant to entertain the argument that there has been so much adverse reporting about a case or the defendant that it would be impossible to empanel a jury which would not already have a view on the defendant's guilt.⁶²

3.52 Nevertheless, the trial judge has an implicit power to put questions to the juror to determine his or her eligibility or suitability to serve.⁶³ Thus, section 35(3) of the 1976 Act provides:

“If any person refuses without reasonable cause or excuse to answer, or gives an answer known to him to be false in a material particular, or recklessly gives an answer that is false in a material particular, when questioned by a judge of the court for the purpose of determining whether that person is qualified to serve as a juror, he shall be guilty of an offence and shall be liable in summary conviction to a fine not exceeding €500.”⁶⁴

3.53 Notwithstanding this, judicial enquiries will not lead to challenges for cause as exercised by the parties to the case, and it is this mechanism upon which the current section focuses. In what follows, the Commission examines comparative approaches to the challenge for cause procedure in order to provide a backdrop against which the consideration of any reform is then discussed.

⁵⁹ [2008] 3 IR 1.

⁶⁰ Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* (Lexis Nexis: Butterworths 2003) at 1239.

⁶¹ [2000] 1 IR 184.

⁶² Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 836. Walsh further notes, however, that in very exceptional circumstances the court may postpone or abandon a prosecution if the media coverage has been such that the accused cannot be assured a fair trial. See also the discussion in Chapter 7, below, of pre-trial publicity and jury tampering.

⁶³ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 838. For discussion on the residual discretion to exclude a juror, see also Chapter 4, below.

⁶⁴ As amended by section 61 of the *Civil Law (Miscellaneous Provisions) Act 2008* (increase of fine from £50 to €500). Moreover, section 15(3) of the 1976 Act provides that the judge must invite any member of the jury panel who is in doubt about his or her qualifications to serve or who may have an interest or connection with the case to communicate the case to the judge. The judge may also put questions to a juror before exercising his or her power under section 24 of the 1976 Act to discharge the juror in the interests of justice. See also Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 838.

(2) Comparative Approaches to Challenges for Cause

(a) United Kingdom

3.54 In all parts of the United Kingdom, both the defence and prosecution may challenge an unlimited number of jurors for cause, and this process is heard by the presiding judge.⁶⁵ As in Ireland, challenges for cause shown are relatively rare.⁶⁶ Where they occur, the judge may order that the hearing of a challenge for cause will be held *in camera* or in chambers where this is necessary in the interests of justice.⁶⁷ In England and Wales, the defendant is permitted to question the juror directly, but generally only after he or she has presented *prima facie* evidence of the grounds upon which the challenge is to be made.⁶⁸ In Scotland, the questioning of jurors to establish cause is prohibited and challenges for cause shown are limited to establishing that the juror is ineligible to serve or otherwise disqualified.⁶⁹

(b) United States

3.55 Legislation permitting challenges for cause is widespread in the United States.⁷⁰ Indeed, the process of jury challenging in the United States (based in part on challenges without cause shown and in part on challenges for cause shown) sometimes involves a lengthy process that includes pre-trial questionnaires and detailed examination and cross-examination of potential jurors. This process, usually referred to as scientific jury selection (SJS), includes in some instances the use of jury consultants, such as psychological “profilers,” who provide advice based on personal grooming habits, survey responses, facial tics, attitude and race, among other matters. This process has been used in highly-publicised criminal trials, in particular where the death penalty is at issue, and in class-action civil law tort claims where the level of potential damages may be enormous. The development of SJS has been criticised on the grounds that it allows parties with virtually unlimited resources an unfair advantage in terms of jury selection. It has been suggested, however, that the available literature does not support the widespread view that SJS is as significant during civil and criminal trials as is commonly believed or that it has a profound effect on trial outcomes.⁷¹ The Commission notes that the development of SJS appears to be a particular feature of specific types of criminal and civil trials in the United States that are not typical of criminal or civil trials in Ireland.

(c) Canada

3.56 Challenges for cause are permitted in Canada by section 638 of the Canadian Criminal Code, and they have been used with greater frequency in recent years, but there remains disagreement on the scope of permissible grounds for their use, as well as the scope of permissible questions leading to their use.⁷² In *R v Williams*⁷³ the Supreme Court of Canada held that an accused could challenge a candidate

⁶⁵ Article 15 of the *Juries (Northern Ireland) Order 1996*, as amended; section 118(2) of the *Criminal Justice Act 1988* (England and Wales); section 130 of the *Criminal Procedure (Scotland) Act 1975*, as amended.

⁶⁶ Vidmar *World Jury Systems* (Oxford University Press, 2000) at 74 (England and Wales) and 260 (Scotland).

⁶⁷ Article 15(5) of the *Juries (Northern Ireland) Order 1996*, as inserted by the *Justice and Security (Northern Ireland) Act 2007*.

⁶⁸ Walsh *Criminal Procedure* (Round Hall, 2002) at 838, referring to *R v Chandler (No.2)* [1964] 2 QB 322 and *R v Broderick* [1970] Crim LR 155. Walsh also refers to *R v Kray* (1969) Cr App R 412 in which the defence was permitted to put questions to the jurors prior to establishing a *prima facie* case.

⁶⁹ Section 130 of the *Criminal Procedure (Scotland) Act 1975*, as amended.

⁷⁰ See Vidmar *World Jury Systems* (Oxford University Press, 2000) at 112.

⁷¹ See Jonakait, *The American Jury System* (Yale University Press, 2003) at 159-161, where the author notes that choosing the trial venue, and consequently the potential jury panel or pool, may be a more significant factor in trial outcomes. Professor Jonakait also suggests that the fictionalised depiction of the effect of SJS in, for example, John Grisham’s *The Runaway Jury* (Doubleday Books, 1996) (which involved a civil trial) may, therefore, be somewhat misleading.

⁷² Vidmar *World Jury Systems* (Oxford University Press, 2000) at 233.

juror for cause on the ground that the juror was “not indifferent between the Queen and the accused.” In this case, the accused, an aboriginal, had not been permitted to challenge candidate jurors on the basis of potential racial prejudice, in a locality in which there was widespread antipathy or prejudice towards aboriginals. The Court suggested that the right to trial by an impartial tribunal was not only a fair trial right, but also a non-discrimination right.⁷⁴

(d) Australia

3.57 All Australian jurisdictions have a system of challenge for cause. The permitted grounds are: lack of necessary qualifications, personal defects resulting in incapacity, partiality, having served on a jury in the same matter, and past conviction for an “infamous,” but not necessarily disqualifying, crime.⁷⁵ Challenges for cause are rare, since counsel for either side have access to limited, if any, information about candidate jurors prior to empanelment, and it is generally considered more convenient to rely on peremptory challenges,⁷⁶ as described above in Part B.

(e) New Zealand

3.58 In New Zealand, the *Juries Act 1981*, as amended by the *Juries Amendment Act 2008*, provides that jurors may be challenged “for want of qualification” (which is ultimately a capacity assessment) or “for cause.” Although the procedure is conducted in private, challenges for cause are rare in New Zealand due to the lack of information generally available to parties about candidate jurors.

(3) Consultation Paper Recommendations

3.59 In its Consultation Paper, the Commission considered reform of the challenge for cause procedure as a substitute for the peremptory challenge, and noted that the challenge for cause shown is difficult to carry out in open court where there is a risk of juror intimidation.⁷⁷ The Commission also noted that the lack of reliable information regarding candidate jurors explains the popular use of peremptory challenges, since reasons for the latter type of challenge are not required.⁷⁸

3.60 The Commission did not favour introducing pre-trial questionnaires for candidate jurors to provide information upon which to challenge such individuals and it therefore provisionally recommended that such a process continue to be prohibited.⁷⁹

3.61 The Commission noted that while the challenge for cause is seldom used, it continues to serve an important purpose and the Commission therefore provisionally recommended that the procedure be retained in its current form.⁸⁰

(4) Submissions, further consultation and Final Recommendations

3.62 The submissions received by the Commission generally agreed that the current law on challenges for cause shown ought to be retained, and that juror questionnaires should continue to be prohibited. This view was reiterated in the further consultations which the Commission also conducted. The Commission therefore sees no reason to depart from the views expressed in the Consultation Paper.

⁷³ [1998] 1 SCR 1128.

⁷⁴ [1998] 1 SCR 1128, paragraph 22.

⁷⁵ Vidmar *World Jury Systems* (Oxford University Press, 2000) at 140.

⁷⁶ *Ibid.*

⁷⁷ Consultation Paper at paragraph 6.49.

⁷⁸ With respect to the infrequent use of the challenge for cause procedure, one New Zealand judge has pointed out: “The reason is that it is too risky unless one can prove something very damning to the person thus challenged. The risk of the challenge for cause not succeeding is, of course, obvious. If the challenge is disallowed and the juror sits, the case of the challenging party is lost at that very moment.” Submission cited in New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69 – 2001) at 88-89.

⁷⁹ Consultation Paper at paragraphs 6.49 and 6.56.

⁸⁰ *Ibid* at paragraph 6.55.

3.63 *The Commission recommends that the current law in the Juries Act 1976 on challenges for cause shown should be retained. The Commission also recommends that pre-trial juror questionnaires continue to be prohibited.*

CHAPTER 4 CAPACITY TO CARRY OUT THE FUNCTIONS OF A JUROR

A Introduction

4.01 In this Chapter, the Commission discusses three matters related to the capacity or competence of potential jurors to carry out their functions as jurors.¹ In Part B, the Commission discusses the eligibility of prospective jurors whose physical capacity may require reasonable accommodation to serve on juries. In Part C, the Commission deals with candidate jurors whose mental ill-health may affect their competence to carry out jury duty. The Commission also discusses the separate question as to whether a person's decision-making capacity may affect his or her competence in this respect. In Part D, the Commission examines the issue of linguistic capacity and communication. In respect of each of these areas, the Commission notes that one of the guiding principles set out in Chapter 1 of particular relevance is that, in order to meet the requirements of the Constitution concerning a fair trial and comparable provisions in international human rights instruments, jurors should have certain minimum standards of personal capacity and competence, which may require reasonable support and accommodation that do not involve a disproportionate or undue burden.²

B Physical Capacity

4.02 In this Part, the Commission discusses the eligibility of prospective jurors whose physical capacity may require reasonable accommodation to serve on juries. The Commission's discussion focuses primarily on individuals whose capacity may relate to mobility, hearing or sight.

(1) Current Law in Ireland

4.03 Schedule 1, Part 1, of the *Juries Act 1976*, as amended by section 64(a) of the *Civil Law (Miscellaneous Provisions) Act 2008*, provides, under the heading "Other people" (which read "Incapable persons" in the 1976 Act as enacted) that the following persons are ineligible for jury service:

"Persons who have –

- (a) an incapacity to read, or
- (b) an enduring impairment

such that it is not practicable for them to perform the duties of a juror."

4.04 This Part focuses on paragraph (b), enduring impairment, insofar as it relates to physical capacity. Prior to the amendment of the 1976 Act by the 2008 Act, the relevant provision in Schedule 1, Part 1, of the *Juries Act 1976* provided that the following was ineligible: "A person who because of insufficient capacity to read, deafness or other permanent infirmity is unfit to serve on a jury." Thus, the amendment made by the 2008 Act repealed the specific reference in the 1976 Act to "deafness," although this can be taken to be included in the more general phrase "enduring impairment." In addition, the 2008 Act replaced the objectionable phrase "is unfit to serve on a jury" with the somewhat more acceptable phrase "such that it is not practicable for them to perform the duties of a juror."

4.05 The use of the word "practicable" in the 1976 Act, as amended by the 2008 Act, alludes to something that is feasible or possible, and therefore indicates that a person with some reading difficulties and some enduring impairments would not necessarily be precluded from carrying out the duties of a juror; otherwise, the words from "such that" would be redundant. This raises the issue as to what type of

¹ See Chapter 4 of the Consultation Paper.

² See paragraphs 1.44-1.47 and 1.50, above.

accommodation, if any, is already provided or might be provided for those who require assistance or accommodation in carrying out the duties of a juror.

4.06 As to physical accessibility of public buildings, the Commission notes that section 25(1) of the *Disability Act 2005* provides that “a public body shall ensure that its public buildings are, as far as practicable, accessible to persons with disabilities.” In general,³ this requires that a building under the control of a public body, such as a courthouse under the control of the Courts Service,⁴ should, as far as “practicable” (the same word that is used in the *Juries Act 1976*), be physically accessible for members of the public not later than 31 December 2015.⁵ This includes, in general terms, accessibility for potential jurors who are summoned for jury service. Similarly, in terms of accessibility to a public service, section 26(1)(a) of the 2005 Act provides that, where a service is provided by a public body, which includes the courts,⁶ it must “where practicable and appropriate, ensure that the provision of access to the service by persons with and persons without disabilities is integrated.” Section 26(1)(b) of the 2005 Act requires the public body “where practicable and appropriate” to provide for assistance, if requested, to persons with disabilities in accessing the service if the public body “is satisfied that such provision is necessary” to ensure compliance with section 26(1)(a) of the 2005 Act. Section 25(2) requires a public body to appoint an access officer for this purpose.⁷

4.07 The Commission is conscious of the commitment of the Courts Service to ensuring the achievement of these objectives. In terms of physical accessibility, this includes where courthouses are refurbished or where entirely new court buildings are developed. This commitment was underlined in 2010 when the Courts Service achieved the status of “Ability Company” in the “Environmental Accessibility” category of the O₂ Ability Awards 2010. The award followed an assessment of the Courts Service on a range of factors including policies relating to disability, accessibility and organisational commitment, and an examination of the Criminal Courts of Justice complex in Dublin, which opened in 2010.⁸

4.08 In terms of specific arrangements, including physical accessibility and service accessibility, the Commission notes that wheelchair ramps are provided at the entrances to many courthouses and that signage and contact details for court offices are in Braille. Similarly, in refurbished court buildings, members of the public and those with cases before the court can adapt hearing aids to make use of

³ Section 25(1) provides for two, conditional, exceptions to this general duty, namely, premises which are being used as public buildings for 3 years or less or otherwise on grounds of cost (section 25(4)), and in respect of access to heritage sites (section 29). Detailed guidance concerning access to heritage sites is contained in the *Disability Act 2005 (Code of Practice) (Declaration) Order 2011* (SI No.484 of 2011).

⁴ The *Disability Act 2005 (Code of Practice) (Declaration) Order 2006* (SI No.163 of 2006) (see also fn7, below) expressly notes that the Courts Service is a public body within the meaning of the 2005 Act.

⁵ Accessibility is defined in section 25(3) of the 2005 Act as meaning compliance with Part M of the *Building Regulations 1997* (SI No.497 of 1997), as amended, not later than 31 December 2015. The 1997 Regulations were made under the *Building Control Act 1990*. Part M of the 1997 Regulations was most recently amended by the *Building Regulations (Part M Amendment) Regulations 2010* (SI No.513 of 2010). In the 1997 Regulations as originally made, Part M was entitled “Access for disabled people.” As amended by the 2010 Regulations, Part M is entitled “Access and Use.” The detailed technical requirements concerning compliance with Part M, including as to what is “practicable,” are set out in *Technical Guidance Document M: Access and Use* (2010) (which replaced *Technical Guidance Document M: Access for People with Disabilities* (2000)), published by the Department of the Environment, Community and Local Government, available at www.environ.ie.

⁶ Section 2(1) of the 2005 Act defines a “service” as “a service or facility of any kind provided by a public body which is available to or accessible by the public generally or a section of the public” and as including “any service provided by a court or other tribunal.”

⁷ Detailed guidance concerning compliance with section 26 of the 2005 Act is set out in the *Disability Act 2005 (Code of Practice) (Declaration) Order 2006* (SI No.163 of 2006).

⁸ See *Courts Service Annual Report 2010* at 39, available at www.courts.ie.

induction loops which form part of the public address system in the courtrooms. In addition, wheelchair users can give evidence in many courthouses at the front of the court beside the witness box.⁹

4.09 In this respect, the Commission notes that the Courts Service is committed to facilitating physical accessibility for court users. To that extent, for example, a prospective juror who is also a wheelchair user would not become ineligible to serve as a juror within the terms of Schedule 1, Part 1, of the *Juries Act 1976*, as amended in 2008, because the physical accessibility of most courthouse buildings means that it is “practicable” for a wheelchair user to perform the duties of a juror. For this reason, basic issues of physical accessibility and other well-established matters of accessibility to services such as induction loops have not given rise to controversy in Ireland in recent years,¹⁰ but other aspects of accessibility related to physical ability have been the subject of recent litigation, notably in terms of hearing and deafness.

4.10 As to the question of hearing and deafness, in *Clarke v County Registrar for County Galway*¹¹ the applicant, who had been deaf since birth, had been summoned for jury service and wished to serve as a juror. The respondent county registrar had excused her from jury service in purported exercise of the power to excuse under section 9 of the *Juries Act 1976*. Section 9(1)(a) of the 1976 Act provides that a county registrar may excuse from jury service any person who falls within the category of “persons excusable as of right” in Schedule 1, Part 2 of the 1976 Act,¹² and where such a person informs the county registrar of his or her wish to be excused. The applicant sought judicial review of the respondent’s decision to excuse her from jury service on the ground that the county registrar had acted *ultra vires* section 9 of the 1976. In the High Court, O’Keeffe J agreed that the county registrar had no jurisdiction under the 1976 Act to excuse the applicant for two reasons: the applicant did not fall within any of the categories of persons in Schedule 1, Part 2 of the 1976 Act that are excusable from jury service as of right, and she had not applied to be excused from jury service (indeed, on the contrary, she had clearly expressed a wish to serve as a juror). On this basis, he quashed the decision to excuse the applicant from jury service.

4.11 O’Keeffe J noted that there is no specific mechanism in the 1976 Act for excusing from jury service those persons listed in Schedule 1, Part 1 of the 1976 Act who are ineligible for jury service, but he also stated that “where there is an issue as to the capacity of the juror to serve it is a matter for the Court to rule on.” In that respect, O’Keeffe J’s decision to quash the respondent’s excusal of the applicant from jury service did not indicate that he considered that the applicant was eligible for jury service. In this respect, it appears to have been understood that the applicant would have required the assistance of another person, commonly referred to as the “13th person in the jury room,”¹³ to act as interpreter of some material in order to serve as a juror, and O’Keeffe J added that, in his view, the presence of an interpreter would breach the principle of the secrecy of jury deliberations. O’Keeffe J stated:

⁹ The information in this paragraph is based on the Commission’s consultative meetings and material on the Accessibility page of the Courts Service website, www.courts.ie.

¹⁰ The Commission is aware from its consultative meetings that, in the past, the physical inaccessibility of courthouse buildings would have presented unacceptable obstacles to wheelchair users. Court officials and experienced practitioners at these meetings confirmed at least one instance in which, because of the inaccessibility of the courtroom, a wheelchair user was physically lifted out of the wheelchair in order to be re-positioned in court. While this indicates a laudable effort to ensure actual access, the Commission agrees with those who recounted this instance that such a situation would not currently be acceptable.

¹¹ *Clarke v County Registrar County Galway, Courts Service of Ireland and Attorney General* (2006 No.1338 JR), High Court, 14 July 2010, *The Irish Times*, 15 July 2010; and High Court 13 October 2010 (date of order). The judgment in the *Clarke* case had not been circulated at the time of writing. The extracts from the judgment in *Clarke* have been derived from the transcript of the decision in *The People (DPP) v O’Brien (Application of Dunne)*, Central Criminal Court, 29 November 2010, discussed below.

¹² The Commission discusses this category in detail in Chapter 5, below.

¹³ The Commission understands, as discussed below, that more than one interpreter would actually be required in order to ensure that suitable rest breaks are provided to the person or persons providing the interpretation service.

“The courts in this country have upheld the principle of the confidentiality of the deliberations of the jury. In my opinion, there is no provision in trial by jury as provided for in Article 38 [of the Constitution] for a person to be present with the jury other than the jurors. Such a presence would breach the absolute confidentiality of such deliberations and the manner in which discussions and deliberations take place which is an integral part of trial by jury. Such confidentiality of jurors in the deliberations of the jury is also part of the common law. This conclusion applies to the presence of a sign language interpreter. Furthermore, there is no provision express or implied in the [1976] Act that a sign language interpreter can assist a person such as the applicant either at the hearing of the case in open court or when the jury retire.”

4.12 O’Keeffe J thus considered that it would not be permissible to have an additional person in the jury room to assist a deaf juror. A similar view was taken by the Circuit (Criminal) Court in November 2010 in *The People (DPP) v JM (Application of Owens)*.¹⁴ In this case, Mr Owens, a person with a profound hearing impairment, had been summoned for jury service and had been selected by ballot from the jury panel. Like the applicant in the *Clarke* case, discussed above, Mr Owens would have required a sign language interpreter in order to carry out his functions as a juror. On this basis, Judge White requested him to leave the jury box because the law did not permit an additional person in the jury room. Judge White added that, where no interpreter is required, he would have had no qualms permitting a deaf person to serve as a juror, but that constitutional questions may be engaged where an interpreter is present. Judge White thus concluded that it was not practicable, within the meaning of Schedule 1, Part 1 of the 1976 Act, for Mr Owens to perform the duties of a juror due to his enduring impairment and that, therefore, he was ineligible to serve.

4.13 A materially different approach was taken in the High Court (Central Criminal Court) later in November 2010 in *The People (DPP) v O’Brien (Application of Dunne)*.¹⁵ As in the previous two instances discussed above, Mr Dunne had been summoned for jury service and, arising from his deafness, would have required the presence of an interpreter to carry out his duties. It was argued on his behalf that, whereas Schedule 1, Part 1 of the 1976 Act as originally enacted had amounted, in effect, to a ban on deaf jurors, the amendments made in 2008 to the 1976 Act (discussed above) had the effect that the issue now was whether it was “practicable” for a deaf person to serve as a juror. It was argued that, with the aid of signers and modern technology, jurors could serve without difficulty. Carney J accepted this argument and, significantly, considered that the situation in relation to having a 13th person in the jury room “can be met by an appropriate oath being taken by the signer in which he would submit himself to the same obligations of confidentiality as rest on the other jurors.” He added that he would be prepared to have the signer participate in this case as an interpreter on taking, first of all, the ordinary interpreter’s oath and then going on to take a further oath in relation to confidentiality.

4.14 Carney J was thus prepared to allow a deaf person serve on a jury, and would have sworn an interpreter along the same lines as a juror, though he acknowledged that it had been intimated to him that if he took this course Mr Dunne would be objected to by means of a challenge without cause shown (peremptory challenge). Indeed, immediately after the decision of Carney J, the juror in question was subject to such a challenge and therefore did not serve. The approach of Carney J appears to reflect recent developments in some other jurisdictions, which the Commission discusses below.

4.15 At the time of writing, the Commission understands that no person with a hearing or sight impairment to the extent that the person would require signage or other interpretive assistance has served on a jury in Ireland.

4.16 As the comparative discussion below indicates, a number of other matters arise in this context that would require consideration. From a technological point of view, while a loop system would resolve the issue of hearing evidence for some with a mild hearing loss, for persons with more profound hearing

¹⁴ The summary of this case has also been derived from the transcript of the decision in *The People (DPP) v O’Brien (Application of Dunne)*, Central Criminal Court, 29 November 2010, discussed below.

¹⁵ Central Criminal Court, 29 November 2010. The transcript of this decision has been made available to the Commission. See also Donnellan, “Deaf Man Can Sit on Jury Says Judge” *The Irish Times*, 30 November 2010.

loss it would be necessary to have in place a computer-aided real time transcription (CART) system. The Commission is aware that a CART system is in place in some refurbished courthouses in Ireland, but not in all courthouses.¹⁶ A second issue is that, while sign language interpreters are currently engaged in Irish courtrooms for the purposes of accommodating deaf defendants and witnesses, Irish Sign Language has no formal status in legislation and that there is no formal accreditation or registration process for interpreters.¹⁷ A third matter and an important principle which the Commission has already set out in Chapter 1, is that the provision of assistance and accommodation, whether in the form already in place or which might be proposed, must have regard to the right of a person to a fair trial, in particular the right of the accused to a fair criminal trial, as provided for in the Constitution and in international human rights instruments, and to the consequent requirement that jurors should have certain minimum standards of personal capacity and competence.¹⁸

4.17 The Commission now turns to provide a brief comparative and international law analysis of this matter before outlining the provisional recommendations made in the Consultation Paper, following which the Commission sets out its final recommendations.

(2) Comparative and International Law Approaches to Physical Disability

4.18 In the Consultation Paper,¹⁹ the Commission considered the approach in a number of other jurisdictions to the issue of physical disability and jury service, as well as relevant international law standards. What follows is a brief review of this, taking account of developments since the Consultation Paper was published.

(a) United Kingdom

4.19 In England and Wales, section 9B of the *Juries Act 1974*, as inserted by the *Criminal Justice and Public Order Act 1994*, provides that where “on account of a physical disability” there is doubt as to the capacity of a person to act effectively as a juror, he or she may be brought before a judge, who must affirm the summons unless the judge is of the opinion that the person will not, on account of that disability, “be capable of acting effectively as a juror.” In Northern Ireland, Article 11(4) and (5) of the *Juries (Northern Ireland) Order 1996* are to the same effect. These provisions are, in general terms, comparable to the amendments made in 2008 to the *Juries Act 1976* and to that extent, physical disability is no longer an insurmountable obstacle to jury service. Thus, a person who uses a wheelchair will be facilitated. Similarly, a person with profound sight loss may serve on a jury, and the Commission notes that the former British Home Secretary David Blunkett, who has profound sight loss and who is accompanied by a guide dog, was called for jury service and served on a jury in England in 2011.²⁰ As to a person with profound deafness who would require the presence of a signer or interpreter the Commission notes that, in the United Kingdom, the comparable and long-standing rule of jury secrecy is set out in statutory form in section 8 of the *Contempt of Court Act 1981*. In that context, in *Re Osman*²¹ it was held that the presence of an interpreter in the jury room was not permissible, even if the interpreter took no part in the deliberations; and that the potential juror was (in the absence of an interpreter) not in a position to carry out his functions effectively and was therefore ineligible to serve.²²

¹⁶ Consultation Paper at paragraphs 4.26 to 4.27.

¹⁷ *Ibid* at paragraphs 4.30 to 4.31.

¹⁸ See paragraphs 1.44-1.47 and 1.50, above.

¹⁹ Consultation Paper at paragraphs 4.10 to 4.22.

²⁰ See Blunkett, “Doing jury service” *Daily Mail*, 20 May 2011, available at www.dailymail.co.uk. The article noted that Mr Blunkett was an Opposition Member of Parliament (MP) at the time he was called for jury service and that he was eligible to serve because the *Juries Act 1974* had been amended by the *Criminal Justice Act 2003* by removing MPs from the list of persons ineligible to serve. The 2003 Act, which Mr Blunkett had sponsored as then Home Secretary, had implemented the recommendations to that effect in the 2001 Auld Report, *Review of the Criminal Courts in England and Wales*.

²¹ (1996) 1 Cr App R 126.

²² Consultation Paper at paragraphs 4.42 and 4.44.

4.20 The 2001 Auld Report, *Review of the Criminal Courts of England and Wales*, considered the issue of physical disability and jury service. In terms of physical accessibility to courtroom buildings under the *Disability Discrimination Act 1995* (broadly equivalent to the *Disability Act 2005* in the State), the Auld Report noted the improvements made and that this accessibility was fully supported by the Disability Committee of the Bar Council of England and Wales, which had observed in its submission that “the concept of disabled persons sitting on juries is wholly consistent with the principle of random selection from all members of society. Enabling them to do so is not just a question of evaluating their disability and relating it to the task, but also of providing, where reasonably practicable, the facilities and/or assistance to them to undertake it.”²³ The Auld Report noted the case law such as the *Osman* case referred to above, and commented that the Disability Committee of the Bar Council had suggested that “anxieties about an interpreter intruding on the privacy of the jury room would be met if he were required to undertake to communicate with the disabled person and the other jurors only as an interpreter and not to divulge the jurors’ deliberations to any third person.”²⁴ The Auld Report acknowledged the “understandable caution” about a 13th person in the jury room but noted that “accredited interpreters work to agreed professional standards that should preclude any attempt to intrude on or breach the confidence of juries’ deliberations.”²⁵ The Report noted that, in 2000, the then UK Lord Chancellor (Lord Irvine) had indicated that he could see no objection to deaf people serving as jurors; and that, as this matter was then under review by the UK Government, the Auld Report did not make a specific recommendation on this matter, but stated that “in principle... all reasonable arrangements, coupled with suitable safeguards, should be provided to enable people with disabilities to sit as jurors with third party assistance.”²⁶ Since, 2001, no change has been made to the relevant legislative provisions but the Commission notes that the approach suggested in the Auld Report and by the Disability Committee of the Bar Council of England and Wales is comparable to the approach taken by Carney J in *The People (DPP) v O’Brien (Application of Dunne)*,²⁷ discussed above.

(b) New Zealand

4.21 In New Zealand, the *Juries Act 1981* as enacted had excluded from jury service persons with “blindness, deafness or other permanent physical disability.” Under section 16AA of the *Juries Act 1981*, as amended by the *Juries Amendment Act 2000*, individuals lacking physical capacity are not automatically disqualified from serving, but the judge may on his or her own motion or on application by the registrar discharge the summons where the judge is satisfied that, due to physical incapacity, an individual is not capable of effectively fulfilling the role of a juror. This is very similar to the provisions in place in the United Kingdom and Ireland and would have facilitated for jury service those hearing or sight impaired persons who did not require an interpreter. The *New Zealand Sign Language Act 2006* formally recognised New Zealand Sign Language (NZSL) as an official language and for its use in legal proceedings; and as a result, a deaf man served as a juror with the aid of an interpreter for the first time in New Zealand in a tax fraud case (and was selected as foreman by his juror colleagues).²⁸

(c) Australia

4.22 In Australia, as in many other common law jurisdictions, jury service legislation in some of the states and territories continues to provide that persons with visual and hearing difficulties are not permitted to serve on juries. This matter has been subject to review by law commissions in recent years and, arising from this, amending legislation has been enacted. The New South Wales Law Reform Commission examined the issue in its 2006 *Report on Deaf or Blind Jurors*,²⁹ and recommended that

²³ Auld Report, at 152.

²⁴ *Ibid* at 153.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ Central Criminal Court, 29 November 2010: see paragraphs 4.14-4.15, above.

²⁸ New South Wales Law Reform Commission *Report on Deaf or Blind Jurors* NSW LRC Report 114 (2006) at 43 (discussing the position in New Zealand).

²⁹ NSW LRC Report 114 (2006).

persons with visual and hearing difficulties should not be prevented from serving on juries solely on that basis. This recommendation was implemented in section 14A(b) of the New South Wales *Jury Act 1977*, as inserted by the *Jury Amendment Act 2010*, which provides that a juror may be excused from jury service if “some disability associated with that person would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror.” The reference to “reasonable accommodation” echoes the language of the 2006 UN Convention on the Rights of Persons With Disabilities (UNCRPD), discussed below. In 2010, the Law Reform Commission of Western Australia recommended that a person should not be disqualified from service on the basis of physical disability alone, but that where that incapacity renders a person unable to discharge the duties of a juror, this would constitute sufficient reason to be excused by the summoning officer or trial judge.³⁰ This recommendation was implemented in section 34G(2)(f) of the Western Australia *Juries Act 1957*, as inserted by the *Juries Legislation Amendment Act 2011*, which provides that a person may be excused from jury service if the court is satisfied that he or she “is not capable of serving effectively as a juror because he or she has a physical disability.”

(d) Canada

4.23 In Canada, federal law permits persons with some physical disability to serve on juries, and a number of provinces follow this approach.³¹ Section 627 of the Criminal Code of Canada provides that a judge may permit a juror with a physical incapacity who is otherwise qualified to serve as a juror to have technical, personal, interpretative or other support services. Section 638(1)(e) of the Criminal Code also provides that a prosecutor or an accused is entitled to any number of challenges on the ground that a juror, even with the aid of such support services as are referred to in section 627, is physically unable to perform properly the duties of a juror.

(e) United States

4.24 In the United States, the US Supreme Court has described jury service in language that reflects the approach in Ireland. In *Thiel v Southern Pacific Co.*,³² the Court stated that “[j]ury service is a duty as well as a privilege of citizenship.” Similarly, in *Powers v Ohio*,³³ the Court stated that jury service “is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.” As to jury service by persons with disabilities, Title II of the *Americans with Disabilities Act 1990* prohibits state and local courts, as public entities, from discriminating against jurors who are hard of hearing, and requires them to take appropriate steps to ensure that communications with applicants, participants, and members of the public lacking capacity are as effective as communication with others; and to this end appropriate auxiliary aids and services are to be furnished where necessary.³⁴ Before and since 1990, a number of US states have reformed their jury service legislation to prohibit the disqualification of a person from jury service exclusively on the basis of a hearing or visual incapacity.³⁵

4.25 This has also been accompanied by a change in the approach taken in case law on the question of the presence of a sign-language interpreter in the jury room. In 1978, in *Eckstein v Kirby*,³⁶ a federal trial court upheld a law excluding deaf or hard of hearing people from jury service, in part on the grounds that the presence of a sign-language interpreter would violate the secrecy of the jury room. In

³⁰ Law Reform Commission of Western Australia *Selection Eligibility and Exemption of Jurors: Final Report* (Project No. 99, 2010) at 107.

³¹ For example, Alberta, British Columbia and New Brunswick permit individuals with physical disabilities to serve under certain conditions.

³² 328 US 217 at 224 (1946).

³³ 499 US 400 at 402 (1991).

³⁴ *Americans with Disabilities Act 1990*, Title II: 42 USC §12131(1).

³⁵ Consultation Paper at paragraphs 4.18 and 4.19.

³⁶ 452 F Supp 1235, at 1244 (ED Ark, 1978).

1987, in *United States v Dempsey*,³⁷ a federal US Court of Appeals took a different approach. In this case, the defendant had challenged a deaf juror for cause, but the trial court held that the juror was eligible to serve and allowed an interpreter to be present during jury deliberations. The trial court required the interpreter to swear an oath promising to serve strictly as an interpreter and not to participate in the jury deliberations. The defendant was convicted and, on appeal, the Court held that the presence of the interpreter in the jury room had not interfered with the secrecy of the jury. The Court noted that the trial court had protected against the risk that the interpreter might unlawfully participate in the jury discussion by requiring him to take an oath not to disclose any confidential information entrusted to him and not to discuss the testimony or the merits of the case under any circumstances with anyone, including the juror for whom he was appointed. The Court also pointed out that interpreters had become commonplace in today's society and would be seen as part of the background, not as another participant.³⁸ The nuanced nature of US case law can be seen in the 2010 decision of the Ohio Supreme Court in *State v Speer*.³⁹ In this case, the Court held that it was proper to dismiss a deaf juror when the trial relied heavily upon a recorded emergency call. In addition to assessing the words and the emotions of the caller, which the Court held that an interpreter could convey, the jurors in this case were required to decide whether the caller sounded as if he was under the influence of alcohol or if his tone otherwise conveyed evidence of his guilt. Given the role that auditory information played in the case, the Court concluded that a deaf person could not serve as a juror in this specific instance.

4.26 The increasing number of deaf jurors in the United States, and the consequent use of sign-language interpreters, has also led to the development of detailed codes of professional conduct with which the interpreters must comply. The leading example of such a code is that developed by the US National Association of the Deaf (NAD) and the US Registry of Interpreters for the Deaf (RID), the *NAD-RID Code of Professional Conduct*.⁴⁰

(f) 2006 UN Convention on the Rights of Persons With Disabilities

4.27 Article 13 of the 2006 UN Convention on the Rights of Persons with Disabilities (“UNCRPD”), which, at the time of writing, Ireland has signed but not ratified, provides that States Parties are required to ensure effective access to justice for persons with disabilities on an equal basis with others. The UNCRPD defines reasonable accommodation as: “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁴¹ In Chapter 1, the Commission noted that one of the guiding principles relevant to this Report is that, in order to meet the requirements of the Constitution concerning a fair trial and comparable provisions in international human rights instruments, jurors should have certain minimum standards of personal capacity and competence, which may require reasonable support and accommodation that do not involve a disproportionate or undue burden.⁴²

(3) Consultation Paper Recommendations on Physical Disabilities

4.28 In the Consultation Paper the Commission provisionally recommended that: (i) the *Juries Act 1976* be amended to ensure that no person is prohibited from jury service on the basis of physical disability alone and that capacity be recognised as the only appropriate requirement for jury service, and that it should be open to the trial judge ultimately to make this decision having regard to the nature of the evidence that will be presented during the trial;⁴³ (ii) reasonable accommodation be provided to hearing

³⁷ 830 F 2d 1084 (10th Cir, 1987).

³⁸ *Ibid* at 1090-1091.

³⁹ 123 Ohio St 3d 564 (Ohio 2010).

⁴⁰ Available at http://www.rid.org/UserFiles/File/NAD_RID_ETHICS.pdf.

⁴¹ Article 2 of the UNCRPD.

⁴² See paragraphs 1.44-1.47 and 1.50, above.

⁴³ Consultation Paper at paragraph 4.58.

and visually impaired jurors to assist them in undertaking the duties of a juror;⁴⁴ (iii) a proper system for regulation and control of court interpreters be established;⁴⁵ (iv) an oath should be introduced applicable to interpreters and stenographers who assist deaf jurors in interpreting evidence at trial, which would include a commitment to uphold the secrecy of jury deliberations;⁴⁶ (v) the Courts Service should prepare guidelines for the reasonable accommodation of persons with physical disabilities to participate in the jury system;⁴⁷ (vi) the Courts Service should provide disability awareness training to Courts Service personnel dealing with jurors with disabilities;⁴⁸ and (vii) a physical disability should not be a basis for excusal from jury service as of right but where a lack of capacity is indicated such excusal should be given.⁴⁹

(4) Submissions and Final Recommendations on Physical Disabilities

4.29 During consultation, the importance of facilitating individuals with physical mobility difficulties was emphasised. The Criminal Courts of Justice complex in Dublin which, as already noted, opened in 2010 provides universal access for persons with mobility difficulties entering the courthouse as well as the jury box specifically. In other courts throughout the country, these facilities are being implemented on a phased basis.

4.30 On the question of individuals with hearing difficulties serving on juries, there was general agreement that the presence of a CART operator or sign language interpreter would represent a major change to the jury system. Consultees agreed that, with technological supports, the translation of documentary evidence for blind jurors would not pose significant difficulties, but it was suggested that a difficulty arises where charts, photographs or CCTV footage might be introduced as evidence.

4.31 A number of consultees suggested that both blind and deaf individuals may be capable of contributing to the discussion in ways that hearing and sighted individuals would not. Other submissions emphasised the importance of observing witness demeanour (an issue for persons with sight difficulty) or tone of voice (an issue for persons with hearing difficulty) in comprehensively and accurately assessing evidence, and suggested that further consideration ought to be given to the question on the basis that deaf or blind jurors could defer to other jurors in relation to issues of demeanour and visual evidence.

4.32 Some submissions doubted the utility of an oath for stenographers and interpreters. Others argued that there is no reason why there should be a blanket ban on allowing a 13th person, in the form of a sign language interpreter, to enter the jury deliberation room. Some consultees suggested that interpretation or transcriptions might not be entirely accurate and that a 13th person in the jury room might influence the decision of the jury. Some suggested that the standards for sign language interpreting in Ireland are very high, but it was acknowledged that a standardised system of accreditation does not exist at present. It was noted that a sign language interpreter would be required all of the time, and not just in the deliberation room, which could leave the interpreter marginalised in terms of matters discussed between jurors outside of the deliberation room. It was also pointed out that best practice standards would require the presence of not just one interpreter but 2 to 3 interpreters at a time; that is, not merely a 13th person in the jury room but more often also a 14th or 15th person (though not necessarily at the same time).

4.33 Having considered the matter in preparing this Report, the Commission is of the view that, as a matter of general principle, it is important to ensure as far as practicable the participation in society of individuals with physical disability. This reflects long-standing policy in this area and is already recognised in, for example, the *Disability Act 2005*. The Commission also fully supports the integration of persons with disabilities in society based on (a) a presumption of capacity, and (b) reasonable support and

⁴⁴ *Ibid* at paragraph 4.59.

⁴⁵ *Ibid* at paragraph 4.60.

⁴⁶ *Ibid* at paragraph 4.61.

⁴⁷ *Ibid* at paragraph 4.62.

⁴⁸ *Ibid* at paragraph 4.63.

⁴⁹ *Ibid* at paragraph 4.68.

accommodation. This approach derives from the Commission's general approach in the 2006 *Report on Vulnerable Adults and the Law*⁵⁰ and the Commission understands that this is likely to be reflected in the proposed *Assisted Decision-Making (Capacity) Bill*, scheduled to be published in 2013, which is intended to implement the key elements of that 2006 Report and which also involves a key component of the State's stated intention to ratify the 2006 UNCRPD.

4.34 The Commission notes that, in the specific context of jury service, the amendments made in 2008 to the *Juries Act 1976* have involved an important step in the direction of providing that persons with a physical disability are not completely prohibited from jury service. In that respect, the improvements in the physical accessibility of courthouses in Ireland – in accordance with the duty to do so in the *Disability Act 2005* which must be implemented by the end of 2015 – are consistent with these amendments to the *Juries Act 1976*. Nonetheless, the Commission considers that it would be more consistent with general policy, with best practice examples on jury service from other jurisdictions already discussed, and with the 2006 UNCRPD, to provide expressly that capacity to serve be recognised as the appropriate requirement for jury service, and that it should be open to the trial judge ultimately to determine this having regard to the nature of the evidence that will be presented during the trial.

4.35 Equally, however, the Commission considers that the involvement of jurors with disabilities must be considered in the context of the role of jury trial, in particular as a mechanism within the framework of the criminal justice system. The Commission has emphasised in its summary in Chapter 1 of the relevant principles that the right to a fair trial, as guaranteed by the Constitution and by relevant international human rights instruments, includes the right to be tried by a jury whose members are of personal capacity and competence. This involves being competent to assess in full the evidence presented. As the case law discussed above indicates, this may require case-by-case analysis, even in those jurisdictions such as the United States where deaf jurors and interpreters have been a feature of the legal landscape for some time. The Commission is conscious that the participation of persons with disabilities in a jury has required, and will continue to require, the provision of physical accessibility, such as wheelchair ramps, and other reasonable accommodation such as induction loops, that make participation practicable and achievable. The Commission fully supports these developments.

4.36 The Commission considers that it is equally important to emphasise that if there is a conflict between the accommodation of a prospective juror and the right to a fair trial, the fairness of a trial must be given priority. The Commission also reiterates two other guiding principles from Chapter 1: that jury service is more accurately described as a duty which falls upon members of the population of the State rather than as a right of an individual in the State; and that the jury should be free to consider their verdict in secrecy in the sense that they do so without the intervention or presence of the judge or any other person during their deliberations (but this does not preclude certain disclosures, for example, inappropriate behaviour in the jury room).

4.37 In the specific context of the need for those with extensive hearing or sight disability to be accommodated with sign or language interpreters, the Commission notes that this also involves consideration of two specific matters. Firstly, the Commission acknowledges that there has been a difference of opinion expressed in the High Court decisions discussed above as to whether the presence of a 13th person (or, possibly, more) in the jury room would be permissible. The Commission accepts that Carney J's view that a specific oath for interpreters would overcome any difficulties reflects the approach taken in those jurisdictions where deaf jurors have been a feature of jury trials, notably the United States but also in other jurisdictions discussed above. The Commission notes that there was no consensus on this matter in the submissions received or in the views of consultees with whom the Commission further consulted. A second, related, matter is that the Supreme Court has placed emphasis on the importance of witness demeanour being visible to a trier of fact, including a jury.⁵¹ The importance of tone of voice, and

⁵⁰ *Report on Vulnerable Adults and the Law* (LRC 83-2006).

⁵¹ *Donnelly v Ireland* [1998] 1 IR 321, 356-357. In upholding the constitutionality of the provision of video-link evidence in the *Criminal Evidence Act 1992* the Supreme Court, noted that the witness's demeanour "in the giving of such evidence and when subject to such cross-examination by counsel on behalf of the accused will be clearly visible by way of monitors to the judge and jury trying the case, who will have ample opportunity to assess the reliability of such testimony."

the assessment of audio evidence by the jury pose challenges in the case of deaf jurors. In the case of blind jurors, the importance of witness demeanour and the jury's assessment of crime scene video evidence, photographic evidence, and jury views are also highly relevant. The Commission accepts that not all of these issues arise in all trials, but it underlines the case-by-case problems that are posed.

4.38 The Commission considers that once in court prospective jurors may identify themselves to the court where they consider their capacity raises the question of carrying out the duties of a juror in the specific case. This could be reinforced by the development of guidance which would include discussion of the importance that jurors are able to understand and follow the evidence that may be presented and that individuals who have concerns about their capacity to follow and assess the evidence should make themselves known, in a confidential fashion, to the court registrar or to the judge.

4.39 The Commission recommends that the court registrar or judge may excuse a candidate juror who has identified himself or herself as unable to sit as a juror on that occasion. Such jurors would have an absolute entitlement to be excused based on the fact that they are the best person to assess their own capacity to understand and follow the evidence. In cases where a juror wishes to serve but is unsure of his or her eligibility, or where the registrar or judge considers that this may arise, the judge should carry out a brief and confidential exchange to arrive at a decision on this matter. In making this decision, the judge should apply the presumption of capacity as well as the requirement of juror competence to ensure the right to a trial in due course of law. The Commission also considers that the judge should make it clear to the jury through an instruction that it is both their entitlement and responsibility to inform the judge where a question of capacity regarding another juror arises. Where the judge considers that, even with reasonable and practicable accommodation, a juror will not be capable of carrying out their duties as a juror, the judge should excuse the prospective juror as ineligible to serve.

4.40 The Commission also considers in this context that it would be appropriate that the further research on jury service recommended in Chapter 11 of this Report, below, should include research into permissible and practicable supports and accommodation for this purpose, based on international best practice and experience. The Commission notes that, in the specific context of potential jurors with hearing or sight difficulties, there is as yet no system of formal accreditation of Irish sign language interpreters or CART operators in the State. Nonetheless, it is clear from discussions with interested parties that considerable work is ongoing to develop best practice codes of conduct and standards for Irish sign language interpreters and CART operators. The Commission considers that, at this stage of the development of such codes and standards, it is not possible to make a definitive recommendation on this matter. The Commission notes that there are considerable difficulties, both in terms of the potential, or perceived, unfairness of a trial that involves a 13th person (or more) in the jury room, and also the practical working out of such a system were it to be introduced. The Commission notes that in some of the jurisdictions surveyed in this Report such codes, standards and practical arrangements have been introduced and appear to work satisfactorily at least in some trials. The Commission has concluded that such a development would require considerable exploration of the relevant legal and practical challenges, and that this would best be done through a dedicated research project as part of the general research recommended in Chapter 11. This would take into account developing codes, standards and practical experience from other jurisdictions as discussed above in this Chapter, and would then determine whether it would be feasible to apply these in the context of the jury system in Ireland.

4.41 *The Commission recommends that the current provisions of the Juries 1976, which provide that persons are ineligible to serve as jurors if they have an enduring impairment such that it is not practicable for them to perform the duties of a juror, should be replaced with a provision to the effect that a person is eligible for jury service unless the person's physical capacity, taking account of the provision of such reasonably practicable supports and accommodation that are consistent with the right to a trial in due course of law, is such that he or she could not perform the duties of a juror.*

4.42 *The Commission recommends that the application of this provision should not involve an individual assessment of capacity. The Commission also recommends that the provision should be supplemented by guidance which would remind jurors in general of the requirements of eligibility for jury service, which should be expressed in a manner that encourages those with any doubts as to their physical capacity to carry out the functions of a juror to identify themselves. In making this decision, the judge should apply the presumption of capacity as well as the requirement of juror competence that forms*

part of the right to a trial in due course of law. The guidance should also make it clear to jurors that it is both their entitlement and responsibility to inform the court where a question of capacity regarding another juror arises. The Commission also recommends that if there is a conflict between the accommodation of a prospective juror in accordance with the 2006 UN Convention on the Rights of Persons With Disabilities and the right to a fair trial, the fairness of a trial must be given priority. The Commission recommends that where the judge considers that, even with reasonable and practicable accommodation, a juror will not be capable of carrying out their duties as a juror, the judge should excuse the prospective juror as ineligible to serve. The Commission also recommends that a physical disability that may require accommodation or support may constitute “good cause” for the purposes of an application for “excusal for cause.”

4.43 The Commission recommends that the Disability Act 2005 should include express recognition for the provision of physical accessibility, such as wheelchair ramps and other reasonable accommodation such as induction loops, that make participation by persons with disabilities in a jury practicable and achievable.

4.44 The Commission recommends that, as to physical disability, it would be appropriate that the research on jury service recommended in paragraph 11.18 of this Report should include research into permissible and practicable supports and accommodation for this purpose, based on international best practice and experience. The Commission also recommends that, in the specific context of potential jurors with hearing or sight difficulties, a dedicated research project should be developed that takes full account of the ongoing development of best practice codes of conduct and standards for Irish sign language interpreters and CART operators, and that also has regard, where relevant, to the potential that the presence of a 13th person (or more) in the jury room may have an impact on the fairness of a trial. This research project would take into account developing codes, standards and practical experience from other jurisdictions, and would then determine whether it would be feasible to apply these in the context of the jury system in Ireland.

C Mental Health and Intellectual Capacity

4.45 In this Part the Commission deals with prospective jurors whose mental health may affect their competence to carry out jury duty. The Commission also discusses the separate question as to whether a person’s intellectual, decision-making, capacity may affect his or her competence in this respect.

(1) Current Law in Ireland

4.46 Schedule 1, Part 1 of the *Juries Act 1976* provides that:

“A person who suffers or has suffered from mental illness or mental disability and on account of that condition either –

- (a) is resident in a hospital or other similar institution, or
- (b) regularly attends for treatment by a medical practitioner

is ineligible for jury service.”

4.47 The 1976 Act does not define mental illness or mental disability, although it is clear that the test of ineligibility for jury service is not merely that a person has a mental illness or mental disability; rather, that the person’s condition has resulted in him or her being resident in a hospital or other similar institution or regularly attends for treatment by a medical practitioner. The Commission also notes that the 1976 Act appears, by using the singular “that condition,” to conflate mental illness and mental disability; it is clear that these are quite separate matters and should be considered separately, and the Commission proceeds to do so in this Part.

(2) Comparative Approaches to Mental Health and Intellectual Capacity

(a) United Kingdom

4.48 In England and Wales, Schedule 1, Part 1 of the *Juries Act 1974* as originally enacted provides that an individual is ineligible to serve as a juror where he or she suffers or has suffered from a mental illness, psychopathic disorder, mental handicap or severe mental handicap and on account of that

condition either (a) is resident in a hospital or other similar institution; or (b) regularly attends for treatment by a medical practitioner. In this respect, it is clear that the English 1974 Act was the basis for the comparable provisions in the *Juries Act 1976*, although the 1974 Act provided that the terms used, such as mental handicap or severe mental handicap, were to be interpreted in accordance with the English *Mental Health Act 1959*, the relevant legislation at that time providing for involuntary commitment of persons to hospital arising from mental ill-health. In 2001, the Auld Report recommended that the 1974 Act should not be amended to alter the ineligibility of this category of persons; this can be contrasted with the Auld Report's recommendations, discussed above, that the 1974 Act should be amended concerning physical disability. Since 2001, these provisions of the 1974 Act have been amended, but these have been limited to (a) adding further detailed provisions concerning persons with mental ill-health who are ineligible and updating the references to relevant mental health legislation and (b) providing for the first explicit distinction between mental ill-health and mental capacity. Thus, the *Criminal Justice Act 2003* added that a person in guardianship under the *Mental Health Act 1983* (which replaced the *Mental Health Act 1959*) was ineligible for jury service. The 2003 Act had also added a third category, those who have been determined by a judge under the 1983 Act to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs. The *Mental Capacity Act 2005* replaced this third category and amended the relevant provision in the 1974 act to provide that the following person is ineligible for jury service: "A person who lacks capacity, within the meaning of the Mental Capacity Act 2005." The Commission notes that the heading for Schedule 1, Part 1 of the 1974 Act, which originally read "The mentally ill," was changed to "Mentally Disordered Persons" by the 2003 Act but was not further changed by the 2005 Act.

(b) Australia

4.49 Australian jurisdictions exclude from jury service people lacking mental capacity where the incapacity renders the person incapable, unable or unfit to perform the functions of a juror.⁵² The mental impairment caught by the legislation of the various jurisdictions can range from short-term anxiety or depression, to long-term psychological disorders and includes cognitive deficits such as those caused by intellectual disability, brain injury, dementia, or the like.

(c) New Zealand and the 2006 UNCRPD

4.50 Section 8(i) of the New Zealand *Juries Act 1981* provided that persons with "mental disorders" could not serve as jurors, and section 8(k) of the 1981 Act provides that person with "intellectual disabilities" are ineligible for service. In 2008, the New Zealand Government published its *Disability (United Nations Convention on the Rights of Persons With Disabilities) Bill 2008* which, as its title indicates, proposed to amend a wide range of New Zealand legislation in order to implement the 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPD). The Bill proposed to repeal section 8(i) of the 1981 Act and to retain section 8(k) of the 1981 Act. The New Zealand Parliament's Justice and Electoral Committee's review of the 2008 Bill, which approved these proposals, noted that "the definition of mental disorder [in the 1981 Act] is overly broad and includes mood disorders no matter how severe their effect." The Committee also noted that the Bill proposed to continue to allow excusal from jury service on the basis of intellectual disability.⁵³ Thus, section 5 of the New Zealand *Disability (United Nations Convention on the Rights of Persons With Disabilities) Act 2008* repealed section 8(i) of the 1981 Act and retained section 8(k) of the 1981 Act.

⁵² Law Reform Commission of Western Australia *Selection, Eligibility and Exemption of Jurors* (Discussion Paper, No. 99, September 2009) at 99.

⁵³ Report of the Justice and Electoral Committee, *Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill* (232–1) and international treaty examination of the Convention on the Rights of Persons with Disabilities, pp.13-14. Available at: http://www.parliament.nz/NR/rdonlyres/CA9ED2D7-9ECA-4383-97AC-4AF9C6C45439/91779/DBSCH_SCR_4163_6161.pdf.

(3) Consultation Paper Recommendations

4.51 In the Consultation Paper the Commission emphasised the importance of juror competence in ensuring the right to a fair trial for the accused and in this light recommended that persons with an intellectual incapacity should continue to be ineligible for jury service.⁵⁴

4.52 With a similar emphasis being placed on the significance of competence, the Commission provisionally recommended that impaired mental health should not automatically exclude persons from jury service, but rather that persons believing themselves to be incapacitated by such impairment should apply for an excusal.

(4) Submissions and Final Recommendations

4.53 Some consultees suggested that the ideal would be a situation in which individuals were presumed to have capacity and, where necessary, assessed on a case-by-case basis and provided with reasonable accommodation. It was accepted, however, that this leads to very complex practical questions, and would also be subject to adequate resourcing.

4.54 In general, it was agreed that a functional approach avoids the tendency to categorisation inherent in a status-based approach. It was suggested by some that a system of self-assessment could be introduced, in which the necessary skills to undertake the functions of a jury, and the duties of the juror, are outlined in brief, and anybody considering themselves not to meet this standard would apply to the Courts Service for an excusal.

4.55 The Commission notes that the Government's *Assisted Decision-Making (Capacity) Bill*, due to be published in 2013, is likely to contain a general statutory principle that persons aged 18 and upwards are presumed, unless the contrary is established, to have decision-making capacity; and that the Bill will also provide that capacity should be based on a functional test of whether the person understands the nature and consequences of the decision at the time it is being made. The Commission also notes that the Government's General Scheme of a Capacity Bill, which was published in 2008 and which is likely to influence the content of the 2013 Bill, stated (in Head 20) that the general principles on capacity in the Bill would not affect the law concerning the capacity required of a person when "acting as a member of a jury". The Commission also reiterates the principle, as outlined in Chapter 1, that the right to a fair trial in the Constitution requires that jury members have the capacity and competence to carry out their decision-making functions and that capacity and competence is an individual, rather than group, attribute. In this respect the Commission has concluded that, subject to appropriate reformulation, the current restrictions on those whose ill health or decision-making capacity prevent them from carrying out the functions of a juror should be retained.

4.56 The Commission emphasises in this respect that is important to differentiate clearly between, on the one hand, ill-health and, on the other hand, decision-making capacity, and that this should be reflected in the legislation on jury service. The Commission notes that the current provisions in the *Juries Act 1976* fail to distinguish between ill health and decision-making capacity.

4.57 Having considered this matter, the Commission has concluded that, as to mental health, the test for ineligibility in the *Juries Act 1976* should be reformulated to provide that the following person is ineligible to serve as a juror: a person whose ill health means that he or she is resident in a hospital or other similar health care facility or whose ill health means that he or she could not perform the duties of a juror. As to decision-making capacity, the Commission has concluded that the test for ineligibility in the *Juries Act 1976* should be reformulated to provide that the following person is ineligible to serve as a juror: excuse individuals "whose capacity, with permissible and practicable supports and accommodation, would be such that he or she could not perform the duties of a juror."

4.58 Having considered this matter, the Commission has concluded that, as to mental health, the test for ineligibility in the *Juries Act 1976* should be reformulated to provide that a person is eligible for jury service unless, arising from the person's ill health, he or she is resident in a hospital or other similar health care facility or is otherwise (with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law) unable to perform the

⁵⁴ Consultation Paper at paragraphs 4.73 to 4.74.

duties of a juror. As to decision-making capacity, the Commission has concluded that the test for ineligibility in the *Juries Act 1976* should be reformulated to provide that a person is eligible for jury service unless his or her decision-making capacity, with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law, would be such that he or she could not perform the duties of a juror. The Commission also considers that the relevant procedural and research issues identified in the context of physical disability, discussed above, should also apply (subject to suitable adaptation) to ineligibility and excusal arising from ill health and decision-making capacity.

4.59 *The Commission recommends that, as to mental health, the test for ineligibility in the Juries Act 1976 should be reformulated to provide that a person is eligible for jury service unless, arising from the person's ill health, he or she is resident in a hospital or other similar health care facility or is otherwise (with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law) unable to perform the duties of a juror. The Commission recommends that, as to decision-making capacity, the test for ineligibility in the Juries Act 1976 should be reformulated to provide that a person is eligible for jury service unless his or her decision-making capacity, with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law, would be such that he or she could not perform the duties of a juror.*

4.60 *The Commission recommends that the application of this provision should not involve an individual assessment of capacity. The Commission also recommends that the provision should be supplemented by guidance which would remind jurors in general of the requirements of eligibility for jury service, which should be expressed in a manner that encourages those with any doubts, arising from their ill health or decision-making capacity, about being able to carry out the functions of a juror to identify themselves. In making this decision, the judge should apply the presumption of capacity as well as the requirement of juror competence that forms part of the right to a trial in due course of law. The guidance should also make it clear to jurors that it is both their entitlement and responsibility to inform the court where a question of capacity regarding another juror arises. The Commission also recommends that if there is a conflict between the accommodation of a prospective juror in accordance with the 2006 UN Convention on the Rights of Persons With Disabilities and the right to a fair trial, the fairness of a trial must be given priority. The Commission recommends that where the judge considers that, even with reasonable and practicable accommodation, a juror will not be capable of carrying out their duties as a juror arising from ill health or decision-making capacity, the judge should excuse the prospective juror as ineligible to serve. The Commission also recommends that ill health or decision-making capacity that may require accommodation or support may constitute "good cause" for the purposes of an application for "excusal for cause."*

4.61 *The Commission recommends that it would be appropriate that the research on jury service recommended in paragraph 11.18 of this Report should include research into permissible and practicable supports and accommodation in connection with health and decision-making capacity, based on international best practice and experience.*

D Reading and Language Capacity

(1) Current Law and Practice in Ireland

4.62 Schedule 1, Part 1, of the *Juries Act 1976*, as amended by section 64(a) of the *Civil Law (Miscellaneous Provisions) Act 2008*, provides (under the heading "Other people") that the following persons are ineligible for jury service:

"Persons who have –

- (a) an incapacity to read, or
- (b) an enduring impairment

such that it is not practicable for them to perform the duties of a juror."

4.63 This Part focuses on paragraph (a), that is, incapacity to read. Prior to the amendment of the 1976 Act by the 2008 Act, the relevant provision in Schedule 1, Part 1, of the *Juries Act 1976* provided that the following (under the heading “Incapable persons”) was ineligible: “A person who because of insufficient capacity to read... is unfit to serve on a jury.” The 2008 Act replaced the phrase “is unfit to serve on a jury” with the somewhat more acceptable phrase “such that it is not practicable for them to perform the duties of a juror.”

4.64 The 1976 Act, as amended, clearly sets a form of reading literacy threshold that is not general in nature but rather is specific to performing the duties of a juror. In that respect, the test of capacity or competence is a “functional test” in the sense used by the Commission in its 2006 *Report on Vulnerable Adults and the Law*,⁵⁵ namely, that it is specific to the particular decision or activity to which it relates. The 2006 Report recommended that this functional approach to capacity, and a general presumption of capacity, should be included in the adult capacity legislation which it recommended should be enacted. As noted above, the proposed *Assisted Decision-Making (Capacity) Bill* (scheduled to be published in 2013) is intended to implement the key elements of that 2006 Report also involves a key component of the State’s stated intention to ratify the 2006 UN Convention on the Rights of Persons With Disabilities.

4.65 The Commission also notes that the use of the word “practicable” in the 1976 Act, as amended by the 2008 Act, alludes to something that is feasible or possible, and therefore indicates that a person with some reading difficulties would not necessarily be precluded from carrying out the duties of a juror; otherwise, the words from “such that” would be redundant. This raises the issue as to what type of accommodation, if any, is already provided or might be provided for those who require assistance or accommodation in carrying out the duties of a juror.

4.66 Section 36 of the 1976 Act provides that a person commits an offence if he or she serves on a jury knowing that he or she is ineligible for jury service. The jury summons on foot of which a person attends for jury service draws the potential juror’s attention to section 36 of the 1976 Act and, while the Commission recognises that a person who has profound inability to read may not be fully aware of this provision the 1976 Act imposes a general duty to disclose any ineligibility when the jury is being selected.

4.67 The Commission is aware from its consultation process and further discussion with interested parties that the Courts Service does not carry out any literacy test of potential jurors. In practice, the issue is dealt with in the same way that other grounds of ineligibility are, namely, it is assumed that a juror will act in accordance with the summons and, if ineligible for jury service, will disclose that fact. Consultees also noted that some comprehension difficulties are often identified when a person repeats, or attempts to repeat, the juror’s oath in court. This is then dealt with in a sensitive and informal manner where the potential juror is reminded of the requirements of the 1976 Act.

4.68 There is no requirement under the 1976 Act that jurors be fluent in English, which is the language used in the vast majority of trials conducted in Ireland.

4.69 The Commission acknowledges that in certain cases literacy is an important requirement for jurors when assessing documentary evidence and other written materials. Written evidence and visual aids (in written form) are becoming more regular features of contemporary trials, which also often involve complex scientific and financial information. The Commission notes that the National Adult Literacy Agency (NALA) has pointed out that up to 25% of Irish adults have literacy difficulties, which can arise from problems experienced during the education process, some of which are connected to learning disabilities such as dyslexia or dyspraxia.⁵⁶ The Commission also recognises that language fluency is an important component of a juror’s comprehension of both written and verbal evidence, which also continues to be a key feature of trials.

⁵⁵ *Report on Vulnerable Adults and the Law* (LRC 83-2006).

⁵⁶ The points out that 25% of Irish adults have literacy difficulties: see <http://www.nala.ie/literacy-ireland>. This figure compares with 3% in Sweden and 5% in Germany.

(2) Comparative and International Approaches

4.70 The Commission considered a number of comparative approaches to this issue in the Consultation Paper, a brief overview of which is provided here.⁵⁷

(a) United Kingdom

4.71 In England and Wales, the 1965 *Report of the Departmental Committee on Jury Service* considered a number of proposals calling for educational, intelligence or literacy tests as a requirement for inclusion on the list for jury service.⁵⁸ The Committee rejected these proposals but did recommend that persons who found it difficult to read, write, speak or understand English should not be eligible for jury service. Section 10 of the *Juries Act 1974* provides that where it appears to the appropriate officer that there is doubt as to the capacity of an individual to act effectively as a juror on account of an “insufficient understanding of English,” that individual may be brought before the judge who will determine whether or not the individual should be discharged. The 1986 *Fraud Trials Committee Report* (the Roskill Report) considered that that the term “insufficient understanding of English” in the 1974 Act did not sufficiently meet the recommendations of the 1965 Report as to literacy.⁵⁹

4.72 The English 2001 Auld Review Report also considered the issue of literacy of jurors.⁶⁰ The Report acknowledged that imposing a literacy qualification for jury service resulted in excluding “a significant section of the community who, despite that inability, have much to contribute to the broad range of experience and common-sense that is required in a jury.”⁶¹ The Report also accepted that it was becoming increasingly necessary for jurors to have a reasonable grasp of written English, that the simplest of cases normally involved exhibited documents and that it was necessary for jurors to be able to understand these. The Report recommended increased use of visual aids and written summaries of the issues, and that there should be a procedure for ensuring that only literate persons were selected for fraud trials or any case that involved critical documentary evidence.⁶²

4.73 The Auld Review considered that the present system of leaving the judge as the final filter during the process of jury selection to identify illiterate jurors was “probably the best that can be achieved. By then the nature of the case for trial and its likely demands on the literacy of potential jurors can be assessed.” It also considered that the trial judge should give the panel of potential jurors an ample and sensitively expressed warning of what the case would entail, and provide jurors with a way in which they could seek excusal without causing them embarrassment. It also considered that as “a very last resort, there is always the option for the prosecution to ‘stand by’ a potential juror who clearly has difficulty, when being sworn, in reading the oath.”⁶³

(b) Australia

4.74 In Australia every state and territory has a statutory language requirement in place, although the formulation of the test for eligibility varies between jurisdictions.⁶⁴ The New South Wales Law Reform Commission considered that non-nationals acquiring Australian citizenship coming from communities adopting a different alphabet or writing style, may be able to speak and communicate in English but have only a limited ability to read.⁶⁵ As such it was considered that a general restriction on persons unable to read may be undesirable. The Law Reform Commission of Western Australia agreed with this approach and considered that a literacy requirement that applied across the board would be undesirable, as it

⁵⁷ Consultation Paper at paragraphs 4.78 to 4.85.

⁵⁸ *Report of the Departmental Committee on Jury Service* (Home Office, Cmnd 2627, 1965) at paragraphs 3 and 6.

⁵⁹ *Fraud Trials Committee Report* (Roskill HMSO, 1986) at paragraphs 7.9 -7.11.

⁶⁰ *Auld Review of the Criminal Courts of England and Wales* (2001) Chapter 5, at paragraph 50.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ For a more detailed analysis, see the Consultation Paper at paragraph 4.78.

⁶⁵ Law Reform Commission for New South Wales *Issues Paper on Jury Selection* (No 28 2006) at 86.

would exclude a section of people from jury service that would be capable of discharging the duties of a juror.⁶⁶ It considered that in circumstances where written aids were provided it would be possible for another juror to read out relevant parts of the material to other jurors if necessary and that in trials involving a significant amount of written evidence it would be necessary for jurors to be able to read.

4.75 The Law Reform Commission of Western Australia also considered that the informal procedures used by court staff in identifying persons with communication and comprehension difficulties were subjective. It proposed that the courts should develop a set of guidelines with standardised procedures and questions to assist in the assessment of the English language ability so that candidate jurors were only excluded from jury service when absolutely necessary.⁶⁷

(c) New Zealand

4.76 In New Zealand, under section 16AA of the *Juries Act 1981*, a judge may, on his or her own motion or on application by the court registrar, discharge the summons of a person if the judge is satisfied that, because of difficulties in understanding or communicating in the English language, the person is not capable of acting effectively as a juror. Candidate jurors are instructed in the jury booklet and introductory video for jurors to advise court staff if they are unable to understand English.⁶⁸ Research conducted for the New Zealand Law Commission's review of the jury system indicated that despite these steps to identify persons with comprehension issues, jurors were selected for jury service who had difficulty in understanding evidence as English was their second language.⁶⁹ The New Zealand Law Commission was of the opinion that an additional screening process was desirable but impracticable. The Commission did, however, recommend that when a jury retires to select a foreman the trial judge should direct the jurors to talk amongst themselves to ensure that they are all able to speak and understand English. It also recommended that in circumstances where it appeared that a juror was unable to do so the trial judge should be advised of the fact. It acknowledged that this recommendation may be considered problematic in that it places a burden on jurors to identify their peers as lacking linguistic competency and that some jurors may feel uneasy with this and be reluctant to do so. In addition, a person may be reluctant to identify such a person fearing that they will be opening themselves to an accusation of racism or bias.

4.77 The New Zealand Law Commission noted that, as over a million New Zealand adults fell below the minimal level of English literacy competence required to meet the demands of everyday life and 20% of adults had "very poor" literacy skills, a significant number of people would not pass a juror literacy test.⁷⁰ The Commission therefore did not recommend the introduction of a literacy test as it considered that this would cause considerable administrative difficulties and that the level of literacy that would be required of a juror would vary from case to case depending on the amount of written evidence involved in a trial.⁷¹

(d) Canada

4.78 Section 638(f) of the Criminal Code of Canada provides that a prosecutor or accused is entitled to an unlimited number of challenges for cause on the ground that a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony.

(e) 2006 UN Convention on the Rights of Persons With Disabilities

4.79 Article 13 of the 2006 UN Convention on the Rights of Persons with Disabilities ("UNCRPD"), which, at the time of writing, Ireland has signed but not ratified, provides that States Parties are required to ensure effective access to justice for persons with disabilities on an equal basis with others. The UNCRPD defines reasonable accommodation as: "necessary and appropriate modification and

⁶⁶ Law Reform Commission of Western Australia *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (No 99 2009) at 93.

⁶⁷ *Ibid* at 95.

⁶⁸ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001) at 78.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at 81.

⁷¹ *Ibid* at 82.

adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁷² In Chapter 1, the Commission noted that one of the guiding principles relevant to this Report is that, in order to meet the requirements of the Constitution concerning a fair trial and comparable provisions in international human rights instruments, jurors should have certain minimum standards of personal capacity and competence, which may require reasonable support and accommodation that do not involve a disproportionate or undue burden.⁷³

(3) Consultation Paper Recommendations

4.80 In the Consultation Paper, the Commission provisionally recommended that procedures for the testing of juror literacy should not be introduced, and that all jurors should have a responsibility to inform the court registrar if they have literacy difficulties and should seek excusal on that ground.⁷⁴ The Commission also provisionally recommended that it should be an offence for any person knowingly to present for jury service where their lack of literacy renders them incapable of performing their duties.⁷⁵

4.81 The Commission provisionally recommended that a requirement of fluency in English should be introduced for all persons serving on a jury,⁷⁶ and the Commission invited submissions on methods to be used in order to establish that a juror is able to understand and communicate in the English language.⁷⁷

(4) Submissions and Final Recommendations

4.82 In the course of the Commission’s consultation process and discussion with interested parties there was general agreement that the absence of fluency in the English language poses difficulties as to the fairness of a trial. There was no consensus as to the precise steps that might be put in place to address this, but a number of suggestions were made. A number of consultees pointed out that current practice is often to use the process of taking the juror’s oath to assess linguistic capacity, while others emphasised the importance of establishing capacity prior to empanelment.

4.83 Another suggestion was to require any person who has lived in the country for a certain minimum period to declare themselves to the court registrar or judge and that an exchange could then take place in order for the court to assess linguistic capacity. A number of submissions suggested that a specific requirement be introduced that a juror be fluent in English. It was also noted that deferral of jury service might be more appropriate than excusal because the individual’s language skills could be expected to improve over time.

4.84 In coming to its conclusions on reading and linguistic capacity the Commission emphasises the importance of juror competence to the fairness of a trial. The Commission notes that this is not a new issue and, indeed, that it is a continuing one bearing in mind that up to 25% of Irish adults have literacy difficulties.⁷⁸ The Commission also notes that this is not, therefore, an issue confined to non-Irish nationals although the ability to understand English, as opposed to the question of literacy levels in general, may pose particular issues for those who have been resident in Ireland for a relatively short period and whose first language is not English. It is relevant to note in this context that the Commission has already recommended that, for a juror who is not an Irish citizen, he or she must be resident in the State for at least 5 years. For those whose first language may not have been English on their arrival in the State, this is likely to minimise the problem of fluency in English.

⁷² Article 2 of the UNCRPD.

⁷³ See paragraphs 1.44-1.47 and 1.50, above.

⁷⁴ Consultation Paper at paragraph 4.91.

⁷⁵ *Ibid* at paragraph 4.92.

⁷⁶ *Ibid* at paragraph 4.93.

⁷⁷ *Ibid* at paragraph 4.94.

⁷⁸ One in four or 25% of Irish adults have literacy difficulties. Obtained from National Adult Literacy Agency: <http://www.nala.ie/literacy-ireland>. This figure compares with 3% in Sweden and 5% in Germany.

4.85 The Commission has concluded that it is important, in order to ensure a fair trial process, that any juror, irrespective of their citizenship, should be able to read, write, speak and understand English to the extent that it is practicable for him or her to carry out the functions of a juror. The Commission does not propose to set down any prescriptive arrangements for the assessment of this aspect of capacity and it notes that the current arrangements appear to work satisfactorily, under which court officials, judges and practitioners use their knowledge and experience to discern indications of capacity or otherwise on a case-by-case basis. The Commission considers that these arrangements can be supplemented by guidance which would remind jurors in general of the requirements of eligibility for jury service, which should be expressed in a manner that encourages those with any doubts as to their capacity to identify themselves. The guidance should also make it clear to jurors that it is both their entitlement and responsibility to inform the court where a question of capacity regarding another juror arises.

4.86 This would facilitate a discussion with the court official or judge who would be well placed to consider, having regard to the specific trial or trials about to be conducted, the competence of the potential juror. The Commission emphasises that this does not amount to setting as a prerequisite that there be an individual assessment of capacity in respect of all jurors, notwithstanding the current reality that up to 25% of those called may have some literacy difficulty. The Commission is satisfied that the current informal arrangements, based on specific matters such as the ability or otherwise to take the juror's oath, remain a suitable method in this respect. In trials with a significant amount of written information (evidence rather than visual aids), judges are likely to emphasise at the outset the importance of reading and linguistic capacity.

4.87 As to the issue of reasonable accommodation in accordance with the 2006 UN Convention on the Rights of Persons With Disabilities, the Commission accepts that, where this is practicable and reasonable it should be done. Nonetheless, the Commission considers that any such arrangements must have regard to the right to a fair trial. The Commission notes that, in a related area, the Oireachtas has legislated to provide that jurors be assisted to the greatest extent possible in complex criminal trials, in particular through the provision of written documents, which the Commission discusses in Chapter 10, below. These arrangements clearly facilitate juror comprehension in such complex cases, but they must be seen against the general background that the jurors are competent in the sense discussed in this Chapter in order to ensure that the trial process retains the fundamental attributes of a trial in due course of law. The Commission considers that it would be appropriate that the further research on jury service recommended in Chapter 11, below, should include research into permissible and practicable supports and accommodation for this purpose, based on international best practice and experience.

4.88 *The Commission recommends that, in order to be eligible to serve, a juror should be able to read, write, speak and understand English to the extent that it is practicable for him or her to carry out the functions of a juror. The Commission also recommends that this should not involve an individual assessment of capacity but that it should continue to be a matter that is considered by court officials, judges and practitioners using their knowledge and experience to discern indications of capacity or otherwise on a case-by-case basis. The Commission also recommends that these arrangements be supplemented by guidance which would remind jurors in general of the requirements of eligibility for jury service, which should be expressed in a manner that encourages those with any doubts as to their capacity to identify themselves. The guidance should also make it clear to jurors that it is both their entitlement and responsibility to inform the court where a question of capacity regarding another juror arises.*

4.89 *The Commission recommends that, as to reasonable accommodation in accordance with the 2006 UN Convention on the Rights of Persons With Disabilities concerning reading and linguistic understanding, any such arrangements must ensure that the trial process retains the fundamental attributes of a trial in due course of law. The Commission also recommends that it would be appropriate that the research on jury service recommended in paragraph 11.18 of this Report should include research into permissible and practicable supports and accommodation for this purpose, based on international best practice and experience.*

CHAPTER 5 INELIGIBILITY, EXCUSAL AND DEFERRAL

A Introduction

5.01 In this Chapter, the Commission examines the extent to which specific categories of persons should be regarded as ineligible for jury service¹ and to what extent other categories of person may be excused from service. In Part B, the Commission examines the current categories of persons who are ineligible for jury service, which comprises the President of Ireland, a specific list of persons connected with the administration of justice (including judges, lawyers in practise and members of the Garda Síochána) as well as members of the Defence Forces. In Part C, the Commission examines the group of persons who may be excused as of right from jury service, including health care professionals (such as doctors, nurses and veterinary surgeons), civil servants, ordained clergy and teachers. The Commission discusses whether this approach to excusal should be replaced with a general provision on excusal for good cause, which is currently available to any person who does not come within the category of persons who are ineligible or excusable as of right. In Part D, the Commission discusses proposals for deferral of jury service to complement the provisions on excusal for good cause.

B Persons Ineligible for Jury Service: President of Ireland, Persons Concerned with Administration of Justice and Members of the Defence Forces

(1) Current Position in Ireland

5.02 Schedule 1, Part 1 of the *Juries Act 1976* provides that the following are ineligible for jury service: the President of Ireland, a specific list of persons and professions connected with the administration of justice and members of the Defence Forces.

5.03 The list in the 1976 Act under the heading “Persons concerned with administration of justice” comprises the following:

- Persons holding or who have at any time held any judicial office
- Coroners, deputy coroners and temporary coroners
- The Attorney General and members of his or her staff
- The Director of Public Prosecutions and members of his or her staff
- Practising barristers and solicitors
- Apprentice solicitors, and other persons employed to carry out work of a legal character in solicitors’ offices
- Officers attached to a court or to the President of the High Court and officers and other persons employed in any office attached to a court
- Persons employed from time to time in any court for the purpose of taking a record of court proceedings (stenographers)
- Members of the Garda Síochána

¹ The Commission has already examined in Chapter 4 the group of persons regarded as ineligible for jury service under Schedule 1, Part 1 of the *Juries Act 1976* for reasons related to juror competence and capacity, namely those whose physical capacity, decision making capacity or literacy capacity may affect their ability to carry out the functions of a juror. This Chapter is therefore concerned with the remaining groups of persons listed in Schedule 1, Part 1 of the 1976 Act (ineligible), and also those in Schedule 1, Part 2 (excusal as of right).

- Prison officers and other persons employed in any prison, including juvenile detention centres
- Persons employed in the welfare service (probation service) of the Department of Justice and Equality and
- A person in charge of, or employed in, a forensic science laboratory

5.04 The list in the 1976 Act under the heading “Defence Forces” comprises the following:

- Members of the Permanent Defence Force, including the Army Nursing Service and
- Members of the Reserve Defence Force while in receipt of pay for such service or duty.

5.05 Walsh has commented that the exclusion of a very wide range of persons associated with the administration of justice “is a well-established feature of jury composition in the common law world” and that is based on two related aspects of the function of a jury. Firstly, it is “a vital element in protecting the jury’s essential image as a representative body of laypersons which provides a critical balance to the legal professionals in the administration of justice.” Second, excluding such persons from jury service is related to “the need to avoid the appearance of bias which may result if such personnel were to sit in their capacity as ordinary citizens determining whether their colleagues had proved a case beyond a reasonable doubt.”²

5.06 The Commission agrees that the exclusion of these categories of persons is important in order to reinforce the impartiality of the jury, one of the guiding principles set out in Chapter 1 of this Report. Were such persons to be eligible for jury service there is the risk that they may be deferred to in the jury room on the basis of their status or legal knowledge or that they may have information (or access to it) about the defendant or the victim that is not presented in evidence at trial. This rationale was also noted during the Oireachtas debates on the 1976 Act.³

(2) Comparative and International Law Approaches

5.07 As pointed out by Walsh, most jurisdictions continue to apply an approach to ineligibility that is broadly comparable to that in the 1976 Act, although the Commission acknowledges that a small number have moved significantly towards a view that all professions should be eligible for jury service. Among the first to do this was the state of New York which, in 1993, launched a *New York Jury Project* with the general aim of making juries more representative of the communities from which they were selected thus making the jury system itself fairer and more efficient.⁴ The outcome was that New York state law removed all previous statutory occupational exclusions and exemptions, including those connected with the administration of justice. Other states in the United States have also limited the ineligibility list, but many still exclude members of professional fire and police forces and members of the armed forces on active duty.⁵

5.08 The only common law jurisdiction of which the Commission is aware to have followed the New York approach is England and Wales. The 1965 *Report of the Departmental Committee on Jury Service* (the Morris Committee) recommended that persons involved in the administration of justice should continue to be ineligible for jury service in England and Wales,⁶ and this was implemented in the *Juries Act 1974*, as enacted. Between 1974 and 2001, a number of reviews had accepted that it was appropriate to continue the exclusion of persons connected with the administration of justice.⁷ The 2001 Auld Review recommended, however, that in terms of eligibility for jury service no distinction should be drawn between professions or occupations and it rejected the suggestion that other members of the jury would be unduly

² Walsh *Criminal Procedure* (Round Hall Ltd. 2002) at 824.

³ Consultation Paper at paragraph 3.25.

⁴ *Ibid* at paragraph 3.09.

⁵ See <http://www.uscourts.gov/FederalCourts/JuryService/JurorQualificaitons.aspx>.

⁶ Consultation Paper at paragraphs 3.27 (generally) and 3.67 (police officers and civilian members).

⁷ *Ibid* at paragraph 3.68.

influenced by the presence of a judge, a lawyer or a police officer.⁸ It also considered that, in terms of the potential for bias, or the perception of bias, this could be dealt with by the trial judge on a case-by-case basis. It accordingly recommended that the exclusion of these persons from jury service should be removed and this was implemented by amendments to the 1974 Act made by the *Criminal Justice Act 2003*. The effect of this is that the 1974 Act, as amended in 2003, provides that virtually all persons involved in the administration of justice, including judges, lawyers and police officers, are eligible to serve on juries in England and Wales.

5.09 The changes made in 2003 have been described as controversial, and Hungerford-Welch has noted that one effect is that, since 2003, “the composition of the jury has been a frequent ground of appeal against conviction.”⁹ In *R v Abdroikov, Green and Williamson*,¹⁰ the UK House of Lords (since 2009 replaced in its judicial capacity by the UK Supreme Court) dealt with appeals from three separate trials, the first two involving a jury that included a serving police officer, and the third involving a solicitor employed by the Crown Prosecution Service (CPS). The House of Lords reviewed the changes in the 1974 Act arising from the Auld Review, and held that, in enacting the 2003 Act, the UK Parliament must have been aware of the test for apparent jury bias but that it must have also concluded that it was appropriate to move from excluding certain persons from eligibility to virtual universal eligibility. In that respect it considered that the UK Parliament must have considered that the risk of bias in the case of serving police officers or CPS solicitors was manageable within the system of jury trial. It also noted, however, that the expectation expressed in the Auld Report that doubtful cases would be resolved by the trial judge was not possible where neither the judge nor counsel knew that the juror was a police officer or CPS solicitor.

5.10 In *Abdroikov*, the House of Lords concluded that the first defendant’s conviction could stand but it quashed the other two. In the case of the first defendant, the trial did not turn on a contest between the evidence of the police and of the defendant, and it would have been difficult to suggest that unconscious prejudice, even if present, would have been likely to operate to his disadvantage. In the second defendant’s trial, however, there was a crucial dispute on the evidence between the defendant and the police officer who was the alleged victim; since the victim and the police officer on the jury shared the same local service background, the instinct of a police officer juror to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair-minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions. In the third defendant’s trial, the House of Lords agreed that justice was not seen to be done where one of the jurors was a full-time, salaried, long-serving employee of the prosecutor, the CPS.

5.11 The approach recommended by the Auld Report has not been followed in Northern Ireland or Scotland. In Northern Ireland, the *Juries (Northern Ireland) Order 1996* continues to deem ineligible for jury service persons connected with the administration of justice, including members of the judiciary, solicitors and barristers.¹¹ During 2008 and 2009 the Scottish Government conducted a review of its juries legislation. In a 2008 Consultation Paper,¹² it pointed out that the rationale for the exclusion of those working within the justice system is that they could have knowledge of the case or those involved in bringing or defending the case, or access to systems such as computerised records about cases or individuals, which could interfere with their impartiality. It added that “[i]n a relatively small jurisdiction such as Scotland, the risk of conflicts of interest is real and should be minimised” and that the wholesale

⁸ Consultation Paper at paragraph 3.69.

⁹ Hungerford-Welch, “Police Officers as Jurors” [2012] Crim L R 320, at 325. He added (at 341): “The objective of trying to ensure that juries are more representative of society is a laudable one. However, it is strongly arguable that the reforms brought about by the Criminal Justice Act 2003 went too far in allowing all those concerned with the administration of justice, particularly police officers and prosecutors, to serve as jurors. A more refined approach would have been preferable.”

¹⁰ [2007] UKHL 37, [2008] 1 All ER 315.

¹¹ Members and staff of the Independent Commission for Police Complaints for Northern Ireland are also ineligible under Schedule 2 of the *Juries (Northern Ireland) Order 1996*.

¹² *The Modern Scottish Jury in Criminal Trials* (Scottish Government 2008).

exclusion of those working in the criminal justice system was a response to this.¹³ It also noted that the English 2003 reforms had given rise to difficulties, such as those noted above, and that they had created a new procedural layer in the jury selection process that was not consistent with fairness or efficiency. While inviting comments on whether the English approach should be adopted in Scotland, it noted that “the objectivity and impartiality of jurors should not be compromised.”¹⁴ In its 2009 review of the consultation process that followed, the Scottish Government stated that it did not intend to amend the “ineligible for jury service” list, pointing out that the responses to the consultation did not indicate a strong appetite for change. It added that there was “a strong indication from respondents that it would be unwise to open up jury duty to those who work within the justice system.”¹⁵ Similar views were expressed by consultees in Northern Ireland when the Northern Ireland Court Service carried out a public consultation between 2008 and 2010 on *Widening the Jury Pool*.¹⁶

5.12 In the Australian states and territories the relevant legislation on jury service continues to render ineligible persons connected with the administration of justice. In 2010, the Law Reform Commission of Western Australia, having reviewed the matter extensively, concluded that the key elements of such restrictions should remain in place, so that judges, lawyers in practice and those closely connected to the administration of justice such as coroners would continue to be ineligible for jury service.¹⁷ Thus, the Western Australia *Juries Act 1957*, as amended by the *Juries Legislation Amendment Act 2011*, continues to render ineligible persons connected with the administration of justice.

5.13 In terms of international law, the European Court of Human Rights (ECtHR) has held that the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) may be violated by the presence on the jury of a serving police officer. In *Hanif and Khan v United Kingdom*¹⁸ the applicants had been convicted of drugs offences by a jury that included a police officer who knew one of the police officers giving evidence and had worked with him previously. The trial judge allowed the police officer to sit as a juror, and he subsequently became the foreman. The applicants appealed their convictions on this basis, but the convictions were upheld by the English Court of Appeal, and the UK House of Lords refused the applicants leave to appeal. The ECtHR noted that, of the 13 jurisdictions it had surveyed,¹⁹ only three (Belgium, England and New York) permitted police officers to serve on juries. The ECtHR did not conclude that police officers could never be permitted to serve on juries but that because English law was in a significant minority on this point it had to be regarded with careful scrutiny. In the case, the ECtHR held that the right of the applicants to a fair and impartial hearing had been violated.

(3) Consultation Paper Recommendations

5.14 In approaching the list of ineligible persons in the Consultation Paper, the Commission took into account the small population in the State and the relatively small numbers of persons connected with

¹³ *The Modern Scottish Jury in Criminal Trials* (Scottish Government 2008) at paragraph 4.2.

¹⁴ *Ibid* at paragraph 4.10.

¹⁵ *The Modern Scottish Jury in Criminal Trials: Next Steps* (Scottish Government 2009) at 3.

¹⁶ Northern Ireland Courts Service *Widening the Jury Pool: Summary of Responses* (2010) at 20ff, available at www.courtsni.gov.uk. As noted in paragraph 1.33, above, that consultation process was carried out just before the devolution of justice matters to the Northern Ireland administration and, at the time of writing, the Northern Ireland Department of Justice has indicated that it intends to proceed to legislate on one matter only discussed in that process, raising the upper age limit for jury service of 65 years in the 1996 Order. Nonetheless, the views expressed in that consultation process remain of value in the context of the preparation of this Report.

¹⁷ Law Reform Commission of Western Australia *Selection, Eligibility and Exemption of Jurors: Final Report* (Project No. 99, 2010), Chapter 4.

¹⁸ Judgment of 20 December 2011.

¹⁹ The ECtHR referred to the following Council of Europe jurisdictions: Austria, Belgium, France, Ireland, Malta, Northern Ireland, Norway and Scotland. It also referred to Australia, Canada, Hong Kong, New York and New Zealand.

the administration of justice. It noted that if all categories of ineligibility were removed, it would be extremely difficult to establish independent and objective juries.²⁰ The Commission therefore provisionally recommended that the following categories of persons continue to be ineligible for jury service: the President,²¹ members of the judiciary,²² retired members of the judiciary,²³ coroners and deputy coroners,²⁴ the Attorney General and members of staff of the Attorney General,²⁵ the Director of Public Prosecutions and members of staff of the Director of Public Prosecutions,²⁶ practising barristers, solicitors and solicitors' apprentices,²⁷ members of An Garda Síochána,²⁸ prison officers and other persons employed in a prison or place of detention,²⁹ persons working in the Probation Service,³⁰ and persons in charge of, or employed in, a forensic science laboratory.³¹

5.15 The Commission provisionally recommended that clerks and other persons employed on work of a legal character in solicitors' offices, and members of the Permanent and Reserve Defence Forces,³² should be eligible for jury service.³³

5.16 The Commission invited submissions on whether persons employed to take court records (stenographers),³⁴ and officers attached to a court,³⁵ are sufficiently connected to the criminal justice system to merit their continued ineligibility for jury service.

5.17 The Commission provisionally recommended that civilians employed in the Garda Síochána continue to be eligible for jury service:³⁶ such persons are not currently included in Schedule 1 of the 1976 Act. The Commission also provisionally recommended that retired members of An Garda Síochána should not be eligible for jury service until three years after retirement and that retired Gardaí selected for jury service should inform the court of their former occupation.³⁷

(4) Submissions and Final Recommendations

5.18 In the submissions received and in the further consultative meetings held by the Commission there was general agreement that the President of Ireland should continue to be ineligible for jury service particularly having regard to his or her constitutional role.

²⁰ Consultation Paper at paragraph 3.28.

²¹ *Ibid* at paragraph 3.31.

²² *Ibid* at paragraph 3.37.

²³ Consultation Paper at paragraph 3.41.

²⁴ *Ibid* at paragraph 3.43.

²⁵ *Ibid* at paragraph 3.45.

²⁶ *Ibid* at paragraph 3.49.

²⁷ *Ibid* at paragraph 3.60.

²⁸ *Ibid* at paragraph 3.84.

²⁹ *Ibid* at paragraph 3.91.

³⁰ *Ibid* at paragraph 3.94.

³¹ *Ibid* at paragraph 3.96.

³² *Ibid* at paragraph 3.99.

³³ *Ibid* at paragraph 3.62.

³⁴ *Ibid* at paragraph 3.66.

³⁵ *Ibid* at paragraph 3.64.

³⁶ *Ibid* at paragraph 3.84.

³⁷ *Ibid* at paragraph 3.88.

5.19 There was also general agreement that those most closely associated with the administration of justice should continue to be ineligible for jury service. Thus consultees were in general agreement that members of the judiciary and persons employed in the offices of the Director of Public Prosecutions and of the Attorney General (which includes the Chief State Solicitor) should continue to be ineligible. There was also general agreement that members and staff of the Garda Síochána Ombudsman Commission should be ineligible to serve (which would reflect the comparable position in Northern Ireland). These views were influenced by the small size of the State and the connected risks discussed in the Consultation Paper to the impartiality of the jury (actual or perceived) and which (as discussed above) had also been adverted to by the Scottish Government in its review of the Scottish jury system in 2008 and 2009.

5.20 As to whether practising solicitors and barristers should serve, the majority of consultees considered that they should continue to be ineligible. A minority of consultees suggested that solicitors and barristers, whether practising or not, should be eligible for jury service and that, if called, a solicitor or barrister could indicate to the court whether there was a specific reason why he or she should not be a juror in a specific case.

5.21 As to whether officers attached to a court should be eligible to serve, it was also noted that there was the possibility that other jurors could be influenced by the level of knowledge that such persons would bring to the deliberations. A similar view was expressed concerning stenographers, and it was also noted that the role of stenographers was being replaced by the computer-aided real time transcription (CART) system being introduced into refurbished courtrooms.³⁸ Consultees also noted that, since the enactment of the *Juries Act 1976*, as the Courts Service has been established (under the *Courts Service Act 1998*) the reference to officers attached to a court should also refer to employees of the Courts Service.³⁹

5.22 A large majority of consultees agreed that, for the same reasons already discussed (possible deference by other jurors and the risk of bias), members of the Garda Síochána should be ineligible for jury service, with a minority suggesting that they be eligible after a number of years following retirement. There was also general agreement that civilian persons employed in the Garda Síochána should be ineligible.

5.23 There was general agreement that members of the Defence Forces should be eligible to serve on juries.

5.24 Having considered these views, the Commission notes the importance of the guiding principle in Chapter 1 that jury members must be, and be seen to be, independent and unbiased. It could be suggested in this respect that the list of persons who may be regarded as ineligible to serve on juries in civil cases need not be as extensive as the list that would apply to criminal trials. Having considered this matter, the Commission has concluded that any such differences do not warrant providing for two separate lists of ineligible persons. The Commission also considers that a significant factor in this respect is the small size and population of the State, which necessarily means that the number of persons currently ineligible under the 1976 Act, including those involved in the administration of justice, is small in number and that, reflecting the nature of Irish society generally, they are often well acquainted with each other through work-related and social interaction. The Commission notes that this factor influenced the analysis by the Scottish Government when in 2008 and 2009 it reviewed this aspect of jury service in Scotland, which has a comparable population. The Commission agrees with the thrust of that analysis, which militates strongly in favour of continuing the current list of persons who are ineligible for jury service. In order to ensure the independent and unbiased nature of juries, therefore, the Commission has concluded that, subject to some minor alterations which are set out in the recommendations below, it is appropriate to retain the list of ineligible persons currently contained in Schedule 1 of the *Juries Act 1976*.

5.25 *The Commission recommends that the President of Ireland should continue to be ineligible for jury service.*

³⁸ See paragraph 4.16, above.

³⁹ Consultees pointed out that, from time to time, officers attached to a court could be transferred to support services within the Courts Service and also transferred back to a court.

- 5.26 *The Commission recommends that members of the judiciary, and retired members of the judiciary, should continue to be ineligible for jury service.*
- 5.27 *The Commission recommends that coroners and deputy coroners should continue to be ineligible for jury service.*
- 5.28 *The Commission recommends that the Attorney General and members of the staff of the Attorney General should continue to be ineligible for jury service.*
- 5.29 *The Commission recommends that the Director of Public Prosecutions and members of the staff of the Director of Public Prosecutions should continue to be ineligible for jury service.*
- 5.30 *The Commission recommends that practising barristers and solicitors should continue to be ineligible for jury service.*
- 5.31 *The Commission recommends that solicitors' apprentices, clerks and other persons employed on work of a legal character in solicitors' offices should continue to be ineligible for jury service.*
- 5.32 *The Commission recommends that officers attached to a court (which, having regard to the establishment of the Courts Service under the Courts Service Act 1998, should also include employees of the Courts Service) continue to be ineligible for jury service.*
- 5.33 *The Commission recommends that persons employed to take court records (stenographers) continue to be ineligible for jury service.*
- 5.34 *The Commission recommends that serving members of An Garda Síochána should continue to be ineligible for jury service.*
- 5.35 *The Commission recommends that retired members of An Garda Síochána should no longer be eligible for jury service.*
- 5.36 *The Commission recommends that civilians employed by An Garda Síochána who perform entirely administrative functions should be eligible for jury service.*
- 5.37 *The Commission recommends that Commissioners and staff of the Garda Síochána Ombudsman Commission be ineligible for jury service.*
- 5.38 *The Commission recommends that prison officers and other persons employed in a prison or place of detention should continue to be ineligible for jury service.*
- 5.39 *The Commission recommends that persons working in the Probation Service should continue to be ineligible for jury service.*
- 5.40 *The Commission recommends that persons in charge of, or employed in, a forensic science laboratory should continue to be ineligible for jury service.*
- 5.41 *The Commission recommends that members of the Permanent Defence Force, and members of the Reserve Defence Force while in receipt of pay for any service or duty, should be eligible for jury service.*

C Persons Excusable as of Right

(1) Current Position in Ireland

5.42 Section 9 of the *Juries Act 1976* provides that a county register "shall" excuse any person summoned for jury service who is one of the persons specified in Schedule 1, Part 2 of the 1976 Act and where that person informs the county registrar of his or her "wish to be excused." The persons in Schedule 1, Part 2 who are thus "excusable as of right" from jury service are:

- Members of either House of the Oireachtas
- Members of the Council of State
- The Comptroller and Auditor General
- The Clerk of Dáil Éireann

- The Clerk of Seanad Éireann
- A person in Holy Orders
- A regular minister of any religious denomination or community
- Vowed members of any religious order living in a monastery, convent or other religious community
- The following health care professionals if actually practising and registered:
 - Medical practitioners
 - Dentists
 - Nurses
 - Midwives
 - Veterinary surgeons
 - Pharmaceutical chemists
- A member of staff of either House of the Oireachtas, heads of Government Departments and Offices, any civil servant, any civilian employed by the Minister for Defence under section 30(1)(g) of the *Defence Act 1954*, the secretary to the Commissioners of Irish Lights and any person in the employment of the Commissioners, chief officers of local authorities, the head or principal teacher of the college of a university, of a school or other educational institution, and any professor, lecturer or member of the teaching staff of any such institution (on a certificate from a designated person that it would be contrary to the public interest to have to serve as a juror because he or she performs services of public importance that cannot reasonably be performed by another or postponed)
- Whole-time students at a college of a university, of a school or other educational institution
- Masters of vessels, duly licensed pilots, and duly licensed aircraft commanders
- Persons aged 65 years or upwards

5.43 Persons on this list are, of course, eligible to serve as jurors if they so wish, but where they do not wish to they may inform the county registrar who must excuse them under section 9 of the 1976 Act.⁴⁰

5.44 In approaching this aspect of jury service, the Commission has had regard to two related matters. In the first place, the group of persons who may be excused as of right comprises a significant proportion of the overall pool of about two million registered electors from which juries are chosen. Thus, to take some of the larger groups of persons involved in this list, there are in the order of 65,000 nurses in the State (on the active register of An Bord Altranais, the Nursing and Widwifery Board), about 60,000 teachers and lecturers in educational institutions (persons whose salaries are paid by the Department of Education), almost 30,000 civil servants, about 18,000 doctors (registered with the Medical Council), in the region of 4,500 pharmaceutical chemists (registered with the Pharmaceutical Society of Ireland), over 2,000 veterinary surgeons (registered with the Veterinary Council of Ireland) and about 2,000 dentists (registered with the Dental Council). This group amounts to almost 200,000 persons who are “excusable as of right” under the 1976 Act (to which would need to be added the other categories, such as those over 65 years of age).

5.45 A second important matter to which the Commission has had regard is that, in practice, many persons who are excusable as of right exercise the option not to serve as jurors under the 1976 Act. As

⁴⁰ Section 9(1)(b) and 9(1)(c) of the *Juries Act 1976* provide that the county registrar must also excuse any person where he or she has served on a jury, or duly attended to serve on a jury, in the previous three years, or where at the conclusion of a trial a judge has excused him or her from serving for a period that has not terminated. Sections 9(4) to 9(8) of the 1976 Act deal with appeals from a refusal by the county register to excuse a person and with the powers of a judge to excuse a person from jury service before, during or at the end of a trial.

already noted, the Commission's discussions with consultees in 2012 confirmed that there is an attrition rate of between 60% and 70% of those summoned for jury service⁴¹ and that this can be broken down as follows. For about 10% of issued summonses, the summons is returned because for example the person has left the address or is deceased. A further 10% of persons who are summoned do not attend on the date specified in the summons. Another 20% to 25% are within the lists of persons who are excusable as of right, ineligible for jury service or disqualified arising from a criminal conviction. A further 20% to 25% are qualified and eligible to serve but are excused on the basis of the discretion to do so under the 1976 Act: the most common reasons for allowing a discretionary excusal are that the person is a full-time carer, has a medical procedure that cannot be postponed, work commitments (in particular where the person is self-employed) or because holidays have been booked. Apart from this administrative reality in terms of the number of jury summonses that must be issued in order to ensure that a sufficient number of persons are available for jury service, a former Director of Public Prosecutions has pointed out that another important effect is that "almost anybody with a professional qualification is either excluded or can claim to be excused." He pointed out that "what one ends up with on a jury is not a group of 12 random citizens: it is a group of people are very heavily weighted towards the unemployed, students and housewives. It is not, generally speaking, a representative sample."⁴²

(2) Comparative Approaches

5.46 The 2001 Auld Review in England and Wales acknowledged that there might be good reasons for excusing people from jury service when they are required to perform important roles during the period specified in the summons.⁴³ It concluded that there was no reason, however, why they should be entitled to be excused as of right "simply by virtue of their position."⁴⁴ The recommendations of the Auld Review were implemented in amendments to the *Juries Act 1974* made by the *Criminal Justice Act 2003*. The position in England and Wales since 2003 is, therefore, that those summoned for jury service make an application for excusal in circumstances where they are unable to undertake jury service or where it would not be in the public interest. Summoning officers in the Jury Central Summoning Bureau (JCSB) consider all deferral and excusal applications. This is done on a case-by-case basis, having regard to the individual merits of the application. The approach of the summoning officers is to be fair to the applicant for excusal, while being consistent and attentive to the needs of the court in selecting a representative jury.

5.47 In its 2008 Consultation Paper on reform of the jury system in Scotland,⁴⁵ the Scottish Government noted that the reforms in England and Wales had not led to the situation that those previously "excusable as of right" would henceforth serve on any jury for which they were summoned. It commented that "the pattern of the previous excusals as of right has, to some extent, been replicated, at least in relation to some of the more obviously public service-focused occupations in healthcare such as hospital consultants and doctors."⁴⁶ In its 2009 review of the consultation process that followed, as already noted the Scottish Government stated that it did not intend to amend the "ineligible for jury service" list, pointing out that the responses to the consultation did not indicate a strong appetite for

⁴¹ See paragraph 2.30, above, and Gallagher, "State turns blind eye to dodgers of jury duty" *Irish independent*, 22 July 2012, available at www.independent.ie.

⁴² Comments by James Hamilton, then Director of Public Prosecutions, to Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights, *Review of Criminal Justice System*, 8 December 2003, available at <http://oireachtasdebates.oireachtas.ie>. These views were reiterated in his paper delivered at a Conference on *Rape Law: Victims on Trial?* organised by the Dublin Rape Crisis Centre and the Trinity College Dublin School of Law (16 January 2010) at 3.

⁴³ *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001) at 150.

⁴⁴ *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001) at 150.

⁴⁵ *The Modern Scottish Jury in Criminal Trials* (Scottish Government 2008).

⁴⁶ *Ibid* at paragraph 4.13, referring to the situation in England and Wales after 2003.

change. This was also the case in respect of the list of those occupations that were eligible to apply for “excusal as of right.”⁴⁷

5.48 In Australia, there has been a significant reduction in the categories of those who are excusable from jury service in most of the states and territories. This has been influenced by the analysis made by a number of reviews of jury legislation. Thus, the 1994 Australian Institute of Judicial Administration review of jury management in New South Wales noted that the list of exemptions in that jurisdiction was too wide and that the exemptions were difficult to reconcile.⁴⁸ Similarly, in 2007 the New South Wales Law Reform Commission recommended that individuals should not be entitled to excusal solely on the basis of their occupation, but that excusal should be decided on a case-by-case basis.⁴⁹ As a result, since 2010 the legislation in New South Wales sets out a list of criteria that must be established in an individual case to excuse a potential juror.⁵⁰ A similar position applies in Tasmania,⁵¹ Southern Australia⁵² and Queensland.⁵³

5.49 In New York state, arising from the 1993 *New York Jury Project*, excusal from jury service is now granted on the basis of ill health (physical or psychological) or “undue hardship” and these are decided on a case-by-case basis.

(3) Consultation Paper Recommendations

5.50 In the Consultation Paper, the Commission provisionally recommended that the categories of persons excusable as of right under the 1976 Act should be repealed and replaced with a general right of excusal for good cause,⁵⁴ and that evidence should be required to support applications for excusal.⁵⁵

(4) Submissions and Final Recommendations

5.51 In the submissions received by the Commission and in the further consultations held with interested parties, there was general agreement that, as a result of the wide number of professions included in the category of “excusal as of right” only a small number of professionals actually serve on juries and that the effect was that some juries are composed of young persons and those over 65. It was acknowledged that persons are rarely prosecuted for failing to turn up for jury service.

5.52 There was general agreement that excusals as of right from jury service ought to be restricted. It was suggested that if this occurred, a discrete method should be available to those wishing to communicate information to the court as to the grounds on which excusal was sought. It was also accepted that self-employed persons, small business owners and those with caring responsibilities were likely to be able to continue to apply successfully for excusals on a case-by-case basis.

5.53 The Commission acknowledges that the current system of excusal on the basis of membership of a particular profession or by holding a particular position in Ireland is difficult to reconcile with the fundamental principle set out in Chapter 1 that the jury pool should be broadly representative of the community and that jury selection should, in general, be random in nature. The Commission is also of the opinion that the approach adopted in the 1976 Act is not sustainable, as the range of persons carrying out important functions across the public or private sectors varies from time to time to such an extent that it is not feasible to maintain a definitive list. In any event, the Commission is of the view that the maintenance

⁴⁷ *The Modern Scottish Jury in Criminal Trials: Next Steps* (Scottish Government 2009) at 3.

⁴⁸ See Findlay *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994) at 173.

⁴⁹ New South Wales Law Reform Commission *Jury Selection* (Report 117, September 2007).

⁵⁰ Section 14 of the *Jury Amendment Act 2010* (NSW),

⁵¹ Schedule 1 and 2 of the *Juries Act 2003*.

⁵² Schedule 3 of the *Juries Act 1927*.

⁵³ Section 21 of the *Jury Act 1995* (Qld).

⁵⁴ Consultation Paper at paragraph 3.115.

⁵⁵ *Ibid* at paragraph 3.116.

of a list of persons who are excusable as of right is likely to give rise to confusion or a sense of arbitrary selection.

5.54 The Commission notes that section 9(2) of the 1976 Act confers a general power on the county registrar or, as the case may be, the judge to excuse a juror from attendance if that person shows “good reason” why he or she should be so excused. As already noted, the most common reasons for allowing a discretionary excusal are that the person is a full-time carer, has a medical procedure that cannot be postponed, work commitments (in particular where the person is self-employed) or because holidays have been booked.

5.55 It has been suggested to the Commission that merely putting forward these grounds is generally sufficient for excusal and that documentary evidence is not usually sought. The Commission considers that clear criteria should be in place to assess applications for excusal. A measure of flexibility would also have to be retained for a case-by-case analysis of particular circumstances. To this end, the Commission recommends that the Courts Service should prepare and publish guiding principles to assist county registrars in determining whether to grant or refuse the application for excusal. These could be based on the type of criteria developed in other jurisdictions.⁵⁶ It should be necessary to support applications for excusal with sufficient evidence. It would not be unduly burdensome to require a person to provide a copy of a travel itinerary showing the dates of holidays booked, for example. Similarly, it is not unreasonable to require medical certification for doctor and dentistry appointments or other evidence that a person can easily obtain.

5.56 *The Commission recommends that section 9(1) and Schedule 1, Part 2, of the Juries Act 1976, which provide for a list of persons excusable from jury service as of right, should be repealed and replaced with a general right of excusal for good cause, and that evidence should be required to support applications for excusal.*

5.57 *The Commission recommends that the Courts Service should prepare and publish guiding principles to assist county registrars in determining whether to grant or refuse the application for excusal for good cause.*

D Deferral of Jury Service

(1) Introduction

5.58 Under a deferral system, a person unable to undertake jury service elects to undertake the obligation at a later date. This does not conflict with the principle of random selection, since it is only after random selection of the candidate juror that deferral is possible. There is no system of deferral of jury service in Ireland at present, and the Commission considers that such a system could ultimately reduce the number of people excused, as well as the number of those summoned, because the Courts Service would have a record of people who rescheduled for particular dates in the calendar year.

(2) Comparative Approaches

5.59 Many jurisdictions have sought to end excessive excusal rates through the introduction of a system of deferral. In England and Wales, section 9 of the *Juries Act 1974* provides for a system of deferral which is discretionary and based on a showing of “good reason.” In Australia, deferral systems have been introduced in Victoria, South Australia, Tasmania, and the Northern Territory. The excusals are generally for periods up to 12 months, with an option to renew. In 2001, the New Zealand Law Commission recommended the introduction of a system of deferral of up to 12 months (with the possibility to renew), which was implemented in section 11 of the *New Zealand Juries Amendment Act 2008*.

⁵⁶ For example, in 2010 the Law Reform Commission of Western Australia suggested the following examples of issues that could be considered in such guidelines: work commitments, being self-employed, student commitments, pregnancy, illness, recent jury service, travel requirements, carer responsibilities, personal commitments and conflict of interest or bias: see *Final Report: Selection, Eligibility and Exemption of Jurors* (Project 99, 2010) at 119-122.

(3) Consultation Paper Recommendations

5.60 The Consultation Paper provisionally recommended that a deferral date of up to 12 months should be introduced in circumstances where a person is not available to undertake jury service.⁵⁷ The Commission also provisionally recommended that a second deferral should be available to a juror, provided that the application is for good cause.⁵⁸ Finally, it was provisionally recommended that guidelines on excusal should contain a section on the administration of the deferral system.⁵⁹

(4) Submissions and Final Recommendations

5.61 The submissions generally welcomed the Commission's provisional recommendations on the introduction of a system of deferral and this was confirmed in the further consultations held with interested parties. Some submissions suggested that there should be a statutory presumption that service be deferred rather than issuing excusals, except in tightly drawn circumstances.

5.62 Some concern was expressed that the introduction of a system of deferral could give rise to additional administrative costs. The Commission accepts that this may be the case but it is also of the view that this would be entirely outweighed by the benefit of ensuring that travel plans, medical appointments and the like would no longer deprive candidate jurors of an opportunity to undertake jury service. The deferral system would encourage greater participation in jury service and would contribute to underpinning the principle of ensuring that the pool from which juries are chosen remains representative of the community as a whole. It may also reduce the number of people seeking excusals and would enhance the experience of those jurors who will have been facilitated in organising their affairs and will thus have minimised the inconvenience caused to themselves, their families, and where relevant their employers. In circumstances where a deferral is granted, the Commission considers that it should be granted for a period of up to 12 months. The Commission acknowledges that a court will not always be in a position to provide advice on court sittings for the forthcoming year. The Commission considers, however, that a general timeframe of 12 months could be provided to the juror without requiring exact dates to be published.

5.63 *The Commission recommends that the legislation on jury service should include a presumption that, even where a person provides excusal from service for cause shown, his or her jury service should be deferred for a period of up to 12 months.*

5.64 *The Commission recommends that the guidelines on excusal already recommended in this Report should contain a section on the administration of the deferral system.*

⁵⁷ Consultation Paper at paragraph 3.125.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

CHAPTER 6 DISQUALIFICATION FROM JURY SERVICE

A Introduction

6.01 In this Chapter, the Commission examines the disqualification of persons from jury service primarily because they have been convicted of certain offences. In Part B, the Commission discusses the current position in the *Juries Act 1976* as well as comparative approaches to this issue. The Commission discusses in this respect the link between disqualification and the approach taken to expunging criminal records under a spent convictions regime. In Part C, the Commission reviews the provisional recommendations in the Consultation Paper and submissions received, and then sets out its final recommendations. In Part D, the Commission discusses the related process of vetting jury lists to identify persons who are disqualified.

B Current Position in Ireland and Comparative Approaches

(1) *Disqualification for criminal convictions and comparison with spent convictions regime*

6.02 Section 8(a) of the *Juries Act 1976* provides that a person is disqualified from jury service if, on conviction of an offence in Ireland, he or she has been sentenced to imprisonment for life or for a term of imprisonment of five years or more, or under the corresponding law of Northern Ireland. Section 8(a) of the 1976 Act thus operates as a lifetime disqualification from jury service. Section 8(b) of the 1976 Act provides that a person is also disqualified from jury service if at any time in the ten years before being summoned for jury service he or she has served either (i) any part of a sentence of imprisonment of at least three months or (ii) a sentence of detention of at least three months in Saint Patrick's Institution (a closed detention centre for persons under 21 years of age)¹ or in a corresponding institution in Northern Ireland.

6.03 The Commission agrees with the approach taken by comparable law reform bodies that a number of competing principles are relevant to a review of disqualification arising from criminal convictions.² Firstly, it is arguable that a person who has been convicted of a serious offence may have a less favourable view of the State (including of the Garda Síochána) and the jury system, and that this may colour their views of the trial process. Second, it is also arguable that a history of criminality is an unsuitable and undesirable characteristic for a jury member, whether a jury in a criminal trial or a civil trial. Third, individuals with a criminal history could conceivably be susceptible to coercion or influence from criminal acquaintances. In this respect, disqualification from jury service because a person has been convicted of a serious offence is consistent with the general principle identified in Chapter 1 that the jury must be independent and impartial.

6.04 The Commission notes that section 8 of the 1976 Act currently approaches this issue by focusing primarily on the sentences imposed on a person, albeit that section 8(a) alludes indirectly to the seriousness of the offence by referring to a sentence of five years or more, which (since the enactment of the *Criminal Law Act 1997*) corresponds to an arrestable offence, one of the most important indicators of the seriousness of a criminal offence. As the comparative analysis below illustrates, a number of jurisdictions have amended their disqualification provisions by introducing a dual test that retains the sentencing criterion but also includes reference to specified offences. In this respect, a number of jurisdiction have also aligned the periods of disqualification with the relevant periods during which a

¹ Until 2012, Saint Patrick's Institution was a closed detention centre for offenders between the ages of 16 and 21. In 2012, arrangements were put in train to provide separate accommodation for the majority of 16 and 17 olds detained in it pending the further development of children detention schools.

² Consultation Paper, at paragraphs 5.05 to 5.08.

conviction remains on a person's criminal record and is not "spent" or expunged under a spent convictions regime. In the 2007 *Report on Spent Convictions*,³ which recommended the enactment of a spent convictions regime, the Commission concluded that this should be based on a combination of: (i) a sentencing threshold (only convictions where the sentence was below a threshold would qualify for being spent and thus expunged from a person's criminal record) and (ii) a specific list of offences (convictions for these offences would never qualify for expungement, regardless of the sentence imposed). This dual sentence-and-offence approach is also evident in the *Criminal Justice (Spent Convictions) Bill 2012*, which implements the key recommendations in the 2007 Report.

(2) Comparative approaches to disqualification for criminal convictions⁴

6.05 In England and Wales the *Juries Act 1974*, as amended, provides for the disqualification *for life* of individuals who have been sentenced to imprisonment for life, custody for life, to a term of imprisonment or youth custody of five years or more, or who has been sentenced to be detained during the pleasure of Her Majesty, the Secretary of State, or the Governor of Northern Ireland. The 1974 Act also provides for the disqualification of individuals *for ten years* who have (a) served any part of a sentence of imprisonment, youth custody or detention; (b) been detained in a Borstal institution; (c) had passed on him or her a suspended sentence of imprisonment or order for detention, or (d) had made in respect of him or her a community service order. The 1974 Act disqualifies *for five years* individuals who have been subject to a probation order. Disqualification in England and Wales applies to those who have been sentenced in the United Kingdom, the Channel Islands or the Isle of Man.⁵ These disqualification periods are broadly in line with the rehabilitation periods in the British *Rehabilitation of Offenders Act 1974*, which provides for a spent convictions regime comparable to the *Criminal Justice (Spent Convictions) Bill 2012*. The 2001 Auld Report⁶ recommended that there be no change to the disqualification provisions.

6.06 In Scotland, where the British *Rehabilitation of Offenders Act 1974* also applies, the disqualification *for life* provisions are largely the same as those found in England and Wales. The other disqualifications differ in a number of respects. Temporary disqualification applies to those who (a) in the last 7 years (or 3.5 years where the individual was under 18 on the date of conviction) served any part of a sentence for imprisonment or detention of between 3 and 6 months; or (b) in the last 10 years (or 5 years where the individual was under 18 on the date of conviction) served any part of a sentence of imprisonment or detention of between 6 and 30 months; or (c) at *any time* served any part of a sentence of imprisonment or detention of between 30 months and 5 years; or (d) in the last 7 years has been detained in a borstal institution. In the case of a person convicted of an offence and to whom a non-custodial order was handed down,⁷ the disqualification period relates to the last 5 years (or 2.5 years where the individual was under 18 on the date of conviction).

6.07 In Northern Ireland, the disqualification provisions in the *Juries (Northern Ireland) Order 1996* differ from those in England, Wales and Scotland and are virtually identical to those in the *Juries Act 1976*. They have not been aligned with the rehabilitation periods in the *Rehabilitation of Offenders (Northern Ireland) Order 1978*, which introduced a spent convictions regime in Northern Ireland broadly comparable to the British *Rehabilitation of Offenders Act 1974*. In its 2010 summary of responses to a public consultation on *Widening the Jury Pool*,⁸ the Northern Ireland Courts Service noted that the majority of respondents considered that the juror disqualification periods should be aligned with the

³ *Report on Spent Convictions* (LRC 84–2007).

⁴ Consultation Paper at paragraphs 5.09 to 5.16.

⁵ Schedule 1 Part 2 of the *Juries Act 1974*.

⁶ Auld, *Report of Review of the Criminal Courts of England and Wales* (London, Stationary Office, 2001), p.149.

⁷ Such non-custodial orders include probation orders, community service orders, drug treatment and testing orders, restriction of liberty orders, community payback orders and youth community orders.

⁸ Northern Ireland Courts Service, *Widening the Jury Pool: Summary of Responses* (2010) at 12-13, available at www.courtsni.gov.uk.

rehabilitation periods in the *Rehabilitation of Offenders (Northern Ireland) Order 1978* but at the time of writing this view has not led to such a realignment.⁹

6.08 In New Zealand, section 7 of the *Juries Act 1981* as amended¹⁰ provides that persons are disqualified from jury service *for life* where they have been sentenced to imprisonment for life or for a term of 3 years or more, or to preventive detention, and are disqualified for 5 years where they have been sentenced to imprisonment for a term of 3 months or more, or to corrective training. The New Zealand Law Commission considered the disqualification of persons from jury service as part of its 2001 review of the jury system and found that, on balance, the current provisions were justified.¹¹ Consistently with this, the New Zealand *Juries Amendment Act 2011* provides that persons sentenced to three months or more home detention in the previous five years are disqualified from jury service. This puts people sentenced to home detention in the same category as those sentenced to imprisonment for three months or more.

6.09 Australian jurisdictions adopt differing approaches to disqualification. In Victoria, under the *Juries Act 2000* there is a *two year* disqualification for anyone sentenced for the commission of any criminal offence, a *five year* disqualification for those sentenced to imprisonment for a total of less than three months, and a *10 year* disqualification for those sentenced to imprisonment for a total of three months or more. Individuals are disqualified *for life* where they have been convicted of treason or an indictable offence and sentenced to a period of imprisonment of 3 years or more.¹² In Queensland, the *Juries Act 1995* provides that there is an absolute ban on jury service for persons convicted of indictable offences or sentenced to imprisonment.¹³

6.10 The New South Wales Law Reform Commission acknowledged in its 2006 *Issues Paper on Jury Selection* that there are “formidable difficulties involved in identifying all of the offences which ought to disqualify a person from serving as a juror.”¹⁴ In its 2007 *Report on Jury Selection*¹⁵ it concluded that the existing sentence-related approach should in general be retained, but that disqualification should also apply to conviction for certain designated offences such as terrorist offences and offences involving the administration of justice. Arising from this, the New South Wales *Jury Act 1977*, as amended by the *Jury Amendment Act 2010*, provides for the exclusion of individuals *for life* for a crime which (wherever committed), if committed in New South Wales, would be punishable with a maximum penalty of life imprisonment; an offence that involves a terrorist act; certain public justice offences, and certain sexual offences.¹⁶ The exclusion ceases to apply if the relevant finding of guilt or the conviction has been quashed or annulled or a pardon has been granted in respect of it. Persons are excluded from serving for 7 years after serving a sentence of less than a consecutive period of 3 months, and for 10 years after serving a sentence of a consecutive period of 3 months or more. The exclusion does not apply if the relevant finding of guilt or the conviction has been quashed or annulled or a pardon has been granted in respect of it, or where it has been converted into a non-custodial sentence on appeal. Nor does it apply to a sentence of imprisonment for failure to pay a fine. In all cases, reference to a sentence includes suspended sentences. Persons are excluded from jury service where they are currently serving a sentence, in custody, or awaiting trial. Individuals are also excluded while carrying out certain non-custodial sentences.¹⁷ The 1977 Act, as amended in 2010, includes a number of further miscellaneous

⁹ As noted in paragraph 1.33, above, that consultation process was carried out just before the devolution of justice matters to the Northern Ireland administration and, at the time of writing, the Northern Ireland Department of Justice has indicated that it intends to proceed to legislate on one matter only discussed in that process, raising the upper age limit for jury service of 65 years in the 1996 Order.

¹⁰ Amended by the *Juries Act 2000*.

¹¹ Law Commission of New Zealand *Juries in Criminal Trials* (Report 69, 2001) at paragraph 189.

¹² Schedule 1 cl 1-5 of the *Juries Act 2000* (Vic).

¹³ Sections 4(3)(m) and (n) of the *Jury Act 1995* (Qld).

¹⁴ New South Wales Law Reform Commission *Issues Paper Jury Selection* (IP 28, 2006) at 46.

¹⁵ New South Wales Law Reform Commission *Report on Jury Selection* (117, 2007), at paragraph 3.23ff.

¹⁶ Schedule 1 of the *New South Wales Jury Act 1977*, (as inserted by *Jury Amendment Act 2010*).

exclusions, for example, exclusion from service during any period of 12 months or more in which a person is disqualified from holding a driving licence.

C Consultation Paper, submissions received and final recommendations

(1) Summary of approach in Consultation Paper

6.11 In the Consultation Paper, the Commission considered approaches to disqualification based on length of sentence and on the seriousness of a crime. The Consultation Paper suggested that determining disqualification solely on the basis of the seriousness of an offence may be problematic because deciphering which criminal offences are more serious could be a time consuming and subjective exercise. The Commission also noted the argument that the seriousness of a criminal offence is best reflected by the sentence imposed by the trial judge, exercising discretion on the particular facts of the case.¹⁸ The Commission therefore provisionally recommended that the criteria for exclusion from eligibility for jury service should, at least in part, continue to be based on length of sentence rather on the seriousness of the offence.¹⁹

6.12 The Commission, noting the previous recommendations in its 2007 *Report on Spent Convictions*,²⁰ invited submissions as to whether there should be a shorter period of disqualification for less serious offences.²¹ The Commission also acknowledged that a ten year disqualification from jury service for young offenders was excessive and provisionally recommended that the exclusion period for offenders under the age of 18 should be reduced and invited submissions as to what lesser period would be appropriate.²² The Commission also invited submissions as to whether persons who are awaiting trial on criminal charges should continue to be eligible for jury service, and whether any requirements as to informing a court of this fact should be required.²³

6.13 The Commission provisionally recommended that the position of those currently serving sentences of imprisonment should be clarified to make clear their disqualification from jury service.²⁴

6.14 The Commission provisionally recommended that disqualification from jury service should not be extended to persons subject to non-custodial sentences or community based orders. Such orders include suspended sentences, community service orders, fines, probation orders and the Court Poor Box, binding over, restriction on movement orders, curfews and exclusion orders, disqualification orders, and compensation orders.²⁵ The Commission invited submissions as to whether persons subject to such sentences should be obliged to inform the court of this fact prior to jury empanelling.²⁶

6.15 The Commission provisionally recommended that persons convicted of criminal offences outside the State should be disqualified from jury service and that disqualification of persons convicted of criminal offences abroad should apply in the same way and for the same period of time as it applies to persons convicted of criminal offences in this jurisdiction.²⁷

¹⁷ For example, community service orders, prohibition orders and apprehended violence orders.

¹⁸ Consultation Paper *on Jury Service* (LRC CP 61-2010) at paragraph 5.17.

¹⁹ *Ibid* at paragraph 5.22.

²⁰ *Report on Spent Convictions* (LRC 84–2007), discussed at paragraph 6.04, above.

²¹ Consultation Paper, at paragraph 5.22.

²² *Ibid* at paragraphs 5.23 to 5.29.

²³ *Ibid* at paragraph 5.33.

²⁴ *Ibid* at paragraph 5.35.

²⁵ *Ibid* at paragraphs 5.36 to 5.50.

²⁶ *Ibid* at paragraph 5.50.

²⁷ Consultation Paper, at paragraph 5.52.

(2) Review of submissions received

6.16 There was general agreement, both in the submissions received during the consultation process and in the further consultations held with interested parties, that statutory provision for disqualification related to criminal convictions should be retained. There was also broad agreement that, in general, a disqualification system related to sentence was appropriate and that there was merit in the proportionate approach taken by the 1976 Act under which those sentenced to shorter periods should also be disqualified for a shorter period. It was noted that this approach was consistent with the approach in spent convictions legislation, such as that proposed in the *Criminal Justice (Spent Convictions) Bill 2012*.

6.17 Some consultees suggested that this general sentence-based approach could be subject to some exceptions. They proposed that persons convicted of an offence relating to interference with the administration of justice should be disqualified for life; and it was also suggested that a conviction for an offence of dishonesty should be treated more seriously than, for example, a conviction for assault.

6.18 There was general agreement that expanding disqualification to include non-custodial sentences would render the system of disqualification too extensive. Some consultees suggested, nonetheless, that consideration be given to disqualifying a person who has been convicted of a serious offence for which a suspended sentence has been imposed.

6.19 There was general agreement that persons who have been charged with but acquitted of crimes should not be disqualified from jury service. A number of consultees noted that the 1976 Act does not disqualify those who have been charged with an offence and are awaiting trial, and some suggested that such persons be brought within the disqualification provisions.

6.20 As to offences committed in other jurisdictions, it was noted that section 8 of the 1976 Act applies not just to convictions and sentences in the State but also to comparable offences in Northern Ireland. Consultees suggested that consideration be given to expanding this to other jurisdictions. It was acknowledged that such a proposal raises the practical question as to how the Courts Service or the Garda Síochána would be aware whether a prospective juror had serious convictions in another jurisdiction, though it was noted that, within the EU, proposals for a register of criminal convictions was under active development.

6.21 Consultees also approved the proposal that the vetting of jury lists be placed on a transparent statutory footing.

(3) Final Recommendations

6.22 The Commission notes that section 8 of the 1976 Act disqualifies persons from jury service on the basis of the length of a sentence imposed on conviction. While this has the benefit of clarity and ease of administration, it can give rise to anomalies in that a person is not disqualified where he or she has been convicted of a serious offence but has been sentenced to a term below the thresholds in the 1976 Act. This gives rise to at least an arguable conflict with the general principle referred to in Chapter 1 that the jury should be competent and free from bias.

6.23 In this respect, the Commission sees great merit in the approach taken by the New South Wales Law Reform Commission in its 2007 *Report on Jury Selection*²⁸ that a sentence-related approach to disqualification should in general be retained, but that this should be complemented by providing that disqualification would also apply to conviction for certain designated offences regardless of the sentence imposed. The Commission considers appropriate for this purpose those offences which the Oireachtas has reserved for trial in the Central Criminal Court, terrorist offences and offences against the administration of justice. The Commission notes that this dual sentence-and-offence approach was adopted by the Commission in its 2007 *Report on Spent Convictions*,²⁹ and that this general approach is

²⁸ New South Wales Law Reform Commission *Report on Jury Selection* (117, 2007), discussed at paragraph 6.10 above.

²⁹ *Report on Spent Convictions* (LRC 84–2007).

also evident in the *Criminal Justice (Spent Convictions) Bill 2012* (at the time of writing, the 2012 Bill has been passed by Seanad Éireann and has passed Committee Stage in Dáil Éireann).

6.24 The Commission also considers that, in respect of offences not encompassed in the proposed specific list of offences the period of disqualification from jury service should, where relevant, mirror the comparable timeframes in the *Criminal Justice (Spent Convictions) Bill 2012*. Thus, under the 2012 Bill,³⁰ where a person is sentenced to imprisonment for a term of 12 months or less but more than 6 months, the conviction becomes spent 5 years after the date of conviction. The Commission considers that, consistently with this view, a person should be disqualified from jury service for a period of 5 years where he or she has been convicted of such an offence and has been sentenced to imprisonment for a term of 12 months or less but more than 6 months. The Commission notes that the *Criminal Justice (Spent Convictions) Bill 2012* does not permit a conviction to be regarded as spent where a person has been sentenced to a period of imprisonment of greater than 12 months. The Commission has concluded that, in respect of such situations, the person should be disqualified for 10 years. The effect of this would, therefore, be that the current 10 year disqualification period in the *Juries Act 1976* would continue to apply where a person has been sentenced to a period of imprisonment in excess of 12 months, and that the period of disqualification would be lowered (matching the periods in the *Criminal Justice (Spent Convictions) Bill 2012*) where the sentence imposed was 12 months or less.

6.25 As to non-custodial sentences, the Commission also confirms the view expressed in the Consultation Paper³¹ that the approach to such sentences should mirror how they are treated in a spent convictions regime, as now set out in the *Criminal Justice (Spent Convictions) Bill 2012*. As with custodial sentences, the 2012 Bill follows a sliding scale approach to non-custodial sentences, as follows:³²

1. Term of imprisonment of 12 months or less which is suspended for a specified period and which suspension is not subsequently revoked in whole or in part: becomes spent after 3 years, or the period specified by the court, whichever is the longer.
2. Term of imprisonment of 2 years or less but more than 12 months which is suspended for a specified period and which suspension is not subsequently revoked in whole or in part: becomes spent after 4 years, or the period of suspension specified by the court, whichever is the longer.
3. Fine not exceeding the maximum amount that can be imposed as a Class A fine (currently, under the *Fines Act 2010*, €5,000 or less): becomes spent after 2 years.
4. Fine exceeding the maximum amount that can be imposed as a Class A fine (currently, under the *Fines Act 2010*, more than €5,000): becomes spent after 3 years.
5. Community service order imposed on a person as an alternative to a sentence of imprisonment for a term of 12 months or less considered by the court at the time of the making of the order (and where the community service order is not subsequently revoked by the court and replaced by a custodial sentence): becomes spent after 2 years.
6. Community service order imposed on a person as an alternative to a sentence of imprisonment for a term of more than 12 months considered by the court at the time of the making of the order (and where the community service order is not subsequently revoked by the court and replaced by a custodial sentence): becomes spent after 3 years.
7. Any other relevant non-custodial sentence (defined in section 2 of the 2013 Act as an order dismissing a charge under section 1(2) of the *Probation of Offenders Act 1907* or a restriction on movement order made under section 101 of the *Criminal Justice Act 2006*): becomes spent after 2 years.

³⁰ See Schedule 2, Part 1 of the *Criminal Justice (Spent Convictions) Bill 2012*, as amended in Committee in Dáil Éireann, having been passed by Seanad Éireann.

³¹ Consultation Paper at paragraphs 5.18 to 5.22.

³² See Schedule 2, Part 2 of the *Criminal Justice (Spent Convictions) Bill 2012*, as amended in Committee in Dáil Éireann, having been passed by Seanad Éireann.

6.26 The Commission considers that this approach should be adapted for the purposes of determining the period of disqualification from jury service. In respect of a suspended sentence in excess of the 2 year period dealt with in the *Criminal Justice (Spent Convictions) Bill 2012*, the Commission considers that the disqualification periods should be related to the general approach already set out. Thus, where the offence involved is one for which the person may be sentenced to life imprisonment or comes within the list of specified offences already discussed, the disqualification period should be for life even where a suspended sentence is imposed. Similarly, in the case of other offences, the relevant disqualification period (whether 10 years, 5 years or 4 years) should apply where a suspended sentence is imposed.

6.27 The Commission acknowledges that this proposed approach involves a greater degree of complexity by comparison with the current provisions on disqualification in section 8 of the *Juries Act 1976*. The Commission nonetheless considers that it is preferable to have in place an approach that is consistent with the general principles set out in Chapter 1 of this Report, in particular to ensure that juries are selected from a panel that can be seen to be competent and unbiased. This approach is also consistent with the rehabilitative approach to convictions set out in the *Criminal Justice (Spent Convictions) Bill 2012*. The Commission also notes that any administrative difficulties arising from the more complex nature of the proposed approach may be more apparent than real. This is because, as discussed in Part D below, the Commission proposes that the question as to whether a person is disqualified from jury service should be confirmed as primarily a matter for the Garda Síochána Central Vetting Unit, which will be renamed the National Vetting Bureau of the Garda Síochána when the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* comes fully into force.

6.28 The Commission also notes that, in respect of offences committed outside the State, section 8 of the *Juries Act 1976* provides, in effect, for recognition of equivalent convictions in Northern Ireland. The Commission considers that, bearing in mind that it has already recommended that non-Irish citizens be eligible for jury service, there should be more general recognition for equivalent convictions imposed outside the State. This recognition will be facilitated by the development of a system for international mutual recognition of criminal records and convictions, as envisaged in the *Scheme of a Criminal Records Information System Bill* published in 2012.³³ Thus, a person convicted of an offence committed outside the State which, if committed in the State, would disqualify a person from jury service, would disqualify that person from jury service in the State on the same basis and for the same periods.

6.29 *The Commission recommends that a person shall be disqualified from jury service for life where he or she has been sentenced to imprisonment (including where the sentence is suspended) on conviction for any offence for which the person may be sentenced to life imprisonment (whether as a mandatory sentence or otherwise).*

6.30 *The Commission also recommends that, without prejudice to the immediately preceding recommendation, a person shall be disqualified from jury service for life where he or she has been convicted of: (a) an offence that is reserved by law to be tried by the Central Criminal Court; (b) a terrorist offence (within the meaning of the Criminal Justice (Terrorist Offences) Act 2005); or (c) an offence against the administration of justice (namely, contempt of court, perverting the course of justice or perjury).*

6.31 *The Commission recommends that, in respect of an offence other than those encompassed by the two immediately preceding recommendations, a person shall be disqualified from jury service: (a) for a period of 10 years where he or she has been convicted of such an offence and has been sentenced to imprisonment for a term greater than 12 months (including a suspended sentence); and (b) for the same periods as the “relevant periods” in the Criminal Justice (Spent Convictions) Bill 2012 both in relation to custodial and non-custodial sentences within the meaning of the 2012 Bill.*

³³ In 2012, the Department of Justice and Equality published the *Scheme of a Criminal Records Information System Bill*, available at www.justice.ie/en/JELR/Draft%20Scheme.pdf/Files/Draft%20Scheme.pdf. This is intended to give effect to Council Framework Decision of 2009/315/JHA on the establishment of the European Criminal Records Information System (ECRIS); and is also intended to provide for exchange of criminal records information with States other than EU Member States.

6.32 *The Commission recommends that persons remanded in custody awaiting trial, and persons remanded on bail awaiting trial, shall be disqualified from jury service until the conclusion of the trial.*

6.33 *The Commission recommends that a person convicted of an offence committed outside the State which, if committed in the State, would disqualify a person from jury service, shall disqualify that person from jury service in the State on the same basis and for the same periods.*

D Vetting Jury Lists to Identify Disqualified Persons

6.34 As discussed in the Introduction to this chapter, an important issue related to the provisions on disqualification from jury service in the *Juries Act 1976* is the process by which disqualified persons are in practice excluded from jury panels. In one respect, it could be said that this is dealt with in the notice (the J2 notice or form) that must (as required under section 12(2) of the 1976 Act) accompany a jury summons, which draws the attention of prospective jurors to the categories of ineligible persons, those excusable as of right and those who are disqualified arising from criminal convictions. Just as an ineligible person may, in returning the notice, draw the court's attention to the fact that they are a person who is ineligible to serve the potential juror may also indicate that he or she is disqualified by virtue of a criminal conviction. This may very well occur in some instances, though it might be suggested that persons with criminal convictions are among the percentage of persons who simply fail to respond to a jury summons. In any event, the importance of ensuring that persons with serious criminal convictions do not serve on juries is reinforced by a separate process of vetting the jury lists.

6.35 This is currently a matter that involves, in large part, the Garda Central Vetting Unit, to be renamed the National Vetting Bureau of the Garda Síochána when the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* comes fully into force. The 2004 *Report of the Working Group on Garda Vetting*, which recommended that there should be a clear statutory framework in place to regulate vetting, now provided for in the 2012 Act,³⁴) noted that at that time the Garda Central Vetting Unit received from the Courts Service every 2 to 3 months a list of persons summoned for jury service, which contained approximately 1,600 names and that these were checked against the Vetting Unit's register of criminal convictions.³⁵ Where a person was identified as having a criminal conviction that disqualified them from service, this was communicated to the Courts Service which would then be in a position to ensure that the person did not sit on a jury.

6.36 The 2004 Report identified two difficulties with the vetting of jury lists at that time, the first being a specific problem of identifying whether a specific person has a criminal record and the second being the extent to which vetting of Garda lists occurred in the State.³⁶ As to identifying whether a specific person has a criminal record, the Report noted that if a father and son with the same name live at the same address, it may be possible to say that a person with that name has a disqualifying criminal conviction but it would not be possible to state that the person called for jury service is the person with the criminal conviction. This is because the jury list is derived from the electoral list, which does not contain further identifying information such as date of birth or PPS number. The 2004 Report recommended that, in order to deal with this specific problem, the notice (the J2 notice or form) that must (as required under section 12(2) of the 1976 Act) accompany a jury summons should include a requirement that the prospective juror specify his or her date of birth. The second, more general, problem identified in the 2004 Report was

³⁴ The 2004 Report, at 20-21, noted that the Garda Central Vetting Unit, which was established in 2002, incorporated the functions of the Garda Criminal Records Office, whose legislative origins may be traced to the establishment of the Habitual Criminal Registry under the *Habitual Criminals Act 1869* and the *Prevention of Crimes Act 1871*. In addition to holding records of criminal convictions, the Criminal Records Office held "person identifier" records, such as photographs and fingerprints of persons detained in Garda custody after arrest or detained in prison. The 2004 Report pointed out that as the legislation providing the statutory basis for the retention of criminal records had been repealed and that the Garda Central Vetting Unit continued to hold these records on the basis of administrative arrangements only, there was a pressing need to provide a modern statutory framework for its functions.

³⁵ *Working Group on Garda Vetting Report (2004)* at 27, available at www.justice.ie.

³⁶ *Ibid* at 46-47.

that the vetting of prospective jurors did not occur uniformly at that time and the Report accordingly recommended that the Courts Service standardise the practice of jury vetting in the State.

6.37 In the Consultation Paper, the Commission suggested that clear and transparent guidelines as to the vetting of jury lists should be introduced, and that these guidelines should only extend to enable information being available as to whether prospective jurors are disqualified from jury service.³⁷ Therefore, the Commission provisionally recommended that provision for the vetting of juries, to ensure that disqualified jurors are not included on the empanelling list for jurors, be included in juries legislation. The Commission provisionally recommended that only the Garda Síochána Central Vetting Unit should be empowered to provide information as to whether a potential juror is disqualified from jury service.³⁸

6.38 The Commission understands from its further discussions with interested parties that the practice of jury vetting has become more uniform since 2004 and that this has been facilitated through the ongoing development within the Courts Service of combined court offices, as provided for in the *Courts and Court Officers Act 2009*. The Commission welcomes these administrative developments. As to the more specific problem raised in the 2004 Report concerning the inability to identify a specific individual with a specific conviction, the Commission appreciates that this raises important questions over the accuracy of the jury vetting process but it also considers that it raises wider issues such as the potential use of a Public Sector Card (PSC). As the Commission has already discussed in this Report,³⁹ the PSC may, in time, provide solutions to a number of issues but this requires separate consideration outside the scope of this project. Bearing in mind the limits of the current arrangements, the Commission acknowledges the clear advantage that the process of vetting related to disqualification of potential jurors arising from criminal convictions is carried out by the State authority with general statutory responsibility for vetting. This has the advantage that the process is done on the basis of well-established protocols that assures its independence from the investigation of a specific criminal offence.

6.39 The Commission also acknowledges that, in a particular trial, the prosecuting authorities may have in their possession specific information concerning the victims or the defendants which may be used in order to challenge a juror. As already discussed,⁴⁰ in the majority of criminal cases the process of jury challenge involves challenges without cause shown, and such challenges may include challenges on the basis that the prosecution or defence – more often than not, the prosecution – is aware that the juror may have either a criminal record or some undesirable association with the victim or the accused.

6.40 In *The People (DPP) v Dundon*⁴¹ during the empanelling of the jury the prosecution exhausted all of their challenges without cause shown (peremptory challenges). The prosecution then sought to challenge a further juror for cause shown, on the basis that a family member had a criminal conviction. It transpired that this challenge may have arisen as a result of a mistake made by a member of the Gardaí who had confused the name of a particular juror with a known criminal. In the event, this juror was not required to stand down. The defendants were convicted and on appeal, they argued that the process involved in the challenges clearly indicated that the prosecution, through the Gardaí, had engaged in a form of vetting of the jury panel. The defence argued that the principle of “equality of arms” was not applied to the provision of information in relation to the jury panel and that, therefore, the accused had not received a trial in due course of law. The Court of Criminal Appeal did not accept this argument. The Court accepted that the process by which the prosecution made the challenge was unclear but also held that there was no evidence of impropriety. The Court added that it would not: “make any finding in respect of... [a] separate contention [by the prosecution] that it would be impossible ever to show cause without making some form of inquiry.”⁴² The Court held that it was sufficient to say that no authority was cited in

³⁷ Consultation Paper at paragraph 5.56.

³⁸ *Ibid* at paragraph 5.67.

³⁹ See paragraphs 2.11ff, above.

⁴⁰ See Chapter 3, above.

⁴¹ [2007] IECCA 64.

⁴² *Ibid*.

the appeal that would prohibit the making of reasonable enquiries. The Court also held that there was no resultant prejudice to the defendants as the challenge had been disallowed.

6.41 The decision in the *Dundon* case confirms that neither the prosecution nor the defence is prohibited from making reasonable enquiries about the suitability of a candidate juror for jury service, including the extent of the candidate's criminal convictions. This reinforces the importance of ensuring that the process of vetting jury panels through the Garda Central Vetting Unit, which is being placed on a modern statutory footing as the National Vetting Bureau under the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*, continues to be applied in a nationally consistent manner by the Courts Service. The Commission reiterates that this should remain the principal process for ensuring that disqualified persons do not sit on juries.

6.42 *The Commission recommends that the principal process for ensuring that a person on a jury list is not disqualified from jury service should continue to be that the Courts Service shall, from time to time, provide jury lists to the Garda Síochána Central Vetting Unit (to be renamed the National Vetting Bureau under the National Vetting Bureau (Children and Vulnerable Persons) Act 2012), and that where the Garda Síochána Central Vetting Unit communicates with the Courts Service that a named person on the jury list is disqualified from jury service the Courts Service shall not summon that person for jury service. The Commission also recommends that this process continue to operate on the basis of nationally agreed procedures and guidelines developed by the Courts Service. The Commission also recommends that it shall continue to be the case that a person commits an offence if he or she knowingly serves on a jury when she or she is disqualified from jury service.*

CHAPTER 7 JURY TAMPERING

A Introduction

7.01 In this Chapter, the Commission examines jury tampering and considers possible reforms aimed at preventing it. This issue concerns the principle, discussed in Chapter 1, that the right to a fair trial requires a jury that is independent and unbiased. In Part B, the Commission considers the relevant common law and statutory offences that deal with jury tampering. The Commission also discusses the extent to which non-jury courts have been used to address jury tampering. The Commission then considers the concern that the provisions in the *Juries Act 1976* concerning access to jury lists may, indirectly, facilitate jury tampering and to what extent other jurisdictions have addressed this. In Part C, the Commission reviews the provisional recommendations made in the Consultation Paper and, having regard to the views expressed in the consultation process, sets out its final recommendations.

B Current Position in Ireland on Jury Tampering

(1) Criminal offences concerning jury tampering

7.02 Jury tampering can take many forms including offers of rewards, threatening communications, making gestures towards jurors in the courtroom and following jurors outside the courtroom. In 2009, the then Minister for Justice noted that the Garda Síochána had confirmed that instances of jury intimidation had occurred and that it was more surreptitious than witness intimidation.¹

7.03 It has been noted that a number of common law and statutory offences deal with jury tampering and related forms of interference, which include the common law offences of embracery, perverting the course of justice and contempt of court and a statutory offence concerning intimidation of jurors and others in section 41 of the *Criminal Justice Act 1999*.²

7.04 Prosecutions for embracery are rare, although in *The People (DPP) v Walsh*³ the defendant was convicted by a jury of embracery in 2005 and sentenced to four years imprisonment. The evidence against the defendant included the testimony of a prison officer who stated that the defendant had phoned him (the prison officer) and said that the prison officer's brother was, at that time, on a jury in a trial of two persons and added that "the jury was hung and could it be swung." Other evidence was that when the jury for the trial of the two persons was being empanelled, the defendant had been sitting in court noting the names and particulars of the members of the jury panel being called forward for service. On appeal, the Court of Criminal Appeal rejected the defendant's argument that there was no such offence as embracery in Irish law. The Court noted that the offence had been mentioned in the 1922 edition of Archbold, *Criminal Pleading Evidence and Practice* and that in *R v Owen*⁴ the English Court of Appeal (Criminal Division) had cited with approval the following definition which had appeared in the 1973 edition of Archbold:⁵

¹ Vol. 688 *Dáil Debates* p.691 (10 July 2009) Committee Stage debate, *Criminal Justice (Amendment) Bill 2009* (Minister for Justice).

² Coen "Interference with Jurors and its Potential Legal Consequences" in (2011) 1 *Criminal Law and Procedure Review* 131, at 142.

³ [2006] IECCA 40, [2009] 2 IR 1. The decision of the Court was delivered *ex tempore*.

⁴ [1976] 1 WLR 840, [1976] 3 All ER 239.

⁵ [2006] IECCA 40, [2009] 2 IR 1, at 4, citing *R v Owen* [1976] 1 WLR 840.

“Embracery is an offence indictable at common law, punishable by fine and imprisonment, and consists of any attempt to corrupt or influence or instruct a jury, or any attempt to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats or persuasions, whether the jurors on whom such an attempt is made give any verdict or not, or whether the verdict given be true or false.”

7.05 The Court of Criminal Appeal in *Walsh* also pointed out that, in 1933 in *In re MM and HM*,⁶ the Supreme Court had approved a comparable definition of embracery from *Hawkins’ Treatise of Pleas of the Crown*.⁷ The Court of Criminal Appeal concluded that there was ample evidence on which the jury could find that the defendant had committed the offence of embracery, and it dismissed the appeal against conviction.

7.06 The Commission notes that in the course of its judgment in *In re MM and HM*⁸ the Supreme Court also referred to section 49 of the *Juries (Ireland) Act 1871* which had provided that, in addition to the fines that could be imposed under the 1871 Act for non-attendance by a summoned juror, this was without prejudice to persons being prosecuted for embracery. No equivalent of section 49 of the 1871 Act was included in either the *Juries Act 1927* or the *Juries Act 1976* but the Court of Criminal Appeal in *Walsh* clearly held that the offence itself was not obsolete.

7.07 The Commission considers, nonetheless, that the two cases cited by the Court of Criminal Appeal in *Walsh* to support its view that embracery remains an offence in Irish law could be cited for the contrary proposition. Thus, the Supreme Court decision in *In re MM and HM*⁹ was not a case of embracery but rather of contempt of court. The case arose from attempts to influence the deliberations of a jury empanelled under section 12 of the *Lunacy Regulation (Ireland) Act 1871* to inquire into whether a person was of unsound mind. Such a jury is empanelled by a commission *de lunatico inquirendo* (now issued by the President of the High Court), a procedure that is referred to in section 30 of the *Juries Act 1976*.¹⁰ The Supreme Court in *In re MM and HM* upheld the conviction for contempt of court and also noted that contempt could be described as a generic term that covered a variety of offences of which embracery was one.¹¹ The Supreme Court’s decision to uphold a conviction for contempt in a context that appeared close to the classic definition of embracery may suggest that, even in 1933, there was little support for the use of embracery. The second case cited by the Court of Criminal Appeal, *R v Owen*,¹² is an even stronger authority against the continuing efficacy of the offence of embracery. The English Court of Appeal (Criminal Division) in *R v Owen* was strongly of the view that, in English law, the offence of embracery was obsolete and that the conduct which it covered should, in a case involving one person, be

⁶ [1933] IR 299, at 323 (FitzGibbon J).

⁷ *Hawkins’ Treatise of Pleas of the Crown* (which was cited in *In re MM and HM* using the common abbreviation “Hawk. P.C.”) was first published in two volumes in the early 18th century and remains a leading authority on English criminal law and criminal procedure.

⁸ [1933] IR 299, at 323 (FitzGibbon J).

⁹ [1933] IR 299.

¹⁰ Section 30 of the 1976 Act provides that when a panel of jurors is lawfully in attendance before a commissioner (which now refers to the President of the High Court exercising the power to do so under section 12 of the *Lunacy Regulation (Ireland) Act 1871*) under a commission *de lunatico inquirendo* then, for the purposes of the 1976 Act, the commissioner (the President of the High Court) is deemed to be a court and also a judge of the court. The Commission notes that section 30 of the 1976 Act appears to be obsolete in that a commission *de lunatico inquirendo* may now only be issued by a judge, so that there is no need to provide that the commissioner is deemed to be a judge. In any event, the entire concept of a jury being empanelled by a commission *de lunatico inquirendo* will become obsolete assuming that the proposed *Assisted Decision-Making (Capacity) Bill* (scheduled to be published in 2013), which proposes to repeal the 1871 Act, is enacted. The Bill also proposes to implement the key recommendations in the Commission’s 2006 *Report on Vulnerable Adults and the Law* (LRC 83-2006).

¹¹ [1933] IR 299, 322.

¹² [1976] 1 WLR 840, [1976] 3 All ER 239.

dealt with by way of a prosecution for contempt of court. Where a case involved more than one person, the Court considered that it should lead to a prosecution for conspiracy to pervert the course of justice. It appears from subsequent editions of Archbold that the views expressed in *Owen* have been followed in practice since then in England.¹³

7.08 In addition to the common law offences, section 41 of the *Criminal Justice Act 1999*¹⁴ contains a statutory offence of intimidating certain persons connected with the administration of justice, including jurors and potential jurors. Section 41 of the 1999 Act provides that a person commits this offence if he or she: (a) whether in or outside the State, harms or threatens, menaces or in any other way intimidates or puts in fear another person who is assisting in the investigation by the Garda Síochána of an offence or is a witness or potential witness or a juror or potential juror, or a member of his or her family (b) with the intention of causing the investigation or the course of justice to be obstructed, perverted or interfered with. On summary conviction the offence is punishable with a Class C fine¹⁵ and imprisonment for a term up to 12 months, or both. On conviction on indictment, the offence is punishable by an unlimited fine and imprisonment for a term up to 15 years,¹⁶ or both. Section 41 of the 1999 Act, which clearly covers more than jury tampering, was modelled on the comparable offence of intimidation of witnesses, jurors and others in section 51 of the English *Criminal Justice and Public Order Act 1994*.¹⁷ Between 2006 and 2011, there were over 50 convictions under section 41 of the 1999 Act, although separate records were not maintained during that period as between offences involving witnesses and jurors.¹⁸

7.09 Bearing in mind that the law on this area is a mixture of common law and statutory offences, the Commission accepts that a case can be made out as has been suggested¹⁹ that a single offence of juror interference, applicable to conduct ranging from the persuasive to the menacing, may be required. The Commission discusses this in Part C, below.

(2) Effect of jury tampering on the integrity of the trial

7.10 Jury tampering may also affect the integrity of the trial process. In *The People (DPP) v Mulder*,²⁰ a number of different issues arose at the start of and during the defendant's trial for murder. During the jury empanelment, relatives of the deceased, some of whom later gave evidence in the trial, shouted abuse about the defendant from the court's public gallery and this was heard by at least some jurors. The empanelling judge, who was not the trial judge, reminded the jurors of their duty to try the case on the evidence presented. During the trial itself, the foreman of the jury informed the trial judge that a juror had been approached by a relative of the deceased, who was also a witness for the prosecution in the trial. Counsel for the defendant applied to have the jury discharged on the basis that any verdict would

¹³ Archbold *Criminal Pleading Evidence and Practice* (2013 edition) at paragraph 28-42: "Improper interference with jurors may be treated as contempt or as an attempt to pervert the course of justice", citing *R v Owen*.

¹⁴ As amended by sections 16 and 20 of the *Criminal Justice (Amendment) Act 2009*.

¹⁵ A fine not exceeding €2,500: see sections 2 and 3 of the *Fines Act 2010*.

¹⁶ In addition, an acquittal that arises from an offence against the administration of justice, including an offence under section 41 of the 1999 Act, is now subject to the restrictions on the rule against double jeopardy in Part 3 of the *Criminal Procedure Act 2010*. Section 7 of the 2010 Act defines an "offence against the administration of justice" as (a) an offence under section 1 of the *Prevention of Corruption Act 1906* in so far as the offence concerned relates to criminal proceedings, (b) an offence under section 41 of the *Criminal Justice Act 1999*, (c) attempting to pervert the course of justice, (d) perjury, or (e) conspiring or inciting another person to commit any of the offences referred to in paragraphs (a) to (d).

¹⁷ The risk of intimidation of jurors was adverted to in the 1993 *Report of the Royal Commission on Criminal Justice* (Cm.2263), at 136 (Chapter 8, paragraph 73). The 1994 Act implemented many of the recommendations in the 1993 Report.

¹⁸ See Vol.748 *Dáil Debates* at 755-756 (Written Answers, Minister for Justice and Equality, 1 December 2011).

¹⁹ Coen "Interference with Jurors and its Potential Legal Consequences" (2011) 1 *Criminal Law and Procedure Review* 131 (Firstlaw, 2011).

²⁰ [2007] IECCA 63, [2007] 4 IR 796.

be tainted. On enquiry by the trial judge at this point, the juror stated that, while he felt that this contact had been inappropriate he had not felt intimidated by it and felt able to continue as a juror. The trial judge therefore refused the application to discharge the jury, the trial proceeded and the jury found the defendant guilty of murder.

7.11 On appeal, the Court of Criminal Appeal held that, as discussed by the Court in *The People (DPP) v Tobin*,²¹ the decision whether to discharge the jury was to be decided in the light of the right to a fair trial under Article 38 of the Constitution, in particular the right of the defendant to be tried by a jury free from any suspicion or taint of bias. The test of bias was an objective one, that is, whether there was a reasonable apprehension of bias, taking into account “the robust common sense of juries.”²² While courts should be reluctant to discharge a jury because of individual incidents involving communications with a juror, the Court concluded that the nature of the incident in this case and the cumulative effect of the other incidents “would all have led a reasonable observer to be concerned that there would be a risk of an unfair trial.”²³ On that basis, the Court concluded that the only safe course of action was for a mistrial to be declared. It therefore allowed the appeal and ordered a re-trial. The decision in the *Mulder* case clearly illustrates that while not every inappropriate contact with a juror must lead to the discharge of the jury it can, when combined with other events, lead to a reasonable apprehension that the jury has been tampered with and that the integrity of the trial has been compromised.

(3) Use of non-jury courts in response to jury intimidation

7.12 In this section the Commission first discusses the use of non-jury special criminal courts established under Article 38.3.1° of the Constitution whose justification arises at least in part as a response to the risk of jury tampering, whether from paramilitary or other criminal organisations. The Commission then considers the statutory provisions on the use of non-jury courts in the United Kingdom which were specifically introduced to deal with jury tampering.

(a) Non-jury special criminal courts in Ireland

7.13 Article 38.3.1° of the Constitution provides that special criminal courts may be established to try cases where “the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.” The special criminal courts, which are governed by the *Offences Against the State Act 1939*, as amended, are non-jury courts comprising three judges. Among the reasons for the establishment of such courts in accordance with Article 38.3.1° of the Constitution is that “the ordinary courts” comprising a judge and jury may be “inadequate to secure the effective administration of justice” because of the risk of jury intimidation by paramilitary organisations and other organised criminal gangs.²⁴

7.14 The 1939 Act, as amended, provides for two methods by which a special criminal court may try a case that would otherwise involve a jury trial: (a) it involves a “scheduled offence”, that is, an offence specifically listed as one for which the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order; or (b) it is a “certified case”, that is, where the Director of Public Prosecutions certifies that in respect of an individual case, not involving a scheduled offence, the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.

7.15 The 2002 *Report of the Committee to Review the Offences Against the State Acts 1939-1998* noted²⁵ that the Supreme Court had held in *The People (DPP) v Quilligan*²⁶ that the operation of the 1939

²¹ [2001] 3 IR 469: see also the discussion of this case in paragraph 8.09 below.

²² [2007] IECCA 63, [2007] 4 IR 796, 805, para [15].

²³ [2007] IECCA 63, [2007] 4 IR 796, 806, para [16].

²⁴ Jackson, Quinn and O'Malley “The Jury System in Contemporary Ireland” in Vidmar (ed) *World Jury Systems* (Oxford University Press, 2000) at 296.

²⁵ *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (2002) at paragraphs 9.19-9.23.

²⁶ [1986] IR 485.

Act was not confined to organised paramilitary offences and that *Kavanagh v Ireland*²⁷ had confirmed previous case law that the decision of the Director of Public Prosecutions to certify a non-scheduled offence for trial in a special criminal court was not subject to judicial review except for extremely limited reasons. In this respect the Committee accepted that the arrangements under the 1939 Act had been upheld as consistent with the Constitution. The Report noted, however, that the Human Rights Committee, which oversees the supervision of the International Covenant on Civil and Political Rights (ICCPR), had held in an individual complaint, *Kavanagh v Ireland*,²⁸ that Ireland had failed to demonstrate that the decision of the Director of Public Prosecutions to certify that the applicant be tried by the special criminal court was based upon reasonable and objective grounds.

7.16 Bearing in mind the approach of the Human Rights Committee under the ICCPR and the State's obligations to meet international human rights standards, the 2002 Report recommended that the jurisdiction of the special criminal courts should no longer be based on the scheduled offence approach in the 1939 Act. The Report concluded that, although the scheduling approach had been held to be consistent with the Constitution, it did not provide a sufficiently clear and transparent basis for depriving an accused of the right to jury trial to which he or she is otherwise *prima facie* constitutionally entitled, and that it would be preferable that any such decision should be based on the merits of an individual case.²⁹ The majority of the Committee members also recommended that the decision of the Director of Public Prosecutions to certify a case would be subject to a form of review.³⁰ At the time of writing, these recommendations have not been implemented.

7.17 The Commission notes that the majority view in the 2002 Report was that the continuing, albeit reduced, threat posed by ongoing paramilitary activity justified the maintenance of the special criminal courts and, indeed, that the threat posed by organised crime alone was sufficient to justify their maintenance.³¹ A minority view expressed by 3 of the 11 members of the Committee suggested that other strategies could be taken to reduce the possibility of jury intimidation before resort to non-jury trial should be considered, such as juror anonymity, that they be protected during the trial or that they be located in a different place from where the trial is held, with communication by video link. The minority acknowledged that "in a small jurisdiction such as Ireland, anonymity is hard to secure, but if the jurors are anonymous and at a secure and secret location, the risk of effective jury intimidation would not be very great."³²

7.18 In a presentation to the Oireachtas Committee on Justice in 2003, which formed part of a review of the criminal justice system, the then Director of Public Prosecutions pointed out that he had used the certification power where, because the offence arose from the activities of organised crime, there was a risk of jury intimidation.³³ In the Committee's subsequent 2004 *Report on a Review of Criminal Justice System*, it recommended that the central position that a right to jury trial had in the State should be maintained. It also in effect accepted the view expressed by the majority in the 2002 *Report of the Committee to Review the Offences Against the State Acts 1939-1998* in its conclusion that "there are occasions when a trial by a non-jury court may be necessary in order to protect the integrity of the criminal justice system."³⁴

²⁷ [1996] 1 IR 321,358.

²⁸ (1998) CCPR/C/71/D/819/1998.

²⁹ *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (2002) at paragraph 9.57 (unanimous recommendation of the 11 members of the Committee).

³⁰ *Ibid* at paragraph 9.38 (majority recommendation of 8 of the 11 members of the Committee).

³¹ *Ibid* at paragraph 9.38 (majority recommendation of 8 of the 11 members of the Committee).

³² *Ibid* at paragraph 9.95 (minority views and recommendations of 3 of the 11 members of the Committee).

³³ Presentation by James Hamilton, then Director of Public Prosecutions, to *Review of Criminal Justice System*, Oireachtas Committee on Justice, Equality, Defence and Women's Rights, 8 December 2003, available at <http://oireachtasdebates.oireachtas.ie>.

³⁴ Joint Committee on Justice, Equality, Defence and Women's Rights, *Report on a Review of Criminal Justice System* (July 2004) at paragraph 93. Available at www.oireachtas.ie.

7.19 Since then, section 8 of the *Criminal Justice (Amendment) Act 2009* now provides that a specific list of offences connected with organised crime are to be regarded as offences for which the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. Section 8 of the 2009 Act thus provides that such offences are scheduled offences for the purposes of the *Offences against the State Act 1939*. In addition, section 5 of the 2009 Act provides for an offence of directing a criminal organisation. During the Oireachtas debates on the Bill that was enacted as the 2009 Act,³⁵ the then Minister for Justice noted that the background to the introduction of the 2009 Act included the murder of a person in 2009 whose brother had given evidence five years previously in a trial involving a criminal organisation. In addition, the Minister noted that the State Solicitor for Limerick had stated in a broadcast interview that he was aware of specific cases of jury intimidation and that there was reluctance among a significant part of the population to participate in jury trials of gang members. The Minister also stated that the Garda Commissioner had expressed concerns regarding jury intimidation.

7.20 The Minister acknowledged that the Irish Human Rights Commission (IHRC), in its Observations on the Bill,³⁶ had reiterated the unanimous view in the 2002 *Report of the Committee to Review the Offences Against the State Acts 1939-1998* that while the scheduling approach proposed in the Bill, and enacted in the 2009 Act, was consistent with the Constitution it did not appear to meet international human rights standards. The IHRC had also expressed the view that the scale of jury intimidation in Ireland did not warrant the further extension of the powers of the Special Criminal Court and that it would be preferable to adopt the precautionary measures that had been suggested by the minority members in the 2002 *Report of the Committee to Review the Offences Against the State Acts 1939-1998*. The Minister for Justice did not accept the view expressed by the IHRC and stated that “[s]equestering jurors, using jurors outside the community from which the defendant comes, shielding jurors from the sight of an open court or providing round the clock protection for jurors are not viable responses to the grave situation we face and will not guarantee freedom from intimidation.”³⁷ The Commission notes that the 2009 Act must be continued in operation each year by positive resolution of the Houses of the Oireachtas and that, at the time of writing, such a resolution has been made each year since 2010.

(b) Non-jury trial for jury tampering in the United Kingdom

7.21 In the United Kingdom, sections 44 to 50 of the *Criminal Justice Act 2003*³⁸ provide for non-jury trial which is limited to instances of jury tampering.³⁹ Section 44 of the 2003 Act provides that the prosecution may apply to court for a trial on indictment to be conducted without a jury, provided that it fulfils two conditions: firstly, that “there is evidence of a real and present danger that jury tampering would take place;” and second, that “notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.” Section 46 of the 2003 Act provides that where a trial judge is minded to halt a jury trial because of

³⁵ Vol.687 *Dáil Debates* at 177-178 (3 July 2009).

³⁶ Irish Human Rights Commission, *Observations on the Scheme of the Criminal Justice (Amendment) Bill 2009* (June 2009) and *Observations on the Criminal Justice (Amendment) Bill 2009* (June 2009), both available at www.ihrc.ie,

³⁷ Vol.687 *Dáil Debates* at 178-179 (3 July 2009).

³⁸ These provisions in the 2003 Act can be traced to the UK Government’s 2002 White Paper, *Justice for All* (CM 5562), at paragraph 4.32, which stated: “A number of trials are stopped each year because an attempt has been made to intimidate or influence the jury. The court currently has no option other than to dismiss the jury and order a re-trial. We intend to legislate to give the judge power to continue the trial with him or her sitting alone, if necessary with police protection, or to order that the case be retried before another judge sitting alone.”

³⁹ Section 43 of the *Criminal Justice Act 2003*, which provided for applications by the prosecution for certain fraud cases to be conducted without a jury was never brought into force and was repealed by section 113 of the *Protection of Freedoms Act 2012*: see the discussion at paragraph 10.05, below.

tampering, he or she may instead consider whether the trial should proceed without a jury provided that this would be fair to the defendants.

7.22 In *R v T and Ors*⁴⁰ which concerned a 2004 robbery of £1.75 million in currency from a warehouse at Heathrow Airport in London, the English Court of Appeal made an order for a non-jury trial under section 44 of the 2003 Act. The Court held that, in deciding an application under section 44 of the 2003 Act, the court should apply the criminal standard of proof, that is, proof beyond reasonable doubt. As to the second condition in section 44, the Court of Appeal held that this required consideration of the feasibility of the proposed steps and their cost, whether such steps might lead to an incurable compromise of the jury's objectivity and the likely impact on the jurors' lives in performing their public responsibilities, and whether even the most extensive measures would be sufficient to prevent the improper exercise of pressure through family members. The Court also held that the evidence relied on by the prosecution should be disclosed to the fullest extent possible, but that it would be contrary to the legislative purpose to make an order for disclosure which would, in effect, require the prosecution to discontinue the prosecution in order to prevent disclosure of sensitive material. In that case, the Court of Appeal considered that the package of protective measures that the trial judge had considered would not be sufficient to counter the risk of jury tampering that had been presented to the court.

7.23 In 2010, the four defendants were convicted on a number of charges arising from the robbery after a non-jury trial (Treacy J) and, in *R v Twomey and Ors*,⁴¹ the English Court of Appeal upheld the convictions and sentences imposed. The Court of Appeal noted that the verdicts "were returned after a trial which was conducted with conspicuous fairness." The Court also noted that the trial remained the only one where trial on indictment by judge alone had taken place in England to nullify the risk of jury tampering. The Court added: "although the statutory provisions relating to trial on indictment by judge alone have been in force for some years, this case is unique, and we must hope that it will remain so." The Court pointed out that the proper operation of the criminal justice system requires that verdicts returned by a jury, as with any other court, must be true verdicts in accordance with the evidence and that "verdicts returned by a jury that has been nobbled cannot represent true verdicts." The Court added that if criminals choose to subvert or attempt to subvert the process of trial by jury they have no justified complaint if they are deprived of it.⁴²

7.24 In *R v J and Ors*⁴³ the English Court of Appeal held that the conditions in section 44 of the 2003 Act had not been established. The Court held that, as the trial was estimated to last 2 weeks, it was possible to have in place protective measures that would not either impose an unacceptable burden on the jurors by intruding for a prolonged period on their ordinary lives, and that the jury, properly managed and directed, would be able to give the case proper attention and, whether convicting or acquitting, could return a true verdict. The Court stated that trial on indictment without a jury must remain a "last resort, only to be ordered when the court is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled."

7.25 In *R v Mackle and Ors*,⁴⁴ in which the defendants were on trial for evading excise on tobacco products, a member of the jury had reported that two partly masked men had come to his home, had offered him money for information about the case, that he had refused to have any dealings with the men but reported to the court that he had experienced considerable fear as a result of this approach. The jury was discharged and the prosecution later applied for an order under section 44 of the 2003 Act. The Northern Ireland Court of Appeal upheld the decision of Stephens J in the High Court that the order should be made. The Court took into account that the trial was likely to be lengthy and that, to meet the substantial likelihood of tampering which the approach to the juror in the first trial had indicated, the type of protective measures that would be required were either round-the-clock protection of the jury or their

⁴⁰ [2009] EWCA Crim 1035, [2009] 3 All ER 1002.

⁴¹ [2011] EWCA Crim 8.

⁴² [2011] EWCA Crim 8, at paragraph 4.

⁴³ [2010] EWCA Crim 1755. See also *R v S* [2010] EWCA Crim 1756.

⁴⁴ [2007] NICA 37.

being sequestered throughout its length. The Court agreed with the conclusion of Stephens J that “this would lead to an incurable compromise of the jury’s objectivity” and that this “could not be dispelled by an admonition from the trial judge.”⁴⁵

7.26 In *R v Clarke and Anor*,⁴⁶ the Northern Ireland Crown Court (McCloskey J) applied section 46 of the 2003 Act on the 11th day of a jury trial in which the defendants were charged with robbery, three counts of false imprisonment and two counts of kidnapping, described by the trial judge (and, on appeal, by the Northern Ireland Court of Appeal) as a form of “tiger kidnapping.” The trial judge was informed by a note from the jury foreperson that her son-in-law had been telephoned two nights previously by a person who had stated that he knew that his mother-in-law was on the jury and added: “We are all going down to court on Monday,” which was the following day. On the trial judge’s enquiries, the jury foreperson indicated that she was extremely frightened when she was told about this telephone call, and the trial judge discharged her from further jury service. The trial judge also noted that there had been an unusually large number of people in the public gallery on the day after the telephone call. He concluded that he should discharge the jury under section 46 of the 2003 Act. He then considered whether to proceed with the trial without a jury and, in this respect, he applied the analysis of the English Court of Appeal in *R v T and Ors*.⁴⁷ Applying these principles, he concluded that he should proceed to try the case and this decision was upheld by the Northern Ireland Court of Appeal. The defendants were subsequently found guilty on a number of counts. One of the defendants appealed against his conviction, which was dismissed by the Northern Ireland Court of Appeal.⁴⁸

(4) Whether access to jury lists may indirectly facilitate jury tampering

7.27 In this section the Commission discusses whether access to jury lists may indirectly facilitate jury tampering. The Commission begins with a discussion of the position in Irish law and then reviews the comparative situation.

(a) The position in Ireland

7.28 Section 16(1) of the *Juries Act 1976* provides that:

“Every person shall be entitled to reasonable facilities to inspect a panel of jurors free of charge and a party to any proceedings, civil or criminal, to be tried with a jury shall be entitled to a copy free of charge on application to the county registrar.”

7.29 Access to this information is possible at any time between the issuing of the jury summons until the close of the trial.⁴⁹ This includes an entitlement, on request, to be shown alterations to the panel, and to be told of any excusals.⁵⁰ It should be noted that section 16 of the 1976 Act does not confer a right to be provided with the names of jurors *selected*, rather it only confers an entitlement to access the names of persons *summoned* for service.

7.30 In the presentation to the Oireachtas Committee on Justice in 2003 discussed above,⁵¹ the then Director of Public Prosecutions also expressed concern that the provisions in section 16 of the *Juries Act 1976*, which provide for access to the jury panel and as a result the names and addresses of potential jurors, may indirectly facilitate jury tampering, and he suggested that consideration be given to greater

⁴⁵ [2007] NICA 37, paragraph 33. The defendants later pleaded guilty after their non-jury trial had opened: see *R v Grew and Ors* [2011] NICA 31, paragraphs 7-11 (which dealt with the validity of confiscation orders made against them).

⁴⁶ [2010] NICC 7 (1 February 2010).

⁴⁷ [2009] EWCA Crim 1035, [2009] 3 All ER 1002, discussed at paragraph 7.22 above.

⁴⁸ *R v McStravick* [2010] NICA 34.

⁴⁹ Section 16(2) of the 1976 Act.

⁵⁰ Section 16(4) of the 1976 Act.

⁵¹ See paragraph 7.18, above.

anonymity for jurors.⁵² The Commission notes that other jurisdictions have adopted varying approaches to this question, with some permitting largely unrestricted access to the lists while others allow no access.

(b) England and Wales

7.31 In England and Wales, section 5 of the *Juries Act 1974* (on which section 16 of the 1976 Act was modelled) continues to provide that the jury list is accessible in broadly the same manner as under the 1976 Act.

(c) Northern Ireland

7.32 In Northern Ireland, Article 7 of the *Juries (Northern Ireland) Order 1996*, as originally made, provided for access to the jury list in similar terms. During the violence associated with Northern Ireland which began in the early 1970s, jury trials were replaced with the non-jury Diplock court system, presided over by a single judge. In the wake of the 1998 Belfast Agreement and the 2006 St Andrew's Agreement, which provided for the devolution of executive and legislative power back to the Northern Ireland Executive and Assembly, jury trial was also gradually re-introduced into Northern Ireland. In doing so, it was nonetheless considered necessary to include specific and additional protections to jurors and to prevent perverse jury verdicts. In a 2006 Consultation Paper⁵³ the UK Government concluded that it would provide considerable reassurance for jurors, and would diminish the risk of jury intimidation and perverse verdicts, if they could attend court knowing that their details were unknown to the defence and their connections and as a result the Consultation Paper proposed that such information would no longer be provided to the defence. To balance the benefits which would accrue from total juror anonymity, against the risk that restricting access may inhibit the carrying out of additional juror checks, which are themselves designed to reduce the risks of perverse verdicts and juror intimidation, the Consultation Paper proposed the development of guidelines to set out clearly the circumstances in which jury checks may be carried out by the Police Service of Northern Ireland.

7.33 As a result of these proposals, Article 7 of the 1996 Order was repealed in its entirety by the *Justice and Security (Northern Ireland) Act 2007*, so that jury lists are not longer available for examination in criminal trials and jury members are now identified by number alone. In *Re McParland*,⁵⁴ the Northern Ireland High Court acknowledged that the introduction of juror anonymity in 2007 "unquestionably reduces the value of the right to challenge for cause" but that this could be justified in order to protect jurors from possible intimidation.⁵⁵ The Court rejected the applicant's argument that juror anonymity was in breach of the right to a fair trial under Article 6 of the European Convention on Human Rights and it concluded that the removal of the right of access to juror names pursued a clear and proper public objective (to protect against intimidation) and represented a fair balance between the general interest of the community in the integrity of the criminal justice process and the individual rights of defendants.⁵⁶

7.34 A related effect of the anonymity of jurors in Northern Ireland is that where any issue as to whether a jury ought to continue to serve, whether because of alleged jury intimidation or because he or she may know a victim of the alleged crime or one of the defendants, the trial judge may be required to declare a mistrial and discharge the jury even without examining the precise circumstances that arise,

⁵² Presentation by James Hamilton, then Director of Public Prosecutions, to Joint Committee on Justice, Equality, Defence and Women's Rights, 8 December 2003, available at <http://oireachtasdebates.oireachtas.ie>. This issue was not discussed in the Committee's subsequent *Report on a Review of Criminal Justice System* (July 2004), available at www.oireachtas.ie. In 2010, it was reported that the names and addresses of jurors who had deliberated in a trial held in February 2009 had been found in the home of a person described as the then girlfriend of the defendant in that trial. This gave rise to a subsequent debate in Dáil Éireann: see Vol.705 *Dáil Debates* at 572-574 (25 March 2010).

⁵³ *Replacement Arrangements for the Diplock Court System: A Consultation Paper* (Northern Ireland Office, 2006), at paragraphs 3.7-3.10.

⁵⁴ [2008] NIQB 1.

⁵⁵ *Ibid* at paragraphs 41-43.

⁵⁶ [2008] NIQB 1 at paragraphs 37-52.

including by making enquiries of the juror in question. This occurred in *R v Clarke*⁵⁷ where the foreman of a jury reported to the trial judge, McCloskey J, that a juror knew one of the victims of the offence with which the defendants had been charged, but did not know any of the defendants. As the trial had just begun and no evidence had been called, McCloskey J concluded that it was preferable to discharge the jury and to re-start the trial on the following day when (he was aware) a new jury panel would be available. McCloskey J added, however, that while in this instance the inconvenience involved was relatively minor he would have been reluctant to discuss this matter with the juror in open court as this would be likely to reveal his address and possibly his name, thereby removing the anonymity conferred on jurors by the amendments made in 2007.

(d) Australia

7.35 In Australia, the relevant legislation in many states and territories had often provided for access in advance of trial on terms that were comparable to those in the 1976 Act, but there has been a general trend towards restricting the length of time allowed to access jury lists before trial,⁵⁸ and some jurisdictions have moved in the direction of anonymity of jurors. For example, in New South Wales, section 38 of the *Jury Act 1977* had provided for access to the juror list, but this was removed in 1997, since when their names are made known only to the parties for the purposes of challenge and the jurors are called in court by number.⁵⁹ This approach was also adopted in Victoria in the *Juries Act 2000*. In Western Australia, the approach taken has been to restrict access but not to move towards anonymity. Thus, section 30 of the Western Australia *Juries Act 1957* had provided that a copy of every panel or pool of jurors was available for inspection for four clear days before the applicable criminal sittings or session commenced. Section 30 of the 1957 Act was amended by the *Juries Legislation Amendment Act 2011* to provide that the panel or pool should be available for inspection by the parties (and their respective solicitors) only from 8 am on the morning of the day on which the trial is due to commence. This implemented a recommendation to that effect in the Law Reform Commission of Western Australia's 2010 *Report on Selection, Eligibility and Exemption of Jurors*.⁶⁰

(e) New Zealand

7.36 In New Zealand, section 14 of the *Juries Act 1981* provides for access to the jury panel not earlier than 7 days before the commencement of the week for which the jurors on the panel are summoned to attend for jury service. The New Zealand Law Commission, in its 2001 *Report on Juries in Criminal Trials*,⁶¹ concluded that this should remain in place and that the move towards anonymity in New South Wales and Victoria should not be followed. The New Zealand Law Commission accepted that there were concerns for juror safety and security about defendants having access to jury lists, and it added that there was no reason why a defendant represented by counsel should be in a position to keep such a list.⁶² Section 14A of the New Zealand *Juries Act 1981*, inserted by section 10 of the *Juries Amendment Act 2008*, now provides that a barrister or solicitor to whom a copy of the jury panel is made available under section 14 of the 1981 Act may show the copy to a defendant in proceedings that are due to be heard during the week for which the jurors on the panel are summoned to attend for jury service, but must not leave the document in the defendant's possession (or in the possession of any witness for either party or of any victim), and must take all reasonable steps to ensure that the defendant (or any witness or victim, as the case may be) does not copy the document. It is notable that section 14A(1) of the 1981 Act provides that the purpose of section 14A "is to help to prevent names or other information disclosed in a

⁵⁷ [2010] NICC 10 (8 January 2010). The second trial in this case, in which the jury was also dismissed, led to a non-jury trial in accordance with section 46 of the *Criminal Justice Act 2003*: see *R v Clarke and Anor* [2010] NICC 7 (1 February 2010), discussed at paragraph 7.26, above.

⁵⁸ Chesterman "Criminal Trial Juries in Australia" in Vidmar (ed), *World Jury Systems* (Oxford, 2000) at 141-144.

⁵⁹ *Ibid* at 163.

⁶⁰ Law Reform Commission of Western Australia *Selection, Eligibility and Exemption of Jurors: Final Report* (2010) at 30.

⁶¹ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69, 2001) at paragraph 241.

⁶² *Ibid* at paragraph 248.

copy of the panel from being used to facilitate actions (for example, actions prejudicing a juror's safety or security) to interfere with the performance of a juror's duties."

C Consultation Paper views, submissions and final recommendations

7.37 In the Consultation Paper, the Commission discussed the current offences that deal with jury tampering, including embracery,⁶³ and also noted the effect of jury tampering on the trial process, as exemplified in *The People (DPP) v Mulder*.⁶⁴ The Commission also referred to the suggestions made to reduce the possibility of jury intimidation such as anonymity views, notably those in the 2002 *Report of the Committee to Review the Offences Against the State Acts 1939-1998* and in 2003 by the then Director of Public Prosecutions.⁶⁵ As to the provisions on inspection of the jury panel in section 16 of the *Juries Act 1976* the Commission invited submissions as to whether the right to inspect should be amended in order to take account of the concerns expressed that it may give rise to tampering and with a view to reinforcing public confidence in the jury process.⁶⁶

(1) Jury tampering offences

7.38 In submissions received and during the Commission's further discussions with interested parties, there was general acknowledgement that some jury intimidation occurs. Consultees considered that, while witness intimidation may be a more common threat to the integrity of the criminal justice system, jury tampering is also a continuing risk. Consultees also considered that the Garda Síochána are generally well equipped to deal with jury tampering including through their presence at criminal trials. The Commission notes in this respect that in *The People (DPP) v Walsh*⁶⁷ an important element in the evidence leading to the defendant's conviction for embracery was that he had been observed sitting in court noting the names and particulars of the members of the jury panel being called forward for jury service.

7.39 As to the offences that concern jury tampering, consultees also agreed that the current law would benefit from reform. In this respect, the Commission agrees with the view⁶⁸ that a single offence concerning jury tampering should be enacted. The Commission considers that, while the Court of Criminal Appeal in *The People (DPP) v Walsh*⁶⁹ held that embracery remains an offence in Irish law, it would be beneficial to combine in a single offence any elements of embracery that are not already included in the statutory intimidation offence created by section 41 of the *Criminal Justice Act 1999*.⁷⁰ The Commission notes that, in the *Walsh* case,⁷¹ the Court of Criminal Appeal approved a definition of embracery as consisting of "any attempt to corrupt or influence or instruct a jury, or any attempt to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats or persuasions, whether the jurors on whom such an attempt is made give any verdict or not, or whether the verdict given be true or false."

7.40 The Commission acknowledges that the offence in section 41 of the 1999 Act deals not merely with the intimidation of jurors and potential jurors but also other persons connected with the administration of justice, such as a person assisting in the investigation by the Garda Síochána of an offence or a witness or potential witness. In that respect, the Commission is conscious that this raises the question as

⁶³ Consultation Paper at paragraph 8.72.

⁶⁴ *Ibid* at paragraph 8.73.

⁶⁵ *Ibid* at paragraph 8.78.

⁶⁶ *Ibid* at paragraph 8.79.

⁶⁷ [2006] IECCA 40, [2009] 2 IR 1.

⁶⁸ See Coen "Interference with Jurors and its Potential Legal Consequences" (2011) 1 *Criminal Law and Procedure Review* 131, at 142.

⁶⁹ [2006] IECCA 40, [2009] 2 IR 1.

⁷⁰ As amended by sections 16 and 20 of the *Criminal Justice (Amendment) Act 2009*.

⁷¹ [2006] IECCA 40, [2009] 2 IR 1, 4: see paragraph 7.04, above.

to whether all offences against the administration of justice should be subject to review with a view to their reform. As this would involve consideration of a very wide range of matters, the Commission does not propose to consider this in the current Report but notes that the desirability of such a review was adverted to in the Commission's 2010 *Report on Consolidation and Reform of the Courts Acts*.⁷²

(2) Use of non-jury courts to address jury tampering

7.41 As to whether the use of non-jury courts can provide a solution to jury tampering, there was no consensus expressed in the submissions received or in the subsequent discussions with interested parties. The Commission notes in this respect that this reflects the differing views on the continued use of the non-jury trials in the Special Criminal Court illustrated in the 2002 *Report of the Committee to Review the Offences Against the State Acts 1939-1998*.⁷³ The Commission also notes that, since the enactment of the *Criminal Justice (Amendment) Act 2009*, the Oireachtas has continued in being from year to year the provisions of the 2009 Act that provide for the transfer to the Special Criminal Court of specific offences connected with organised crime.

7.42 The Commission considers that this raises wider questions outside the scope of this Report but it also considers that there is a strong argument, as described in the 2002 *Report of the Committee to Review the Offences Against the State Acts 1939-1998*, in favour of a re-examination of whether the use of scheduling of offences complies with the State's obligations under international law and whether a more individualised case-by-case approach may be justified. The Commission also notes in this respect that the provisions in sections 44 to 50 of the United Kingdom *Criminal Justice Act 2003* provide such a case-by-case approach to the use of non-jury trials where jury intimidation is at issue.

(3) Access to the jury list, jury anonymity and procedural reforms

7.43 In the context of the issues that fall clearly within the scope of this project, the Commission notes that in 2003 the then Director of Public Prosecutions suggested that the risk of intimidation arising from access to the jury panel under section 16 of the *Juries Act 1976* could be addressed by jury anonymity. The Commission considers that section 16 of the 1976 Act requires analysis of two competing principles. On the one hand, access to the jury panel fosters public confidence in the criminal justice system but on the other hand it may also assist those who wish to engage in jury interference.

7.44 The Commission notes from its comparative review in this chapter that the approach to anonymity varies greatly. Thus in England and Wales, the provisions on access to jury lists remain very similar to those in the *Juries Act 1976*. By contrast, when jury trial was reintroduced in general terms in Northern Ireland in recent years, it was considered to be a necessary aspect of this to repeal the provisions on access to jury lists in their entirety and to provide for virtual complete anonymity. The Commission has noted that complete juror anonymity has, itself, given rise to practical problems where the issue of jury intimidation has arisen, as evidenced in *R v Clarke*.⁷⁴ It is clear that the majority of jurisdictions surveyed have concluded that arrangements falling short of complete anonymity can achieve the appropriate balance between maintaining public confidence in the criminal justice system while also hampering those who may be inclined to engage in jury tampering. The Commission also considers that, against a background in Ireland in which jury tampering remains an issue of concern, but where its prevalence is limited and where the Garda Síochána appear well placed to deal with most instances of it (with the possible exception of some trials related to organised paramilitary or other criminal organisations), any proposed reforms should be suitably proportionate.

7.45 During the Commission's further discussions with interested parties, consultees generally agreed that some elements of anonymity could be introduced to protect jurors from intimidation. The Commission considers in this respect that three matters could be addressed to improve current arrangements.

⁷² *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010) at paragraphs 2.105-2.108 (which adverted to both the criminal offences against the administration of justice and related civil wrongs).

⁷³ *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (2002): see paragraph 7.12ff, above.

⁷⁴ [2010] NICC 10 (8 January 2010); discussed at paragraph 7.34, above.

7.46 As to access to the jury list, the Commission accepts that, in order for an accused to exercise his or her right to challenge candidate jurors effectively, there should remain some access to the jury panel or list. Equally, the Commission accepts that section 16 of the *Juries Act 1976* contains an unnecessarily wide right of access which has the potential to lead to improper use, including as a means of tracking jurors for the purpose of intimidation. The Commission considers that, in order to ensure that the accused may exercise a right to challenge effectively while at the same time protecting as far as practicable the security and privacy of jurors, access to jury lists should be possible only by the parties' legal advisers (or the parties if they are not legally represented) and only for a period of four days prior to the trial in which the parties have an interest. Access to the jury list would not be permitted once the jury has been sworn, except for some exceptional reason and only with the sanction of the court on application. Furthermore, where a party is legally represented he or she may be provided with the information in the jury list but not a copy of the list.

7.47 A second matter related to intimidation to which consultees referred is that, after empanelment, there is currently a daily roll call of the jury which is carried out in open court, thereby revealing on a daily basis the names of the 12 jurors. The Commission agrees with consultees that this is an unnecessary process and it should be abolished in order to protect juror privacy and assist in preventing potential intimidation.

7.48 Related to the calling of the jury roll is a third matter to which consultees referred, which is that there is currently no formal requirement for jurors to establish their identity when summoned to appear in court, although the Commission understands that, in practice, this is sought. The Commission considers that the juries legislation should expressly provide that prospective jurors be required to bring a valid form of personal identification when attending for jury selection. This would assist the courts to deal with the risks arising from the use of the electoral roll where, as already discussed, it is not possible to identify with precision specific persons with the same name at the same address. In addition, the provision of formal identification would assist in limiting the necessity for calling names in court on a repeated basis. The Commission also considers that this is a suitable requirement, bearing in mind that the jury lists are derived from the electoral register and that section 111 of the *Electoral Act 1992* requires voters to bring prescribed personal identification to a polling station. The current list of prescribed personal identification comprises the following: (i) a passport; (ii) a driving licence; (iii) an employee identity card containing a photograph; (iv) a student identity card issued by an educational institution and containing a photograph; (v) a travel document containing name and photograph; (vi) a bank or savings or credit union book containing address in constituency or electoral area; (vii) a cheque book; (viii) a cheque card; (ix) a credit card; (x) a birth certificate; or (xi) a marriage certificate.⁷⁵ The Commission adds that the failure to produce suitable identification should not, in itself, prevent a juror from serving and in such a case the juror should be required to confirm their identity by oath or affirmation, which is also a process of identification under the Electoral Acts. The Commission also considers that the form or notice accompanying the jury summons (as currently required by section 12 of the *Juries Act 1976*) should include a statement referring to the benefits of bringing such personal identification, including that the person may positively identify themselves in court and that this may limit the extent to which the person's name is called out in public.

7.49 *The Commission recommends that the elements of the common law offence of embracery which remain of relevance and which do not already overlap with the offence of intimidation in section 41 of the Criminal Justice Act 1999 should be incorporated into a single offence that deals with all forms of jury tampering. The single offence should include any attempt to corrupt or influence or instruct a jury, or any attempt to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats or persuasions, with an intent to obstruct, pervert, or interfere with, the course of justice.*

7.50 *The Commission considers that there is a strong argument, as described in the 2002 Report of the Committee to Review the Offences Against the State Acts 1939-1998, in favour of a re-examination of whether the use of scheduling of offences for the purposes of the Offences Against the State Act 1939 complies with the State's obligations under international law and whether a more individualised case-by-case approach may be justified.*

⁷⁵ See the *Electoral Regulations 2007* (SI No.156 of 2007).

7.51 *The Commission recommends that, in order to ensure that the accused may exercise a right to challenge effectively while at the same time protecting as far as practicable the security and privacy of jurors, access to jury lists should be possible only by the parties' legal advisers (or the parties if they are not legally represented) and only for a period of four days prior to the trial in which the parties have an interest. The Commission also recommends that access to the jury list should not be permitted once the jury has been sworn, except for some exceptional reason and only with the sanction of the court on application; and that, where a party is legally represented he or she may be provided with the information in the jury list but not a copy of the list.*

7.52 *The Commission recommends that, in order to protect juror privacy and assist in preventing potential intimidation, the daily roll call of the jury after empanelment should be abolished.*

7.53 *The Commission recommends that the juries legislation should expressly provide that prospective jurors be required to bring a valid form of personal identification when attending for jury selection, and that this should take the same form as the prescribed personal identification required under section 111 of the Electoral Act 1992. The Commission also recommends that the failure to produce suitable identification should not, in itself, prevent a juror from serving and in such a case the juror should be required to confirm their identity by oath or affirmation. The Commission also recommends that the form or notice accompanying the jury summons (as currently required by section 12 of the Juries Act 1976) should include a statement referring to the benefits of bringing such personal identification, including that the person may positively identify themselves in court and that this may limit the extent to which the person's name is called out in public.*

CHAPTER 8 JUROR MISCONDUCT: INDEPENDENT INVESTIGATIONS AND INTERNET SEARCHES

A Introduction

8.01 In this Chapter the Commission examines to what extent current law is sufficient to deal with the risk of juror misconduct, in particular the risk that a juror may engage in independent investigations, such as searching for information on the internet about the case on which the person is sitting as a juror or visiting a crime scene alone. This involves the application of two principles discussed in Chapter 1, the right to a fair trial and that the jury must be unbiased. In Part B the Commission examines whether the juror's oath to arrive at a verdict "according to the evidence" is sufficient to prevent such misconduct and also discusses a related issue, to what extent the publicity surrounding a case could affect the fairness of a trial. The Commission also examines the approaches taken to juror misconduct in other jurisdictions. In Part C, the Commission reviews the provisional recommendations made in the Consultation Paper and, having regard to the views expressed in the consultation process, sets out its final recommendations.

B Current Position in Ireland and Comparative Approaches

(1) *The juror's oath and judge's directions to the jury*

8.02 Section 19(1) of the *Juries Act 1976* sets out the following oath that each juror involved in a criminal trial must take:

"I will well and truly try the issue whether the accused is (*or are*) guilty or not guilty of the offences (*or the several offences*) charged in the indictment preferred against him (*or her or them*) and a true verdict give according to the evidence."¹

8.03 Similarly, section 19(3) of the 1976 Act sets out the following oath that each juror in a case other than a criminal trial must take:

"I will well and truly try all such issues as shall be given to me to try and true verdicts give according to the evidence."

8.04 The oath clearly requires a juror to decide a case, whether a criminal trial or otherwise, exclusively on the basis of evidence presented in court. This obligation is reinforced by a specific direction from the trial judge after the jury has been selected that they must try the case on the evidence presented in court, and must not be influenced by any external matters or to obtain information elsewhere. This is also reinforced in the trial judge's summing up to the jury at the end of the trial and immediately before they retire to consider their verdict.

8.05 It has been noted that the content of such a direction may be moulded to the facts of the case and, for example, may take account of the degree of publicity that the case has attracted.² In the past, the direction would typically include a statement that the jury should not read any newspapers or magazines that might include coverage of the trial or listen to radio programmes or watch TV. The advent of the internet and social media sites, and in particular their ready accessibility through smart phones or Wi-Fi enabled tablets, now provide access to a wide range of materials such as archives of media reports that may have reported on the factual background to a trial, general information on scientific matters that

¹ Section 19(2) of the 1976 Act had also provided for a comparable oath where the issue to be tried was whether an accused was competent to plead on the ground of insanity, but this was repealed by the *Criminal Law (Insanity) Act 2006*. The oath taken under section 19(1) of the 1976 Act is sufficient to deal with cases that come under the 2006 Act.

² Coonan and Foley *The Judge's Charge in Criminal Cases* (Round Hall, 2008) at 510.

might arise in a trial (such as DNA evidence) and a huge array of general commentary such as blogs and other material from social media. This information can contain prejudicial material, and has the potential to impact on the right to a fair trial. In recent years, trial judges have incorporated specific comments to the jury not to access information regarding the trial through internet search engines or social media.³

(2) Effect of publicity on the fairness of jury trial

8.06 In a number of cases the courts have considered the effect on jurors of pre-trial publicity and on ongoing media coverage as a trial proceeds. As to pre-trial publicity, in *Z v Director of Public Prosecutions*⁴ the applicant applied in 1993 to prohibit his trial on charges of rape. The applicant's (then-alleged) victim, who was 14 years of age at the time, had become pregnant as a result of this and she and her parents had inquired about whether obtaining a termination of the pregnancy would affect the admissibility of evidence at the trial of Z. This then gave rise to the decision in 1992 in *Attorney General v X*⁵ in which the Supreme Court had held that it was permissible for Z's victim, referred to as Ms A, to obtain a termination. This decision in 1992 received enormous national and international media coverage, although neither Ms A nor Mr Z were named in the media. Nonetheless, Mr Z sought to have his trial prohibited on the basis that the pre-trial publicity would mean that it was highly probable that the jurors would be pre-disposed to convict him. This argument was rejected on the ground that the trial judge would be able to deal with the publicity surrounding the trial by directing the jury that the controversy and publicity surrounding the case was completely irrelevant to the trial and should be completely disregarded. In *Kelly v O'Neill*⁶ Denham J commented in the Supreme Court that the decision in *Z v Director of Public Prosecutions* recognised "the robustness of the Irish jury... and the administration of justice proceeded."

8.07 As to publicity occurring in the course of course of a trial, in *D v Director of Public Prosecutions*⁷ the applicant had been charged with indecent assault of a girl. As a result of inaccurate newspaper reporting of the trial, the jury in his trial had been discharged and when the newspapers in question had appeared in court to explain their inaccurate reporting counsel for the prosecution had stated that as a result of the reporting "a patently guilty man had gone free." This in turn received further widespread media coverage which included a sympathetic interview with the victim (who was not named), and the applicant sought to prevent his re-trial on the charge in question. The High Court granted the order sought but this was overturned by the Supreme Court. The Supreme Court accepted the importance of the right to a fair trial and that a juror might well remember reading the media coverage of the previous trial and feel sympathy towards the victim, but the applicant had not established that there was a real risk that the jury would be prevented from returning an impartial. The Court concluded that, to hold otherwise, would imply that the jury would ignore their oath to try the case on the evidence adduced and to ignore extraneous evidence.

8.08 In these decisions, the courts have emphasised the importance of the trial judge's directions to a jury that they must try the issues before them only on the evidence adduced. In the *D* case, Blayney J noted that the jury will be reminded of this in the trial judge's summing up immediately before they begin deliberations.⁸

(3) Prior juror experience and perception of bias

8.09 Jurors will bring their general experience of life to bear on their deliberations without breaching the oath under section 19 of the *Juries Act 1976* or risking an unfair trial; indeed, as previously noted,⁹

³ See, for example, "Judge warns jury not to 'Google' trial" *Irish Independent* 26 November 2008, available at www.independent.ie.

⁴ [1994] 2 IR 476.

⁵ [1992] 1 IR 1.

⁶ [2000] 1 IR 354.

⁷ [1994] 2 IR 465.

⁸ [1994] 2 IR 465 at 472.

⁹ See paragraph 1.41, above.

such life experience is of immense value in the deliberative process required of juries. In some instances, however, this life experience may be more directly related to the issues under consideration and raise the risk that the trial is not conducted by an impartial jury. This was the issue that arose in *The People (DPP) v Tobin*,¹⁰ where the defendant was on trial for rape and other sexual offences. During the jury's deliberations, a woman juror revealed that she had previously experienced sexual abuse. The trial judge was informed of this and was assured by the foreman that the disclosure by the juror had had no impact on her impartiality and, after legal argument, the trial judge declined to discharge the jury and allowed the trial to proceed. The defendant was convicted and, on appeal, the Court of Criminal Appeal, applying the objective test of reasonable apprehension of bias, held that given the particular circumstances of the case the disclosure in question could lead to a reasonable apprehension that the juror may have been influenced by her experience of abuse and that this might also have had an influence on the other members of the jury. The Court therefore quashed the conviction and ordered a re-trial. The Court of Criminal Appeal added that its decision in this case did not rule out the possibility that, in another case, a considered and carefully worded direction to the jury could deal with this type of problem and allow the trial to proceed and avoid the need to discharge the jury.

(4) Juror misconduct and contempt of court

8.10 An instance that came close to active juror misconduct occurred in *The People (DPP) v McDonagh*.¹¹ In this case, two members of the Garda Síochána had been sworn as jury keepers but it was clear that they did not fully understand their role beyond preventing external interference with the jury. On at least one occasion one of the Garda jury keepers had discussed the case with one of the jurors, though only in a fairly general way, and there were, it appears, discussions of "war time stories" from other cases over drinks; and, when the jury were sequestered overnight in a hotel a Garda jury keeper had spent some time drinking with one of the jurors in her bedroom into the early hours of the morning. The Court of Criminal Appeal accepted that these events did not involve subornation of the jury in that there had been no attempt to influence the jury's decision-making process but, applying the objective test of bias in *The People (DPP) v Tobin*,¹² discussed above, the Court concluded that the conviction should be quashed and a re-trial ordered.

8.11 The examples discussed above do not involve misconduct in the sense of a juror actively seeking extraneous information by, for example, visiting a crime scene or carrying out an internet search in breach of the juror's oath. As discussed in the Consultation Paper and briefly below, however, such misconduct has occurred in other jurisdictions.

8.12 As the Commission has previously noted, it is in general desirable to preserve the general secrecy of jury deliberations¹³ but this does not preclude communication with the trial judge after the jury has begun its deliberations, as expressly referred to in section 15(4) of the *Juries Act 1976* and illustrated by the decision in *The People (DPP) v Tobin*.¹⁴ Where the jury communicates in this way during the trial and if the trial judge considers that the behavior is inappropriate, the juror may be discharged from the jury under section 24 of the 1976 Act and the trial may be able to proceed. Where juror misconduct occurs that is in clear breach of the oath, whether through internet searches or other inappropriate behavior, this constitutes an interference with the administration of justice and, therefore, a case of criminal contempt of court.¹⁵ Where the conduct comes to light after the jury's verdict has been delivered, a prosecution for contempt of court may be instituted. The Commission now turns to examine the approach to this issue in other jurisdictions, where the question of enacting a specific offence to deal with juror misconduct has been considered.

¹⁰ [2001] 3 IR 469.

¹¹ [2003] 4 IR 417.

¹² [2001] 3 IR 469.

¹³ *Report on Contempt of Court* (LRC 47-1994) at paragraph 7.14.

¹⁴ [2001] 3 IR 469.

¹⁵ See generally the Commission's *Report on Contempt of Court* (LRC 47-1994).

(5) Comparative approaches to juror misconduct

8.13 As the Commission noted in the Consultation Paper,¹⁶ in other jurisdictions juries have been discharged arising from the impact of extraneous influences, including active forms of juror misconduct such as internet-based research by jury members.

8.14 In the English case *R v Young*¹⁷ it emerged that some members of the jury had used an ouija board in an attempt to make contact with the murder victim in the case that they were empanelled to hear. In *R v Marshall and Crump*¹⁸ it emerged after the jury had delivered its verdict that some printed material downloaded from the internet had been found in the jury room. The material, obtained from the websites of the Crown Prosecution Service, the Home Office and a criminal defence solicitor's practice, dealt with a number of issues relating to charging and sentencing practice and in relation to the offences with which the defendants had been charged. The defendants argued on appeal that the jury members must have undertaken their own research and that the material found indicated that they might have taken extraneous matters into account when reaching their verdicts. The Court of Appeal accepted that a jury's access and use of additional material could in principle be regarded as an irregularity that could render a conviction unsafe but in this instance concluded that it had not and it dismissed the defendants' appeal.

8.15 In *R v Mirza*¹⁹ Lord Hope stated that the jury system would be strengthened if jurors were told before the trial begins that they are under a duty to inform the court at once of any irregularity that occurs while they are deliberating. After the decision in *Mirza*, a 2004 Practice Direction was issued in England and Wales²⁰ which provides that trial judges should ensure that the jury are alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time they occur, and not to wait until the case is concluded. The Practice Direction added that "it is undesirable to encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court." In support of this balanced approach, the Judicial Studies Board for England and Wales has also issued guidance on the form of judicial direction that should be given, which points out that the judge should note that jurors ought not to presume that misconduct is common or likely to occur but that if it does occur it should be brought to the judge's attention. The Commission is also aware that, since 2010 there has been a specimen "Internet Direction" to juries in Northern Ireland, which focuses on the requirement in the juror's oath to determine the case according to the evidence only.

8.16 In *R v Smith and Mercieca*²¹ a juror wrote a letter to the trial judge expressing concern in relation to the conduct of other jurors in the case. The UK House of Lords held that the trial judge had acted correctly when he decided not to question the jurors about the contents of the letter because if he had done so he inevitably would have had to question the jurors about their deliberations and whether the defendant was guilty of any of the offences charged. Nonetheless, the House of Lords concluded that the trial judge should have assumed that the letter was accurate and that, therefore, if the jury had been behaving as alleged by the juror in her letter, they required a strong, even stern, warning that they must follow the judge's directions on the law, adhere to the evidence without speculation and decide on the verdicts without pressure or bargaining. In this respect, the House of Lords concluded that the general reiteration by the trial judge of the jurors' duty to decide the case on the evidence adduced was not sufficient. In this instance the jury required stronger and more detailed guidance and instruction, and without this it was difficult to be satisfied that the discussion in the jury room was conducted after that in the proper manner.

¹⁶ Consultation Paper at paragraphs 8.17-8.56.

¹⁷ (1995) 2 Cr App R 379.

¹⁸ [2007] EWCA Crim 35.

¹⁹ [2004] 1 AC 1118.

²⁰ *Practice Direction (Criminal Proceedings)* [2004] 1 WLR 665, amending *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 WLR 2870, cited in Coonan and Foley *The Judge's Charge in Criminal Cases* (Round Hall, 2008) at 10.

²¹ [2005] UKHL 12.

8.17 In this context, while a prosecution for contempt of court can rightly be regarded as a last resort, in 2011 a juror in an English case who contacted the defendant during the course of the trial through her Facebook account was convicted of contempt of court and sentenced to a term of imprisonment.²²

8.18 A 2010 English study carried out for the UK Ministry of Justice by Cheryl Thomas²³ examined the effect of publicity on juror decision-making and the prevalence of internet searches by jurors. This was the first empirical study in England of the “fade factor”, that is, whether the further away media reports are from a trial the more likely they are to fade from jurors’ memories. The study’s findings supported the view that, in general, a “fade factor” applies to pre-trial publicity and does not affect the deliberations of a jury. Of the jurors who participated in the study, those serving on high profile cases were almost seven times more likely to recall media coverage (70%) than jurors serving on standard cases (11%). In high profile cases, the study found that over a third of jurors (35%) remembered pre-trial coverage, with television (66%) and national newspapers (53%) the two main sources. This contrasted with jurors’ recall of media reports in standard cases, where local newspapers accounted for almost all (77%) coverage recalled. Two thirds (66%) of jurors in high profile cases who recalled media coverage either did not or could not remember it having any particular slant. Where jurors did recall any emphasis, almost all recalled it suggesting the defendant was guilty. In high profile cases, 20% of jurors who recalled media reports of their case said they found it difficult to put these reports out of their mind while serving as a juror.²⁴

8.19 As to internet searches, the 2010 English study found that more jurors said they saw information on the internet than admitted looking for it on the internet. Dr Thomas concluded that as the jurors who participated in the study were admitting to doing something they would have been told by the judge not to do, this may have explained why more jurors said they saw reports on the internet than said they looked on the internet.²⁵ The study found that in high profile cases 26% said they saw information on the internet compared to 12% who said they looked. In standard cases 13% said they saw information compared to 5% who said they looked. Among the jurors who said they looked for information on the internet, most (68%) were over 30 years old. Among jurors in high profile cases, an even higher percentage (81%) of those who looked for information on the internet was over 30.

8.20 The 2010 English study concluded that to address both jury impropriety in general and juror use of the internet, the judiciary and the UK Courts Service should consider issuing every sworn juror with written guidelines clearly outlining the requirements for serving on a jury, which should acknowledge the value of the juror’s role and clearly explain what improper behaviour is, why it is wrong and what to do about it. The study also recommended that the trial judge should review the requirements with jurors as soon as they are sworn, which should include a fuller direction to jurors on why they should not use the internet to look for information or discuss their case. It also recommended that jurors should be required to keep the guidelines with them throughout the trial.²⁶

8.21 In the majority of other common law jurisdictions,²⁷ courts continue to provide juries with specific warnings and directions as required to deal with extraneous influences and they have in general not enacted specific offences of juror misconduct. An exception is the Australian state of New South Wales in which legislative change to the *NSW Jury Act 1977* followed a number of cases involving juror misconduct.²⁸ In one of these, *R v K*,²⁹ the New South Wales Court of Criminal Appeal quashed a murder

²² See “Juror admits contempt of court over Facebook contact” *BBC News* 14 June 2011, available at www.bbc.co.uk.

²³ Thomas *Are Juries Fair?* UK Ministry of Justice Research Series 1/10 (2010).

²⁴ *Ibid* at vii.

²⁵ *Ibid* at viii.

²⁶ *Ibid* at ix.

²⁷ Consultation Paper at paragraphs 8.17-8.56.

²⁸ *R v K* [2003] NSWCCA 406, *R v Skaf* [2004] NSWCCA 37, *R v Fajka* [2004] NSWCCA 166 and *R v Forbes* [2005] NSWCCA 377.

²⁹ [2003] NSWCCA 406.

conviction after it emerged that jurors accessed incriminating evidence about an accused via the internet. This was discovered after the verdict was reached, when jurors went to a nearby hotel for a drink where they met counsel for the defendant who was told by a juror that other jurors had discovered through the internet that the defendant had been accused of murdering his second wife, and that the current trial was a retrial on this charge. The trial judge had given the jury the standard direction to disregard any information apart from evidence presented at trial but he had not given a specific direction to refrain from engaging in internet research about the accused and the case. In quashing the conviction, the New South Wales Court of Criminal Appeal suggested that the *NSW Jury Act 1977* should be amended and that it should be an offence for jurors to conduct research about the accused and the case. The Court also suggested that a trial judge should give a specific direction about such research in addition to the normal direction about disregarding any publicity about the case.

8.22 Following this, the *NSW Jury Act 1977* was amended by the *NSW Jury Amendment Act 2004* to deal with juror misconduct.³⁰ Section 68B of the *Jury Act 1977*, as inserted by the 2004 Act, provides that it is an offence for a juror wilfully to disclose to any person during the trial information about the deliberations of the jury or how a juror or jury formed any opinion or conclusion in relation to an issue arising in the trial. The offence does not apply where a juror discloses information to another juror, or where the trial judge consents to a disclosure. Section 68C of the *Jury Act 1977*, as inserted by the 2004 Act, prohibits jurors from making inquiries about the accused, or any other matters relevant to the trial, but does not prohibit a juror from making an inquiry of the court, or of another member of the jury, in the proper exercise of his or her functions as a juror. Nor does it prevent a juror from making an inquiry authorised by the court. Section 68C also provides that anything done by a juror in contravention of a direction given to the jury by the judge in the criminal proceedings is not a proper exercise by the juror of his or her functions as a juror. Section 68C defines what constitutes “making an inquiry” to include: asking a question of any person, conducting any research, for example, by searching an electronic database for information (such as by using the internet), viewing or inspecting any place or object, conducting an experiment or causing someone else to make an inquiry.

C Consultation Paper Recommendations, Submissions and Final Recommendations

8.23 The Consultation Paper provisionally recommended that it should be an offence to make inquiries about matters arising in the course of a trial beyond the evidence presented; and that there be a separate offence for a juror to disclose matters discussed in the jury room that would affect the fairness of the trial.³¹ It also provisionally recommended that the Courts Service should provide information to jurors explaining why independent investigations or internet searches about a case should not be undertaken,³² and it invited submissions as to whether a trial judge’s directions should be reformulated specifically to cover juror misconduct.³³

8.24 Given the general secrecy that surrounds jury deliberations, it is difficult to assess to what extent, if any, such misconduct occurs now or has occurred in the past. In the Commission’s discussions with interested parties, including those involved in the criminal justice system in Ireland, the general view expressed was that jurors take their oath and task very seriously and that misconduct, if it occurs, appears to be rare. Nonetheless, in addition to the examples already discussed where the Court of Criminal Appeal has dealt with recorded instances of concern arising within juror deliberation, there has been at least one published reference where a juror had observed a fellow self-employed juror using his mobile phone in the jury room in order to keep in contact with his business.³⁴ While that specific example may indicate the difficulties posed for self-employed persons serving on juries where there is no financial

³⁰ See Johns “Trial by Jury: Recent Developments” (NSW Parliamentary Library Research Service Briefing Paper No 4/05), available at <http://parliament.nsw.gov.au>.

³¹ Consultation Paper at paragraph 8.69.

³² *Ibid* at paragraph 8.70.

³³ *Ibid* at paragraph 8.71.

³⁴ See the article by Elaine Byrne, *The Irish Times*, 30 June 2009.

support in place,³⁵ the Commission is also conscious of the need to ensure that public confidence in the jury system is not impaired through any perception of inappropriate juror behaviour and that there should therefore be specific statutory provisions and administrative arrangements in place to reduce as far as possible the risk of this occurring. The Commission considers that this is reinforced by the findings in the 2010 English study of the effect of publicity on juror decision-making and the prevalence of internet searches by jurors carried out for the UK Ministry of Justice by Cheryl Thomas,³⁶ discussed above. While no comparable study has been carried out in Ireland, the Commission considers that its findings are of value in indicating that the impact of extraneous publicity on the one hand and the risk of internet searches by jurors on the other hand should be addressed.

8.25 Consultees agreed that the issue of juror misconduct, and in particular the risk of extraneous investigations in the internet and social media age, was in need of specific reform and that the general approach taken in the Consultation Paper was correct. Submissions suggested that as soon as the jury has been empanelled, the judge ought to inform jurors clearly of their role, make clear the type of conduct that is inconsistent with this role and that specific mention ought to be made of the use of phone or internet sources to either seek or disseminate information about the trial. It was also suggested that the guidance and approach in place in England and Wales and in Northern Ireland, in which the judge should state that jurors should not expect that misconduct is likely to happen, could also usefully be followed. It was also generally agreed that jurors should be informed clearly as to how to go about reporting misbehaviour, to avoid the situation in which this is reported after the verdict.

8.26 Having regard to the submissions received and the further discussions with interested parties, the Commission has concluded that it should affirm the views expressed in the Consultation Paper. The Commission acknowledges that consultees indicated that juror misconduct may be a relatively rare occurrence, but it is nonetheless important that suitable measures are in place to ensure public confidence in the deliberations of juries to the greatest extent possible. In this respect, the Commission has concluded that the issue of juror misconduct should be addressed by a combination of the type of specific directions and guidance used in England and Wales and in Northern Ireland and the specific legislative reforms adopted in New South Wales. These legislative reforms would be without prejudice to other offences involving the administration of justice, notably contempt of court and perverting the course of justice.

8.27 The Commission is also conscious that prosecutions for existing offences under the *Juries Act 1976* have in the past been brought in rare cases only and that, in recent years, there is no clear evidence that any prosecutions have been brought. The Commission is conscious that prosecution of jurors should not always occur as an automatic response to non-appearance to a jury summons but it is equally important to recognise that the complete absence of prosecutions is likely to lead to a greater level of non-appearance and, ultimately, disrespect for the rule of law. It also signals an official indifference to those who are prepared to attend for jury service and recognise its value as a civic duty. In this respect the Commission recommends the development of an agreed protocol on prosecutions for the various offences provided for in the legislation on jury service. The Commission also recommends that, to complement this, the legislation on jury service should provide that a fixed charge notice may also be issued in respect of any offence provided for under that legislation.

8.28 *The Commission recommends that the judge's direction to a jury should inform jurors clearly of the type of conduct that is inconsistent with the juror oath to arrive at a verdict "according to the evidence"; that specific mention ought to be made of the use of phone or internet sources to either seek or disseminate information about the case in which they are involved; that the judge should state that jurors should not expect that misconduct is likely to happen, but that they should also be informed clearly as to how to go about reporting misbehaviour if it occurs, in particular to avoid the situation in which this is reported after the verdict.*

8.29 *The Commission recommends that possible juror misconduct should also be addressed by providing for two specific offences. The first should be an offence for a juror wilfully to disclose to any*

³⁵ On juror compensation and expenses, see Chapter 9 below.

³⁶ Thomas *Are Juries Fair?* UK Ministry of Justice Research Series 1/10 (2010).

person during the trial information about the deliberations of the jury or how a juror or jury formed any opinion or conclusion in relation to an issue arising in the trial; this offence would not apply where a juror discloses information to another juror, or where the trial judge consents to a disclosure. The second offence should prohibit jurors from making inquiries about the accused, or any other matters relevant to the trial, but would not prohibit a juror from making an inquiry of the court, or of another member of the jury, in the proper exercise of his or her functions as a juror nor would it prevent a juror from making an inquiry authorised by the court. It would also provide that anything done by a juror in contravention of a direction given to the jury by the judge would not be a proper exercise by the juror of his or her functions as a juror. In this offence, "making an inquiry" would be defined to include: asking a question of any person, conducting any research, for example, by searching an electronic database for information (such as by using the internet), viewing or inspecting any place or object, conducting an experiment or causing someone else to make an inquiry. These offences would be without prejudice to other offences involving the administration of justice, notably contempt of court and perverting the course of justice, and without prejudice to the recommendation in paragraph 11.18 of this Report concerning jury research.

8.30 *The Commission recommends the development of an agreed protocol on prosecutions for the various offences provided for in the legislation on jury service. The Commission also recommends that, to complement this, the legislation on jury service should provide that a fixed charge notice may also be issued in respect of any offence provided for under that legislation.*

CHAPTER 9 JUROR COMPENSATION AND EXPENSES

A Introduction

9.01 As noted in Chapter 1, jury service is correctly described as a civic duty rather than a right. Nonetheless, given the critical function served by juries in the justice system, it is important that jurors should be encouraged to perform this civic duty and that any disadvantage should be minimised as far as possible. In Chapter 2 of the Report, the Commission explored the extent to which the greater use of technology could assist in this. In this Chapter, the Commission examines to what juror remuneration and expenses could assist in supporting and encouraging jury service. In Part B the Commission examines the current position in the *Juries Act 1976* and the position in other jurisdictions. In Part C the Commission reviews the provisional recommendations made in the Consultation Paper, the views expressed during the consultation process and then its final recommendations on this aspect of jury service.

B Current Position in Ireland and Comparative Approaches

(1) *Juror compensation in the Juries Act 1976*

9.02 The Committee on Court Practice and Procedure's 1965 *Report on Jury Service* recommended that jurors should be "remunerated on a reasonable basis", that this should include any overnight accommodation certified by the trial judge, and that this cost should be borne by the State.¹ This recommendation, other than on overnight accommodation after jury deliberations begin, was not implemented in the *Juries Act 1976*. Instead, section 29 of the 1976 Act provides that when an employee or apprentice who is absent from his or her place of work in order to comply with a jury summons this absence is to be treated as if the person was at work. This ensures that the salary of the person called for jury service must be paid by the employer rather than by the State. Section 29 also provides that any provision in an employment contract or agreement which would have the effect of excluding or limiting the liability of an employer in respect of the payment of salary or wages during an absence for jury service is void.

9.03 The present system of remuneration has been criticised on the basis that requiring an employer to continue to pay a salary during the employee's absence places a burden on all employers. This is particularly the case for small businesses, which account for over 50% of employees in the State, that is, about 900,000 people. A small business is not only liable to pay the salary of an employee who is on jury service but may also sometimes be required to hire temporary staff cover. As discussed in Chapter 2, above, a county registrar has a discretion under section 9(2) of the *Juries Act 1976* to excuse from jury service for good cause and it has been suggested that persons who can establish that their employer would suffer significantly due to the absence of employees are regularly excused on this basis.²

9.04 The Commission also notes that section 29 of the 1976 Act deals with employees only, so that a self-employed person's income is not provided for when he or she is on jury service. Research in other jurisdictions suggests that small business owners and the self-employed often cite the financial hardship that jury service would cause in support of an application to be excused from jury service.³ While there is no comparable research in Ireland, the Commission understands from its discussions with interested parties that self-employed persons often ground applications for excusal from jury service on the

¹ Committee on Court Practice and Procedure *Second Interim Report on Jury Service* (Pr. 8328, 1965) at 14.

² Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 827.

³ See Law Reform Commission for New South Wales *Report on Jury Selection* (No.117, 2007) at 139 and New Zealand Law Commission *Report on Juries in Criminal Trials* (No.69, 2001) at 188.

basis of economic hardship, and that self-employed people are underrepresented on juries as a result. The self-employed number over 100,000 persons in Ireland, which is a significant proportion of the total available jury pool of 3 million adults.

9.05 The Commission notes that direct State provision for jury service is thus primarily confined to the provision of tea, coffee and biscuits in jury reception areas and jury rooms, lunches where required and overnight accommodation where necessary. As well as imposing a duty on employers to pay the salary of an employee who is on jury service, the State does not provide for the travel costs of a juror to or from a courthouse or any other out-of-pocket expenses such as parking fees.

(2) Comparative Approaches to Juror Expenses

9.06 Jurors in Northern Ireland are entitled to claim for loss of earnings or benefits and for expenses as a result of attendance for jury service.⁴ A juror is entitled to a travel allowance for public transport or for the use their private vehicle. This also covers taxi costs where prior approval has been given to by the Juries Officer. Payments for parking fees are available where they have been reasonably incurred. A juror is also entitled to a meal allowance where a meal is not provided by the Courts Service.

9.07 In England and Wales there is provision for the payment of allowances to jurors and for the payment of travel expenses and subsistence.⁵ Jurors are also permitted to claim for any financial loss suffered as a direct result of jury service: this will cover loss of earnings or benefits, fees paid to carers or child minders, or other payments which have been solely due to jury service. Employers are not obliged to pay compensation, and where they choose not to, the state bears the burden of the cost.

9.08 In Scotland jurors are entitled to payment in respect of loss of earnings or benefits, travel,⁶ subsistence,⁷ child-minding/babysitting expenses and some other expenses incurred as a result of jury service.⁸ The entitlement for loss of earnings or benefits is for the period of jury service and where the employer does not pay the juror's wages or where a benefit is withdrawn and the juror suffers financial loss. As in England and Wales, employers are not under any obligation to pay compensation. This is particularly relevant to the self-employed as they may be forced to hire locum cover.

9.09 In the Australian state of Victoria jurors are entitled to allowances for attendance and travel.⁹ A daily allowance (regardless of whether the juror has actually served or not) is payable for the first 6 days. In New South Wales, the daily attendance allowance payable to jurors varies according to the length of the trial.¹⁰ This payment is made to all jurors at the same rate regardless of their employment status.¹¹

9.10 In New Zealand jurors receive a flat rate payment for jury service. Jurors are also paid for their travel expenses on public transport. There is increased payment for jurors in exceptional circumstances. Jurors are also entitled to claim for the actual and reasonable costs of childcare incurred.¹² The New Zealand Law Commission examined the issue of juror payment in its review of the jury system.¹³ The Commission recommended that jurors should continue to be paid at a flat rate but that the registrar should have the discretion to increase the payment to cover or contribute to the actual loss.¹⁴ In addition,

⁴ *Juries (Northern Ireland) Order 1996 and Juries Regulations (Northern Ireland) 1996.*

⁵ *Juries Act 1974* as amended.

⁶ This covers the cost of travelling from home or work to the court for jury service.

⁷ This covers meals and other out of pocket expenses incurred.

⁸ *Juries Act 1949* as amended.

⁹ *Juries Act 2000.*

¹⁰ *Jury Regulation 2004.*

¹¹ This payment is treated as income for tax and social security purposes.

¹² *Jury Rules 1990.*

¹³ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001).

¹⁴ *Ibid* at 190.

the Commission recommended the introduction of a criminal offence to cover a situation where an employer terminates or threatens to terminate the employment of an employee because of jury duty.

9.11 In the United States, federal courts provide payment for jury service in respect of both grand juries and petit juries.¹⁵ Jurors sitting on federal cases are paid a flat daily rate for jury service.¹⁶ In most courts, jurors are also reimbursed for reasonable transportation expenses and parking fees. However, there is no provision requiring employers to pay their employees for their time spent on jury service. All States in the US have passed laws that protect employees from discharge as a result of absence for attending jury service. In addition, a number of states have introduced laws that provide a daily allowance for jury service.¹⁷ These limit the amount of time for which an employee must be paid. They also restrict the requirement to full time and/or public sector employees. Most of these laws permit an employer to deduct the employee's daily juror payment against their wages. In 2003, the American Legislative Exchange Council (ALEC)¹⁸ developed a model *Jury Patriotism Act* intended to ease the financial loss experienced by jurors, particularly those who serve on long trials and it is aimed at supporting the available pool of jurors. One of the provisions of the *Jury Patriotism Act* is the creation of a court-administered Lengthy Trial Fund, which is supported by revenue from court filing fees and jurors can apply for compensation for lost wages. At least 14 states have enacted a version of the *Jury Patriotism Act* that includes the Lengthy Trial Fund.¹⁹

C Consultation Paper Recommendations, Submissions and Final Recommendations

9.12 In the Consultation Paper the Commission provisionally recommended that there should not be a system in which jurors are paid by the State for their services,²⁰ and that the current system under section 29 of the 1976 Act of payment for jury service by employers should be retained.²¹ The Commission invited submissions on whether a limited form of expenses should be paid to jurors to cover costs directly incurred by virtue of their participation in the jury system.²²

9.13 The Consultation Paper noted the possibility that tax credits for self-employed jurors could be used to alleviate the financial burden endured by those individuals and invited submissions on this point.²³ Submissions were also invited on the possibility of using insurance as a means of protecting employers and the self-employed from losses incurred: insurance policies of this type would pay salaries or wages for the time that a policyholder is off work while on jury service.²⁴

9.14 The submissions received by the Commission noted the importance of a system of compensation for jury service. A number of submissions emphasised the challenges posed to small businesses and the self-employed by jury service and suggested that the only just solution would be for the State to pay juror compensation. Others suggested that the financial burden of jury service should not be placed on employers generally as it is essentially a function performed by their employees that benefits the justice system and, as such, the costs should be borne by the State. It was generally agreed that incurring of expenses by jurors was undesirable, particularly if the State is interested in improving the

¹⁵ Title 28, section 1871 of the United States Code.

¹⁶ Employees of the federal government are paid their regular salary in lieu of this fee.

¹⁷ Alabama, Arkansas, Colorado, Connecticut, Georgia, Louisiana, Massachusetts, Nebraska, New Jersey, New York, Ohio, Tennessee and Wisconsin and the District of Columbia.

¹⁸ See www.alec.org.

¹⁹ Alabama, Arizona, Colorado, Indiana, Louisiana, Maryland, Mississippi, Missouri, New Mexico, Ohio, Oklahoma, Texas, Utah and Vermont. See Garcia "A Greater Good: Jury Duty, Payment and Your Job" *The Washington Post*, 7 June 2007, available at www.washingtonpost.com.

²⁰ Consultation Paper at paragraph 7.37.

²¹ *Ibid* at paragraph 7.38.

²² *Ibid* at paragraph 7.39.

²³ *Ibid* at paragraphs 7.11 to 7.15.

²⁴ *Ibid* at paragraphs 7.13 to 7.16.

public perception of the duty. Consultees differed on whether the implementation of a system of expenses should be flat rate or vouched.

9.15 The Commission recognises the argument that jury service benefits the justice system, and as such at least some costs should be borne by the State. However, the introduction of a system of payment by the State for jury service would not be consistent with the concept that jury service is a civic duty rather than a right, any more than payment for voting would be acceptable. The Commission considers that a secondary factor is that such a system would require significant additional funding which the Commission recognises would be difficult to justify in the current economic climate. It would also involve the creation, delivery and management of a complex system that would have to take account of the many different circumstances of persons selected for jury service.

9.16 The Commission nonetheless recognises the annoyance, and sometimes hardship, that even minor additional expenses can cause to persons who are called for jury service. The Commission has therefore concluded that a limited system should be introduced to cover the cost of transport and other incidentals involved in jury service. This could be achieved by setting a modest flat rate daily payment, which could be administered without re requirement of significant additional administrative costs for the Courts Service which currently administers a lunch voucher system for jurors. The Commission does not consider that flat rate payments would present a significant financial burden to the State and that it would represent a modest encouragement to wider participation in the jury process.

9.17 The Commission accepts that this recommended modest daily payment is unlikely to offset the financial burden placed on certain persons, notably small businesses and the self-employed, who are prepared to take up jury service. The Commission therefore recommends that consideration be given by the Government (notably, the Department of Finance, the Department of Jobs, Enterprise and Innovation, and the Department of Justice and Equality) as to what other means could be used to alleviate the financial burden that jury service involves for small businesses and self-employed persons, including the use of tax credits and insurance.

9.18 *The Commission recommends the introduction of a modest flat rate daily payment to cover the cost of transport and other incidentals involved in jury service. The Commission also recommends that consideration be given by the Government (notably, the Department of Finance, the Department of Jobs, Enterprise and Innovation, and the Department of Justice and Equality) as to what other means could be used to alleviate the financial burden that jury service involves for small businesses and self-employed persons, including the use of tax credits and insurance.*

CHAPTER 10 LENGTHY TRIALS AND JUROR COMPREHENSION

A Introduction

10.01 In this Chapter the Commission examines the challenges posed for jurors in complex or lengthy trials where they are presented with information such as DNA evidence in a murder trial or financial information in a fraud trial. Allied to the complexity of the information presented is that such trials may also extend to months rather than days or weeks. In Part B, the Commission examines whether non-jury trials or special juries should be used in cases of complexity or in lengthy trials and concludes that before considering these and thereby creating another exception to the general right in Article 38.5 of the Constitution to jury trial, other procedural solutions should first be considered. In Part C, therefore, the Commission discusses three procedural alternatives, namely, the selection of more than 12 jurors, the use of assessors and the provision of specific information in written form to assist juror comprehension. In this respect the Chapter addresses, in particular, the principle discussed in Chapter 1 that in order to ensure the right to a fair trial, jurors should have certain minimum standards of personal capacity and competence, which may require reasonable support and accommodation.

B Non-Jury Trials and Special Juries

10.02 The increasing length and complexity of some jury trials has been the subject of a number of reviews in Ireland and in other jurisdictions. The earliest such reviews tended to focus on difficulties that had arisen in complex fraud trials, especially in corporate fraud cases, and to propose reforms of both substantive law and procedural law in order to ensure that such cases could be presented and considered in court in an effective and efficient manner. More recent reviews have examined to what extent such reforms could be applied more generally. These reviews examined a wide range of matters that are outside the scope of this project, such as reform of pre-trial procedures and the relevant substantive law, and in this chapter the Commission confines its analysis to the issues that affect jury service.

10.03 One of the first such reviews in a common law jurisdiction was the 1986 English *Report of the Fraud Trials Committee*¹ (the Roskill Committee) which examined to what extent reform of the substantive and procedural law on fraud could improve the fairness of fraud trials. This arose against the background of the collapse of lengthy fraud trials, especially those concerning complex corporate fraud. The Roskill Committee concluded that provision should be made for the trial of complex fraud cases other than with a conventional jury of 12 persons. It recommended that consideration be given to all or any of the following: special juries that would comprise specialist experts such as accountants; a single judge sitting with a jury to assist on key issues; a judge or panel of judges sitting with expert assessors; or a fraud tribunal. In 1998, the English Home Office issued a consultation document² which also suggested that these options be considered.

10.04 In 2001, the Auld Report reviewed this matter again and noted that there are strong arguments to be made both for and against use of the current jury system to try complex fraud cases.³ The arguments in favour include the following: defendants have a general right to a jury trial; the random selection of juries ensure their fairness and independence; juries are best equipped to assess the reliability and credibility of witnesses; there is no evidence to suggest that jurors are not able to tolerate long and complex cases; and there is value in encouraging the parties to simplify the evidence for the

¹ *Report of the Fraud Trials Committee* (1986). The Committee was chaired by Lord Roskill.

² *Juries in Serious Fraud Trials* (Home Office Consultation Document, 1998).

³ *Auld Review of the Criminal Courts in England and Wales* (2001) at 202-204.

jury's sake. Arguments against include the following: there are obvious comprehension difficulties in complex cases; the length of such trials is an unreasonable imposition on jurors; and juries on these cases are more likely to be unrepresentative, as professionals will be more likely to be excused; specialist adjudicators would mean that the trial would be more expedient; a specialist tribunal or panel would give rise to greater openness, since the decision would be reasoned and appealable; and complex cases are extremely costly to the State.

10.05 Having considered these arguments, the 2001 Auld Report recommended that a court should be empowered to direct trial with a judge and jury or with a judge and lay members, and that where the defendant is deprived of jury trial against his or her wishes, there should be an option for trial by a tribunal comprised in part of persons with appropriate expertise.⁴ The Auld Report also recommended that it should be open for the defendant to opt for trial with a judge alone. Provision for such non-jury trials was enacted in England in section 43 of the *Criminal Justice Act 2003*, which provided for applications by the prosecution for certain fraud cases to be conducted without a jury. The then UK Government stated that before section 43 of the 2003 Act would be brought into force separate specific legislation would also be introduced. This was done in the form of the *Fraud (Trials Without A Jury) Bill 2006*, but this met with considerable parliamentary opposition in particular in the House of Lords, as well as external opposition, and it was not enacted. The Commission notes that section 43 of the 2003 Act was never brought into force and it was repealed by section 113 of the *Protection of Freedoms Act 2012*.⁵

10.06 In Ireland, the 1992 *Report of the Government Advisory Committee on Fraud*⁶ was influenced by the Roskill Committee's general approach to reform of the substantive law in this area, but it concluded that the replacement of the ordinary jury with a special jury would conflict with the requirement set out by the Supreme Court in *de Burca v Attorney General*⁷ that the jury pool and jury panels be broadly representative of the community.⁸ In 2011 the then Director of Public Prosecutions echoed the recommendations made by the Roskill Committee and by the Auld Review that consideration be given to trying major commercial criminal cases using specially-appointed lay judges, or using jurors who had training in accountancy and finance, in place of the ordinary jury of 12 people.⁹

10.07 The concept that the jury pool be representative is also one of the key principles set out in Chapter 1, above. The Commission has already discussed in Chapter 7 of this Report the use of non-jury trials to address the risk of jury tampering in trials arising from organised crime as an exception to the general right to jury trial in Article 38.5 of the Constitution. This is permissible because Article 38.3.1^o of the Constitution provides that non-jury special criminal courts may be established for the trial of offences in cases where it is determined that jury trial would be inadequate to secure the effective administration of justice, and the preservation of public peace and order. Since fraud trials or other comparable lengthy trials are not likely in general to give rise to the circumstances envisaged in Article 38.3.1^o the Commission agrees with the analysis in the 1992 *Report of the Government Advisory Committee on Fraud* that, in the absence of a constitutional amendment, it would not be permissible to provide for non-jury trials in such instances.

10.08 During the Commission's consultation with interested parties leading to the preparation of this Report, it was acknowledged that a heavy burden may arise for jurors in a lengthy trial in which they are required to understand complex evidence and to devote a large period of time to the civic duty involved in jury service in such a case. Consultees also considered, however, that the use of non-jury trial was not desirable in principle, and that the use of special juries raised questions over the impartiality of persons chosen from a specific profession or area of expertise sitting in judgement over other members of their

⁴ Auld *Review of the Criminal Courts in England and Wales* (2001) at 207-208.

⁵ See also the related provisions in sections 44 to 50 of the 2003 Act, which provide for non-jury trials to deal with jury tampering, discussed at paragraphs 7.21-7.29, above.

⁶ *Report of the Government Advisory Committee on Fraud* (PI.9409, 1992).

⁷ [1976] IR 36: see the discussion in Chapter 1, above.

⁸ *Report of the Government Advisory Committee on Fraud* (PI.9409, 1992), at paragraphs 8.8-8.9.

⁹ *Sunday Business Post*, 24 October 2011.

profession. The Commission agrees that, in addition to the important issues of constitutional principle, it would be preferable to examine other possible solutions for complex or lengthy trials before giving further consideration to creating another exception to the general right in Article 38.5 of the Constitution to jury trial based on a pool that is broadly representative of the community. The Commission also notes that in the specific context of fraud trials, consultees pointed that a jury may be especially well placed to decide whether a defendant is guilty or not guilty because, even in a complex case, the question of whether a fraud has occurred may involve the exercise of judgement on the basis of the evidence presented. In Part C, the Commission turns to consider three procedural reforms that could assist in this respect: the use of more than 12 jurors for a lengthy trial, the use of assessors and the provision of documentation to juries.

10.09 *The Commission recommends that, before considering the use of non-jury trials or trials by special juries in lengthy or complex trials which would involve creating another exception to the general right in Article 38.5 of the Constitution to jury trial based on a pool that is broadly representative of the community, other procedural solutions to assist jury trials in such cases should first be considered.*

C Enlarged Juries in Lengthy Trials, Assessors and Provision of Documentation

(1) Enlarged juries and reserve jurors

10.10 In submissions received by the Commission after the publication of the Consultation Paper, and during the course of its further consultation with interested parties leading to the preparation of this Report, it was suggested that it would be appropriate to provide for the swearing of up to three extra jurors where it was clear that a trial would be one of considerable length. The Commission is aware that this has been considered in a number of reviews of jury systems in other common law jurisdictions and that legislation has been enacted to provide for extra jurors where juries ordinarily consist of 12 members.¹⁰

10.11 In those jurisdictions where provision is made for extra jurors, two types of legislative model are evident. The first type provides for the swearing of up to three “reserve jurors” who, if they are not ultimately needed by the end of the trial in order to replace one of the “core” 12 original jurors, are then discharged from jury service. The second type of legislative model provides for swearing of three “additional jurors” to form a “super jury” of 15 jurors at the beginning of the trial, and if more than 12 jurors remain at the end of the trial, a ballot is conducted to reduce the jury to 12 members. The key difference between these two legislative models is that “reserve jurors” are present in court during the entire trial and hear all the evidence presented they are positioned separately from the “core” jury of 12 and do not join the jury of 12 unless and until one or more of them replaces a discharged juror; by contrast, “additional members” are members of the “super jury” of 15 from the beginning, are positioned with the other members and remain members of jury unless and until they are discharged.

10.12 Australia has had provision for extra jurors for many years and the states and territories have adopted variations on the two models already discussed. In 2007, the Law Reform Commission for New South Wales reviewed these in its *Report on Jury Selection*,¹¹ in which it noted that the NSW *Jury Act 1977* was, at that time, the only Australian jurisdiction in which there was no provision whereby the danger that the number of jurors in a particular trial might drop below an acceptable minimum number could be met by allowing for the swearing of more than 12 jurors. The 2007 Report noted that the Northern Territory, Queensland and Tasmania had adopted the first legislative model discussed above, which provided for up to two or three “reserve” jurors who, as already noted, if not used to replace a discharged juror, would themselves be discharged once the jury commenced deliberations. The 2007 Report also noted that, by contrast, the Australian Capital Territory, South Australia, Victoria and Western Australia had adopted the second model, which provided for the swearing of between 3 and 6 “additional” jurors. Again, as already noted, if more than 12 jurors remained when the jury retired to deliberate, a ballot would be conducted to reduce the jury to 12 members.

¹⁰ See Vidmar (ed) *World Jury Systems* (Oxford University Press, 2000).

¹¹ Law Reform Commission for New South Wales *Report on Jury Selection* (No.117, 2007).

10.13 The 2007 Report went on to note that the absence of any provision for additional or reserve jurors in New South Wales had recently given rise to concern and that the New South Wales Commission itself had received a number of submissions on the topic. This reflects similar concerns expressed in the context of the preparation of this Report. In its 2007 Report, the New South Wales Commission concluded that provision should be made to empower judges to empanel up to three additional jurors where the trial is estimated to exceed three months in length and it expressed a strong preference for the second legislative model discussed above, namely the empanelment of additional, rather than reserve, jurors. It also recommended that, where additional jurors have been empanelled and more than 12 jurors remain when the jury is about to retire to consider its verdict, the additional jurors should be balloted out.

10.14 The 2007 Report explained why it favoured the second model of “additional jurors” over the first model of “reserve jurors.” The New South Wales Law Reform Commission noted that while “reserve jurors” were expected to participate fully as jurors in the trial up to the time of deliberation, they would be identified as reserve jurors from the outset. Because of this, the New South Wales Commission considered that they might, as a result, “regard themselves as having second-class standing and, therefore, fail to give the matter their fullest attention.” By contrast, it noted that the second model of using additional jurors who formed an integral part of the enlarged jury of 15 from the beginning did not share this problem and was, in its view, “clearly the preferred model.” The 2007 Report noted that this was confirmed by the experience of Western Australia, where the *WA Juries Amendment Act 2003* had repealed a reserve juror system and replaced it with an additional juror system.

10.15 The 2007 Report acknowledged that the additional juror system carried the risk of some disappointment for any jurors that might be balloted out to reduce the jury to 12 and that the dynamics of the remainder of the panel might also be disrupted. To address this risk, the 2007 Report noted that the trial judge would provide a full explanation of the system of additional jurors to the jury at the outset of the trial, so that all the members of the jury panel would be aware of what might happen in respect of membership of the jury panel and of why it would happen. The recommendations in the 2007 Report were implemented in section 19 of the *NSW Jury Act 1977*, as inserted by the *NSW Jury Amendment Act 2007*.

10.16 Having considered this matter, the Commission agrees with the submissions received, supported by the further discussions with interested parties that the provision of extra jurors is a suitable method of ensuring that lengthy trials can continue to finality. The Commission also notes that this approach is consistent with the requirement set out by the Supreme Court in *de Burca v Attorney General*¹² that the jury pool and jury panels be broadly representative of the community,¹³ one of the key principles discussed in Chapter 1. The Commission does not minimise the reality that swearing extra jurors involves additional burdens on those who are prepared to be involved in a trial that is predicted to be lengthy. Nonetheless it considers that the jury selection process, which may require the need to ballot a greater than usual number of potential jurors, will result in a sufficient number of willing jurors and which allows for the risk of some jury members being discharged without falling below the minimum number necessary for a valid verdict. As to the model to be adopted, the Commission acknowledges the disadvantages described above of the concept of reserve members and has concluded that the model of additional jurors who would form a larger jury of 15 members is to be preferred.

10.17 *The Commission recommends that a court should be empowered to empanel up to three additional jurors where the judge estimates that the trial will take in excess of three months. The Commission also recommends that, where additional jurors have been empanelled and more than 12 jurors remain when the jury is about to retire to consider its verdict, the additional jurors shall be balloted out and then discharged from jury service.*

(2) Provision of documentation to juries

10.18 The reviews in Ireland and in other jurisdictions that have examined complex and lengthy trials have also invariably concluded that juror comprehension of complex information could be significantly improved by providing aids such as glossaries and written summaries, and using visual aids to present

¹² [1976] IR 36: see the discussion in Chapter 1, above.

¹³ *Report of the Government Advisory Committee on Fraud* (PI.9409, 1992) at paragraphs 8.8-8.9.

the information. In 1986 the English Roskill Committee¹⁴ recommended that a variety of written documents and visual aids should be used in such cases. The Roskill Committee recommended that these should include:¹⁵ (1) the prosecution's case statement and reply by the defence (these refer to new pre-trial preparatory arrangements which the Committee recommended and which were later implemented); (2) any charts prepared by the prosecution summarising essential figures and explaining how the alleged fraud was carried out; (3) any charts prepared by the defence; (4) written statements of expert witnesses; (5) short statements by the prosecution or defence of what they consider the principal issues in the case, which could be handed to the jury at the conclusion of the evidence. The Committee also recommended that visual aids such as overhead projectors and computers should be available in court to assist jurors.¹⁶ This aspect of the Roskill Committee's analysis has been adopted in comparable reviews of the law on theft and fraud and, indeed, more widely for jury trial generally.

10.19 The views in the Roskill Committee on this issue were adopted by the Commission in its 1992 *Report on the Law Relating to Dishonesty*¹⁷ in which (as well as recommending wide-ranging reform of the substantive law) it recommended that provision should be made by which a jury could be presented with advisory expert evidence from an accountant that would summarise in a form likely to be understood by the jury the type of financial transactions at issue in the trial in question. It also recommended that evidential aids such as overhead projectors and computers should be used to assist jurors to understand complicated issues "in fraud trials or in all criminal trials." Also in 1992, the *Report of the Government Advisory Committee on Fraud*¹⁸ was influenced by the Roskill Committee's approach to reform of the substantive law in this area. As to the procedural matters of relevance to this project, it also reflected the Roskill Committee's view on the provision of documents and recommended that the trial judge should be empowered to provide the jury in a fraud trial with the following to assist their deliberations: (1) the Committee's proposed pre-trial case statement and the defence response (this proposal of the Committee concerning pre-trial procedures has not been implemented);¹⁹ (2) any document admitted in evidence; (3) any statement of facts; (4) the opening and closing speeches of counsel; (5) any graphics, charts or other summaries of evidence; (6) transcripts of evidence; (7) the trial judge's summing up; and (8) any other document that the trial judge thinks fit.²⁰

10.20 The Committee on Court Practice and Procedure was subsequently asked to examine items (2), (4), (6) and (7) listed in the *Report of the Government Advisory Committee on Fraud* and in its 1997 Report *The Provision of Documentation to Juries in Serious Fraud Trials*²¹ it recommended that the trial judge should be given a discretionary power to provide each of these documents to a jury. The Report provided a helpful discussion on each of the documents. As to (2), any document admitted in evidence, the Committee noted that the supply of any such document was already covered by existing practice at that time because it would have been an exhibit at the trial and that when a jury retired to consider their verdict they are given all exhibits. As to (4), the opening and closing speeches of counsel, the Committee noted that their provision would involve a departure from then existing practice and that while a trial judge would not often consider this necessary it might be useful at the end of a long trial. As to (6), transcripts of evidence, the Committee considered it was important that a jury was not asked to assimilate too many documents so that it was unlikely a trial judge would wish to supply a jury with the entire transcript, but also considered that it was right that a trial judge should have the power to make specific parts of a

¹⁴ *Report of the Fraud Trials Committee* (1986).

¹⁵ *Ibid* at paragraphs 9.9-9.15.

¹⁶ *Ibid* at paragraphs 9.19-9.25.

¹⁷ *Report on the Law Relating to Dishonesty* (LRC 43-1992) at paragraphs 39.28-39.31.

¹⁸ *Report of the Government Advisory Committee on Fraud* (Pl.9409, 1992).

¹⁹ As already noted, the question of reform of pre-trial procedures in criminal trials on indictment is outside the scope of this project and requires separate consideration.

²⁰ *Report of the Government Advisory Committee on Fraud* (Pl.9409, 1992) at paragraph 8.16.

²¹ 25th Interim Report of the Committee on Court Practice and Procedure *The Provision of Documentation to Juries in Serious Fraud Trials* (1997).

transcript available. The Committee stated that where a jury asks to be reminded of the evidence of a particular witness, the provision of the relevant part of the transcript would be preferable to the traditional practice of the judge reading his or her notes of the evidence to the jury. As to (7), the judge's summing up, the Committee stated that it was "very much in favour of this recommendation" and that "it could be particularly helpful for the jury to have, for example, the part of the judge's charge explaining the ingredients of the offence, or the onus of proof" and it also stated that the judge should have the power to supply the jury with the entire charge if that appeared to be the correct course in the circumstances.²² While the Report considered that it was unlikely that the provision of these documents required legislative change, it recommended that this be done in order to specify the changes being made to previous practice. The Committee also considered that "the recommendations could be applied to indictments in general" but that it was "unlikely that they would be availed of except in trials of considerable length."²³

10.21 Subsequently, the *Criminal Justice (Theft and Fraud Offences) Act 2001* implemented the recommendations on the reform of substantive law on dishonesty and fraud in the Commission's 1992 *Report on the Law Relating to Dishonesty* and in the 1992 *Report of the Government Advisory Committee on Fraud*. As to the provision of documents to juries, section 57 of the 2001 Act sets out a list of documents that combines those referred to in both the 1992 Reports discussed above and this is not confined to the four types of documents which the Committee on Court Practice and Procedure was asked to examine in its 1997 Report. Thus, section 57(1) of the 2001 Act provides that in a trial on indictment of an offence under the 2001 Act itself, the trial judge may order that copies of any or all of the following documents shall be given to the jury in any form that the judge considers appropriate: (1) any document admitted in evidence at the trial, (2) the transcript of the opening speeches of counsel, (3) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial, (4) the transcript of the whole or any part of the evidence given at the trial, (5) the transcript of the closing speeches of counsel, (6) the transcript of the trial judge's charge to the jury, and (7) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, an affidavit by an accountant summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offence.

10.22 Section 57(2) of the 2001 Act provides that if the prosecutor proposes to apply to the trial judge for an order that a document that comes within category (7) in section 57(1) is to be given to the jury, the prosecutor must give a copy of the document to the accused in advance of the trial and, on the hearing of the application, the trial judge must take into account any representations made by or on behalf of the accused in relation to it. Section 57(3) of the 2001 Act provides that where the trial judge has made an order that an affidavit of an accountant is to be given to the jury under section 57(1), the accountant concerned: (a) shall be summoned by the prosecutor to attend at the trial as an expert witness, and (b) may be required by the trial judge, in an appropriate case, to give evidence in regard to any relevant accounting procedures or principles. Section 57 of the 2001 Act was brought into force on 1 August 2011.²⁴

10.23 Similarly, section 10 of the *Competition Act 2002* puts in place comparable measures to assist juries in considering complex financial and economic evidence during trials for offences under the 2002 Act. It provides that the trial judge may provide any of the following to the jury: (1) any document admitted in evidence at the trial, (2) the transcript of the opening speeches of counsel, (3) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial, (4) the transcript of the whole or any part of the evidence given at the trial, (5) the transcript of the closing speeches of counsel and (6) the transcript of the trial judge's charge to the jury.²⁵ Section 10 of the 2002 Act was brought into force on 3 October 2011.²⁶

²² 25th Interim Report of the Committee on Court Practice and Procedure *The Provision of Documentation to Juries in Serious Fraud Trials* (1997) at paragraph 6.

²³ *Ibid* at paragraph 7.

²⁴ See *Criminal Justice (Theft and Fraud Offences) Act 2001 (Commencement) Order 2011* (SI No.394 of 2011).

²⁵ Section 10 of the *Competition Bill 2001* had been modelled exactly on section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* and had also provided for the provision of documents coming within category

10.24 The Commission notes that the 2010 English study of juror decision-making carried out for the UK Ministry of Justice by Cheryl Thomas²⁷ discussed the question of juror comprehension. The study involved 797 jurors at three court venues who all saw the same simulated trial and heard exactly the same judicial directions on the law. The study found that there was not a consistent view among jurors at all courts about their ability to understand judicial directions. Over two thirds (69%) of jurors at two venues surveyed felt they were able to understand the directions, while just over half (51%) at the third venue felt the directions were difficult to understand. The study also examined jurors' actual comprehension of the judge's legal directions. While over half of the jurors perceived the judge's directions as easy to understand, only a minority (31%) actually understood the directions fully in the legal terms used by the judge. The study noted that, in 2008 the English Lord Chief Justice, Lord Judge, had expressed concern that the younger "internet generation" may find the oral presentation of information in jury trials unfamiliar and that this could ultimately have a negative impact on jurors' ability to follow information presented orally at trial. The study's findings were, however, that younger jurors were better able than older jurors to comprehend the legal instructions, with comprehension of directions on the law declining as the age of the juror increased. The study concluded that this was, perhaps, not surprising as studies of memory and recall of oral information showed that younger people are best able to recall oral information even when presented over relatively short periods of time and that young jurors are also most likely to have recent experience of formal education, where oral learning is routine.

10.25 The study also found that a written summary of the judge's directions on the law given to jurors at the time of the judge's oral instructions improved juror comprehension of the law and that the proportion of jurors who fully understood the legal questions in the case in the terms used by the judge increased from 31% to 48% with written instructions. The study recommended that an assessment should also be made of how many judges already use written instructions, when and how often and that further research should be conducted as a matter of priority to identify the most effective tools for increasing juror comprehension of judicial directions.²⁸

10.26 The Commission considers that these developments indicate that there is a general recognition that jurors should have available to them specific arrangements to manage the detailed documentation that is likely to arise in complex frauds trials and comparable complex competition cases. The Commission sees no reason to restrict these arrangements to these particular instances of jury trials, and agrees with the view of the Committee on Court Practice and Procedure in its 1997 Report *The Provision of Documentation to Juries in Serious Fraud Trials*,²⁹ discussed above, that the provision of such information could be applied to trials on indictments in general. The Commission acknowledges the need for further analysis of the extent to which such arrangements prove effective in practice but notes that the 2010 English study by Dr Cheryl Thomas³⁰ suggests that written information greatly assists in improving juror comprehension. The Commission discusses the general question of juror research in Chapter 11, below.

(7) in section 57(1) of the 2001 Act. This was removed during Committee Stage in Dáil Éireann, though without discussion: see Dáil Éireann, Committee Stage, *Competition Bill 2001* (20 March 2002), available at <http://debates.oireachtas.ie/BUS/2002/03/20/00003.asp>. As a result, section 10 of the *Competition Act 2002* as enacted does not provide for such documents. This does not, in practice, create an enormous difference between the Acts because section 9 of the 2002 Act provides for the use of assessors: see the discussion below.

²⁶ See *Competition Act 2002 (Section 10) (Commencement) Order 2011* (SI No.491 of 2011).

²⁷ Thomas *Are Juries Fair?* UK Ministry of Justice Research Series 1/10 (2010), discussed in Chapter 8, above, in the context of jury misconduct and use of the internet.

²⁸ Thomas *Are Juries Fair?* UK Ministry of Justice Research Series 1/10 (2010).

²⁹ 25th Interim Report of the Committee on Court Practice and Procedure *The Provision of Documentation to Juries in Serious Fraud Trials* (1997).

³⁰ Thomas *Are Juries Fair?* UK Ministry of Justice Research Series 1/10 (2010), discussed in Chapter 8, above, in the context of jury misconduct and use of the internet.

10.27 *The Commission recommends that section 57 of the Criminal Justice (Theft and Fraud Offences) Act 2001, which concerns the provision of specified documentation to juries, should be extended to all trials on indictment.*

(3) Assessors

10.28 The court assessor, or adviser, has been used over the centuries by common law courts to provide specialist or expert experience, skill or knowledge, which the court might not ordinarily possess.³¹ Section 59 of the *Supreme Court of Judicature (Ireland) Act 1877* empowers the High Court and, on appeal, the Supreme Court, to appoint a specially qualified assessor, and the court may hear civil proceedings wholly or partly with the assistance of such an assessor. Order 36, rule 41 of the *Rules of the Superior Courts 1986* provides, in accordance with section 59 of the 1877 Act, that civil trials with assessors shall take place in such manner and upon such terms as the Court shall direct. The use of assessors originated in the admiralty courts and they remain available in such proceedings as well as in a number of other settings such as railway inquiries and merchant shipping inquiries. Their use in civil proceedings has been expressly approved in a number of Irish cases.³² The assessor sits with a judge during court proceedings in order to answer any questions which might be put by the judge on the subject on which the assessor has expertise.³³

10.29 More recently, provision has been made for assessors in both criminal and civil competition cases. The 2000 *Final Report of the Competition and Merger Review Group*³⁴ recommended that “greater consideration should be given to the use of court appointed assessors in the conduct of competition law cases (whether civil or criminal).” As a result, section 9(1) of the *Competition Act 2002* provides that in any proceedings under the 2002 Act, whether civil or criminal, the opinion of any witness who appears to the court to possess the appropriate qualifications or experience as respects the matter to which his or her evidence relates shall be admissible in evidence as regards any matter calling for expertise or special knowledge that is relevant to the proceedings. It also provides that such evidence is admissible in particular in connection with the following matters: (a) the effects that types of agreements, decisions or concerted practices may have, or that specific agreements, decisions or concerted practices have had, on competition in trade or (b) an explanation to the court of any relevant economic principles or the application of such principles in practice, where such an explanation would be of assistance to the judge “or, as the case may be, jury.” Section 9(2) of the 2002 Act provides that a court may, in the interests of justice, direct that such is not admissible in proceedings for an offence under section 6 or 7 of the 2002 Act or shall be admissible in such proceedings for specified purposes only. In *Competition Authority v O’Regan*³⁵ the High Court (Kearns J) appointed an assessor under Order 36, rule 41 of the *Rules of the Superior Courts 1986* (his judgment adding: “or alternatively under the court’s inherent jurisdiction”) in a civil enforcement case brought by the Competition Authority under section 14 of the *Competition Act 2002*. The judgment does not state why the High Court chose to refer to Order 36, rule 31 of the 1986 Rules (and to the court’s inherent jurisdiction) rather than by reference to the power to do so under section 9 of the 2002 Act.³⁶

³¹ Dickey “The Province and Function of Assessors in English Courts” (1970) 33 MLR 494.

³² See for example *The State (Polymark Ireland Ltd) v Labour Court* [1987] ILRM 357, approved in *Georgopoulos v Beaumont Hospital Board* [1994] ILRM 58,

³³ Dickey “The Province and Function of Assessors in English Courts” (1970) 33 MLR 494, at 501.

³⁴ *Final Report of the Competition and Merger Review Group* (2000), Recommendation 8, at 337. Available at www.djei.ie.

³⁵ [2004] IEHC 330, [2007] IESC 22, [2007] 4 IR 757.

³⁶ In addition, in High Court civil competition claims, Order 63B of the *Rules of the Superior Courts 1986* provides for the use of assessors, as opposed to expert witnesses, in civil competition cases. Order 63B was inserted into the 1986 Rules by the *Rules of the Superior Courts (Competition Proceedings) 2005* (SI No.130 of 2005). Order 63B, rule 23 has the heading “Assessors” and provides for the appointment “to assist the court in understanding or clarifying a matter, or evidence in relation to a matter, in respect of which that person (in this rule hereinafter called an “expert”) has skill and experience.” Although O.63B, rule 23, perhaps

10.30 The Commission notes that the provision of assessors in section 9 of the 2002 Act has the same general purpose as the provision under section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* of evidence by affidavit by an accountant summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offences under consideration. In this respect both provisions are of value for juries in trials where complex technical matters are involved and need explanation. The Commission has concluded that a trial judge should have the discretion to consider whether an assessor should be appointed to assist in more general terms and on an ongoing basis in the course of the trial. The trial judge would, of course, take into account in this respect that the cost of an assessor would be more likely to be greater than the cost associated with obtaining an affidavit from an expert.

10.31 *The Commission recommends that in a jury trial in criminal proceedings, the trial judge should be empowered to appoint an assessor to assist the court, including the jury, to address any difficulties associated with juror comprehension of complex evidence.*

confusingly, refers to such a person as an “expert” the person appointed is not an expert witness because he or she acts in the manner envisaged by section 59 of the *Supreme Court of Judicature (Ireland) Act 1877*. Thus, O.63B, rule 23(4) states: “Where the expert [assessor] provides advice or other information to the Court, the Court shall, where it considers it appropriate in the interests of justice, inform the parties of such advice or information and afford each of them an opportunity to make submissions in respect of it.” This would not be required if the person appointed acted as a witness.

CHAPTER 11 EMPIRICAL RESEARCH CONCERNING THE JURY PROCESS

A Introduction

11.01 In this Chapter, the Commission examines whether, and if so to what extent, provision should be made for empirical research into the functioning of the jury system. In Part B, the Commission examines the current position on the secrecy of jury deliberations in Ireland, which is one of the key principles discussed in Chapter 1. In Part C, the Commission discusses comparative approaches to this question, outlines the submissions received on the topic and then sets out its final recommendations.

B Current Position in Ireland

11.02 At common law, a court will not enquire into the manner in which a jury has conducted its deliberations. Jurors cannot be questioned, as individuals, or as a group, about how a verdict has been reached.¹ The rule is generally justified by the need for candour among jurors during deliberations. It also promotes the finality of proceedings.

11.03 Irish courts have repeatedly stressed the importance of the secrecy rule.² In *O'Callaghan v Attorney General*³ the Supreme Court again stressed the importance of the jury secrecy rule. The applicant had been convicted on the basis of a majority jury verdict in accordance with section 25 of the *Criminal Justice Act 1984*. In the Supreme Court he argued, among other things, that the right to a trial in due course of law, under Article 38 of the Constitution, required that jury verdicts be unanimous, and that to permit a majority verdict was to breach the confidentiality of the deliberations which was presupposed by Article 38.5. The Court rejected the challenge to the constitutionality of the majority verdict rule in section 25 of the 1984 Act but added:⁴

“The Court would wish to reiterate that the deliberations of a jury should always be regarded as completely confidential. The course of the deliberations of a jury should not be published after a trial... The Court wishes to reiterate how important it is for the preservation of the central position of jury trials in the constitutional scheme that the situation should be preserved.”

11.04 Nonetheless despite the apparent generality of this comment, and while exceptions to the secrecy rule are narrowly construed,⁵ a court, including an appeal court, may enquire into juror competence, extraneous influences⁶ or serious misconduct by the jury as a whole.⁷ The Commission has already discussed in Chapter 8, above, that the trial judge will specifically instruct jurors that they should communicate any instances of juror misconduct, whether arising from perceived bias or other inappropriate behaviour.

¹ Walsh *Criminal Procedure* (Round Hall, 2002) at 939.

² See for example *The People (Attorney General) v Longe* [1967] IR 369.

³ [1992] 2 IR 17.

⁴ *Ibid* at 26-27.

⁵ Walsh *Criminal Procedure* (Round Hall, 2002) at 858-859.

⁶ Where possible, the extraneous material or communication is brought to the judge's attention, and not the impact which it had on deliberations, in order to preserve insofar as possible the secrecy of the jury room. Walsh *Criminal Procedure* (Round Hall, 2002) at 862-864.

⁷ Walsh *Criminal Procedure* (Round Hall, 2002) at 859-860.

11.05 As a result of the general secrecy rule, very little is known about the juror deliberation process. Walsh has commented that:

“The jury is now unique in terms of being a crucially important decision-making institution within the public domain, while at the same time completely immune from research scrutiny... we still know relatively little about such important matters as the extent to which juries understand judicial instructions on the law, [and] how they analyse and weigh the evidence...”⁸

11.06 It has also been noted that “[o]ur official culture is one in which criminal justice policy is not informed by research, evidence and reasoned argument... in an age where transparency and accountability are lauded values, the secret decision-making of the jury can seem anachronistic.”⁹

11.07 The Commission’s 1991 *Consultation Paper on Contempt of Court*¹⁰ considered the secrecy of jury deliberations. The Commission noted that the case in favour of jury secrecy rested on the four principal arguments: the need of jurors for security and privacy,¹¹ the desirability of finality,¹² the need to preserve public confidence in the jury system,¹³ and the need to preserve the jury’s “dispensing power.”¹⁴ The 1991 Consultation Paper also noted three primary arguments against jury secrecy: it prevents the rectification of miscarriages of justice, freedom to disclose would be unlikely to have the profoundly detrimental effects envisaged by its opponents, and secrecy prevents valuable research which could result in improvements in the law.¹⁵ The Commission provisionally concluded therefore that a blanket prohibition on research on the jury would be unwise and that much could be learned from such research. The Commission also considered that some controls over such research would be necessary and that this would include the approval of the Chief Justice and the Presidents of the High Court, Circuit Court or District Court.¹⁶ The Commission’s subsequent 1994 *Report on Contempt of Court* confirmed this approach and noted that there had been “much support, in particular, for the view that disclosure is desirable in cases of suspected miscarriages of justice and for purposes of *bona fide* research.”¹⁷

C Consultation Paper View, Submissions and Final Recommendations

11.08 Consistent with the emphasis placed on jury secrecy under Irish law, the Consultation Paper recommended that legislation be introduced to make it a criminal offence for a juror to disclose matters discussed in the jury room.¹⁸ Submissions received by the Commission were in general agreement about the need to preserve the general secrecy of juror deliberations but there was also general agreement that empirical research into the jury system would be a welcome development provided it was carefully developed and managed and of high quality. It was suggested that an ethics committee in the proposed

⁸ Walsh *Criminal Procedure* (Round Hall, 2002) at 867.

⁹ Coen “Elephants in the Room: The Law Reform Commission Consultation Paper on Jury Service – Part I” (2010) *Irish Criminal Law Journal* 20(3) 75, at 75-76.

¹⁰ *Consultation Paper on Contempt of Court* (LRC CP 4-1991).

¹¹ *Ibid* at 364.

¹² *Ibid* at 365.

¹³ *Ibid* at 364-366.

¹⁴ That is, the power of the jury to acquit a defendant whose conduct unquestionably falls within the definition of the offence as a result of a dislike of or disrespect for the law. The *Consultation Paper on Contempt of Court* (LRC CP 4-1991) pointed out that if deliberations were no longer to remain secret juries would lack the autonomy to rectify injustices according to the perception of common people, citing *R v Ponting* [1985] Crim LR 318.

¹⁵ *Consultation Paper on Contempt of Court* (LRC CP 4-1991) at 369.

¹⁶ *Ibid* at 370-371.

¹⁷ *Report on Contempt of Court* (LRC 46-1994) at 51.

¹⁸ Consultation Paper at paragraph 8.69.

Judicial Council could sanction the authorisation of such research, based on the model used for the reports into *in camera* family law proceedings that had been prepared in accordance with the express authorisation to carry out such research enacted in section 30 of the *Civil Liability and Courts Act 2004*.

11.09 Some submissions referred to research in other jurisdictions which indicated that jurors did not always understand judicial directions and that the research could provide an insight into how complicated issues of law can best be communicated to the jury as part of the judge's directions. Other submissions also noted that research could provide an insight into the impact, if any, of jury composition and thus address various "myths" around jury decision-making, without breaching the essential secrecy of jury deliberation.

11.10 While research from other countries may be only of limited value, of particular note are recent studies from both New Zealand and England and Wales. A study by the Law Commission of New Zealand on the subject of juries in criminal trials,¹⁹ involved, among other things, questioning jurors before trial as to their knowledge, if any, of the case, observing the trial, interviewing the trial judge and questioning jurors after verdict on the adequacy and clarity of pre-trial information, their reactions to the trial process, the nature of and basis for their verdict and the impact of pre-trial and trial publicity. The research was then used by the Commission in arriving at its final recommendations.

11.11 In England and Wales, section 8 of the *Contempt of Court Act 1981* provides that it is a contempt of court "to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings." This was included in the 1981 Act following the dismissal of a contempt of court prosecution, *Attorney General for England and Wales v New Statesman and Nation Publishing Co Ltd*.²⁰ This arose following the publication by the *New Statesman* of a number of articles shortly after the conclusion of a high-profile criminal trial held in 1979, *R v Thorpe and Ors*. The defendants had been charged with conspiring to murder Mr Norman Scott. One of the defendants, Jeremy Thorpe, was an MP and a former leader of the English Liberal Party, and the case attracted enormous publicity. Mr Thorpe was acquitted by the jury, and the *New Statesman* then published articles on the case, one of which revealed that one of the prosecution witnesses had accepted money to appear in court and had been promised a bonus if there was a conviction. The article also stated that this fact had influenced the jurors in their deliberations and in their final decision to deliver a not guilty verdict. In the contempt prosecution, the Attorney General for England and Wales conceded that the article could not have interfered with the administration of justice and that the article itself actually showed that the jury had decided the case in a sensible and responsible manner. The English High Court held that "[a]lthough the mere disclosure of the secrets of the jury room was not necessarily a contempt of court, if such a disclosure or any other similar activity tended to imperil the finality of jury verdicts or to affect adversely the attitude of future jurors and the quality of their deliberations it was capable of being a contempt, and each case had to be judged on its facts." In the particular circumstances, the Court held that there was no evidence presented that the article would imperil the finality of jury verdicts or affect adversely the attitude of future jurors and the quality of their deliberations and it therefore dismissed the prosecution for contempt. Section 8 of the 1981 Act introduced a "strict liability" test that would probably result in a conviction were a case similar to the *New Statesman* case to be brought now. At the time of writing, the Law Commission for England and Wales is engaged in a review of contempt of court, which includes a review of whether section 8 of the 1981 Act should be amended to provide expressly for juror research.²¹ Without prejudice to any reform proposals that may emerge from this and despite the apparent strictness of section 8 of the 1981 Act, two jury research projects have been carried out in England by Dr Cheryl Thomas which have avoided the prohibition in section 8 by using an approach based on case simulation with real jurors, alongside a study of jury verdicts in real cases.

¹⁹ Law Commission of New Zealand *Juries in Criminal Trials* (Preliminary Paper 37, Vols. 1 and 2, November 1999) and (Report 69, February 2001, Chapter 14).

²⁰ [1981] QB 1.

²¹ Law Commission for England and Wales *Contempt of Court: A Consultation Paper* (Consultation Paper No 209, 2012), available at http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court.pdf.

11.12 The first study, the Jury Diversity Project, was published in 2007 and addressed the key issues of representativeness of the local community as summoned for jury service, and the representativeness of those actually serving as jurors, as well as the effect ethnicity had on jury decision-making.²² The research also considered the relationship between juror ethnicity and other factors such as gender, age, income, employment, religion, and language, with a view to assessing how these factors affect the performance on a jury, as well as the final decision. The Jury Diversity project identified a number of commonly held and deeply entrenched assumptions about jury service and found that most current thinking “is based on myth, not reality.” The key myths identified were that black and minority ethnic groups were under-represented, and that ethnic minorities were less likely to answer summonses, reflecting a reluctance to serve, that there is mass evasion of service by the general public, and finally, that the middle and upper classes managed to avoid service, leaving juries to consist mainly of retired and unemployed persons.

11.13 The second study, *Are Juries Fair?*, was published in 2010.²³ This has been discussed by the Commission above in Chapters 8 and 10, and provided useful insights into extraneous influences on juries such as media coverage, the prevalence of juror misconduct (notably the extent of internet searches), and the impact of jury directions and the provision of written materials on juror comprehension.

11.14 The Commission has also referred in this Report to a 2010 Northern Ireland study *Management of Jurors*.²⁴ This independent study of the management of jurors in Northern Ireland which included a questionnaire-based survey of jurors, made a number of recommendations to improve further the jury management system.

11.15 Some limited research of this type has been carried out in Ireland. In 2009, the Rape Crisis Network Ireland carried out a study of the legal process involved in rape incidents, including the composition of juries and their likelihood to convict.²⁵ In addition, as already noted, research has also been conducted into *in camera* family law proceedings as part of the Family Law Reporting Pilot Project under section 40(3) of the *Civil Liability and Courts Act 2004*, which ensures confidentiality by prohibiting the publication of any identifying information about the parties in a family law case.

11.16 The Commission accepts that while it is important to reinforce the general rule of jury secrecy it is also clear that it is not an absolute rule and that, as discussed in Chapter 8 on juror misconduct, the need for some form of communication as to misconduct in the jury room is required to prevent unfair trials and possible miscarriages of justice. In this respect the Commission considers that carefully managed empirical research into a number of aspects of the jury system would not breach of general jury secrecy rule. This might include the type of research already mentioned that has occurred in other jurisdictions, such as those carried out by Dr Cheryl Thomas in England in 2007 and 2010 on the representative nature of the jury and important issues related to the ability of jurors to understand, process and weigh evidence presented at trial. Similarly, the research conducted in Northern Ireland in 2010 on the general management of jurors appears to have been carefully constructed to avoid any breach of the juror secrecy rule or to risk breaching the law on contempt of court. In addition, the Commission has already suggested in Chapter 3 that research on the approach used in jury challenges would be of assistance to understanding this process and has recommended in Chapter 4 that specific research concerning juror capacity and competence is required to examine whether suitable supports and accommodations could be put in place that would be consistent with the right to a trial in due course of law.

²² Thomas *Diversity and Fairness in the Jury System* UK Ministry of Justice Research Series 2/07 (2007) (Jury Diversity Project), Chapter 1.

²³ Thomas *Are Juries Fair?* UK Ministry of Justice Research Series 1/10 (2010).

²⁴ *Management of Jurors: An inspection of the management of jurors by the Northern Ireland Courts Service* (Criminal Justice Inspection Northern Ireland, 2010), available at www.cjini.org, discussed at paragraph 2.35, above.

²⁵ See Rape Crisis Network Ireland *Rape and Justice in Ireland* (2009).

11.17 The Commission reiterates that the jury secrecy rule is an important component of the successful operation of the justice system, and the Commission also considers that well-managed research into matters such as jury representativeness, juror comprehension, juror management and juror capacity and competence would also assist in further enhancing the effectiveness of the court process. The Commission considers that this is consistent with the recommendations made in paragraph 8.29 of this Report that disclosure of jury deliberations should, in general, be an offence, which should be subject to providing that this does not preclude research of the kind detailed above.

11.18 *The Commission recommends that, without prejudice to the offences recommended in paragraph 8.29 concerning disclosure of matters discussed during jury deliberation, provision should be made in legislation for empirical research into matters such as jury representativeness, juror comprehension, juror management and juror capacity and competence, and that such research would be subject to appropriate safeguards to prevent disclosure of the deliberative process of a specific juror or jury and which would be subject to confidentiality requirements comparable to those in section 40(3) of the Civil Liability and Courts Act 2004.*

CHAPTER 12 SUMMARY OF RECOMMENDATIONS

The recommendations made by the Commission in this Report are as follows:

12.01 The Commission recommends that the register of electors should continue to be the source from which jury panels are drawn. The Commission notes that the proposed establishment of an Electoral Commission could further facilitate steps to ensure the accuracy of the register of electors. [paragraph 2.18]

12.02 The Commission commends the ongoing commitment of the Courts Service to enhance the efficiency of jury selection procedures through the use of ICT resources and through its proposal to establish a central Jury Management system, which has the potential of leading to a higher proportion of those summoned for jury service actually serving on a jury, to enhancing further the efficient and effective running of jury trials and to reducing the administrative costs of the jury selection process. [paragraph 2.40]

12.03 The Commission recommends that, in addition to the current position under which Irish citizens who are registered to vote as Dáil electors in a jury district are qualified and liable to serve on juries, the following persons should also be qualified and liable to serve: every citizen of the United Kingdom aged 18 years or upwards who is entered in a register of Dáil electors in a jury district; and every other person aged 18 years and upwards who is entered in a register of local government electors in a jury district. [paragraph 2.65]

12.04 The Commission also recommends that a non-Irish citizen referred to in paragraph 2.65 must, in order to be eligible for jury service, be ordinarily resident in the State for 5 years prior to being summoned for jury service. [paragraph 2.66]

12.05 The Commission recommends that the current law in the *Juries Act 1976* on challenges without cause shown (peremptory challenges) should be retained. The Commission also recommends that the courts should continue to provide clear and consistent guidance to the effect that the use of peremptory challenges does not involve any personal slight on a potential juror and that the Director of Public Prosecutions consider whether general guidance on challenges without cause shown would be suitable for inclusion in the Director's Guidelines for Prosecutors. [paragraph 3.38]

12.06 The Commission recommends that the current law in the *Juries Act 1976* on challenges for cause shown should be retained. The Commission also recommends that pre-trial juror questionnaires continue to be prohibited. [paragraph 3.62]

12.07 The Commission recommends that the current provisions of the *Juries 1976*, which provide that persons are ineligible to serve as jurors if they have an enduring impairment such that it is not practicable for them to perform the duties of a juror, should be replaced with a provision to the effect that a person is eligible for jury service unless the person's physical capacity, taking account of the provision of such reasonably practicable supports and accommodation that are consistent with the right to a trial in due course of law, is such that he or she could not perform the duties of a juror. [paragraph 4.41]

12.08 The Commission recommends that the application of this provision should not involve an individual assessment of capacity. The Commission also recommends that the provision should be supplemented by guidance which would remind jurors in general of the requirements of eligibility for jury service, which should be expressed in a manner that encourages those with any doubts as to their physical capacity to carry out the functions of a juror to identify themselves. In making this decision, the judge should apply the presumption of capacity as well as the requirement of juror competence that forms part of the right to a trial in due course of law. The guidance should also make it clear to jurors that it is both their entitlement and responsibility to inform the court where a question of capacity regarding another juror arises. The Commission also recommends that if there is a conflict between the

accommodation of a prospective juror in accordance with the 2006 UN Convention on the Rights of Persons With Disabilities and the right to a fair trial, the fairness of a trial must be given priority. The Commission recommends that where the judge considers that, even with reasonable and practicable accommodation, a juror will not be capable of carrying out their duties as a juror, the judge should excuse the prospective juror as ineligible to serve. The Commission also recommends that a physical disability that may require accommodation or support may constitute “good cause” for the purposes of an application for “excusal for cause.” [paragraph 4.42]

12.09 The Commission recommends that the *Disability Act 2005* should include express recognition for the provision of physical accessibility, such as wheelchair ramps and other reasonable accommodation such as induction loops, that make participation by persons with disabilities in a jury practicable and achievable. [paragraph 4.43]

12.10 The Commission recommends that it would be appropriate that, as to physical disability, the research on jury service recommended in paragraph 11.18 of this Report should include research into permissible and practicable supports and accommodation for this purpose, based on international best practice and experience. The Commission also recommends that, in the specific context of potential jurors with hearing or sight difficulties, a dedicated research project should be developed that takes full account of the ongoing development of best practice codes of conduct and standards for Irish sign language interpreters and CART operators, and that also has regard, where relevant, to the potential that the presence of a 13th person (or more) in the jury room may have an impact on the fairness of a trial. This research project would take into account developing codes, standards and practical experience from other jurisdictions, and would then determine whether it would be feasible to apply these in the context of the jury system in Ireland. [paragraph 4.44]

12.11 The Commission recommends that, as to mental health, the test for ineligibility in the *Juries Act 1976* should be reformulated to provide that a person is eligible for jury service unless, arising from the person’s ill health, he or she is resident in a hospital or other similar health care facility or is otherwise (with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law) unable to perform the duties of a juror. The Commission recommends that, as to decision-making capacity, the test for ineligibility in the *Juries Act 1976* should be reformulated to provide that a person is eligible for jury service unless his or her decision-making capacity, with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law, would be such that he or she could not perform the duties of a juror. [paragraph 4.59]

12.12 The Commission recommends that the application of this provision should not involve an individual assessment of capacity. The Commission also recommends that the provision should be supplemented by guidance which would remind jurors in general of the requirements of eligibility for jury service, which should be expressed in a manner that encourages those with any doubts, arising from their ill health or decision-making capacity, about being able to carry out the functions of a juror to identify themselves. In making this decision, the judge should apply the presumption of capacity as well as the requirement of juror competence that forms part of the right to a trial in due course of law. The guidance should also make it clear to jurors that it is both their entitlement and responsibility to inform the court where a question of capacity regarding another juror arises. The Commission also recommends that if there is a conflict between the accommodation of a prospective juror in accordance with the 2006 UN Convention on the Rights of Persons With Disabilities and the right to a fair trial, the fairness of a trial must be given priority. The Commission recommends that where the judge considers that, even with reasonable and practicable accommodation, a juror will not be capable of carrying out their duties as a juror arising from ill health or decision-making capacity, the judge should excuse the prospective juror as ineligible to serve. The Commission also recommends that ill health or decision-making capacity that may require accommodation or support may constitute “good cause” for the purposes of an application for “excusal for cause.” [paragraph 4.60]

12.13 The Commission recommends that it would be appropriate that the research on jury service recommended in paragraph 11.18 of this Report should include research into permissible and practicable supports and accommodation in connection with decision-making capacity, based on international best practice and experience. [paragraph 4.61]

12.14 The Commission recommends that, in order to be eligible to serve, a juror should be able to read, write, speak and understand English to the extent that it is practicable for him or her to carry out the functions of a juror. The Commission also recommends that this should not involve an individual assessment of capacity but that it should continue to be a matter that is considered by court officials, judges and practitioners using their knowledge and experience to discern indications of capacity or otherwise on a case-by-case basis. The Commission also recommends that these arrangements be supplemented by guidance which would remind jurors in general of the requirements of eligibility for jury service, which should be expressed in a manner that encourages those with any doubts as to their capacity to identify themselves. The guidance should also make it clear to jurors that it is both their entitlement and responsibility to inform the court where a question of capacity regarding another juror arises. [paragraph 4.88]

12.15 The Commission recommends that, as to reasonable accommodation in accordance with the 2006 UN Convention on the Rights of Persons With Disabilities concerning reading and linguistic understanding, any such arrangements must ensure that the trial process retains the fundamental attributes of a trial in due course of law. The Commission also recommends that it would be appropriate that the research on jury service recommended in paragraph 11.18 of this Report should include research into permissible and practicable supports and accommodation for this purpose, based on international best practice and experience. [paragraph 4.89]

12.16 The Commission recommends that the President of Ireland should continue to be ineligible for jury service. [paragraph 5.25]

12.17 The Commission recommends that members of the judiciary, and retired members of the judiciary, should continue to be ineligible for jury service. [paragraph 5.26]

12.18 The Commission recommends that coroners and deputy coroners should continue to be ineligible for jury service. [paragraph 5.27]

12.19 The Commission recommends that the Attorney General and members of the staff of the Attorney General should continue to be ineligible for jury service. [paragraph 5.28]

12.20 The Commission recommends that the Director of Public Prosecutions and members of the staff of the Director of Public Prosecutions should continue to be ineligible for jury service. [paragraph 5.29]

12.21 The Commission recommends that practising barristers and solicitors should continue to be ineligible for jury service. [paragraph 5.30]

12.22 The Commission recommends that solicitors' apprentices, clerks and other persons employed on work of a legal character in solicitors' offices should continue to be ineligible for jury service. [paragraph 5.31]

12.23 The Commission recommends that officers attached to a court (which, having regard to the establishment of the Courts Service under the *Courts Service Act 1998*, should also include employees of the Courts Service) continue to be ineligible for jury service. [paragraph 5.32]

12.24 The Commission recommends that persons employed to take court records (stenographers) continue to be ineligible for jury service. [paragraph 5.33]

12.25 The Commission recommends that serving members of An Garda Síochána should continue to be ineligible for jury service. [paragraph 5.34]

12.26 The Commission recommends that retired members of An Garda Síochána should no longer be eligible for jury service. [paragraph 5.35]

12.27 The Commission recommends that civilians employed by An Garda Síochána should be ineligible for jury service. [paragraph 5.36]

12.28 The Commission recommends that Commissioners and staff of the Garda Síochána Ombudsman Commission be ineligible for jury service. [paragraph 5.37]

12.29 The Commission recommends that prison officers and other persons employed in a prison or place of detention should continue to be ineligible for jury service. [paragraph 5.38]

- 12.30 The Commission recommends that persons working in the Probation Service should continue to be ineligible for jury service. [paragraph 5.39]
- 12.31 The Commission recommends that persons in charge of, or employed in, a forensic science laboratory should continue to be ineligible for jury service. [paragraph 5.40]
- 12.32 The Commission recommends that members of the Permanent Defence Force, and members of the Reserve Defence Force while in receipt of pay for any service or duty, should be eligible for jury service. [paragraph 5.41]
- 12.33 The Commission recommends that section 9(1) and Schedule 1, Part 2, of the *Juries Act 1976*, which provide for a list of persons excusable from jury service as of right, should be repealed and replaced with a general right of excusal for good cause, and that evidence should be required to support applications for excusal. [paragraph 5.56]
- 12.34 The Commission recommends that the Courts Service should prepare and publish guiding principles to assist county registrars in determining whether to grant or refuse the application for excusal for good cause. [paragraph 5.57]
- 12.35 The Commission recommends that the legislation on jury service should include a presumption that, even where a person provides excusal from service for cause shown, his or her jury service should be deferred for a period of up to 12 months. [paragraph 5.63]
- 12.36 The Commission recommends that the guidelines on excusal already recommended in this Report should contain a section on the administration of the deferral system. [paragraph 5.64]
- 12.37 The Commission recommends that a person shall be disqualified from jury service for life where he or she has been sentenced to imprisonment (including where the sentence is suspended) on conviction for any offence for which the person may be sentenced to life imprisonment (whether as a mandatory sentence or otherwise). [paragraph 6.29]
- 12.38 The Commission also recommends that, without prejudice to the immediately preceding recommendation, a person shall be disqualified from jury service for life where he or she has been convicted of: (a) an offence that is reserved by law to be tried by the Central Criminal Court; (b) a terrorist offence (within the meaning of the *Criminal Justice (Terrorist Offences) Act 2005*); or (c) an offence against the administration of justice (namely, contempt of court, perverting the course of justice or perjury). [paragraph 6.30]
- 12.39 The Commission recommends that, in respect of an offence other than those encompassed by the two immediately preceding recommendations, a person shall be disqualified from jury service: (a) for a period of 10 years where he or she has been convicted of such an offence and has been sentenced to imprisonment for a term greater than 12 months (including a suspended sentence); and (b) for the same periods as the “relevant periods” in the *Criminal Justice (Spent Convictions) Bill 2012* both in relation to custodial and non-custodial sentences within the meaning of the 2012 Bill. [paragraph 6.31]
- 12.40 The Commission recommends that persons remanded in custody awaiting trial, and persons remanded on bail awaiting trial, shall be disqualified from jury service until the conclusion of the trial. [paragraph 6.32]
- 12.41 The Commission recommends that a person convicted of an offence committed outside the State which, if committed in the State, would disqualify a person from jury service, shall disqualify that person from jury service in the State on the same basis and for the same periods. [paragraph 6.33]
- 12.42 The Commission recommends that the principal process for ensuring that a person on a jury list is not disqualified from jury service should continue to be that the Courts Service shall, from time to time, provide jury lists to the Garda Síochána Central Vetting Unit (to be renamed the National Vetting Bureau under the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*), and that where the Garda Síochána Central Vetting Unit communicates with the Courts Service that a named person on the jury list is disqualified from jury service the Courts Service shall not summon that person for jury service. The Commission also recommends that this process continue to operate on the basis of nationally agreed procedures and guidelines developed by the Courts Service. The Commission also

recommends that it shall continue to be the case that a person commits an offence if he or she knowingly serves on a jury when she or she is disqualified from jury service. [paragraph 6.42]

12.43 The Commission recommends that the elements of the common law offence of embracery which remain of relevance and which do not already overlap with the offence of intimidation in section 41 of the *Criminal Justice Act 1999* should be incorporated into a single offence that deals with all forms of jury tampering. The single offence should include any attempt to corrupt or influence or instruct a jury, or any attempt to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats or persuasions, with an intent to obstruct, pervert, or interfere with, the course of justice. [paragraph 7.49]

12.44 The Commission considers that there is a strong argument, as described in the 2002 *Report of the Committee to Review the Offences Against the State Acts 1939-1998*, in favour of a re-examination of whether the use of scheduling of offences for the purposes of the *Offences Against the State Act 1939* complies with the State's obligations under international law and whether a more individualised case-by-case approach may be justified. [paragraph 7.50]

12.45 The Commission recommends that, in order to ensure that the accused may exercise a right to challenge effectively while at the same time protecting as far as practicable the security and privacy of jurors, access to jury lists should be possible only by the parties' legal advisers (or the parties if they are not legally represented) and only for a period of four days prior to the trial in which the parties have an interest. The Commission also recommends that access to the jury list should not be permitted once the jury has been sworn, except for some exceptional reason and only with the sanction of the court on application; and that, where a party is legally represented he or she may be provided with the information in the jury list but not a copy of the list. [paragraph 7.51]

12.46 The Commission recommends that, in order to protect juror privacy and assist in preventing potential intimidation, the daily roll call of the jury after empanelment should be abolished. [paragraph 7.52]

12.47 The Commission recommends that the juries legislation should expressly provide that prospective jurors be required to bring a valid form of personal identification when attending for jury selection, and that this should take the same form as the prescribed personal identification required under section 111 of the *Electoral Act 1992*. The Commission also recommends that the failure to produce suitable identification should not, in itself, prevent a juror from serving and in such a case the juror should be required to confirm their identity by oath or affirmation. The Commission also recommends that the form or notice accompanying the jury summons (as currently required by section 12 of the *Juries Act 1976*) should include a statement referring to the benefits of bringing such personal identification, including that the person may positively identify themselves in court and that this may limit the extent to which the person's name is called out in public. [paragraph 7.53]

12.48 The Commission recommends that the judge's direction to a jury should inform jurors clearly of the type of conduct that is inconsistent with the juror oath to arrive at a verdict "according to the evidence"; that specific mention ought to be made of the use of phone or internet sources to either seek or disseminate information about the case in which they are involved; that the judge should state that jurors should not expect that misconduct is likely to happen, but that they should also be informed clearly as to how to go about reporting misbehaviour if it occurs, in particular to avoid the situation in which this is reported after the verdict. [paragraph 8.28]

12.49 The Commission recommends that possible juror misconduct should also be addressed by providing for two specific offences. The first should be an offence for a juror wilfully to disclose to any person during the trial information about the deliberations of the jury or how a juror or jury formed any opinion or conclusion in relation to an issue arising in the trial; this offence would not apply where a juror discloses information to another juror, or where the trial judge consents to a disclosure. The second offence should prohibit jurors from making inquiries about the accused, or any other matters relevant to the trial, but would not prohibit a juror from making an inquiry of the court, or of another member of the jury, in the proper exercise of his or her functions as a juror nor would it prevent a juror from making an inquiry authorised by the court. It would also provide that anything done by a juror in contravention of a direction given to the jury by the judge would not be a proper exercise by the juror of his or her functions

as a juror. In this offence, “making an inquiry” would be defined to include: asking a question of any person, conducting any research, for example, by searching an electronic database for information (such as by using the internet), viewing or inspecting any place or object, conducting an experiment or causing someone else to make an inquiry. These offences would be without prejudice to other offences involving the administration of justice, notably contempt of court and perverting the course of justice, and without prejudice to the recommendation in paragraph 11.18 of this Report concerning jury research. [paragraph 8.29]

12.50 The Commission recommends the development of an agreed protocol on prosecutions for the various offences provided for in the legislation on jury service. The Commission also recommends that, to complement this, the legislation on jury service should provide that a fixed charge notice may also be issued in respect of any offence provided for under that legislation. [paragraph 8.30]

12.51 The Commission recommends the introduction of a modest flat rate daily payment to cover the cost of transport and other incidentals involved in jury service. The Commission also recommends that consideration be given by the Government (notably, the Department of Finance, the Department of Jobs, Enterprise and Innovation, and the Department of Justice and Equality) as to what other means could be used to alleviate the financial burden that jury service involves for small businesses and self-employed persons, including the use of tax credits and insurance. [paragraph 9.18]

12.52 The Commission recommends that, before considering the use of non-jury trials or trials by special juries in lengthy or complex trials which would involve creating another exception to the general right in Article 38.5 of the Constitution to jury trial based on a pool that is broadly representative of the community, other procedural solutions to assist jury trials in such cases should first be considered. [paragraph 10.09]

12.53 The Commission recommends that a court should be empowered to empanel up to three additional jurors where the judge estimates that the trial will take in excess of three months. The Commission also recommends that, where additional jurors have been empanelled and more than 12 jurors remain when the jury is about to retire to consider its verdict, the additional jurors shall be balloted out and then discharged from jury service. [paragraph 10.17]

12.54 The Commission recommends that section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, which concerns the provision of specified documentation to juries, should be extended to all trials on indictment. [paragraph 10.27]

12.55 The Commission recommends that in a jury trial in criminal proceedings, the trial judge should be empowered to appoint an assessor to assist the court, including the jury, to address any difficulties associated with juror comprehension of complex evidence. [paragraph 10.31]

12.56 The Commission recommends that, without prejudice to the offences recommended in paragraph 8.29 concerning disclosure of matters discussed during jury deliberation, provision should be made in legislation for empirical research into matters such as jury representativeness, juror comprehension, juror management and juror capacity and competence, and that such research would be subject to appropriate safeguards to prevent disclosure of the deliberative process of a specific juror or jury and which would be subject to confidentiality requirements comparable to those in section 40(3) of the *Civil Liability and Courts Act 2004*. [paragraph 11.18]

¹ This *Draft Juries Bill 2013* implements the recommendations in the Report that involve the reform of the law on jury service, currently set out in the *Juries Act 1976* (as amended). A number of sections of the draft Bill repeat, without amendment (other than small drafting changes), those provisions of the 1976 Act in respect of which the Commission has either not recommended reform or which did not form part of this project but which are set out in the draft Bill for completeness.

DRAFT JURIES BILL 2013

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SCHEDULE

Persons Not Eligible for Jury Service

ACTS REFERRED TO

| | |
|--|---------------------|
| Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 | 2010, No.24 |
| Court Officers Act 1945 | 1945, No.25 |
| Courts (Establishment and Constitution) Act 1961 | 1961, No.38 |
| Criminal Justice (Terrorist Offences) Act 2005 | 2005, No.2 |
| Electoral Act 1992 | 1992, No.23 |
| Juries Act 1976 | 1976, No.4 |
| Mercantile Marine Act 1955 | 1955, No.29 |
| Oaths Act 1888 | 51 & 52 Vict., c.46 |
| Prisons Act 1970 | 1970, No.11 |
| Prisons Act 1972 | 1972, No.7 |

DRAFT JURIES BILL 2013

BILL

entitled

An Act to consolidate and reform the law relating to qualification, eligibility and selection for jury service, to repeal the Juries Act 1976 and to provide for related matters.

Be it enacted by the Oireachtas as follows:

PART 1

Preliminary

Short title and commencement

1. — (1) This Act may be cited as the Juries Act 2013.

(2) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory Note

This section contains standard provisions on the Short Title of the Bill and commencement arrangements.

Interpretation

2. — In this Act —

“county” means an administrative county;

“jury summons” means a summons under section 12;

“the Minister” means the Minister for Justice and Equality;

“prescribed” means prescribed in Regulations made by the Minister.

Explanatory Note

This section contains the relevant definitions for the Bill, largely replicating section 2(1) of the *Juries Act*

1976. Section 2(2) and (3) of the *Juries Act 1976* have not been replicated in this Bill as such provisions are now unnecessary by virtue of section 9 of the *Interpretation Act 2005*.

Expenses

3. — The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Explanatory Note

This section largely replicates section 3 of the *Juries Act 1976*.

Repeals

4. — The *Juries Act 1976* is repealed.

Explanatory Note

This section provides for the repeal of the *Juries Act 1976*, as amended.

PART 2

Qualification, Liability and Eligibility for Service as a Juror

Jury districts

5. — (1) Subject to the provisions of this section, each county shall be a jury district and for this purpose the county boroughs of Cork, Limerick and Waterford shall be deemed to form part of the counties of Cork, Limerick and Waterford respectively and the county borough of Dublin and the counties of South Dublin, Fingal and Dun Laoghaire-Rathdown shall form one jury district.

(2) The Minister may by order divide a county into two or more jury districts or limit a jury district to a part or parts of a county.

(3) The Minister may by order revoke or vary an order under this section.

(4) Every issue that is triable with a jury shall be triable with a jury called from a panel of jurors drawn from the jury district in which the court is sitting.

Explanatory Note

The issue of jury districts fell outside the scope of this project, and this section therefore replicates section 5 of the *Juries Act 1976*, as amended. Section 5(1) of the 1976 Act had been amended by section 28 of the *Local Government (Dublin) Act 1993*.

Qualification, liability and eligibility for jury service

6. — (1) Subject to *sections 7 and 8* and the other provisions of this Act, the following shall be qualified and liable to serve as a juror for the trial of all or any issues which are for the time being triable with a jury drawn from that jury district—

(a) every citizen of Ireland and every citizen of the United Kingdom aged 18 years or upwards who is entered in a register of Dáil electors in a jury district, and

(b) every other person aged 18 years and upwards who is entered in a register of local government electors in a jury district.

(2) Without prejudice to *subsection (1)*, a person who is not a citizen of Ireland shall be eligible for jury service only where he or she has been ordinarily resident in the State for 5 years prior to being summoned for jury service.

(3) Without prejudice to *subsection (1)*—

(a) a person is eligible for jury service unless the person's physical capacity, taking account of the provision of such reasonably practicable supports and accommodation that are consistent with the right to a trial in due course of law, is such that he or she could not perform the duties of a juror.

(b) a person is eligible for jury service unless, arising from the person's ill health, he or she is resident in a hospital or other similar health care facility or is otherwise (with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law) unable to perform the duties of a juror.

(c) a person is eligible for jury service unless his or her decision-making capacity, with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law, would be such that he or she could not perform the duties of a juror.

(4) (a) Where any question as to eligibility for jury service under *subsection (3)* arises, the matter shall be determined by the court, and in making such a determination the court shall apply a presumption of capacity and the requirement of competence that forms part of the right to a trial in due course of law, and shall also ensure that the principle of the fairness of the trial is given priority.

(b) Where the court determines under this subsection that a person is not eligible for jury service, the court shall excuse the person from jury service.

(5) Without prejudice to *subsection (1)*, a person shall be eligible for jury service only where he or she is able to read, write, speak and understand English to the extent that it is practicable for him or her to carry out the functions of a juror.

Explanatory note

Section 6(1)(a) of the Bill largely replicates section 6 of the *Juries Act 1976*, as amended, which provides that every citizen of Ireland aged 18 years or upwards who is entered in a register of Dáil electors is qualified and liable for jury service (unless he or she is not eligible for jury service under *section 7* or is disqualified under *section 8*). *Section 6(1)(a)* adds to this in order to implement the recommendation in paragraph 2.65 of the Report that every citizen of the United Kingdom who is entered in a register of Dáil electors is also qualified and liable for jury service. *Section 6(1)(b)* of the Bill implements the recommendation in paragraph 2.65 that persons who are registered in the register for local elections should also be qualified and eligible for jury service. This would include EU citizens and other persons who are ordinarily resident in the State at the time the electoral register is compiled. (The upper age limit of 70 years for jury service, which was included in section 6 of the 1976 Act as enacted, was repealed by section 54 of the *Civil Law (Miscellaneous Provisions) Act 2008*.)

Section 6(2) of the Bill implements the recommendation in paragraph 2.66 that a person who is not a citizen of Ireland must, in order to be eligible to serve, be ordinarily resident in the State for 5 years prior

to being summoned for jury service.

Section 6(3) and (4) of the Bill implement the recommendations in the Report concerning eligibility for jury service related to capacity, discussed in Chapter 4. *Section 6(3)(a)* implements the recommendation in paragraph 4.41 that a person is eligible for jury service unless the person's physical capacity, taking account of the provision of such reasonably practicable supports and accommodation that are consistent with the right to a trial in due course of law, is such that he or she could not perform the duties of a juror. *Section 6(3)(b)* implements the recommendation in paragraph 4.59 that a person is eligible for jury service unless, arising from the person's ill health, he or she is resident in a hospital or other similar health care facility or is otherwise (with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law) unable to perform the duties of a juror. *Section 6(3)(c)* implements the recommendation in paragraph 4.59 that a person is eligible for jury service unless his or her decision-making capacity, with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law, would be such that he or she could not perform the duties of a juror. *Section 6(4)* implements the recommendations in paragraphs 4.42 and 4.60 that where any question as to eligibility for jury service related to capacity arises the court must apply a presumption of capacity and the requirement of competence that forms part of the right to a trial in due course of law, and must also ensure that the principle of the fairness of the trial is given priority; and that where the court decides that a person is not eligible for jury service on this ground, the court should excuse the person from jury service. *Section 6(3) and (4)* are related to *section 41(2)* of this Bill, which deals with the recommendations in paragraphs 4.44 and 4.61 as to carrying out research in this area based on international best practice and experience. The Commission is also conscious that the detailed content of the proposed *Assisted Decision-Making (Capacity) Bill* (discussed in Chapter 4 of the Report and which is due to be published in 2013), including the inclusion in it of principles that derive from the 2006 UN Convention on the Rights of Persons With Disabilities, may alter or affect the final drafting of legislative provisions on capacity for jury service that derive from this Report.

Section 6(5) of the Bill implements the recommendation in paragraph 4.88 of the Report that, in order to be eligible to serve, a juror should be able to read, write, speak and understand English to the extent that it is practicable for him or her to carry out the functions of a juror.

Persons who are not eligible for jury service

7. — The persons specified in the Schedule are not eligible for jury service.

Explanatory Note

This section largely replicates section 7 of the *Juries Act 1976* as to the persons who are not eligible for jury service. The precise contents of the Schedule of this Bill include important differences by comparison with the, broadly equivalent, Schedule 1, Part 1 of the *Juries Act 1976*. These changes reflect the recommendations in paragraphs 5.25 to 5.41 of the Report: see further the Explanatory Note to the Schedule.

Persons who are disqualified from jury service

8. — (1) A person shall be disqualified for jury service for life if he or she has been sentenced to imprisonment (including where the sentence is suspended) on conviction of an offence in any part of Ireland for any offence for which the person may be sentenced to life imprisonment (whether as a mandatory sentence or otherwise).

- (2) A person shall, without prejudice to *subsection (1)*, be disqualified for jury service for life if he or she has been convicted of—
- (a) an offence that is reserved by law to be tried by the Central Criminal Court,
 - (b) a terrorist offence within the meaning of the Criminal Justice (Terrorist Offences) Act 2005, or
 - (c) an offence against the administration of justice, namely, contempt of court, perverting the course of justice or perjury.
- (3) A person shall, without prejudice to *subsections (1) and (2)*, be disqualified for jury service—
- (a) for a period of 10 years where he or she has been convicted of such an offence and has been sentenced to imprisonment for a term greater than 12 months (including a suspended sentence), and
 - (b) for the same periods as the “relevant periods” in the *Criminal Justice (Spent Convictions) [Act 2013]* both in relation to custodial and non-custodial sentences within the meaning of that Act.
- (4) A person shall be disqualified for jury service where he or she has been remanded in custody awaiting trial or remanded on bail awaiting trial until the conclusion of the trial.
- (5) Where a person has been convicted of an offence committed outside the State which, if committed in the State, would disqualify the person from jury service, the person shall be disqualified for jury service on the same basis and for the same periods as would apply, where appropriate, under *subsections (1) to (3)*.
- (6) The Courts Service shall, from time to time, provide jury lists to the National Vetting Bureau and where the National Vetting Bureau communicates with the Courts Service that a named person on a jury list is disqualified from jury service the Courts Service shall not summon that person for jury service.

Explanatory note

This section replaces section 8 of the *Juries Act 1976* and implements the recommendations in Chapter 6 of the Report concerning disqualification for jury service. *Section 8(1)* implements the recommendation in paragraph 6.29 that a person shall be disqualified from jury service for life where he or she has been sentenced to imprisonment (including where the sentence is suspended) on conviction for any offence for which the person may be sentenced to life imprisonment (whether as a mandatory sentence or otherwise). *Section 8(2)* implements the recommendation in paragraph 6.30 that, without prejudice to the immediately preceding recommendation, a person shall be disqualified from jury service for life where he or she has been convicted of: (a) an offence that is reserved by law to be tried by the Central Criminal Court; (b) a terrorist offence (within the meaning of the *Criminal Justice (Terrorist Offences) Act 2005*); or (c) an offence against the administration of justice (namely, contempt of court, perverting the course of justice or perjury). *Section 8(3)* implements the recommendation in paragraph 6.31 that, in respect of an offence other than those encompassed by the two immediately preceding recommendations, a person shall be disqualified from jury service: (a) for a period of 10 years where he or she has been convicted of such an offence and has been sentenced to imprisonment for a term greater than 12 months (including a suspended sentence); and (b) for the same periods as the “relevant periods” in the *Criminal Justice (Spent Convictions) Bill 2012* (which, at the time of writing, is close to having passed all Stages in the Oireachtas) both in relation to custodial and non-custodial sentences within the meaning of the 2012 Bill. *Section 8(4)* implements the recommendation in paragraph 6.32 that persons remanded in custody awaiting trial, and persons remanded on bail awaiting trial, shall be disqualified from jury service until the conclusion of the trial. *Section 8(5)* implements the recommendation in paragraph 6.33 that a person convicted of an offence committed outside the State which, if committed in the State, would disqualify a person from jury service, shall disqualify that person from jury service in the State on the same basis and

for the same periods. *Section 8(6)* implements the recommendation in paragraph 6.42 that the principal process for ensuring that a person on a jury list is not disqualified from jury service should continue to be that the Courts Service shall, from time to time, provide jury lists to the Garda Síochána Central Vetting Unit (to be renamed the National Vetting Bureau under the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*), and that where the Garda Síochána Central Vetting Unit communicates with the Courts Service that a named person on the jury list is disqualified from jury service the Courts Service shall not summon that person for jury service.

Excusing a person from jury service and deferral of jury service

9. — (1) A county registrar shall excuse any person whom he or she has summoned as a juror under this Act if—

(a) that person shows to the satisfaction of the county registrar that he or she has served on a jury, or duly attended to serve on a jury, in the 3 years ending with the service of the summons on him or her, or

(b) that person shows to the satisfaction of the county registrar that, at the conclusion of a trial, a judge of any court has excused him or her from jury service for a period that has not terminated.

(2) A county registrar may excuse any person whom the registrar has summoned as a juror from attendance during the whole or any part of the sittings in question if that person shows to the registrar's satisfaction that there is good reason why he or she should be so excused.

(3) If a person summoned as a juror under this Act is unable, owing to illness or any other reason, to make any representation to a county registrar under *subsection (1) or (2)*, another person may make the representation on his or her behalf.

(4) Notwithstanding *subsections (2) and (3)*, if a person summoned as a juror under this Act shows to the satisfaction of the county registrar that there is good reason why his or her attendance in pursuance of the summons should be deferred, the county registrar may defer his or her attendance for a period not exceeding 12 months, and, if the county registrar does so, he or she shall vary the days on which that person is summoned to attend and the summons shall have effect accordingly.

(5) A person whom the county registrar has refused to excuse or who is dissatisfied with a decision of the registrar concerning deferral may appeal against the refusal or, as the case may be, decision to the court at which he or she has been summoned to attend.

(5) The procedure for the appeal, including the designation of the judge to hear the appeal, and the time within which and the manner in which it should be brought, shall be as provided by directions of the President of the High Court and the President of the Circuit Court respectively.

(6) The decision of the court shall be final.

(7) When a person is required to be in attendance as a juror at a court during a sitting, the judge shall have the same duty or discretion, as the case may be, as that imposed or conferred on the county registrar under this section to excuse that person from attendance or further attendance or to grant a deferral. The judge may also, for good reason, excuse the juror during the course of a trial from further service as a juror in the trial.

(8) The judge of any court may, at the conclusion of a trial of an exceptionally exacting nature, excuse the members of the jury from jury service for such period as the judge may think fit.

Explanatory note

This section largely replicates, subject to two recommended reforms, the provisions of section 9 of the *Juries Act 1976* concerning the powers of a county registrar, and court, to excuse a person from jury service. The first of these is the recommendation in paragraph 5.56 of the Report to repeal the provisions to allow “excusal as of right” currently contained in section 9(1) of the 1976 Act and related to the list in Schedule 1, Part 2 of the 1976 Act of persons who may be excused as of right. Such persons would, instead, be subject to the general discretion to excuse for good reason currently in section 9(2) of the 1976 Act and replicated in *section 9(2)* of the Bill. The second reform, in *section 9(4)* of the Bill, implements the recommendation in paragraph 5.63 of the Report to provide for a new power to defer jury service for up to 12 months.

PART 3

Selection and Service of Jurors

Supply of electoral registers

10. — For the purpose of enabling county registrars to empanel and summon jurors, every county council and corporation of a county borough, as registration authority under section 20 of the Electoral Act 1992, shall as soon as practicable after the passing of this Act deliver to the county registrar for the county such number of copies of the then current register of Dáil electors and of the then current register of local government electors for the county or county borough as the county registrar may require and shall do likewise as soon as practicable after the publication of every similar registers thereafter.

Explanatory note

This section largely replicates the provisions of section 10 of the *Juries Act 1976*, subject to the addition of the obligation to supply copies of the register of local government electors as well as the existing obligation to supply copies of the register of Dáil electors. The reference to section 20 of the *Electoral Act 1992* replaces the reference in section 10 of the 1976 Act to the equivalent section 7 of the *Electoral Act 1963*.

Empanelling of jurors

11. — Each county registrar, using a procedure of random or other non-discriminatory selection, shall draw up a panel of jurors for one or more courts within a jury district from the registers delivered to him under section 10 (omitting persons whom the registrar knows or believes not to be qualified as jurors).

Explanatory note

This section largely replicates the provisions of section 11 of the *Juries Act 1976*, as amended by section 55 of the *Civil Law (Miscellaneous Provisions) Act 2008*.

Summoning of jurors

12. — (1) Each county registrar shall cause a written summons, in such form as the Minister may by regulations prescribe, to be served on every person whom the registrar has selected as a juror requiring the person—

- (a) to attend as a juror at the court in question or other place specified in the summons for the

reception of jurors on the day and at the time specified in the summons, and

(b) after that, to attend at that court or place, as the case may be, or such other court or place as the court may direct, at such times as are directed by—

(i) the court, or

(ii) the registrar in any case where the registrar is authorised to do so by the court, and

(c) to bring a valid form of personal identification when attending for jury selection, namely, one of the prescribed personal identification required under section 111 of the Electoral Act 1992..

(2) A jury summons served on a person under this section shall be accompanied by a notice informing the person—

(a) of the effect of sections 6, 7, 8, 9(1), 35 and 36, and

(b) that he or she may make representations to the county registrar with a view to obtaining a withdrawal of the summons, if for any reason he or she is not qualified or eligible for jury service or wishes to be excused, and

(c) a statement referring to the benefits of bringing the personal identification in accordance with subsection (1)(c), including that the person may positively identify himself or herself in court and that this may limit the extent to which the person's name is called out in public.

(3) If a person fails to produce suitable identification in accordance with subsection (1)(c) this shall not, by itself, prevent the person from serving on a jury but in such a case the person shall be required to confirm his or her identity by oath or affirmation.

Explanatory note

This section largely replicates the provisions of section 12 of the *Juries Act 1976* (as amended by section 56 of the *Civil Law (Miscellaneous Provisions) Act 2008*), subject to the inclusion of new provisions in *section 12(1)(c)*, *section 12(2)(c)* and *section 12(3)*. These implement the recommendations in paragraph 7.53 that prospective jurors be required to bring a valid form of personal identification when attending for jury selection, and that this should take the same form as the prescribed personal identification required under section 111 of the *Electoral Act 1992*; that the failure to produce suitable identification should not, in itself, prevent a juror from serving and in such a case the juror should be required to confirm their identity by oath or affirmation; and that the form or notice accompanying the jury summons should include a statement referring to the benefits of bringing personal identification, including that the person may positively identify himself or herself in court and that this may limit the extent to which the person's name is called out in public.

Service of jury summons

13. — (1) A jury summons may be sent by post or delivered by hand.

(2) For the purposes of section 25 of the Interpretation Act 2005, a letter containing a jury summons shall be deemed to be properly addressed if it is addressed to the juror at his or her address as shown in the current register of Dáil electors or, as the case may be, the current register of local government electors.

(3) In any proceedings for an offence of non-attendance in compliance with a jury summons or of not being available when called upon to serve as a juror—

(a) a certificate by the county registrar or an officer acting on his or her behalf that the registrar or officer posted a letter containing the summons addressed as provided in *subsection (2)* shall be evidence of the fact so certified;

(b) a certificate by the county registrar or an officer acting on his or her behalf or a member of the Garda Síochána that he or she personally delivered the summons to the juror on a specified date shall be evidence of the fact so certified, and

(c) a certificate by—

(i) the registrar or other officer acting as registrar of a court, or

(ii) a member of the staff of the Courts Service duly authorised in that behalf by the Chief Executive Officer of the Courts Service,

present when a person summoned to attend as a juror in that court failed to answer to his or her name at the time it was called out in that court or at the place specified in the summons shall be evidence, unless the contrary is proved, that that person failed to attend in compliance with the summons, or was not available when called on to serve, as the case may be.

(4) A document purporting to be a certificate under this section of a county registrar, or officer acting on his or her behalf, officer of a court or member of the Garda Síochána and to be signed by him or her shall be deemed, for the purposes of this section, to be such a certificate and to be so signed unless the contrary is proved.

Explanatory note

This section largely replicates the provisions of section 13 of the *Juries Act 1976*, as amended by section 57 of the *Civil Law (Miscellaneous Provisions) Act 2008*. The reference to section 25 of the *Interpretation Act 2005* replaces the reference in section 13 of the 1976 Act to the equivalent section 18 of the *Interpretation Act 1937*.

Summoning of jurors to make up deficiency

14. — (1) If it appears to a judge of a court that a jury to try any issue before the court will or may be incomplete, the judge may require any persons (being person; qualified and liable to serve as jurors in that court) to be summoned by the county registrar in order to make up the number needed.

(2) The judge shall specify the area from which persons may be summoned (which may be the area in the vicinity of the court) and the method of summons, whether by written notice or otherwise.

(3) Section 9 shall apply to persons summoned under this section except that there shall not be an appeal from the county registrar.

(4) The names of persons summoned under this section shall be added to the panel of jurors.

Explanatory note

This section replicates the provisions of section 14 of the *Juries Act 1976*.

Selection of jury from panel

15. — (1) Any practice observed before the coming into force of this Act by which there was a daily roll call in court of persons empanelled as jurors shall be discontinued.

(2) The selection of persons empanelled as jurors to serve on a particular jury shall be made by balloting in open court.

(3) The power of summoning jurors under section 14 may be exercised after balloting has begun, as well as earlier, and if it is exercised after balloting has begun the judge may dispense with balloting for persons summoned under section 14.

(4) Before the selection is begun the judge shall warn the jurors present that they must not serve if they are ineligible or disqualified and as to the penalty under section 36 for doing so; and the judge shall invite any person who knows that he or she is not qualified to serve or who is in doubt as to whether he or she is qualified or who may have an interest in or connection with the case or the parties to communicate the fact to the judge (either orally or otherwise as the judge may direct or authorise) if he or she is selected on the ballot.

(5) The foreman (who may be a male or female member of the jury) shall be such member as the jurors shall choose and the choice shall be made at such time as the judge may direct or, in the absence of a direction, before the jury bring in their verdict or make any other communication to the judge.

Explanatory note

This section largely replicates the provisions of section 15 of the *Juries Act 1976*, subject to the addition of subsection (1), which implements the recommendation in paragraph 7.52 of the Report that, in order to protect juror privacy and assist in preventing potential intimidation, the daily roll call of the jury after empanelment should be abolished.

Inspection of jury panel

16. — (1) The legal advisers of a party or (if a party is not legally represented) the party to any proceedings, civil or criminal, to be tried with a jury shall be entitled to inspect the jury panel free of charge on application to the county registrar.

(2) The rights under *subsection (1)* shall, subject to *subsection (5)*, be exercisable for a period beginning 4 days prior to the trial and ending when the jury has been sworn.

(3) The right to inspect the panel shall not be permitted once the jury has been sworn, except for some exceptional reason and only with the sanction of the court on application.

(4) The panel referred to in *subsection (1)* is the panel as prepared for and in advance of the sittings, including any supplemental panel so prepared, and it shall not be necessary to indicate in it that any of the persons in it have been excused in the meantime, or to include any persons summoned under *section 14*.

(5) The right to inspect the panel shall, however, include a right to be shown, on request, all alterations to the panel and the names of any persons summoned under *section 14* and, on request, to be told of any excusals.

Explanatory note

Section 16 of the Bill replaces section 16 of the *Juries Act 1976*. *Section 16(1), (2) and (3)* of the Bill

implement the recommendations in paragraph 7.51 of the Report that in order to ensure that the accused may exercise a right to challenge effectively while at the same time protecting as far as practicable the security and privacy of jurors, access to jury lists should be possible only by the parties' legal advisers (or the parties if they are not legally represented) and only for a period of four days prior to the trial in which the parties have an interest; and that access to the jury list should not be permitted once the jury has been sworn, except for some exceptional reason and only with the sanction of the court on application; and that, where a party is legally represented he or she may be provided with the information in the jury list but not a copy of the list. *Section 16(4) and (5)* of the Bill largely replicate section 16(3) and (4) of the 1976 Act.

Mode of swearing a jury

17. — (1) When swearing a juror the registrar or other officer acting as registrar shall call out the juror's name and direct the juror to take the Testament in his or her hand and shall administer the oath to the juror in accordance with sections 18 and 19.

(2) The jurors shall be sworn separately.

(3) Any juror who objects to be sworn in the ordinary manner shall make his or her objection immediately after his or her name is called out and before the administration of the oath to him or her has begun.

(4) Every challenge of a juror shall be made immediately after the juror's name is called out and before the administration of the oath to him or her has begun.

(5) If any juror refuses to be sworn or insists on being sworn in a manner not authorised by this Act or otherwise by law, he or she shall not be included in the jury then being sworn.

(6) For the purposes of this section the administration of an oath shall be deemed to be begun when the registrar or other officer begins to say the words of the oath to the juror being sworn.

(7) In this section and in the next following section the word "Testament" means, in the case of a person of the Christian faith, the New Testament and, in the case of a person of the Jewish faith, the Old Testament.

Explanatory note

This section largely replicates the provisions of section 17 of the *Juries Act 1976*.

Administration of oath to jurors

18. — (1) The ordinary manner of administering the oath shall be as follows—

The juror to be sworn shall hold the Testament in his uplifted hand and the registrar or other officer shall say to the juror the words "I swear by Almighty God that..." followed by the appropriate form of oath provided by *section 19* and the juror shall repeat after him or her the words so spoken by him or her.

(2) The Oaths Act 1888 (which provides for the making of an affirmation instead of an oath) and also every Act for the time being in force authorising an oath to be taken in a court in any particular manner shall apply to the oaths required by this Act to be taken by jurors.

(3) A juror who states that he or she has a religious belief but that he or she is neither of the

Christian nor of the Jewish faith may, if the judge so permits, be sworn in any manner that the juror states to be binding on him or her.

(4) The oath shall be administered to every juror in the ordinary manner without question unless the juror appears to be physically incapable of taking the oath in that manner or objects to taking the oath in that manner and satisfies the judge that he or she is entitled to take the oath in some other manner.

Explanatory note

This section largely replicates the provisions of section 18 of the *Juries Act 1976*.

Forms of oaths to be taken by jurors

19. — (1) Whenever the issue to be tried is whether an accused person is or is not guilty of an offence, the form of oath to be administered to the jurors shall be as follows:

“I will well and truly try the issue whether the accused is (or are) guilty or not guilty of the offence (or the several offences) charged in the indictment preferred against him (or her or them) and a true verdict give according to the evidence.”

(2) Whenever the issue to be tried is not the issue provided for in *subsection (1)*, the form of oath to be administered to the jurors shall be as follows:

“I will well and truly try all such issues as shall be given to me to try and true verdicts give according to the evidence.”

Explanatory note

This section largely replicates the provisions of section 19(1) and (3) of the *Juries Act 1976*. Section 19(2) of the 1976 Act was repealed by section 24 and Schedule 2 of the *Criminal Law (Insanity) Act 2006*.

Challenges without cause shown

20. — (1) In every trial of a civil issue which is tried with a jury each party may challenge without cause shown 7 jurors and no more.

(2) In every trial of a criminal issue which is tried with a jury the prosecution and each accused person may challenge without cause shown 7 jurors and no more.

(3) Whenever a juror is lawfully challenged without cause shown, the juror shall not be included in the jury.

Explanatory note

This section replicates the provisions of section 20 of the *Juries Act 1976*, and thus implements the recommendation in paragraph 3.38 of the Report that the current law on challenges without cause shown (peremptory challenges, challenges for which no specific reason is articulated) should be retained.

Challenges for cause shown

21. — (1) In every trial of a civil issue which is tried with a jury any party may challenge for cause shown any number of jurors.

(2) In every trial of a criminal issue which is tried with a jury the prosecution and each accused person may challenge for cause shown any number of jurors.

(3) Whenever a juror is challenged for cause shown, such cause shall be shown immediately upon the challenge being made and the judge shall then allow or disallow the challenge as the judge shall think proper.

(4) Whenever a juror is challenged for cause shown and such challenge is allowed by the judge, the juror shall not be included in the jury.

Explanatory note

This section largely replicates the provisions of section 21 of the *Juries Act 1976* and thus implements the recommendation in paragraph 3.62 of the Report that the current law on challenges for cause shown (challenges based on stated reasons) should be retained.

View by jury

22. — (1) In the trial of any issue with a jury the judge may, at any time after the jurors have been sworn and before they have given their verdict, by order direct that the jurors shall have a view of any place specified in the order which in the opinion of the judge it is expedient for the purposes of the trial that the jurors should see, and when any such order is made the judge may adjourn the trial at such stage and for such time as appears to the judge to be convenient for the execution of the order.

(2) In the trial of a civil issue, an order under this section shall be made only on the application of one of the parties and the expenses of the conveyance of the jurors to and from the place specified in the order shall be paid in the first instance by the party on whose application the order was made but shall be included in the costs of that party and be ultimately borne accordingly.

(3) In the trial of a criminal issue, an order under this section shall be made only on the application of the prosecution or of the accused person or of one or more of the accused persons and the expenses of the conveyance of the jurors to and from the place specified in the order shall be paid by the county registrar or other officer acting as registrar to the court during the trial out of moneys to be provided by the Oireachtas.

(4) Whenever a judge makes an order under this section, he or she shall give such directions as appear to him or her to be expedient for the purpose of preventing undue communication with the jurors during the execution of the order.

Explanatory note

This section largely replicates the provisions of section 22 of the *Juries Act 1976*.

Death or discharge of juror during trial

23. — Whenever in the course of the trial of any issue a juror dies or is discharged by the judge owing to the juror being incapable through illness or any other cause of continuing to act as a juror, or under

section 9(7) or 24, the jury shall, unless the judge otherwise directs or the number of jurors is as a result reduced below 10, be considered as remaining properly constituted for all the purposes of the trial and the trial shall proceed and a verdict may be found accordingly.

Explanatory note

This section largely replicates the provisions of section 23 of the *Juries Act 1976*.

Discontinuance of juror's service

24. — In any trial with a jury the judge may at any stage direct that any person summoned or sworn as a juror shall not serve, or shall not continue to serve, as a juror if the judge considers that for any stated reason it is desirable in the interests of justice that he or she should give that direction.

Explanatory note

This section largely replicates the provisions of section 24 of the *Juries Act 1976*.

Separation of juries during trial

25.— (1) In any trial with a jury—

- (a) the jurors may, at any time before they retire to consider their verdict, separate unless the judge otherwise directs, and
- (b) the jurors may, after they retire to consider their verdict, only separate for such period or periods as the judge directs.

(2) A direction *under subsection (1)(b)* may be given in respect of a jury whether or not the jury is present when the direction is given.

Explanatory note

This section replicates the provisions of section 25 of the *Juries Act 1976* as substituted by section 58 of the *Civil Law (Miscellaneous Provisions) Act 2008*.

Non-effect of appeals as to electoral register on jury service

26. — The qualification or liability of a person to serve as a juror shall not be affected by the fact that an appeal is pending under section 21 of the Electoral Act 1992 (which relates to appeals regarding the register of electors).

Explanatory note

This section replicates the provisions of section 26 of the *Juries Act 1976*. The reference to section 21 of the *Electoral Act 1992* replaces the reference in section 26 of the 1976 Act to the equivalent section 8 of the *Electoral Act 1963*.

PART 4

General

Administrative instructions and guidance

27. — (1) With a view to securing consistency in the administration of this Act, the Courts Service may issue instructions to county registrars with regard to the practice and the procedure to be adopted by them in the discharge of their duties under this Act; but nothing in this section shall authorise the Courts Service to issue any instruction as to whether particular persons should or should not be summoned for service as jurors or, if summoned, should or should not be excused from attendance in accordance with the summons.

(2) Without prejudice to *subsection (1)*, the Courts Service may issue and publish guidance concerning the application of any or all provisions of this Act in such form as it deems appropriate, including on the internet.

Explanatory note

Section 27(1) largely replicates the provisions of section 27 of the *Juries Act 1976*. *Section 27(2)* facilitates the Courts Service in providing guidance on the application of the Bill, in respect of which the Commission made a number of recommendations in the Report.

Person standing mute

28. — Whenever a person charged with an offence to be tried with a jury stands mute when called upon to plead, the issue whether he or she is mute of malice or by the visitation of God shall be decided by the judge and, if the judge is not satisfied that the person is mute by the visitation of God, the judge shall direct a plea of not guilty to be entered for him or her.

Explanatory note

This section largely replicates the provisions of section 28 of the *Juries Act 1976*. It appears to be obsolete having regard to the provisions in the *Criminal Law (Insanity) Act 2006*.

Jury service by employees and apprentices and juror expenses

29. — (1) For the purposes of any contract of employment or apprenticeship or any agreement collateral to such contract (including a contract or agreement entered into before the passing of this Act), a person shall be treated as employed or apprenticed during any period when he or she is absent from his or her employment or apprenticeship in order to comply with a jury summons.

(2) Any provision contained in any such contract or agreement shall be void in so far as it would have the effect of excluding or limiting any liability of the employer in respect of the payment of salary or wages to the employee or apprentice during any such absence.

(3) A person who serves as a juror in a civil or criminal trial shall be entitled, in respect of his or her attendance at court for the purpose of performing such jury service, to receive prescribed payments and subject to any prescribed conditions by way of allowance for travelling and subsistence.

Explanatory note

Section 29(1) and (2) largely replicate the provisions of section 29 of the *Juries Act 1976*. Section 29(3) implements the recommendation in paragraph 9.18 of the Report to introduce a modest flat rate daily payment to cover the cost of transport and other incidentals involved in jury service.

Commission *de lunatico inquirendo*

30.— Whenever a panel of jurors is lawfully in attendance before a commissioner under a commission *de lunatico inquirendo*, then, for the purposes of this Act, the commissioner shall be deemed to be a court and also a judge of the court.

Explanatory note

This section largely replicates the provisions of section 30 of the *Juries Act 1976*. This will be obsolete assuming the enactment of the proposed *Assisted Decision-Making (Capacity) Bill* (which is scheduled to be published in 2013 and which would repeal and replace the *Lunacy Regulation (Ireland) Act 1871* under which such a jury is empanelled.

Liability to serve on coroner's jury

31. — Every person who is qualified to serve as a juror under this Act and who is residing in a coroner's district shall be qualified and liable to serve on the jury at any coroner's inquest held in that district unless he or she is ineligible or disqualified under this Act for jury service.

Explanatory note

This section largely replicates the provisions of section 31 of the *Juries Act 1976*, as amended by section 59 of the *Civil Law (Miscellaneous Provisions) Act 2008*, subject to providing that qualification and liability to serve on a coroner's jury match those for juries in the other sections of this Bill.

Non-application of provisions to coroners' inquests

32. — Nothing in this Act except section 31 shall apply to a coroner's inquest, and in this Act the word "jury" does not include a jury at such an inquest and the word "juror" does not include a juror serving on such a jury.

Explanatory note

This section largely replicates the provisions of section 32 of the *Juries Act 1976*.

Restriction of functions of sheriff

33. — The powers and duties conferred and imposed on a county registrar under this Act shall be exercised and performed by him or her notwithstanding anything in section 12 of the Court Officers Act 1945 (which refers to the duties of sheriffs) or in any order made under that section.

Explanatory note

This section largely replicates the provisions of section 33 of the *Juries Act 1976*. In the *Report on the Consolidation and Reform of the Courts Acts* (LRC 97-2010), the Commission recommended that the

Court Officers Act 1945 should be repealed and its remaining provisions incorporated into the draft *Courts (Consolidation and Reform) Bill* appended to the Report.

PART 5

Offences, Jury Research and Lengthy Trials

Failure of juror to attend court, etc.

34. — (1) Any person who, having been duly summoned as a juror, fails without reasonable excuse to attend in compliance with the summons or to attend on any day when required by the court commits an offence and is liable on summary conviction to a fine not exceeding €500.

(2) A juror who, having attended in pursuance of a summons, is not available when called upon to serve as a juror, or is unfit for service by reason of drink or drugs, commits an offence and is liable on summary conviction to a fine not exceeding €500.

(3) Except in a case to which section 14 applies, a person does not commit an offence under *subsection (1)* in respect of failure to attend in compliance with a summons unless the summons was served at least 14 days before the date specified in it for his or her first attendance.

Explanatory note

This section largely replicates the provisions of section 34 of the *Juries Act 1976* as amended by section 60 of the *Civil Law (Miscellaneous Provisions) Act 2008* (increase in fines).

False statements by or on behalf of juror

35. — (1) If any person who has been duly summoned as a juror makes or causes or permits to be made on his or her behalf a false representation to the county registrar or any person acting on the registrar's behalf, or to a judge, with the intention of evading jury service, he or she commits an offence and is liable on summary conviction to a fine not exceeding €500.

(2) If any person makes or causes or permits to be made on behalf of another person duly summoned as a juror a false representation in order to enable that other person to evade jury service, he or she commits an offence and is liable on summary conviction to a fine not exceeding €500.

(3) If any person refuses without reasonable excuse to answer, or gives an answer known to that person to be false in a material particular, or recklessly gives an answer that is false in a material particular, when questioned by a judge of a court for the purpose of determining whether that person is qualified to serve as a juror, he or she commits an offence and is liable on summary conviction to a fine not exceeding €500.

Explanatory note

This section largely replicates the provisions of section 35 of the *Juries Act 1976* as amended by section 61 of the *Civil Law (Miscellaneous Provisions) Act 2008* (increase in fines).

Service by ineligible or disqualified person

36. — (1) Any person who serves on a jury knowing that he or she is ineligible for service commits an offence and is liable on summary conviction to a Class E fine.

(2) Any person who serves on a jury knowing that he or she is disqualified commits an offence and is liable on summary conviction to a Class B fine.

Explanatory note

This section largely replicates the provisions of section 36 of the *Juries Act 1976* as amended by section 62 of the *Civil Law (Miscellaneous Provisions) Act 2008*.

Refusal to be sworn as a juror

37. — Any person who, on being called upon to be sworn as a juror, refuses to be sworn in a manner authorised by this Act or otherwise by law commits an offence and is liable on summary conviction to a Class E fine.

Explanatory note

Section 37 largely replicates the provisions of section 37 of the *Juries Act 1976* as amended by section 63 of the *Civil Law (Miscellaneous Provisions) Act 2008*.

Intimidation etc of witnesses, jurors and others

38. — (1) Without prejudice to any provision made by any other enactment or rule of law, a person shall be guilty of an offence who (whether in or outside the State)—

- (a) with the intention of causing an investigation by the Garda Síochána of an offence or the course of justice to be obstructed, perverted or interfered with, harms or threatens, menaces or in any other way intimidates or puts in fear another person who is assisting in the investigation by the Garda Síochána of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, or a member of his or her family, or his or her civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, or
- (b) with the intention of causing the course of justice to be obstructed, perverted or interfered with, attempts to corrupt or influence or instruct a juror or potential juror (whether in connection with in a civil trial or a criminal trial) or attempts to incline the juror to be more favourable to the one side than to the other, by money, promises, letters, threats or persuasions.

(2) In this section, “potential juror” means a person who has been summoned for jury service but has not been empanelled as a juror to serve on a particular jury.

(3) In proceedings for an offence under this section, proof to the satisfaction of the court or jury, as the case may be, that the accused did an act referred to in subsection (1)(a) shall be evidence that the act was done with the intention required by subsection (1)(b).

(4) A person shall be guilty of an offence under this section for conduct that the person engages in outside the State only if—

- (a) the conduct takes place on board an Irish ship (within the meaning of section 9 of the Mercantile Marine Act 1955),
- (b) the conduct takes place on an aircraft registered in the State,

(c) the person is an Irish citizen, or

(d) the person is ordinarily resident in the State.

(5) A person who has his or her principal residence in the State for the 12 months immediately preceding the commission of an offence under subsection (1) is, for the purposes of subsection (4)(d), ordinarily resident in the State on the date of the commission of the offence

(6) In subsection (1) the reference to a member of a person's family includes a reference to—

(a) the person's spouse,

(b) a parent, grandparent, step-parent, child (including a step-child or an adopted child), grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece of the person or his or her spouse, or

(c) any person who is cohabiting or residing with him or her.

(7) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a Class C fine or imprisonment for a term not exceeding 12 months or both, and

(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 15 years or both.

Explanatory note

Section 38 implements the recommendation in paragraph 7.49 of the Report that the elements of the common law offence of embracery which remain of relevance and which do not already overlap with the offence of intimidation in section 41 of the *Criminal Justice Act 1999* should be incorporated into a single offence that deals with all forms of jury tampering; and that the single offence should include any attempt to corrupt or influence or instruct a jury, or any attempt to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats or persuasions, with an intent to obstruct, pervert, or interfere with, the course of justice. For convenience, section 38 of the Bill incorporates the Commission's recommended offence and the offence in section 41 of the 1999 Act (as amended).

Disclosure of information

39.—(1) A juror who wilfully discloses to any person during a civil or criminal trial information about the deliberations of the jury or how a juror or jury formed any opinion or conclusion in relation to an issue arising in the trial commits an offence, but this offence does not apply where a juror discloses information to another juror, or where the trial judge consents to a disclosure.

(2) (a) A juror who, in a criminal trial, makes inquiries about the accused, or any other matters relevant to the trial commits an offence, but this offence does not apply where a juror makes an inquiry of the court, or of another member of the jury, in the proper exercise of his or her functions as a juror nor where such an inquiry is authorised by the court.

(b) Anything done by a juror in contravention of a direction given to the jury by the judge shall not constitute a proper exercise by the juror of his or her functions as a juror.

(c) For the purpose of this subsection, “making an inquiry” includes asking a question of any person, conducting any research, for example, by searching an electronic database for information (such as by using the internet), viewing or inspecting any place or object,

conducting an experiment or causing someone else to make an inquiry.

(2) A person who commits an offence under this section is liable on summary conviction to a Class B fine.

(3) The offences in this section are without prejudice to *section 38* and any other offence against the administration of justice (including contempt of court and perverting the course of justice) and without prejudice to *section 41*.

Explanatory note

Section 39 implements the recommendations in paragraph 8.29 of the Report that possible juror misconduct should also be addressed by providing for two specific offences. The first offence is for a juror wilfully to disclose to any person during the trial information about the deliberations of the jury or how a juror or jury formed any opinion or conclusion in relation to an issue arising in the trial; this offence would not apply where a juror discloses information to another juror, or where the trial judge consents to a disclosure. The second offence prohibits jurors from making inquiries about the accused, or any other matters relevant to the trial, but would not prohibit a juror from making an inquiry of the court, or of another member of the jury, in the proper exercise of his or her functions as a juror nor would it prevent a juror from making an inquiry authorised by the court. It also provides that anything done by a juror in contravention of a direction given to the jury by the judge would not be a proper exercise by the juror of his or her functions as a juror. In this offence, “making an inquiry” is defined to include: asking a question of any person, conducting any research, for example, by searching an electronic database for information (such as by using the internet), viewing or inspecting any place or object, conducting an experiment or causing someone else to make an inquiry. These offences are without prejudice to other offences involving the administration of justice, notably contempt of court and perverting the course of justice, and without prejudice to the recommendation in paragraph 11.18 of this Report concerning jury research: see *section 41* of the Bill.

Fixed charge notice

40.— (1) Where a member of the Garda Síochána has reasonable grounds for believing that a person has committed an offence under section 34, 35, 36, 37 or 39, he or she may serve a notice in writing (in this section referred to as a “fixed payment notice”) on that person stating that—

- (a) the person is alleged to have committed the offence,
- (b) the person may during the period of 28 days from the date of the notice make to the Courts Service at the address specified in the notice a payment of €100 (or such other amount, being an amount not exceeding €1,000, as stands prescribed) accompanied by the notice,
- (c) the person is not obliged to make the payment specified in the notice, and
- (d) a prosecution in respect of the alleged offence will not be instituted during the period of 28 days specified in the notice and, if the payment specified in the notice is made during that period, no prosecution in respect of the alleged offence will be instituted.

(2) Where a fixed payment notice is given under subsection (1)—

- (a) a person to whom the notice applies may, during the period of 28 days specified in the notice, make to the Courts Service at the address specified in the notice the payment specified in the notice accompanied by the notice,

- (b) the Courts Service may upon receiving the payment, issue a receipt for it and any payment so received is not recoverable in any circumstances by the person who made it, and
- (c) a prosecution in respect of the alleged offence shall not be instituted in the period specified in the notice, and if the payment so specified is made during that period, no prosecution in respect of the alleged offence shall be instituted.

(3) In a prosecution for an offence under this Act, the onus of proving that a payment pursuant to a notice under this section has been made lies on the defendant.

(4) In proceedings for an offence under section 34, 35, 36, 37 or 39 it is a good defence for the defendant to prove that he or she has made a payment in accordance with this section pursuant to a fixed payment notice issued in respect of that offence.

(5) Moneys received pursuant to the giving of a fixed payment notice shall be disposed of in a manner determined by the Courts Service.

Explanatory note

Section 40 implements the recommendations in paragraph 8.30 of the Report that fixed charge notices may be issued in respect of offences under the juries legislation.

Jury Research

41. — (1) Without prejudice to *section 39* and any other provisions of this Act, research may be carried out in accordance with this section into matters such as jury representativeness, juror comprehension, juror management and juror capacity and competence.

(2) (a) Research carried out under this section shall be undertaken by a barrister at law or a solicitor or a person falling within any other class of persons specified in regulations made by the Minister.

(b) Research carried out under this section shall not include research concerning the deliberations of a jury in a specific trial (whether civil or criminal), but may include case simulation with persons who are qualified for jury service or who have served on a jury.

(c) Research carried out under this section shall be published, but such publication shall not contain any information which would enable any juror to be identified or any specific trial (whether civil or criminal) to be identified.

(d) A person referred to in paragraph (a) may, for the purposes of carrying out research under this section, attend court proceedings subject to any directions the court may give in that behalf.

(3) (a) Without prejudice to the generality of *subsection (1)*, research may be carried out under this section into permissible and practicable supports and accommodation related to physical disability, ill health, decision-making capacity and reading and linguistic understanding, based on international best practice and experience.

(b) In relation to potential jurors with hearing or sight difficulties, such a research project should take full account of the ongoing development of codes of conduct and standards for Irish sign language interpreters and CART operators, and should also have regard, where relevant, to the potential that the presence of a person or persons other than a juror in the jury room may have an impact on the fairness of a trial, and to developing codes, standards and practical experience from other jurisdictions, and should then determine

whether it would be feasible to apply these in the jury system in the State.

Explanatory note

Section 41(1) implements the recommendation in paragraph 11.18 of the Report that, without prejudice to the offences recommended in paragraph 8.29 concerning disclosure of matters discussed during jury deliberation (see *section 39* of the Bill), provision should be made in legislation for empirical research into matters such as jury representativeness, juror comprehension, juror management and juror capacity and competence. *Section 41(2)* implements the recommendation in paragraph 11.18 that such research would be subject to appropriate safeguards to prevent disclosure of the deliberative process of a specific juror or jury and which would be subject to confidentiality requirements comparable to those in *section 40(3)* of the *Civil Liability and Courts Act 2004*.

Section 41(3)(a) implements the recommendations in paragraphs 4.44, 4.61 and 4.89 that such research should include an examination into permissible and practicable supports and accommodation related to physical disability, ill health, decision-making capacity and reading and linguistic understanding, based on international best practice and experience. *Section 41(3)(b)* implements the recommendation in paragraph 4.44 that, in the specific context of potential jurors with hearing or sight difficulties, a dedicated research project should be developed that takes full account of the ongoing development of best practice codes of conduct and standards for Irish sign language interpreters and CART operators, and that also has regard, where relevant, to the potential that the presence of a 13th person (or more) in the jury room may have an impact on the fairness of a trial; and that this research project would take into account developing codes, standards and practical experience from other jurisdictions, and would then determine whether it would be feasible to apply these in the context of the jury system in Ireland.

Lengthy trials and provision of information to juries

- 43.** —(1) (a) A court may empanel up to three additional jurors where the judge estimates that the trial will extend beyond three months in duration.
- (b) Where such additional jurors have been empanelled and more than 12 jurors remain when the jury is about to retire to consider its verdict, the additional jurors shall be balloted out and then discharged from jury service.
- (2) In any trial on indictment, the trial judge may order that copies of any or all of the following documents shall be given to the jury in any form that the judge considers appropriate:
- (a) any document admitted in evidence at the trial,
- (b) the transcript of the opening speeches of counsel,
- (c) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial,
- (d) the transcript of the whole or any part of the evidence given at the trial,
- (e) the transcript of the closing speeches of counsel,
- (f) the transcript of the trial judge's charge to the jury,
- (g) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, an affidavit by an accountant summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offence.

(3) If the prosecutor proposes to apply to the trial judge for an order that a document mentioned in subsection (2)(g) shall be given to the jury, the prosecutor shall give a copy of the document to the accused in advance of the trial and, on the hearing of the application, the trial judge shall take into account any representations made by or on behalf of the accused in relation to it.

(4) Where the trial judge has made an order that an affidavit mentioned in subsection (2)(g) shall be given to the jury, the accountant concerned—

(a) shall be summoned by the prosecutor to attend at the trial as an expert witness, and

(b) may be required by the trial judge, in an appropriate case, to give evidence in regard to any relevant accounting procedures or principles.

(5) In any trial on indictment, the trial judge may appoint an assessor to assist the court, including the jury, to address any difficulties associated with juror comprehension of complex evidence.

Explanatory note

Section 42 implements the recommendation in Chapter 10 concerning lengthy trials and juror comprehension. *Section 42(1)* implements the recommendations in paragraph 10.17 that a court should be empowered to empanel up to three additional jurors where the judge estimates that the trial will take in excess of three months; and that, where additional jurors have been empanelled and more than 12 jurors remain when the jury is about to retire to consider its verdict, the additional jurors shall be balloted out and then discharged from jury service. *Section 42(2) to (4)* implement the recommendations in paragraph 10.27 that section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, which concerns the provision of specified documentation to juries, should be extended to all trials on indictment. *Section 42(3)* implements the recommendation in paragraph 10.31 that the trial judge should be empowered to appoint an assessor to assist the court, including the jury, to address any difficulties associated with juror comprehension of complex evidence.

Amendment of section 25 of the Disability Act 2005

43. —Section 25 of the Disability Act 2005 is amended by the insertion of the following subsection after subsection (1)—

“(1A) Without prejudice to the generality of *subsection (1)*, the Courts Service shall ensure that courthouses and courtrooms are, as far as practicable, accessible by means of ramps and other reasonable accommodation such as induction loops.”

Explanatory note

Section 43 implements the recommendation in paragraph 4.43 of the Report that the *Disability Act 2005* should include express recognition for the provision of physical accessibility, such as wheelchair ramps and other reasonable accommodation such as induction loops, that make participation by persons with disabilities in a jury practicable and achievable.

SCHEDULE
Persons Not Eligible for Jury Service

President of Ireland (*Uachtarán na hÉireann*).

Persons concerned with administration of justice

Persons holding or who have at any time held any judicial office within the meaning of the Courts (Establishment and Constitution) Act 1961.

Coroners, deputy coroners and persons appointed under section 5(2) of the Local Authorities (Officers and Employees) Act 1926 to fill the office of coroner temporarily.

The Attorney General and members of his or her staff.

The Director of Public Prosecutions and members of his or her staff.

Barristers and solicitors actually practising as such.

Solicitors' apprentices, solicitors' clerks and other persons employed on work of a legal character in solicitors' offices.

Officers attached to a court or to the President of the High Court, officers and other persons employed in any office attached to a court or attached to the President of the High Court and, without prejudice to the scope of such officers or persons, any employees of the Courts Service.

Persons employed from time to time in any court for the purpose of taking a record of the proceedings of the court.

Members and former members of the Garda Síochána, and civilian employees of the Garda Síochána.

Commissioners and staff of the Garda Síochána Ombudsman Commission.

Prison officers and other persons employed in any prison, Saint Patrick's Institution or any place provided under section 2 of the Prisons Act 1970 or in any place in which persons are kept in military custody pursuant to section 2 of the Prisons Act 1972 or in any place specified to be used as a prison under section 3 of the Act of 1972, chaplains and medical officers of, and members of visiting committees for, any such establishment or place.

Persons employed in the Probation Service of the Department of Justice.

A person in charge of, or employed in, a forensic science laboratory.

Explanatory note

This Schedule implements the recommendations in paragraphs 5.25 to 5.41 of the Report concerning the list of persons who are not eligible for jury service. The list comprises, primarily, persons who are concerned with the administration of justice (and the President of Ireland). Subject to a number of amendments to the list recommended by the Commission, it largely replicates the list of persons in Schedule 1, Part 1 of the *Juries Act 1976*. Thus, the following persons continue to be ineligible for jury service: serving and former members of the judiciary; coroners; the Attorney General and members of his or her staff; the Director of Public Prosecutions and members of his or her staff; practising barristers and solicitors; court officers; stenographers; and members of the Garda Síochána. The Commission has recommended in paragraphs 5.35, 5.36 and 5.37 that former members of the Garda Síochána, civilian employees of the Garda Síochána, and Commissioners and staff of the Garda Síochána Ombudsman Commission should also be ineligible for jury service. The Commission has recommended in paragraph 5.41 that members of the Defence Forces and the Reserve Defence Forces should no longer be ineligible for jury service. The list of persons referred to under the heading "Other Persons" in Schedule 1, Part 1 of

the *Juries Act 1976* are now referred to in *section 6(3) and (4)* of the Bill.

This Schedule omits entirely the current Schedule 1, Part 2 of the *Juries Act 1976*, which contains a list of persons “excusable as of right” from jury service (and which is connected to section 9(1) of the 1976 Act). This omission implements the recommendation in paragraph 5.56 of the Report, in which the Commission recommends that section 9(1) and Schedule 1, Part 2, of the 1976 Act should be repealed and replaced with a general right of excusal for good cause, and that evidence should be required to support applications for excusal. *Section 9* of the Bill now deals with excusal for good cause and deferral of jury service.