



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

JURY SERVICE

(LRC CP 61 – 2010)



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Law Reform Commission

FIRST PUBLISHED
March 2010

ISSN 1393-3140

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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 150 documents (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.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

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Professor Finbarr McAuley

Part-time Commissioner:

Marian Shanley, Solicitor

Part-time Commissioner:

Mr Justice Donal O'Donnell, Judge of the Supreme Court

LAW REFORM RESEARCH STAFF

Director of Research:

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

Legal Researchers:

John P Byrne BCL, LLM, PhD (NUI), Barrister-at-Law

Chris Campbell B Corp Law, LLB Diop Sa Gh (NUI)

Siobhan Drislane BCL, LLM (NUI)

Gemma Ní Chaoimh BCL, LLM (NUI)

Bríd Nic Suibhne BA, LLB, LLM (TCD), Diop sa Gh (NUI)

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

Gerard Sadlier BCL (NUI)

Joseph Spooner, BCL (Law with French Law) (NUI), Dip. French and European Law (Paris II), BCL (Oxon)

Ciara Staunton BCL, LLM (NUI), Diop sa Gh (NUI)

STATUTE LAW RESTATEMENT

Project Manager for Restatement:

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

Legal Researcher:

Catriona Moloney BCL (NUI), LLM (Public Law)

LEGISLATION DIRECTORY

Project Manager for Legislation Directory:

Heather Mahon LLB (ing. Ger.), M.Litt, Barrister-at-Law

Legal Researcher:

Rachel Kemp BCL (Law and German), LLM (NUI)

ADMINISTRATION STAFF

Executive Officers:

Deirdre Bell
Simon Fallon
Darina Moran
Peter Trainor

Legal Information Manager:

Conor Kennedy BA, H Dip LIS

Cataloguer:

Eithne Boland BA (Hons), HDip Ed, HDip LIS

Clerical Officers:

Ann Browne
Ann Byrne
Liam Dargan
Sabrina Kelly

PRINCIPAL LEGAL RESEARCHER FOR THIS CONSULTATION PAPER

Charles O'Mahony, BA, LL.B (NUI), LL.M (Lond), LL.M (NUI)

CONTACT DETAILS

Further information can be obtained from:

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

ACKNOWLEDGEMENTS

The Commission would like to thank the following people who provided valuable assistance, a large number of whom attended the Commission's roundtable discussion on this project on 18 June 2008:

Ms Claire Bruton, Barrister

Ms Patricia Casey, Courts Service

Mr Mark Coen, School of Law, Trinity College Dublin

Ms Rebecca Coen, Office of the Director of Public Prosecutions

Ms Eileen Creedon, Office of the Director of Public Prosecutions

Dr Penny Darbyshire, School of Law, Kingston University, London

Mr Noel A Doherty, Courts Service

Mr Bobby Eager, Solicitor, Garret Sheehan & Partners

Mr Michael Farrell, Solicitor, Free Legal Advice Centres

Mr Remy Farrell, Barrister

Ms Mary Feerick, Courts Service

Mr Kevin Fidgeon, Courts Service

Ms Aine Flynn, Solicitor, Terence Lyons & Co

Mr James Hamilton, Director of Public Prosecutions

Mr Conor Hanly, Faculty of Law, NUI Galway

Dr Niamh Howlin, Faculty of Law, Queen's University Belfast

Ms Liz Hughes, Courts Service

Ms Claire Loftus, Office of the Director of Public Prosecutions

Mr Tony McGillicuddy, Barrister

Ms Kate Mulkerrins, Office of the Director of Public Prosecutions

Mr Ronan Munro, Barrister

Mr David Nolan, Senior Counsel

Mr Thomas O'Malley, Barrister, Faculty of Law, NUI Galway

Ms Clare O'Regan, Solicitor, McGuill & Co

Ms Emer O'Sullivan, Solicitor, Emer O'Sullivan & Co

Mr Robert Purcell, Solicitor, Hanahoe & Hanahoe

Mr Noel Rubotham, Courts Service

Ms Susan Ryan, Courts Service

Mr Damian Sheridan, Barrister

Ms Pauline Walley, Senior Counsel

Ms Aisling Wall, Barrister

Mr Thomas Ward, Courts Service

Full responsibility for this publication lies, however, with the Commission.

TABLE OF CONTENTS

INTRODUCTION	1
A Background to the Project	1
B The role of juries in Ireland's court system	1
C The Constitution and representative juries	2
D Scope of the Project	4
E Changes made in 2008 Act and other developments since 2007	5
F The Commission's general approach to jury service	7
G Outline of the Consultation Paper	8
CHAPTER 1 JURY SELECTION IN IRELAND: FROM HISTORICAL DEVELOPMENT TO PRESENT TIMES 1	
A Introduction	1
B The Emergence of Jury Trial	2
(1) The Brehon non-jury trial system	2
(2) The Anglo-Norman introduction of juries	2
(3) Special Juries: an historical note	3
(4) Juries as fact finders and independent of the judge	6
C Trial by Jury in Ireland to the 19 th Century	7
(1) The political setting in the 19 th century	8
(2) Regulation of Qualification for Jury Service in the 19 th century	10
D Jury selection since the Foundation of the State	15
(1) Main elements of Juries Act 1927	16
(2) 1965 Reports of the Committee on Court Practice and Procedure on Juries	18
(3) 1965 Report on Jury Service in England	20
E <i>de Burca v Attorney General</i> and the <i>Juries Act 1976</i>	21
(1) De Burca v Attorney General	22
(2) Key matters and principles arising from the de Burca case	26
(3) The impact of the English 1974 Act on the 1976 Act	28
(4) Key elements of the 1976 Act	28
(5) Changes made in 2008 Act	29
CHAPTER 2 CITIZENSHIP, RESIDENCY AND JURY SERVICE 31	

A	Introduction	31
B	Jury Selection	31
	(1) Objectives of Jury Selection in Ireland	32
C	Citizenship and Demographics in Eligibility for Jury Service	38
	(1) The 1976 Act and changing demographics in Ireland	38
	(2) England and Wales	40
	(3) Australia	41
	(4) New Zealand	44
	(5) Citizenship as an Eligibility Requirement for Jury Service in Ireland	45
D	The Potential Use of the Register of electors for European and Local Elections	48
CHAPTER 3	INELIGIBILITY AND EXCUSAL FROM JURY SERVICE	53
A	Introduction	53
B	Concern with Ineligibility and Excusal from Jury Service	53
C	Ineligibility and Excusal: The Law Reform Trend	55
D	Ineligibility from Jury Service	61
	(1) Background to Ineligibility for Jury Service	62
	(2) Discussion of categories of Ineligible Persons under the Juries Act 1976	63
E	Excusal from Jury Service	80
	(1) Background to Excusal from Jury Service	80
	(2) Developments since 1976	81
	(3) Persons Excusable from Jury Service in the 1976 Act	82
	(4) Effectiveness of Reform	84
F	Deferral of jury service	86
	(1) Comparative Review	86
	(2) Length of deferral	88
	(3) The Commission's View	88
CHAPTER 4	CAPACITY TO UNDERTAKE THE DUTIES OF A JUROR	89
A	Introduction	89
B	The 1976 Act, as amended, and relevant international standards	89
	(1) Juries Act 1976, as amended in 2008	89

	(2) United Nations Convention on the Rights of Persons with Disabilities	90
	(3) Pending Challenge to the Juries Act 1976	91
	(4) The Right to a Fair Trial in Ireland	92
C	Comparative Study	92
	(1) Canada	92
	(2) England and Wales	94
	(3) New Zealand	94
	(4) United States	95
	(5) Australia	97
	(6) Summary	98
D	Reasonable Accommodation	98
	(1) Deaf and Hearing Impaired Jurors: Reasonable Accommodation	98
	(2) Secrecy of Jury Deliberations	103
	(3) Conclusion	105
E	Blind and Sight Impaired Jurors	105
	(1) Reasonable Accommodation	105
	(2) The Commission's Conclusions	107
	(3) Excusal	108
	(4) The Commission's View	109
F	Mental Health and Mental Capacity	110
	(1) Comparative Overview	110
	(2) The Commission's View	111
G	Literacy, Linguistic Comprehension and Communication Requirements	112
	(1) Comparative Overview	113
	(2) The Commission's View	116
H	Juries and the Irish Language	118
CHAPTER 5	DISQUALIFICATION FROM JURY SERVICE FOR CERTAIN PRIOR CONVICTIONS	121
A	Introduction	121
B	Overview of disqualification for certain prior convictions	121
	(1) Scope of disqualification under 1976 Act	121
	(2) Rationale for Disqualification of Persons with Prior Criminal Conduct from Jury Service	122
C	Comparative Overview	124
	(1) England and Wales	124
	(2) Australia	125
	(3) New Zealand	127
	(4) Summary	127

D	Reform of the Disqualification Provisions	128
(1)	Disqualification on the Length of Sentence v Seriousness of the Crime under the Juries Act 1976	128
(2)	Relevance of proposed spent convictions regime	129
(3)	Disqualification of Young Offenders	130
(4)	Pending Criminal Proceedings	132
(5)	Persons Currently Serving a Sentence	134
(6)	Non-custodial punishments	134
(7)	Types of non-custodial orders	135
(8)	Criminal Convictions outside the State	139
E	Jury Vetting	139
(1)	Vetting of Jury Lists	140
CHAPTER 6	PEREMPTORY CHALLENGES AND CHALLENGE FOR CAUSE	145
A	Introduction	145
B	Irish law on challenges from the 1927 Act to the 1976 Act	145
(1)	Challenges in the Juries Act 1927	145
(2)	1965 Report on Jury Challenges	146
(3)	Juries Act 1976	147
C	Comparative Overview of Challenges	149
(1)	England and Wales	149
(2)	Northern Ireland	150
(3)	United States	151
(4)	Canada	152
(5)	Australia	153
(6)	Hong Kong	156
(7)	New Zealand	156
(8)	Summary	159
D	Peremptory Challenges: The Arguments For and Against	159
(1)	Arguments For the Abolition of Peremptory Challenges	160
(2)	Arguments against the Abolition of Peremptory Challenges	163
E	The Commission's View	165
(1)	Peremptory Challenge	165
(2)	Challenge for Cause	167
(3)	Guidelines on the use of Peremptory Challenge	167
CHAPTER 7	PAYMENT FOR JURY SERVICE	169

A	Introduction	169
B	Employers and jury service	169
C	Small Business Owners and Self-employed Jurors	171
D	Payment for Jury Service	173
	(1) Committee on Court Practice and Procedure	173
	(2) Juries Act 1976	173
	(3) Comparative analysis of payment for jury service	173
	(4) Appreciation of Jurors	177
CHAPTER 8	JUROR MISCONDUCT AND JURY TAMPERING	181
A	Introduction	181
B	The Right to a Fair Trial and Directions to Jurors	181
	(1) The Right to a Fair Trial	181
	(2) Juror Misconduct in Ireland	183
	(3) The Secrecy of Jury Deliberations	183
	(4) The Assumption that Jurors Act Properly in Arriving at their Verdict	184
C	Comparative Analysis	185
	(1) United States	185
	(2) England and Wales	187
	(3) Scotland	191
	(4) Australia	192
	(5) European Court of Human Rights Case Law	200
	(6) Conclusion on Comparative Analysis	204
D	The Necessity of Law Reform in Ireland	204
	(1) Offence prohibiting jurors conducting independent inquiries	205
	(2) Reformulation of the Trial Judge's Directions to the Jury	205
E	Jury Tampering	206
CHAPTER 9	SUMMARY OF PROVISIONAL RECOMMENDATIONS	211
APPENDIX A	CONSOLIDATED TEXT OF THE <i>JURIES ACT 1976, AS AMENDED</i>	217

INTRODUCTION

A Background to the Project

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*¹ and involves an examination of the law concerning jury service, in particular qualification, eligibility and selection processes, and related matters. The principal legislation in this area is the *Juries Act 1976*, as amended, most recently by the *Civil Law (Miscellaneous Provisions) Act 2008*.²
2. The 1976 Act was enacted against the immediate background of the decision of the Supreme Court in *de Burca v Attorney General*³ in which the Court found that the provisions in the *Juries Act 1927* which limited jury panels to property owners, and which in effect prevented women from being selected for jury service, were in breach of the Constitution of Ireland. The 1976 Act also implemented, belatedly, wide-ranging recommendations for reform made in 1965 by the Committee on Court Practice and Procedure.⁴ This project involves the first publication by a public body since 1965 of proposals for reform in the area of jury service.

B The role of juries in Ireland's court system

3. Court hearings involving a jury, whose members are drawn from the general community, are a distinctive feature of common law legal systems,⁵ of which Ireland is one. Indeed, Article 38.5 of the Constitution of Ireland

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

² An informal consolidated text of the *Juries Act 1976*, as amended, is set out in the Appendix to this Consultation Paper. This is not a formal Statute Law Restatement of the 1976 Act. The Commission is currently in the preliminary stages of preparing a Second Programme of Statute Law Restatement, having previously developed its First Programme, as to which see *Report on Statute Law Restatement* (LRC 91-2008).

³ [1976] IR 38.

⁴ Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, March 1965) and Fourth Interim Report *Jury Challenges* (Pr.8577, November 1965). The Committee was chaired by Walsh J.

⁵ These are the legal systems that derive from the Anglo-Saxon or British system of law, which was exported to British colonies and former colonies, such as Australia, Ireland, New Zealand and the United States of America.

generally⁶ requires that major criminal cases tried on indictment (such as murder and robbery) must involve a trial with a jury. 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, for example, that a person is either guilty or not guilty of serious crimes.⁷ At one time, juries in Ireland were also used in many civil cases, including in personal injuries actions,⁸ but they are now used in very few civil cases, the most common being High Court defamation claims.⁹ 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.

C The Constitution and representative juries

4. The inclusion of this project on juries in the *Third Programme of Law Reform* arose from a number of submissions received in 2007 during the Commission's consultation process leading to the Programme's formulation. These had raised concerns as to whether the provisions of the *Juries Act 1976* concerning qualification and eligibility for jury service, and the processes involved in jury selection, continued to facilitate the selection of juries that were representative of the community.

5. The Commission, in deciding whether to include the project in the *Third Programme of Law Reform*, was conscious of the connection between the Constitution of Ireland and the enactment of the *Juries Act 1976*. As already mentioned, the Supreme Court decided, in *de Burca v Attorney General*,¹⁰ that

⁶ Article 38.2 allows for summary trials (in the District Court) for minor criminal offences cases, and Article 38.3 allows, on specified conditions, for non-jury trials in Special Criminal Courts for major criminal offences: see generally, *Byrne and McCutcheon on the Irish Legal System* (5th ed Bloomsbury Professional 2009), para 5.103.

⁷ By contrast, while other legal systems, such as the Civil Law legal systems of France, Germany and most other countries of continental Europe (and their former colonies, such as Canada) also feature court hearings involving a jury, the jury often has an advisory role only, and the final decision is made by a judge or panel of judges.

⁸ The *Courts Act 1988* abolished the right to have High Court personal injuries actions decided by a jury.

⁹ The *Defamation Act 2009* retained juries for High Court defamation actions.

¹⁰ [1976] IR 38, discussed in detail at paragraph 1.51ff, below.

the *Juries Act* 1927, which had set out the arrangements for jury selection at that time, was in breach of the Constitution. The Court decided that a criminal trial under Article 38.5 of the Constitution must involve a jury that is representative of a cross-section of the community. The Court concluded that the 1927 Act, by restricting jury selection to certain categories of property owners – in effect, restricting jury service to “men of property”¹¹ and excluding virtually all women from jury service – was in breach of this constitutional requirement of cross-community representativeness. The Court therefore declared invalid these provisions of the 1927 Act. Because it was therefore impossible to hold jury trials under the remaining provisions of the 1927 Act, it was necessary to enact new legislation as a matter of urgency. Within three months, the Oireachtas had enacted the *Juries Act* 1976 which, in response to the *de Burca* case, provides that, in general, juries are to be selected from all persons on the electoral roll for general elections, that is, Irish citizens aged at least 18 years.

6. While the 1976 Act was thus a necessary legislative reaction to the *de Burca* case, it also constituted, as the Commission has already noted,¹² a belated implementation of recommendations made in 1965 by the Committee on Court Practice and Procedure, which had also concluded that the effective exclusion of women and young men from jury service was not acceptable. In that respect, it is clear that the 1976 Act had been in preparation before the decision in *de Burca*, and that its detailed format and content also owed much to the content of the UK *Juries Act* 1974. The UK 1974 Act had also provided for jury service for women on an equal footing with men, responding to the growing political influence of the burgeoning women’s movement, an influence that, in Ireland, was converted into constitutional action in the *de Burca* case, necessitating immediate legislative action. It is also notable that the 1976 Act carried over many other provisions on jury service that had been in place in the 1927 Act (and in the juries legislation that predated the foundation of the State), such as the excusal from jury service of many categories of public service employees and professional persons.

7. The submissions received by the Commission in 2007 acknowledged that the 1976 Act had provided for more representative juries, in particular by ensuring that greater numbers of women and young persons were empanelled

¹¹ Indeed, as the Commission discusses in Chapter 1 below, this limitation of jury service to men was common in other countries well into the 20th century, reflected in the title of the best-known Hollywood film on jury deliberations of the 1950s, *Twelve Angry Men* (MGM, 1957; director: Sidney Lumet). More recent movies can draw on women jurors as their protagonists.

¹² See paragraph 2, above and paragraphs 1.44ff, below.

for jury service. Nonetheless, they also drew attention to a number of significant remaining issues around representativeness, notably the wide categories of persons whom the 1976 Act deem ineligible for jury service and those who may be excused. The submissions also drew attention to specific concerns about the secrecy of jury deliberations, in particular how this might affect inquiries into juror conduct (including misconduct), whether during a trial or in its aftermath.

8. The Commission decided that these issues indicated a clear need to assess whether some of the provisions in the 1976 Act could continue to be justified, including by reference to the general constitutional standards set down in the *de Burca* case. In addition, the Commission took into account that there had been significant legislative developments on jury service in other States since the 1970s and, importantly, that Ireland had seen major demographic changes, notably the increasing number of EU citizens who have become resident in the State. The Commission considered that the issue of jury secrecy, while potentially very wide in scope, could form part of this analysis if limited to the specific issues raised in the submissions. For these reasons, the project was included in the *Third Programme of Law Reform*.

D Scope of the Project

9. In general terms, the scope of this project extends to a review of the law concerning the criteria on which persons are ultimately selected for jury service. As already indicated, the key eligibility criterion, used in section 6 of the 1976 Act, is that a person is on the electoral role for general elections, that is, a citizen of Ireland aged at least 18 years who has registered his or her name on the electoral roll for general elections.

10. In addition, the 1976 Act contains two grounds on which categories of persons must be excluded from consideration for jury service. First, 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). As discussed below,¹³ a number of people, including the Director of Public Prosecutions, have drawn attention to this aspect of the 1976 Act in recent comments on jury representativeness. Section 9 of the 1976 Act contains a general discretion to excuse a person from jury service, and

¹³ See paragraph 15, below.

figures broadcast in 2008, also discussed below,¹⁴ have drawn attention to the possible effect of this discretion. The Commission analyses and reviews these provisions of the 1976 Act in this Consultation Paper.

11. 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. 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 be biased. The Commission also examines and reviews these provisions.

12. Section 29 of the 1976 Act requires an employer to pay the salary of any employee during jury service, and the Commission also examines this provision. The final area examined by the Commission is potential juror misconduct and access to information about jurors which could give rise to interference with jury deliberations, against the background of the traditional secrecy of jury deliberations.

13. The Commission accepts that the scope of the project necessarily excludes a number of important aspects of the law concerning juries. Without attempting to set out a complete list of these excluded areas, the Commission notes that the project does not include discussion of: the organisation of jury districts; the number of jurors on a jury; the respective roles of the judge and jury; whether juries are sent home or sequestered during cases; or majority jury verdicts. While each of these matters is of importance, the Commission emphasises that they fall outside the scope of this project.

E Changes made in 2008 Act and other developments since 2007

14. The submissions received by the Commission in 2007 had drawn attention to some particularly glaring anomalies in the 1976 Act. Thus, while in general terms, the 1976 Act provided for jury selection from the electoral roll for general elections, section 6 of the 1976 Act 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*

¹⁴ *Ibid.*

*Provisions) Act 2008.*¹⁵ These welcome 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.

15. As was clear, however, from other matters raised in the submissions received by the Commission in 2007, a wider range of issues concerning the 1976 Act remained to be reviewed and analysed. During the course of preparing this Consultation Paper, the Commission was also conscious that concerns had been expressed publicly by those with particular knowledge of and insight into the workings of the jury system. For example, the Director of Public Prosecutions has expressed concern that “[a]s a result of the wide variety of exemptions from jury service which are given to various professions and occupations and in practice much of the public service” these groups in society may be under-represented on juries.¹⁶ These comments¹⁷ appear to be supported by figures made available by the Courts Service and broadcast in 2008,¹⁸ which indicated that, out of a total of 41,500 persons who were summoned for jury service in Dublin in 2007, over 22,000 were excused from service under the 1976 Act. Of these, 15,844 people were disqualified from jury service because of their job, on health grounds or due to their age.¹⁹ A further 7,018 were excused under the general discretionary power to do so in section 9 of the 1976 Act. During one specific week when 322 people were excused, 100

¹⁵ See Chapter 4, below.

¹⁶ Paper delivered by James Hamilton, Director of Public Prosecutions, Conference on *Rape Law: Victims on Trial?* organised by Dublin Rape Crisis Centre and the Law School Trinity College Dublin, 16 January 2010. The Director expressed similar views at his address to the 10th Annual Prosecutors’ Conference, 23 May 2009 (see Coulter, *The Irish Times*, 25 May 2009) and to the Joint Oireachtas Committee on Justice, Equality, Defence and Women’s Rights on 8 December 2003: see paragraph 3.02, below.

¹⁷ Other writers have also raised the issue of jury representativeness in Ireland: see, for example, O’Malley, “A Representative and Impartial Jury” (2003) *Bar Review* 233, and Jeffers, “The Representative and Impartial Jury in the Criminal Trial: An Achievable Reality in Ireland Today?” (2008) 18(2) *Irish Criminal Law Journal* 34.

¹⁸ These figures were broadcast on 23 November 2008 by the public service broadcaster, Radio Telefís Éireann, based on material supplied to it by the Courts Service on foot of a request made under the *Freedom of Information Acts 1997 and 2003*. See www.rte.ie/news/2008/1123/jury.html.

¹⁹ At that time, the 70 years age limit in the 1976 Act had not been removed.

people said they could not attend because of work, 99 people said they were primary carers and 84 said they were travelling.

16. The Commission is also aware that concerns have been expressed by a university lecturer in politics (and newspaper columnist) as to the manner in which a jury member had carried out his duties on a jury on which the lecturer had recently served;²⁰ she had expressed particular concern that a self-employed person who had served on the jury was unable to give full attention to the case because of worries about the effect on his business.²¹ This reflects two intersecting aspects of the Commission's project: first, whether certain members of society are reluctant to serve on juries because of the economic consequences for them (an issue of great importance in 2010); and secondly, the need to ensure that public confidence is not impaired through inappropriate behaviour by those who actually serve on juries.

F The Commission's general approach to jury service

17. Bearing in mind the issues which have given rise to the inclusion of this project in the *Third Programme of Law Reform* and the public comments briefly mentioned in this Introduction, the Commission has approached this Consultation Paper with a number of overlapping concerns in mind. First, the Commission must have regard to the importance of the jury in the Irish court system; in particular that Article 38.5 of the Constitution of Ireland makes the jury mandatory in most serious criminal trials. Secondly, the Commission has borne in mind the need to reinforce public confidence in jury deliberations, particularly to prevent any possible jury misconduct. Thirdly, as the Supreme Court emphasised in *de Burca v Attorney General*,²² the Commission recognises that the process for selection of juries must, under the Constitution, be broadly representative of society. The Commission discusses in more detail in Chapter 1, below, the specific matters and principles that flow from the constitutional perspective set out in the *de Burca* case.²³

18. 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 correctly described as involving an enforceable individual right; it is more accurately described as a duty that falls on members of the population of the State. While not a right as such, the Commission nonetheless considers that jury service

²⁰ See the article by Elaine Byrne, *The Irish Times*, 30 June 2009.

²¹ The Commission discusses the position of self-employed persons who are called for jury service in Chapter 7, below.

²² [1976] IR 38, discussed in detail at paragraph 1.51ff, below.

²³ See paragraph 1.65, below.

should be valued and supported to the greatest extent possible by the State. Thus any proposals for reform in this area should facilitate the constitutional requirement of representativeness, including the removal, to the greatest extent possible, of potential barriers to jury service.

19. The Commission now turns to provide a brief overview of the Consultation Paper.

G Outline of the Consultation Paper

20. In Chapter 1, the Commission examines the process of jury selection in Ireland, from its historical origins to an overview of the current position under the *Juries Act 1976*. The Commission's analysis is related to the specific issues examined in this Consultation Paper, and is not a general review of the history of juries in Ireland. The Commission begins with the origins of jury trial in the Anglo-Norman medieval period and discusses the hugely influential decision in 1670 in *Bushell's Case*, which established the independence of jury decision-making from excessive judicial interference.

21. The Commission then discusses the use of jury trial in Ireland in the 19th century, focusing primarily on the criteria concerning eligibility for and selection of juries, though the wider political setting is also outlined. In the post-Independence setting, the Commission discusses how the *Juries Act 1927* broadly followed the pre-Independence approach and maintained a largely male-only jury panel. The Commission also discusses the 1965 Report of the Committee on Court Practice and Procedure *Jury Service*, which – in line with developments occurring internationally – recommended a widening of the jury panel, notably to include women on an equal footing with men and to remove the land-owning eligibility requirement.

22. The Commission notes that the 1965 Report was not acted on until after the 1975 Supreme Court decision in *de Burca v Attorney General*,²⁴ in which the jury panel restrictions in the 1927 Act were declared unconstitutional. This was followed almost immediately with the enactment of the *Juries Act 1976*, which removed the property restrictions and the effective exclusion of women from jury panels. The Commission then sets out an overview of the key principles outlined by the Supreme Court in the *de Burca* case, which form the background to the analysis in the following chapters of the Consultation Paper.

23. In Chapter 2, the Commission considers a key element of representativeness as currently provided for in the *Juries Act 1976*, which focuses exclusively on citizenship. This, in turn, requires the Commission to examine the source lists from which jury panels are selected, currently confined

²⁴ [1976] IR 38.

to the general election electoral list. The Commission begins with a brief overview of the process of jury selection, including some of the key issues concerning representativeness that arise. The Commission then discusses how changing demographics in Ireland make it especially relevant to discuss how other States have developed different models, focusing on residency, from which to select jury panels. The Commission then discusses to what extent the electoral register for local and European elections (and other possible lists) could be used in this respect, and makes provisional recommendations on this.

24. In Chapter 3, the Commission considers, firstly, the ineligibility of certain persons from jury service under the *Juries Act 1976*, many for the reason that they are connected with the administration of justice, such as members of An Garda Síochána. The Commission then discusses the very wide category of persons who are excusable as of right under the 1976 Act, many being public servants and professional persons. The Commission also considers general concerns expressed about the levels of ineligibility and excusal from jury service in Ireland. The Commission then discusses the trend in other States in connection with reforming the law on ineligibility and excusal. Following this the Commission sets out its detailed proposals concerning the categories of persons currently ineligible for jury service and then as to excusal from jury service, including consideration of the introduction of a system of deferral in circumstances where a person is unable to undertake jury service.

25. In Chapter 4, the Commission examines the capacity of persons to undertake jury service. Under the *Juries Act 1976* as originally enacted, capacity was specifically defined so as to exclude deaf, blind, hearing and sight impaired persons but this has been amended by the *Civil Law (Miscellaneous Provisions) Act 2008* which emphasises the function of the juror rather than the incapacity of any particular group.

26. The Commission discusses to what extent the *Juries Act 1976* might be further 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. The Commission recognises in this respect that significant practical and financial considerations as to reasonable accommodation for potential jurors may arise. The Commission discusses these matters against the background of the relevant international human rights standards, notably the 2006 UN Convention on the Rights of Persons with Disabilities. The Commission also discusses the consequential issues that arise in this respect, including issues of fluency in English, which directly concern the capacity of a person to serve on a jury.

27. In Chapter 5, the Commission considers section 8 of the *Juries Act 1976* which deals with the disqualification of persons from jury service on the basis of prior criminal convictions. The Commission first provides an overview of

the history of this type of provision up to the 1976 Act. The Commission then examines the position in other States, and follows this by setting out its provisional recommendations for reform. The Commission also examines the issue of juror vetting, as this relates directly to the issue of disqualification for certain prior convictions

28. In Chapter 6 the Commission considers challenges to jurors, with particular emphasis on peremptory challenges. The Commission provides an overview of the law on juror challenges in Ireland as it was found in the *Juries Act 1927* and the extent to which this was altered in the *Juries Act 1976*. The Commission then sets out a comparative analysis of the use of peremptory challenges and the reforms adopted in other States. Having discussed arguments for and against the abolition of peremptory challenges, the Commission then sets out its reform options and provisional recommendations.

29. In Chapter 7 the Commission discusses the issue of remuneration of jurors. The issue arises in two ways. First, who bears the cost of an employee's absence from work during jury service, and secondly, who bears the cost of out of pocket expenses incurred by jurors by having to attend jury duty? Under the 1976 Act, employers are obliged to pay employees whilst they are on jury service and there is no system for out of pocket expenses which must be borne by the juror.

30. The question of juror expenses was raised in the Oireachtas debate on the amendments made to the *Juries Act 1976* by the *Civil Law (Miscellaneous Provisions) Act 2008*. The issue was also raised with the Commission during the public consultation on the Commission's *Third Programme of Law Reform 2008-2014*. The Commission considers how jury service can be further valued in terms of possible arrangements to address financial hardship for jurors, especially those who are not employees.

31. In Chapter 8, the Commission considers the issue of juror misconduct, in particular where jurors consider information not presented as evidence at trial. The emergence of wireless technology and the proliferation of Internet use now make it possible for jurors to obtain a significant amount of information about a defendant and about the crime with which they are charged should they so wish. The Commission's comparative analysis of the jury system in other common law jurisdictions reveals that the issue of jurors who obtain information independently of the court is emerging as a significant matter of concern. The Commission considers the various options that have been developed in other States and makes provisional recommendations for reform.

32. The Commission also discusses in Chapter 8 the connected issue of to what extent jury tampering is affected by the manner in which the jury selection process is carried out, particularly in terms of the current provisions in the *Juries Act 1976* which facilitate inspection of the jury panel.

33. Chapter 9 contains the provisional recommendations made by the Commission in this Consultation Paper.

34. The Appendix contains an informal consolidated text of the *Juries Act 1976*, as amended.

35. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations are provisional in nature. The Commission will make its final recommendations on jury service following further consideration of the issues and consultation. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its Report on this project, those who wish to do so are requested to make their submissions in writing to the Commission or by email to info@lawreform.ie by **31 May 2010**.

CHAPTER 1 JURY SELECTION IN IRELAND: FROM HISTORICAL DEVELOPMENT TO PRESENT TIMES

A Introduction

1.01 In this Chapter, the Commission examines the process of jury selection in Ireland, from its historical origins to an overview of the current position under the *Juries Act 1976*. The Commission's analysis is related to the specific issues examined in this Consultation Paper, and is not a general review of the history of juries in Ireland. In Part B, after a brief discussion of the Brehon law non-jury trial process, the Commission examines the origins of jury trial in the Anglo-Norman medieval period and ending with the hugely influential decision in 1670 in *Bushell's Case*, which established the independence of jury decision-making from excessive judicial interference. In Part C, the Commission discusses the principal changes that evolved until the end of the 19th century in connection with the criteria concerning eligibility for and selection of juries, largely confining jury panels to male property owners. The wider political setting of jury trial in Ireland at that time is briefly discussed. In Part D, the Commission discusses the relevant legislation enacted since the foundation of the State, beginning with the *Juries Act 1927*, which broadly followed the pre-Independence approach and maintained a largely male-only jury panel. The Commission also discusses the 1965 Report of the Committee on Court Practice and Procedure *Jury Service*, which – in line with developments occurring internationally – recommended a widening of the jury panel, notably to include women on an equal footing with men and to remove the land-owning eligibility requirement. The Commission notes that the 1965 Report was not acted on until after the 1975 Supreme Court decision in *de Burca v Attorney General*,¹ in which the jury panel restrictions in the 1927 Act were declared unconstitutional. This was followed almost immediately with the enactment of the *Juries Act 1976*, which removed the property restrictions and the effective exclusion of women from jury panels. In Part E, the Commission provides an overview of the key principles outlined by the Supreme Court in the *de Burca* case, which forms the background to the analysis in the following chapters of this Consultation Paper, and also an outline of the main elements of the 1976 Act.

¹ [1976] IR 38.

B The Emergence of Jury Trial

(1) *The Brehon non-jury trial system*

1.02 In terms of Irish history, Brehon law, which was codified in the aftermath of the arrival of Christianity in Ireland in the 5th century,² involved non-jury trials presided over by a brehon, the equivalent of a travelling judge, who gave decisions on behalf of the provincial king.³ It can be argued that jury trial in Ireland dates from the Anglo-Norman invasion of 1169-1171,⁴ although of course in reality the English common law system did not become fully applicable throughout Ireland until the end of the 17th Century, when the Irish clan or royal family system (in which the Brehon law system flourished) ended with the Flight of the Earls. From the perspective of the 21st century, however, Ireland is a common law jurisdiction in which jury trial, rather than the Brehon non-jury trial system, has been in place for many centuries. In that respect, it is important to outline the development of the common law jury system from its origins in England in the 11th century.

(2) *The Anglo-Norman introduction of juries*

1.03 It is generally accepted that jury trial, in a sense that would be broadly understand today, was first introduced into England by the Norman conquerors of the 11th century. From the 8th century onwards Frankish emperors and kings had occasionally summoned inquests of neighbours to answer the questions of itinerant royal officers.⁵ The Normans had adopted the occasional use of these inquests which were also a feature of Germanic local law and incorporated them into their legal system.⁶ The jury system was to become a significant and enduring emblem of what became known as the Anglo-Norman common law system of law.

1.04 The *Assize of Clarendon* of 1166 comprised a series of ordinances, in effect legislation, by King Henry II and was seen as a significant point of origin for trial by jury in England. The *Assize of Clarendon* represented an attempt to improve criminal law procedures. It established the grand jury, or presenting jury, consisting of 12 men in each hundred and 4 men in each township, whose role was to inform the King's itinerant judges of the most

² See Osborough, "Roman Law in Ireland" (1990-1992) 25-27 *Irish Jurist (ns)* 212.

³ See *Byrne and McCutcheon on the Irish Legal System* (5th ed Bloomsbury Professional 2009), para 2.02.

⁴ Jackson, Quinn & O'Malley "The Jury System in Contemporary Ireland" in Vidmar (ed) *World Jury Systems* (2nd ed Oxford University Press 2000) at 284.

⁵ Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Cambridge Massachusetts 1983) at 448.

⁶ *Ibid.* See also Turner "The Origins of the Medieval English Jury: Frankish, English or Scandinavian?" (1968) 7 *Journal of British Studies* 1-10.

serious crimes committed in each local district and to name “any man accused or notoriously suspect of being a robber or murderer or thief.”

1.05 Prior to the introduction of trial by jury, various forms of trial existed in Europe, many originally supervised by religious clerics, of which the oldest known was trial by ordeal, typically taking the form of trial by fire or trial by water. Trial by ordeal was grounded in the belief that God, when called upon, would detect and punish the guilty and leave unharmed the innocent. Trial by ordeal was based solely on religious belief and did not involve the weighing of testimony or the cross-examination of witnesses. The problems with trial by ordeal are obvious. It was open to manipulation and a significant number of people managed to achieve an acquittal, which contributed to the popularity of the practice.⁷ There is a general consensus that the Fourth Lateran Council of 1215 marked the turning point in the disappearance of trial by ordeal, as it prohibited clerics from being involved in judicial decisions that resulted in the shedding of blood.⁸ In England, trial by ordeal had already been largely replaced by trial by jury since the Assize of Clarendon of 1166.

(3) *Special Juries: an historical note*

1.06 Before turning to examine the key elements in the evolution of the Anglo-Norman jury system, the Commission turns to discuss the phenomenon of the special jury, which was ultimately abolished by the *Juries Act 1927*. While this discussion of the special jury is thus of historical interest only, its existence nonetheless indicates the complexity of the historical development of the jury system.

1.07 It appears that special juries had operated from the 14th century. In 1730 the *Act for the Better Regulation of Juries* sought to regulate special juries in England.⁹ The 1730 Act provided for the use of special juries wherever they were requested by the parties to an action or where their use was considered necessary. It was extended to Ireland in 1778¹⁰ and, later, by the *Jury Act*

⁷ Sward “A History of the Civil Trial in the United States” (2003) 51 *Kansas Law Review* 347 at 352.

⁸ See Bartlett *Trial by Fire and Water: The Medieval Judicial Ordeal* (Clarendon 1986); Brown *Society and the Holy in Late Antiquity* (University of California Press 1982); Baldwin “The Intellectual Preparation for the Canon of 1215 against Ordeals” (1961) 36 *Speculum* 613-636; Pilarczyk “Between a Rock and a Hot Place: the Role of Subjectivity And Rationality in the Medieval Ordeal by Hot Iron” (1996) 25 *Anglo American Law Review* 87-112.

⁹ *An Act for the better Regulation of Juries* (3 Geo II, c.25), cited in Oldham “The Origins of the Special Jury (1983) 50 *Univ Chicago Law Rev* 137, at 139-140.

¹⁰ *An Act for the Amendment of the Law with Respect to Outlawries, Special Juries and the Future Effects of Bankruptcy in Certain Cases* (17 & 18 Geo III, c.45).

1826.¹¹ *The Irish Jury Act 1833* was the first specific legislative reference to special juries in Ireland.¹² Special juries varied significantly and took many different forms, such as all female juries¹³ or “the jury of matrons” who considered cases of pregnancy or paternity.¹⁴ The trial of ‘aliens or foreigners’ also historically gave rise to a specially constituted jury. The jury of the half tongue was also known as the jury *de medietate linguae*.¹⁵ Half the jury could be empanelled from juries consisting of half citizens and half foreigners, so that the trial would be more impartial.¹⁶ The jury *de medietate linguae* came into being as a result of the treatment of Jewish people in medieval England.

1.08 The use of special juries was common in trade disputes in London from the 1300s. Throughout the 14th and 15th centuries, supervisors of the different guilds would bring cases before the Mayor of London against those who were alleged to have committed serious breaches of the trade regulations. Examples of breaches of trade regulations included fishing with meshes smaller than those required, improper tanning of hides, improper hats and caps, false tapestry and false wine.¹⁷ Following a complaint the Mayor would summon a jury composed of men of the particular trade who would make a decision as to

See Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 *Irish Student Law Review* 19 at 35.

¹¹ *Ibid* at 35.

¹² This Act consolidated all previous legislation that regulated juries. Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 *Irish Student Law Review* 19 at 35.

¹³ Note that section 4 (and the Second Schedule) of the *Juries Act 1976* abolished the discretion in section 1 of the *Sex Disqualification (Removal) Act 1919* which empowered a judge to order an all-male or all-female jury.

¹⁴ Oldham “The Origins of the Special Jury” (1983) 50 *Univ Chicago Law Rev* 137 at fn.190. If a woman was convicted of a capital crime she was entitled to have the death sentence delayed until such time as her child was born if she could prove that she was pregnant. When a child of a convicted woman was born the sentence of the court was suppose to be administered. However, the reality was that the defendant was pardoned as the financial burden of rearing a newborn was significant. See also Blackstone *Commentaries on the Laws of England* Vol IX (A Facsimile of the First Edition, University of Chicago Press, 1769) Book III, Ch. 23 at 362.

¹⁵ However, it is noteworthy that this type of jury is not necessarily classified as a special jury. This type of jury was commonly referred to as the “party jury”. Robinson “A Historical and Comparative Perspective on the Common Law Jury” in Vidmar (ed) *World Jury Systems* (2nd ed Oxford University Press 2000) at 23.

¹⁶ Blackstone *Commentaries on the Laws of England* Vol IX (A Facsimile of the First Edition University of Chicago Press 1769) Book III, Ch. 23 at 360.

¹⁷ For a discussion on these and other disputes see Riley *Memorials of London and London Life in the 13th, 14th and 15th Centuries* (Longmans Green & Co 1868).

whether there was a breach of the trade regulations. The Mayor would then enforce the ruling.¹⁸

1.09 The qualification requirements for jury service in special jury civil cases were so narrow and restrictive that real difficulties existed in summoning jurors. The problem was so significant that legislation had to be introduced to relax the rules.¹⁹ Special juries were being abused by the mid 19th century. They were requested by parties to ensure that higher-class jurors and special juries were available where a party to a dispute was willing to fund them.²⁰ Other abuses of special juries included jury packing. The 19th century English reformer and philosopher Jeremy Bentham referred to special juries as “an engine of corruption,” and “the Guinea Trade,” and called special jurors “Guineamen,”²¹ as these jurors were paid one guinea (a pound sterling and a shilling) per case.

1.10 In light of the criticisms and problems with special juries, two main statutory reforms were enacted in the 19th century. The *County Juries Act 1825* sought to enhance the qualifications and quality of special jurors by requiring them to be merchants, bankers, esquires, or persons of higher degree. The 1825 Act also established a system of anonymous balloting in the selection of jurors, which was aimed at ending jury packing. The second reform came in the *Juries Act 1870*²² which introduced further procedural rules governing special jurors, and altered the qualification requirements for special jurors.

1.11 The special jury disappeared in Ireland earlier than in England. Section 66 of the *Juries Act 1927* provided for the abolition of the two-tiered system of jurors. The *Juries Act 1949* abolished the special jury in England. The City of London Special Jury was retained, but this was eventually abolished by the English Courts Act 1971.

1.12 The Commission now returns to the key developments in the general jury system up to the 19th century.

¹⁸ Hand “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harv Law Rev* 40 at 41.

¹⁹ See Lobban “The strange life of the English civil jury: 1837-1914” in Cairns and McLeod (eds) *The Dearest Right of the People of England* (Hart 2002) at 200-201.

²⁰ Oldham “Special Juries in England: Nineteenth Century Usage and Reform” *Journal of Legal History* 148 at 15.

²¹ A common juror was paid either a shilling (twelve pence) or eight pence. See Bentham *The Elements of the Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law* (Effingham Wilson 1821), Ch.4 § 4. Available at <http://www.constitution.org/jb/packing.htm>.

²² 33 & 34 Vict, c.77.

(4) ***Juries as fact finders and independent of the judge***

1.13 The key innovation in the Anglo-Norman jury system was the involvement of lay or community members in the decision-making process. But, in other respects, the earliest forms of trial by jury have very little in common with our contemporary understanding of the system. Early juries were composed of male property owners who fulfilled a role of witness testifying as to their local knowledge of an event,²³ rather than as impartial decision-makers who heard evidence and decided what had happened. Over the centuries the role of trial by jury changed, with jurors gradually required to hear evidence and decide what had happened: they became “fact finders” or “triers of fact.”²⁴ Nonetheless, the male, property-owning domination of Anglo-Saxon juries continued to be a feature.

1.14 The English judge Sir Patrick Devlin pointed out that the jury system was not something that was planned; rather it developed in a particular way because that way was proven to work and for no other reasons.²⁵ He noted that in the Norman system a juror was a man who was required by the King to take an oath and that the Normans “brought over this device whereby the spiritual forces could be made to perform a temporal service and the immense efficacy which they possessed in medieval times, used for the King’s own ends.”²⁶ The oath therefore served as a strong guarantee of obtaining the truth. The men who were required to answer were those who knew the truth in relation to a particular matter and as such this was considered the best way of determining facts.²⁷

1.15 For many centuries, the judiciary exercised substantial power over jurors, including whether they were given food and water. Judges also often overturned the verdicts of juries where they disagreed with the decision made. This came to a head in England in 1670, in *Bushell’s Case*.²⁸ This was a hugely significant decision on the independent nature of the jury in a common law legal system. The case also reflected the deep religious divisions in England at the

²³ The first juries were composed of neighbours of accused persons often referred to as “next neighbours”. These “next neighbours” lived in the vicinity of a party to a dispute. The rationale for the use of juries of neighbours was that they were likely to have local information on the circumstances surrounding a dispute and on the characters of the parties to a dispute.

²⁴ Hans (ed) *The Jury System: Contemporary Scholarship* (Ashgate The International Library of Essays in Law and Society 2006) at xi.

²⁵ Devlin *Trial by Jury* (8th Series Hamlyn Lectures 1966) at 5.

²⁶ *Ibid* at 5-6.

²⁷ *Ibid* at 6.

²⁸ 24 Eng. Rep. 1006 (1670).

time. The case arose out the trial of William Penn and William Mead, who were accused of “leading a dissident form of worship.” Penn, a leading member of the Society of Friends (the Quakers) and prolific writer on the subject, did not exactly have a great defence to the charge, but the jury, whose foreman was Edward Bushell, acquitted him and Mead. The 10 judges presiding over the case repeatedly directed the jury to convict. The jury refused and were imprisoned. One of the presiding trial judges stated: “You shall not be dismissed ‘til we have a verdict that the court will accept.” He ordered that “[y]ou shall be locked up without meat, drink, fire, and tobacco. You shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.”

1.16 Bushell applied for a writ of *habeas corpus* seeking his release, arguing that jurors should not be punished for their verdict. In a truly landmark decision on the independence of the jury, Vaughan CJ, in the Court of Common Pleas, granted the order of *habeas corpus* and ordered his release. Vaughan CJ stated that, in doing so, he was upholding “the right of juries to give their verdict by their conscience.”²⁹ The importance of this decision was that it set the precedent that jurors could no longer be penalised for their verdicts.³⁰

1.17 Ultimately, the jury system that evolved in England was transplanted by Britain to all its colonies around the globe. It thus remains a feature not only of the Irish court system but the other common law systems found in, for example, Australia, New Zealand and the United States of America. Although other legal systems, such as the Civil Law legal systems of France, Germany and most other countries of continental Europe (and their former colonies, such as Canada), also feature court hearings involving a jury, such juries often have an advisory role only, and the final decision is made by a judge or panel of judges.

C Trial by Jury in Ireland to the 19th Century

1.18 The development of the Anglo-Norman jury trial developed differently in Ireland than in Britain due to what might be described rather neutrally as a

²⁹ William Penn remained imprisoned in the Tower of London for some time afterwards but was eventually released. He travelled to “the Americas” to manage his family’s plantations there, and King Charles II later granted him an enormous tract of land, which he named Pennsylvania after his father. William Penn is thus known as the founder of Pennsylvania.

³⁰ A memorial plaque commemorating *Bushell's Case* remains in place in the Old Bailey, the Central Criminal Court in London.

divergent culture and history.³¹ While English law was, in general, imposed in Ireland by the end of the 17th century, trial by jury never established a firm grasp to the same extent as in Britain.³² It has been suggested that this was due to the political environment in Ireland during the 18th and 19th centuries.³³

(1) *The political setting in the 19th century*

1.19 The 19th century in Ireland, from the perspective of the British administration, involved decade after decade of political unrest and occasional outbursts of violent opposition. From the perspective of those who ultimately “wrote the history,” Irish nationalists, it involved decade after decade of, first, political agitation for improvements in the legal and political conditions for the Irish under British rule (in particular for Irish Roman Catholics), and the later agitation for Home Rule and, ultimately, independence in the early 20th century. It is not surprising that this political battle was occasionally acted out in court and that the British administration in Dublin attempted to use its political and legislative power to manipulate the court system, including juries, in its favour. In 1844, the State Trial for conspiracy of Daniel O’Connell MP (the leader of the Catholic Emancipation Movement, and one of the leading barristers, and political orators, of his day) was an example of how the boundaries between law and politics became blurred in its application to jury trial in Ireland during the 19th century.³⁴

1.20 In this context, the British authorities in Ireland attempted to influence jury outcomes using a variety of processes. This included requiring candidate jurors to “stand-by,” in effect to defer an individual’s jury service until a later court session. This right, enjoyed by the Crown under common law, enabled it to restrict the number of potential jurors by permitting it to challenge an unlimited number of jurors without showing cause for challenge.³⁵ The right of the Crown to ask a juror to “stand-by” was controversial and attracted criticism as it resulted in jury packing. Where the defendant was Roman Catholic, as in the Daniel O’Connell trial, the Crown used its right of “stand-by” in an attempt to

³¹ Jackson, Quinn and O’Malley “The Jury System in Contemporary Ireland” in Vidmar *World Jury Systems* (2nd Oxford University Press 2000) at 284-285.

³² *Ibid.* at 285.

³³ *Ibid.*

³⁴ *R v O’Connell* (1844) 8 ILR 261; (1844) 11 Cl & F 155 (HL). For an account of the O’Connell trial and other similar trials with a strong political flavour in the 19th century, see Dungan, *Conspiracy: Irish Political Trials* (Prism: Royal Irish Academy 2009).

³⁵ The Crown was only required to show cause for challenge where the entire jury panel was exhausted. Johnson suggests that in practice the Crown was rarely required to show cause when they exhausted a jury panel. Johnson “Trial by Jury in Ireland 1860-1914” (1996) *Journal of Legal History* 270, at 271.

pack juries with Protestant jurors who might be more sympathetic to the prosecution's case.³⁶ The Crown defended the right of "stand-by" on the ground that it assisted in empanelling unbiased juries where the impartiality of jurors was in question. It has also been suggested that sub-sheriffs were involved in jury-packing and that they only called particular types of jurors for specific cases.³⁷

1.21 The defence also attempted to influence the composition of juries, and used peremptory challenges for this purpose.³⁸ Accused persons were permitted to challenge 20 jurors when facing a felony charge. From 1876, the accused was permitted to challenge 6 jurors if charged with a misdemeanour.³⁹ This may have assisted in keeping the conviction rates relatively low, or at least lower than it might otherwise have been, in cases dealing with agrarian and political crime.⁴⁰

1.22 Jury-packing by sheriffs was such a problem that the *Juries (Ireland) Act 1871* curtailed it greatly.⁴¹ The 1871 Act required alphabetical rotation for jury service, which restricted the power of sheriffs during empanelling of juries. The type of prosecution strategies adopted by the Crown in Ireland was also used in England and Wales, although not to the same extent.⁴² However, trial by jury came under strain in Ireland during periods of political and agrarian unrest. During particularly turbulent times trial by jury was suspended for periods of time for specific offences, in different areas. Special courts were used to administer justice when jury trials were suspended. After the murder of Lord Frederick Cavendish, the Irish Chief Secretary and Thomas Henry Burke, the Irish Under Secretary, in the Phoenix Park in Dublin in 1882 (from a nationalist perspective, a double assassination by a breakaway Fenian group called the Invincibles), legislation was introduced that permitted the use of non-jury trials for

³⁶ Johnson "Trial by Jury in Ireland 1860-1914" (1996) *Journal of Legal History* 270, 285.

³⁷ Where it was suspected that a sheriff had engaged in jury-packing the common law procedure of "challenge to the array" was available to the accused or to the Crown. Johnson "Trial by Jury in Ireland 1860-1914" (1996) *Journal of Legal History* 270, 272.

³⁸ The current law on peremptory challenge and challenge for cause is discussed in Chapter 6, below.

³⁹ Section 10, *Juries Procedure (Ireland) Act 1876*, 39 & 40 Vict., c.78.

⁴⁰ Jackson, Quinn & O'Malley "The Jury System in Contemporary Ireland" in Vidmar (ed) *World Jury Systems* (2nd ed Oxford University Press 2000) at 287.

⁴¹ *Ibid* at 286.

⁴² *Ibid* at 287.

certain serious offences, although it was never brought into force.⁴³ In fact 15 individuals were convicted after jury trials on foot of the Phoenix Park murders, five of whom were hanged.⁴⁴

(2) ***Regulation of Qualification for Jury Service in the 19th century***

1.23 Turning from the political background of jury trial in 19th century Ireland to the more mundane issue of the legislative regulation of jury qualification, the *Extension of Trial by Jury Act 1834* (the *Perrin Act 1834*) provided that qualification for jury service was based, in the cities and towns, on a personal estate to the value of £100. In effect, of course, this was limited to men. In the counties, qualification required £10 freeholders, £15 leaseholders with leases of not less than 21 years, magistrates, freemen and (in small county towns) householders, rated at not less than £29. As Johnson notes “the Act at the time, during the post-famine period... became largely unworkable. The quantity of qualified jurors fell as the number of leaseholders and freeholders fell faster than the population.”⁴⁵ It was also very difficult for the sub-sheriff or his deputy to assess whether a juror met the appropriate property qualifications under the 1834 Act.⁴⁶ The Chairman of Monaghan Quarter Sessions in 1852 expressed the opinion that there were no means of ascertaining the qualification of jurors and that only a third of those on the jury list were entitled to be on it.⁴⁷

1.24 The *Juries Act (Ireland) 1871*⁴⁸ introduced a jury qualification in rural areas based on a ratable value of £20. As already indicated, the 1871 Act also introduced a process of selecting the panel from the list of qualified jurors on an alphabetical rotation, which greatly limited the sub-sheriff's influence over jury selection. The 1871 Act was amended twice in 1873 and 1876, raising the qualification first to £30 and then to £40.

1.25 The social and political conditions in 19th century Ireland, in addition to the waves of crime and criminality throughout the century, significantly affected the evolution and operation of the criminal justice system generally,

⁴³ The *Prevention of Crimes (Ireland) Act 1882* provided for a Special Commission Court, composed of three senior judges who would try cases without a jury. However, the 1882 Act was never used.

⁴⁴ See Dungan, *Conspiracy: Irish Political Trials* (Prism: Royal Irish Academy 2009), pp.173ff.

⁴⁵ Johnson “Trial by Jury in Ireland 1860-1914” (1996) 17(3) *Journal of Legal History* 270 at 271.

⁴⁶ *Ibid.*

⁴⁷ *Select Committee on Outrages (Ireland)*, PP 1852, XIV (43) 1, Q. 2259 cited in Johnson “Trial by Jury in Ireland 1860-1914” (1996) 17(3) *Journal of Legal History* 270 at 271.

⁴⁸ 34 &35 Vic., c.65.

and the jury trial in particular. It has been pointed out that the composition of the Irish jury was distinctive in the 19th century.⁴⁹ This was affected by factors coming from below such as demographics, including issues of relative wealth or poverty and factors imposed from above such as the controls exerted by the authorities.⁵⁰

1.26 The Crown often sought to remove cases from the location of the crime, with a view to circumventing the obstacles posed by local prejudices.⁵¹ In addition, the use of the “stand-by” procedure” meant that the Crown could both manipulate the selected jury at the trial stage, and exert influence over the jury lists and jurors’ books, from which the jury panels drawn.⁵²

1.27 In 1873 a parliamentary committee was appointed to examine the *Juries Act (Ireland) 1871*.⁵³ Its interim recommendations were enacted in the *Juries (Ireland) Act 1873*,⁵⁴ which raised the qualification for jurors. The Committee in its final report in 1874 considered that the rating qualifications introduced in 1871 were too low, and that some of the calculations introduced by the *Juries (Ireland) Act 1873* should be increased. The *Juries (Procedure) Ireland Act 1876*⁵⁵ and the *Jurors (Qualification) Ireland Act 1876*⁵⁶ implemented the final recommendations of the Committee. The *Jurors (Qualification) Ireland Act 1876* increased the rating qualification for lands in rural areas and reduced the qualifications for private homes and offices. In circumstances where the qualification for jury service was reduced, it was often suggested that the newly qualified jurors were unwilling to return guilty verdicts as they shared the same class background as the accused.⁵⁷

1.28 The increased participation of farmers on juries was linked to the growing unwillingness of men from higher social strata to undertake jury

⁴⁹ Howlin, ‘English and Irish jury laws: a growing divergence 1825-1833’ in Donlan & Brown (eds) *The Boundaries of the State: Law in Ireland 1700-1850* (Hampshire 2010).

⁵⁰ *Ibid.*

⁵¹ Howlin “Controlling Jury Composition in Nineteenth-Century Ireland” (2009) *Journal of Legal History* 30: 3, 227-261.

⁵² *Ibid.*

⁵³ See *First, Second, and Special Reports from the Select Committee on Juries (Ireland)* H.C. 1873 (283) xv, 389.

⁵⁴ 36 & 37 Vic., c. 27.

⁵⁵ 39 & 40 Vic., c. 78.

⁵⁶ 39 & 40 Vic. c. 21.

⁵⁷ See Howlin “Controlling Jury Composition in Nineteenth-Century Ireland” (2009) *Journal of Legal History* 30: 3, 227-261.

service, with many choosing to ignore summonses.⁵⁸ The Irish Lord Chancellor Lord O'Hagan stated that jurors of high class and wealth should be “compelled to do the duties which, in spite of repeated remonstrance and rebuke from the bench, they have too much abandoned to their humbler colleagues. This is a great public evil.”⁵⁹ The political environment in the latter part of the 19th century certainly contributed to evasion of jury service. As Howlin notes, in this period the majority of jurors were farmers, who probably had some involvement in the agrarian movement. As such “[a]t certain periods, the wealthier minority’s evasion of jury duty probably had as much to do with fears for their personal safety both during and after the trial, as unwillingness to mingle with the so-called lower orders.”⁶⁰

1.29 In addition to not answering the summons, jurors often refused to answer to their names in court. Under the *Juries (Ireland) Act 1833* a failure to answer to your name on the third calling-over of the list resulted in a fine.⁶¹ However, judges tended to be lenient and fines were often not enforced.⁶² Even when fines were imposed, they were regarded by the juror escaping jury service as a small price for the preservation of personal safety.⁶³ The consensus was that the system of imposing fines for jury evasion was completely ineffective.

1.30 The 19th century legislation regulating juries explicitly provided that specified categories of person were exempted from sitting on juries. However, it was possible for the Crown to grant exemptions or excusals.⁶⁴ The *Juries (Ireland) Act 1833* explicitly exempted specified categories of persons from jury service. Men connected to the administration of criminal justice, members of certain professions such as surgeons, pharmacists (or as they were then known apothecaries) and postmasters. Similarly the *Juries Act (Ireland) 1871*⁶⁵ provided for the exemption of similar categories of persons from jury service as

⁵⁸ *Ibid.*

⁵⁹ *Parliamentary Debates*, series 3, vol. 231, col. 498, 4 August 1876 (House of Lords), cited in Howlin “Controlling Jury Composition in Nineteenth-Century Ireland” (2009) 30: 3 *Journal of Legal History*, 227-261 at 256.

⁶⁰ Howlin “Controlling Jury Composition in Nineteenth-Century Ireland” (2009) 30: 3 *Journal of Legal History* 227-261 at 257.

⁶¹ Howlin “Controlling Jury Composition in Nineteenth-Century Ireland” (2009) *Journal of Legal History* 30: 3, 227-261 at 257.

⁶² *Ibid* at 257-258.

⁶³ *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1, paragraph 150, cited in Howlin “Controlling Jury Composition in Nineteenth-Century Ireland” (2009) 30:3 *Journal of Legal History* 227-261 at 258.

⁶⁴ See for example *R v Perceval and others* (1659) Sid 243; 82 ER 1083.

⁶⁵ 34 & 35 Vic., c. 65.

was contained in the 1833 Act. However, the 1871 Act introduced new categories of persons to be exempted, such as Members of Parliament, civil engineers, professors, clergymen, schoolmasters and teachers, public notaries, masters of vessels and licensed pilots.⁶⁶

1.31 As already mentioned the *Juries Act (Ireland) 1871* was quite significant in increasing the numbers of male land owners eligible for jury service, to the extent that it was much criticised and reform was introduced initially by way of the 1873 Act. It was suggested at the time that there was a need to restrict the categories of persons eligible for jury service in order to maintain a sufficient number of jurors. Thus, in 1872, the *Irish Law Times and Solicitors' Journal* stated:⁶⁷

“objections have been made to the proposed curtailment of exemptions, and the rendering liable ministers of religion and members of Parliament. We do not see any good reason why any person should be relieved from serving on juries unless otherwise actively engaged in services which are of public importance or connected with the courts.”

1.32 The *Juries (Procedure) Ireland Act 1876* did not significantly change the position in relation to the exemption categories for jury service but it did introduce an English literacy requirement. Practicing “pharmaceutical chemists duly registered” and small publicans were included as new categories of exemption. It is worth noting that, at that point, the categories of persons exempt in Ireland were not as extensive as those in England. In England the *Juries Act 1870*⁶⁸ specifically listed certified conveyancers, coroners, gaolers, income-tax commissioners, Jewish ministers, judges, Roman Catholic priests and special pleaders as being exempt from jury service. Despite the more limited approach to exemption in Ireland there was a broad sense that the *Juries (Procedure) Ireland Act 1876* had increased the categories of exemption too far.⁶⁹ Submissions to the 1881 parliamentary committee suggested that they should be limited.⁷⁰

⁶⁶ Justices of the Peace were no longer exempted from jury service.

⁶⁷ ‘Juries Bill 1871’ (1872) 6 *Irish Law Times and Solicitors' Journal* 326 cited in Howlin “Controlling Jury Composition in Nineteenth-Century Ireland” (2009) *Journal of Legal History* 30: 3, 227-261 at 244.

⁶⁸ 33 & 34 Vic., c. 77.

⁶⁹ *Report of the Select Committee on law and practice relating to summoning, attendance and remuneration of special and common juries HC 1867-68* (401), xii, 677, 579, per Sir William Erle, at paragraph 1076.

⁷⁰ See *Report from the Select Committee of the House of Lords on Irish Jury Laws*, H.L. 1881 (430), xi, 1.

1.33 As already mentioned, the Crown and the accused were entitled to challenge a limited number of jurors without cause (peremptory challenge) and an unlimited number of jurors “for cause”. In Ireland, persons charged with misdemeanour crimes were entitled to challenge six jurors without cause, but in England, there was no corresponding provision for peremptory challenges. Accused persons in felony cases in Ireland were entitled to challenge 20 jurors peremptorily, while in England the challenge was limited to six. As already mentioned, the Crown was entitled to order an unlimited number of jurors to “stand by.” This right was exercised without the requirement of showing cause, until the full list of jurors’ names had been called.⁷¹ The rules regarding the use of challenges were somewhat complicated, and there was a substantial body of case law regarding challenges, which indicates the perceived importance attached to the practice.⁷²

1.34 A challenge to the array represented an objection to the manner in which a jury panel was compiled. A challenge to the polls involved a challenge to one particular juror and there was no limit in the number of challenges to the polls in both civil and criminal cases. In circumstances where an accused failed to remove a juror in a challenge to the polls for cause, it was still possible to remove a juror through peremptory challenge.

1.35 The problems associated with challenge to the array were highlighted in the State Trial of Daniel O’Connell MP (the leader of the Catholic Emancipation Movement, and one of the leading barristers, and political orators, of his day) for conspiracy in 1844.⁷³ O’Connell and his co-accused sought to have their trial postponed to the following year, on the basis that the jury lists contained considerable errors. The Dublin special jury lists for that year contained 388 names.⁷⁴ Of the 388 jurors only 53 were Catholic, and 30 of these were exempt, which left only 23 potential Catholic jurors.⁷⁵ Counsel for O’Connell contended that at least 300 Roman Catholics were qualified to serve as special jurors, and the lists were revised. He also argued that the qualified jurors had been fraudulently removed from the general lists from which the jurors’ book was composed. It was suggested that this “jury-packing” was carried out with a view to selecting a jury that was prejudicial to O’Connell. The

⁷¹ McEldowney “Stand by for the Crown”: An historical analysis” (1979) *Criminal Law Review* 272.

⁷² Howlin “Controlling Jury Composition in Nineteenth-Century Ireland” (2009) *Journal of Legal History* 30: 3, 227-261 at 245-246.

⁷³ *R v O’Connell* (1844) 8 ILR 261. See also Dungan, *Conspiracy: Irish Political Trials* (Prism: Royal Irish Academy, 2009) pp.87ff.

⁷⁴ At least 70 of these were disqualified for one reason or another.

⁷⁵ The Catholic jurors were exempt for jury service as they were town councillors or magistrates.

trial court refused to allow the challenge to the array and a jury was sworn in, which subsequently delivered a guilty verdict. On appeal to the Judicial Committee of the UK House of Lords, the conviction was overturned on the basis of errors contained in the indictment, and not because of concerns about the composition of the jury.⁷⁶

1.36 Summing up the post-independence views of the Irish on jury trial as it operated in Ireland in the 19th century, Henchy J commented over 140 years after the O'Connell trial:⁷⁷

“The bitter Irish race-memory of politically appointed and Executive-oriented judges, of the suspension of jury trial in times of popular revolt, of the substitution therefore of summary trial or detention without trial, of cat-and-mouse releases from such detention, of packed juries and sometimes corrupt judges and prosecutors, had long implanted in the consciousness of the people [after the foundation of the State] and, therefore, in the minds of their political representatives, the conviction that the best way of preventing an individual from suffering a wrong conviction for an offence was to allow him to ‘put himself upon his country’, that is to say, to allow him to be tried for that offence by a fair, impartial and representative jury, sitting in a court presided over by an impartial and independent judge appointed under the Constitution [of Ireland], who would see that all the requirements for a fair and proper jury trial would be observed...”

D Jury selection since the Foundation of the State

1.37 In this Part the Commission examines the development of the legislative provisions on jury selection since the foundation of the State. When the State was established in 1922, the main legislation on jury service was the *Juries (Ireland) Act 1871*, as amended in the manner described in Part C.

⁷⁶ *R v O'Connell* (1844) 11 Cl & F 155. The decision of the Judicial Committee of the House of Lords was not popular with the non-judicial (political) members of the House, who attempted to vote to uphold O'Connell's conviction (as convention allowed, even though it was relatively rare even then). The then Lord Chancellor prevented this, thus creating the convention from that time that only judicially qualified “Law Lords” could sit in the Judicial Committee. In 2009, the Judicial Committee of the House of Lords was replaced as the final court of appeal in the United Kingdom by the Supreme Court of the United Kingdom.

⁷⁷ *The People (DPP) v O'Shea* [1982] IR 384, at 432.

(1) Main elements of Juries Act 1927

1.38 In 1923, a Judiciary Committee was appointed by the new Government of Saorstát Éireann (the Irish Free State). While its principal remit concerned the need to put in place a new court system in the wake of the foundation of the State, it was also required to include consideration of “the method of trial by jury.”⁷⁸ The Judiciary Committee’s recommendations on the new court system led to the enactment of the *Courts of Justice Act 1924*, and those concerning the jury system led to the *Juries Act 1927*. The 1927 Act operated, with minor amendments,⁷⁹ as the key legislation on jury service for almost 50 years until it was replaced by the *Juries Act 1976*. The 1927 Act consolidated into a single Act the pre-1922 legislation on juries, notably the *Juries (Ireland) Act 1871*, discussed above; and it also incorporated some modest legislative changes that had been made in England since that time, notably those in the (English) *Juries Act 1922*.

(a) Property qualification in the 1927 Act

1.39 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.

(b) Women jurors in the 1927 Act and in the early 20th century generally

1.40 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. It is worth noting that Ireland was to the fore internationally in the 1918 General Election by having in place universal suffrage, in other words women voting on an equal footing with men for the first time, and in which Countess Markievicz was elected as an MP, and later became the first women Minister (Minister for Labour) in an Irish government in 1922. Nonetheless, by 1927 it is clear that the political appetite for this form of innovation in Ireland had waned by 1927. Indeed, this reflected a reluctance internationally, including in the United States and Australia,⁸⁰ to translate universal suffrage into universal jury service. From

⁷⁸ *Report of the Judiciary Committee* (Stationery Office 1923) at 5.

⁷⁹ For example, by the *Juries Act 1945* and the *Juries Act 1961*.

⁸⁰ For a discussion of the parliamentary debates arguing against jury service for women in Australia, see, for example, Walker, “Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898-1957” (2004) 11:4 *E Law*:

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. In many States, the sight of women at the polling booth became common from the 1920s and 1930s, but many Parliaments in common law states rejected the idea that women should sit on juries. Two main arguments were made in this respect: first, that women (especially married women) should not be required to serve on juries where this would conflict with their duties at home;⁸¹ 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.⁸²

1.41 It was not until the arguments of the "first wave" of the women's movement, of feminists (in Ireland, groups such as the Irish Housewives Association),⁸³ 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 *deBurca v Attorney General*,⁸⁴ discussed below, this also became the position in the State.

(c) Exemption of public servants

1.42 The *Juries Act 1927* also provided that civil servants and local government officials enjoyed a complete exemption from jury service. These key elements, which also largely mirrored those in the *Juries (Ireland) Act 1871*, meant that women, and men with limited property, were virtually excluded from jury service under the 1927 Act.

Murdoch University Electronic Journal of Law, available at
<http://www.murdoch.edu.au/elaw/issues/v11n4/walker114.html>.

⁸¹ This view prevailed, although as a minority view, into the 1960s in Ireland in Committee on Court Practice and Procedure, Second Interim Report *Jury Service*, (1965): see fn91, below.

⁸² 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>

⁸³ 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.

⁸⁴ [1976] IR 38.

(d) General effect on representativeness of the 1927 Act

1.43 In was noted in 1976 that the rating restriction “excluded all men, however well educated, who did not happen to have landed property; and in practice women hardly ever served on juries.”⁸⁵ 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.⁸⁶ 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.⁸⁷ In effect, therefore, between the foundation of the State and the 1970s the categories of persons eligible to serve on juries reflected the approach of a patriarchal, male-dominated, property-owning society that was more in tune with the 18th and 19th centuries than the emerging modern Irish society that, by 1973, had become a member of the European Economic Community (now the European Union).

(2) 1965 Reports of the Committee on Court Practice and Procedure on Juries

1.44 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, which in Ireland was represented by groups such as the Irish Housewives Association.⁸⁸ 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 Procedure⁸⁹ 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.

1.45 In its *Report on Jury Service*⁹⁰ the Committee recommended fundamental reform of the selection system in the *Juries Act 1927*. In

⁸⁵ Vol 287 *Dáil Éireann Debates* col.1850 (12 February 1976), available at: <http://historical-debates.oireachtas.ie/D/0287/D.0287.197602120003.html>.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ 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.

⁸⁹ 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).

⁹⁰ Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, March 1965). The Committee was chaired by Walsh J.

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.”⁹¹ 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 British 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”.⁹² The Committee therefore concluded that the property qualification was “no longer appropriate in present-day [1965] circumstances.”⁹³ The Committee concluded 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.”⁹⁴

1.46 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 groups⁹⁵ – 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.”⁹⁶

1.47 The Committee also recommended that the exemptions in the 1927 Act for civil servants, local government employees, and other specific

⁹¹ *Ibid.*, at p.10.

⁹² *Ibid.*, at p.11, quoting Devlin *Trial by Jury* (8th series Hamlyn Lectures 1966) at 20.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, at p.12.

⁹⁵ The Irish Countrywomen’s Association and the Irish Housewives Association had each made written and oral submissions to the Committee: *ibid.*, at pp.20 and 21.

⁹⁶ Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, March 1965), at p.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 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.

categories of employees were no longer justifiable.⁹⁷ 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 State bodies would not be required to serve.

1.48 The Committee's second 1965 Report on juries was a brief *Report on Jury Challenges*.⁹⁸ 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 Report in detail in Chapter 6, below.

(3) ***1965 Report on Jury Service in England***

1.49 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*.⁹⁹ 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.¹⁰⁰ 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

⁹⁷ Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, March 1965), p.13.

⁹⁸ 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 from pp.1-48, and the Fourth Interim Report *Jury Challenges* running from pp.51-55.

⁹⁹ 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.

¹⁰⁰ See, for example, Cornish, "Report of the Departmental Committee on Jury Service" (1965) 28 *Modern Law Review* 477.

members of the English Departmental Committee.¹⁰¹ The 1965 Report of the Departmental Committee made extensive recommendations for reform of the law, and these were ultimately implemented in the (UK) *Juries Act 1974*. The Commission also discusses the recommendations made in this Reports in detail in the succeeding chapters of this Consultation Paper, in addition to many other subsequent Reports on this area which have been published in the intervening years.

E *de Burca v Attorney General and the Juries Act 1976*

1.50 The recommendations made in 1965 by the Committee on Court Practice and Procedure had not been acted on when, in August 1971, two members of the Irish Women's Liberation Movement (IWLM),¹⁰² Máirín de Burca and Mary Anderson, were arrested outside Dáil Éireann¹⁰³ and charged with obstructing a police officer in the due execution of his duty, contrary to section 38 of the *Offences Against the Person Act 1861*.¹⁰⁴ 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.

¹⁰¹ Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, March 1965), p.6. The Second Interim Report was completed in March 1965, which preceded the publication of the English Departmental Committee Report.

¹⁰² 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.

¹⁰³ 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 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*.

¹⁰⁴ The fact that their arrests occurred in the context of protests by the IWLM was not referred to in the judgments in *de Burca and Anderson 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, at 43): “Miss de Burca is a secretary and Miss Anderson is a journalist.”

(1) De Burca v Attorney General

1.51 While awaiting trial, they began proceedings, *de Burca and Anderson v Attorney General*,¹⁰⁵ 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.

1.52 It is worth noting that, just before their case was heard in the High Court, the ground-breaking *Report of the Commission on the Status of Women* was published, which recommended that a great deal of legislation needed to be enacted concerning sexual equality, in particular in the light of Ireland's membership of the European Economic Community (now the European Union), which began in January 1973. This included the need for legislation on equal pay and inclusion of women on an equal footing on jury panels.¹⁰⁶

1.53 In June 1973, in the High Court, Pringle J dismissed their claims, primarily on the basis that jury service had, historically been restricted to limited groups of persons and that there was nothing in the Constitution of Ireland which required that juries must be composed of a wider range of persons.¹⁰⁷ He also held that the 1927 Act was not in breach of the guarantee of equality in Article 40.2 of the Constitution, as women were not actually debarred by the 1927 Act from sitting on juries. He also considered that Article 41.2.1^o, which provides that "the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved" also supported his conclusion that the requirement in the 1927 Act that women needed to apply to have their names entered on the jury panel did not amount to invidious discrimination under Article 40.1 but was a reasonable

¹⁰⁵ [1976] IR 38.

¹⁰⁶ *Report of the Commission on the Status of Women* (December 1972). The Commission had been chaired by Dr Thekla Beere, one of the few women Secretaries General of a Government Department in Ireland. The Report was debated in the Seanad in July 1973 on foot of a motion by Senator Mary Robinson: Vol. 75 *Seanad Debates* (25 July 1973).

¹⁰⁷ *Ibid*, at 48.

restriction which recognised different social functions performed by women in Irish society.¹⁰⁸

1.54 On appeal, the Supreme Court, in December 1975 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, to which the Oireachtas responded virtually immediately by enacting the *Juries Act 1976*. The Commission returns to the provisions of the 1976 Act below but outlines here a number of important comments made by the judges of the Supreme Court in the *de Burca* case, as these continue to provide important guidance on the approach to be taken to any further reforms in this area.

1.55 The Commission also notes that the historical restrictions involved in jury panels, on which Pringle J had relied in the High Court, did not commend themselves to the Supreme Court, which found that this could not impose an analysis of the relevant constitutional requirements.

1.56 In connection with the nature of jury service, Walsh J stated in the Supreme Court:¹⁰⁹

“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.”

1.57 In connection with eligibility for jury service, Walsh J stated:¹¹⁰

“I am... of the view 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. I am satisfied that the constitutional provisions relating to trial with a jury, or the other provisions of the Constitution relied upon ... do not prevent the Oireachtas from validly enacting that certain categories of the citizens or inhabitants of the State, by virtue of their physical or moral capacity, could properly be excluded from either the obligation or qualification to serve as jurors.”

¹⁰⁸ Article 41.2.1^o had also been cited by the 3 minority members of the Committee on Court Practice and Procedure in their Note of Dissent to the Second Interim Report *Jury Service* (Pr.8328, March 1965), at p.18-19: see paragraph 1.45, footnote 94, above.

¹⁰⁹ [1976] IR 38, at 66.

¹¹⁰ [1976] IR 38, at 67.

1.58 In connection with the effective exclusion of women from jury service, Walsh J stated:¹¹¹

"It would not be competent for the Oireachtas to legislate on the basis that women, by reason only of their sex, are physically or morally incapable of serving and acting as jurors. The statutory provision [in the 1927 Act] does not seek to make any distinction between the different functions that women may fulfil and it does not seek to justify the discrimination on the basis of any social function. It simply lumps together half of the members of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only."

1.59 One of the other leading judgments in the Supreme Court was delivered by Henchy J, who dealt with the issues of representativeness in more detail. He stated that:¹¹²

"In determining whether a particular method of jury selection will produce a jury that fairly represents a cross-section of the community, it is not enough to show that a particular class or particular classes are not represented or are under-represented. Competence to fulfil the duties of a juror is an individual rather than a class attribute. No group or class can lay claim to have any special qualification to produce representative jurors. Ideally as many identifiable groups and classes as possible should be included by the standard of eligibility employed, so that a jury drawn from the panel will be seen to be a random sample of the whole community of the relevant district. But, because jurors are drawn by lot, a particular jury may turn out to be quite unrepresentative of the community. The Constitution cannot be read as postulating a system of jury selection that will avoid that risk. Therefore, the Courts will not test the constitutionality of an impugned system of jury selection by seeing whether it provides the most comprehensive choice possible. Of course, the jury must be drawn from a pool broadly representative of the community so that its verdict will be stamped with the fairness and acceptability of a genuinely diffused community decision. The

¹¹¹ [1976] IR 38, at 71.

¹¹² [1976] IR 38 at 75-76.

particular breath of choice necessary to satisfy this requirement cannot be laid down in advance. It is left to the discretion of the legislature to formulate a system for the compilation of jury lists and panels from which will be recruited juries which will be competent, impartial and representative.”

1.60 Henchy J considered that the Court was not required to rule on the standards and procedures that were necessary to meet the requirements of competency and impartiality as those issues were not raised in the case.¹¹³ Rather, the court was required merely make a judicial determination as to whether jury panels drawn exclusively from persons rated in respect of property of the prescribed rateable value can be said to be representative of the citizenry of the relevant district. In this respect, he stated:¹¹⁴

“When a system of jury recruitment is assailed for being exclusionary to the point of unconstitutionality, the test is whether, by intent or operation, there is an exclusion of any class or group of citizens (other than those excluded for reasons based on capacity or social function) who, if included, might be expected to carry out their duties as jurors according to beliefs, standards, or attitudes not represented by those included. If such a class or group is excluded, it cannot be said that a resulting jury will be representative of the community. The exclusion will leave untapped a reservoir of potential jurors without whom the jurors’ lists will lack constitutional completeness”

1.61 Henchy J. concluded that the “the minimum rating qualification, in my opinion, produces that result”.¹¹⁵ He also found that the property qualification for jury service produced a socio-economic classification that shut the door to jury service on all citizens who did not pay rates. He found that this embargo was constitutionally objectionable not only because it made a substantial section of the citizenry ineligible but that it also ensured that the jury would not include non-ratepayers.¹¹⁶ Henchy J also concluded that the circumscribed composition did not meet the standard of representativeness guaranteed by Article 38.5 of the Constitution. He considered that the exclusion of a range of mental attitudes, from the jury box and the jury room, would leave an accused person with no hope of such persons making a contribution in determining guilt or innocence. He noted that this concern was particularly relevant to the trial of offences for damage to property for which ratepayers were liable to make financial contributions.

¹¹³ *Ibid* at 76.

¹¹⁴ [1976] IR 38 at 76.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

1.62 Henchy J concluded that “[a] jury which is so selective and exclusionary is not stamped with the genuine community representativeness necessary to classify it as the jury guaranteed by s.5 of Article 38. It is, therefore, unconstitutional.”¹¹⁷

1.63 As to the exclusion of women from jury service Henchy J found this unconstitutional for two reasons.¹¹⁸ The first was that the exclusion failed the test of representativeness as approximately 50% of the population were not included in the jury lists. The second reason, to which he afforded even greater importance, was that the narrowed choice meant that a woman’s experience, understanding, and general attitude formed no part of the jury processes leading to a verdict. He stated:¹¹⁹

“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. Juries recruited in that way fall short of minimum constitutional standards no less than would juries recruit entirely from female citizens.”

1.64 In this respect, Henchy J added:

“When a system of jury recruitment is assailed for being exclusionary to the point of unconstitutionality, the test is whether, by intent or operation, there is an exclusion of any class or group of citizens (other than those excluded for reasons based on capacity or social function) who, if included, might be expected to carry out their duties as jurors according to beliefs, standards, or attitudes not represented by those included. If such a class or group is excluded, it cannot be said that a resulting jury will be representative of the community. The exclusion will leave untapped a reservoir of potential jurors without whom the jurors’ lists will lack constitutional completeness.”

(2) Key matters and principles arising from the de Burca case

1.65 Bearing in mind the wide-ranging nature of the comments made by Walsh and Henchy JJ in the *de Burca* case, the Commission does not propose

¹¹⁷ [1976] IR 38 at 76.

¹¹⁸ *Ibid.*

¹¹⁹ [1976] IR 38 at 78.

to set out a complete analysis of these. It is, however, important that a number of key matters and principles should be set out in order to provide a general frame of reference for the Commission's approach to the specific issues discussed in the subsequent chapters of this Consultation Paper.¹²⁰ The Commission considers that the following are of particular relevance in this respect.

- 1) Jury service is more accurately described as a duty that falls on members of the population of the State rather than as a right of an individual in the State.
- 2) Jury representativeness refers not to the actual jury selected from a jury panel but rather to the pool of persons from which juries are selected.
- 3) Under the Constitution of Ireland, juries should be selected from a pool broadly representative of the community.
- 4) Representativeness is assured through the process of random selection from a pool broadly representative of the community.
- 5) Jury legislation may validly exclude certain persons from the jury pool, provided this does not infringe specific constitutional provisions.
- 6) Historical restrictions on, or effective exclusions of, groups from inclusion in the jury pool do not necessarily meet current constitutional requirements for representative juries.
- 7) Restricting the jury pool to property owners, and the effective exclusion of women from the jury pool, is not constitutionally permissible, even though historically a feature of juries legislation.
- 8) 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.

1.66 Bearing in mind these matters and principles, the Commission accepts that the focus of representativeness should be on ensuring that the jury panel system continues to represent, in broad terms, the community in Ireland

¹²⁰ The Commission also notes that the analysis in the *de Burca* case, in particular that juries be broadly representative of the community, has since been affirmed by the Supreme Court in *O'Callaghan v Attorney General* [1993] 2 IR 17. In the *O'Callaghan* case the Court rejected a claim that the introduction of majority jury verdicts in criminal trials, in section 25 of the *Criminal Justice Act 1984*, was unconstitutional.

at a given time. The Commission uses these as general reference points in the succeeding chapters in considering whether the current arrangements for jury selection continue to meet the fundamental requirements set out in the *de Burca* case.

1.67 The Commission now turns to provide an overview of the *Juries Act 1976*.

(3) *The impact of the English 1974 Act on the 1976 Act*

1.68 The Commission notes that, even before the Supreme Court decision, in July 1975 the Government had already introduced into the Oireachtas¹²¹ the *Juries Bill 1975* (largely based on the recommendations in the 1965 Reports and modelled on the UK *Juries Act 1974*). Following the Supreme Court decision in December 1975, the 1975 Bill was enacted by the Oireachtas, with minor changes, as the *Juries Act 1976*.

1.69 The *Juries Act 1976* ultimately 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*, discussed above. In terms of detailed content, there is no doubt that the UK *Juries Act 1974* was clearly the legislative model used for the *Juries Act 1976*.

(4) *Key elements of the 1976 Act*

1.70 The key eligibility criterion for jury service, in section 6 of the 1976 Act, is that a person is on the electoral role for general elections, that is, a citizen of Ireland aged at least 18 years who has registered his or her name on the electoral roll for general elections.

1.71 In addition, the 1976 Act contains two grounds on which categories of persons must be excluded from consideration for jury service. First, 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). As already discussed,¹²² a number of people, including the Director of Public Prosecutions, have drawn attention to this aspect of the 1976 Act in recent comments on jury representativeness. Section

¹²¹ See Vol.82 Seanad Éireann Debates, 30 July 1975, *Juries Bill 1975 First Stage*.

¹²² See paragraph 12 of the Introduction, above.

9 of the 1976 Act contains a general discretion to excuse a person from jury service, and figures broadcast in 2008, also discussed above,¹²³ have drawn attention to the possible effect of this discretion. The Commission analyses and reviews these provisions of the 1976 Act in this Consultation Paper.

1.72 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. 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 be biased. The Commission also examines and reviews these provisions.

1.73 Section 29 of the 1976 Act requires an employer to pay the salary of any employee during jury service, and the Commission also examines this provision. The final area examined by the Commission is potential juror misconduct and access to information about jurors which could give rise to interference with jury deliberations, against the background of the traditional secrecy of jury deliberations.

(5) Changes made in 2008 Act

1.74 While in general terms the 1976 Act provided for jury selection from the electoral roll for general elections, section 6 of the 1976 Act 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*.¹²⁴ These welcome amendments by the Óireachtas 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.

1.75 In the course of preparing this Consultation Paper, the Commission was also conscious that concerns had been expressed publicly by those with particular knowledge of and insight into the workings of the jury system. For example, the Director of Public Prosecutions has expressed concern that “[a]s a result of the wide variety of exemptions from jury service which are given to various professions and occupations and in practice much of the public service”

¹²³ *Ibid.*

¹²⁴ See Chapter 3 below.

these groups in society may be under-represented on juries.¹²⁵ These comments appear to be supported by figures made available by the Courts Service and broadcast in 2008,¹²⁶ which indicated that, out of a total of 41,500 persons who were summoned for jury service in Dublin in 2007, over 22,000 were excused from service under the 1976 Act. Of these, 15,844 people were disqualified from jury service because of their job, on health grounds or due to their age.¹²⁷ A further 7,018 were excused under the general discretionary power to do so in section 9 of the 1976 Act. During one specific week when 322 people were excused, 100 people said they could not attend because of work, 99 people said they were primary carers and 84 said they were travelling.

1.76 The Commission is also aware that concerns have been expressed by a university lecturer in politics (and newspaper columnist) as to the manner in which a jury member had carried out his duties on a jury on which the lecturer had recently served;¹²⁸ she had expressed particular concern that a self-employed person who had served on the jury was unable to give full attention to the case because of worries about the effect on his business.¹²⁹ This reflects two intersecting aspects of the Commission's project: first, whether certain members of society are reluctant to serve on juries because of the economic consequences for them (an issue of great importance in 2010); and secondly, the need to ensure that public confidence is not impaired through inappropriate behaviour by those who actually serve on juries.

1.77 The Commission now turns in the succeeding chapters to discuss the specific areas concerning jury service that arise in this project.

¹²⁵ Paper delivered by James Hamilton, Director of Public Prosecutions, Conference on *Rape Law: Victims on Trial?* Organised by Dublin Rape Crisis Centre and the Law School Trinity College Dublin, 16 January 2010. The Director expressed similar views at his address to the 10th Annual Prosecutors' Conference, 23 May 2009: see Coulter, *The Irish Times*, 25 May 2009, noting that the Director had made a submission to the Commission in the context of this project.

¹²⁶ These figures were broadcast on 23 November 2008 by the public service broadcaster, Radio Telefís Éireann, based on material supplied to it by the Courts Service on foot of a request made under the *Freedom of Information Acts 1997 and 2003*. See www.rte.ie/news/2008/1123/jury.html.

¹²⁷ At that time, the 70 years age limit in the 1976 Act had not been removed.

¹²⁸ See Elaine Byrne, *The Irish Times*, 30 June 2009.

¹²⁹ The Commission discusses the position of self-employed persons who are called for jury service in Chapter 3, below.

CHAPTER 2 CITIZENSHIP, RESIDENCY AND JURY SERVICE

A Introduction

2.01 In this Chapter, the Commission considers a key element of representativeness as currently provided for in the *Juries Act 1976*, which focuses exclusively on citizenship. This, in turn, requires the Commission to examine the source lists from which jury panels are selected, currently confined to the general election electoral list. The Commission begins in Part B with a brief overview of the process of jury selection, including some of the key issues concerning representativeness that arise. The Commission then discusses in Part C how changing demographics in Ireland make it especially relevant to discuss how other States have developed different models, focusing on residency, from which to select jury panels. In Part D the Commission discusses to what extent the electoral register for local and European elections (and other possible lists) could be used in this respect, and makes provisional recommendations on this.

B Jury Selection

2.02 Section 11 of the *Juries Act 1976* sets out the current arrangements governing jury selection. The first part of the selection process is the compilation of jury lists, through random selection from the register of Dáil electors, a register that is restricted to Irish citizens. Potential jurors are randomly selected from these lists and are issued with a summons to appear in court for jury service. The *Juries Act 1976* provides that certain categories of persons are ineligible, excusable as of right or disqualified from jury service. These categories will be considered in detail in chapters 3, 4 and 5.

2.03 The court registrar is responsible for randomly drawing jurors from the jury list, which is drawn from the register of Dáil electors for each district. A member of the judiciary oversees this process in the Central Criminal Court (High Court) and the Circuit Court. A ballot then takes place in the courtroom, and the 12 jurors for the trial are randomly selected from the named jurors on the jury list. However, before the jurors take their place in the jury box, the prosecution or defence can challenge them. The issue of peremptory challenges and challenge for cause is considered in greater detail in Chapter 6, below. Once the 12 jurors are seated in the jury box, the jury is selected. It

should be noted that jurors and entire juries are sometimes discharged after this process is completed.¹

(1) *Objectives of Jury Selection in Ireland*

2.04 It is clear from the provisions of the *Juries Act 1976* that jury selection is done randomly with a view to selecting a jury that is broadly representative of the community and which is impartial, independent and competent.

(a) *Representativeness*

2.05 There is a significant amount of literature examining representativeness of the jury system. The meaning of a ‘representative’ jury is complicated by the assortment of meanings that can be attributed to the phrase a jury of one’s “peers”.² As discussed in Chapter 1, in the past jurors were selected for jury service on the basis that they possessed local knowledge of the case and defendant. In contrast, jurors are now selected on the basis of a lack of knowledge about the circumstances of the case or the defendant.

2.06 The decision of the Supreme Court in *de Burca v Attorney General*, discussed in Chapter 1, provides valuable guidance on this matter, so that the key issue is that the jury pool, or jury panels, should be broadly representative of the general community. Thus, in the Commission’s view, the term refers to the jurors being representative of the community, as opposed to being representative of some particular group, or of peers of the accused. As Henchy J stated in the *de Burca* case:³

“Of course, the jury must be drawn from a pool broadly representative of the community so that its verdict will be stamped with the fairness and acceptability of a genuinely diffused community

¹ There are many reasons for the discharge of a juror at this stage of the process. For example, a juror may no longer be able to commit their time to jury service or it may emerge that they have some connection to the accused, victim or witness. Recent examples include the discharge of a jury in a murder trial after it emerged that a member of the jury was required to attend hospital and might require surgery: see *The Irish Times* 12 November 2009. Another example was where a juror was discharged by the trial judge during a murder trial, after it emerged that she had a conversation about a rumour she heard about the case with a juror not selected for the trial: see *The Irish Times* 26 June 2007.

² The first reference in the Anglo-Norman setting to the concept of judgment by peers appears to be in clause 39 of the original version of *Magna Carta* of 1215. A translation of clause 39 reads: “No free man shall be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgment of his peers, or by the law of the land.” This is regarded as having influenced the concept of due process in, for example, the United States Constitution and the concept of “due course of law” in the Constitution of Ireland.

³ [1976] IR 38, at 75.

decision. The particular breadth of choice necessary to satisfy this requirement cannot be laid down in advance. It is left to the discretion of the legislature to formulate a system for the compilation of jury lists and panels from which will be recruited juries which will be competent, impartial and representative.”

2.07 The goal of jury selection procedures should be to ensure that juries are as broadly representative of the community as possible. A mix of factors such as age, gender, ethnicity, occupation, employment status, socio-economic background can contribute to the creation of a broadly representative jury. A particular mix of jurors falling into these categories is not necessary in order for a jury to be representative of the community. So, a randomly selected jury that turns out to be all male and all unmarried would not in itself be unrepresentative provided the criteria for selection were genuinely random.

2.08 Juries representative of the community complement the other goals of jury selection such as competence, impartiality and independence. Juries composed of persons from different backgrounds bring a diversity of perspectives and this is useful in enhancing the competence of the jury as fact-finder.⁴ A mix of different backgrounds and perspectives is beneficial also in bringing jurors common sense judgment to bear on cases. In the United States Supreme Court decision *Peters v Kiff*,⁵ Marshall J stated:

“Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case.”

2.09 The participation of different groups has an unquantifiable impact on jury deliberations. There is no available research in this jurisdiction that has examined the impact of juror representativeness on jury decision-making. Nevertheless, the Commission is of the opinion that participation and representation of different groups from the community in jury trials is important

⁴ This is a perspective shared by the New Zealand Law Commission. See New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials Part One*, 32-1999 chapter 5 at 60.

⁵ 407 US 493 (1972) at 503–504.

in that it further legitimises both the jury system and the criminal justice system.⁶ The legitimacy of the jury system is very much based on concepts such as democratic government. Indeed, public confidence in the fairness of the jury system requires that all groups in the community should participate in the administration of the system.⁷

(b) Impartiality

2.10 In Ireland trial judges are empowered under the *Juries Act 1976* to exclude biased jurors or jurors perceived to be biased. However, it is impossible for a juror to be completely impartial. A distinction can be drawn between impartiality and neutrality. Judges or jurors are not expected to be neutral about issues raised during the course of a trial. As O’Malley notes:

“As human beings, they may feel anything but neutral about crime in general or about some category of crime, such as child abuse. This, in itself, should not be sufficient to disqualify them.”⁸

2.11 Impartiality is also concerned with the approach to be adopted in a specific case. A juror may feel strongly about the need to prevent and punish crime and still be capable of reaching an impartial decision on whether the defendant committed the criminal offence charged.⁹ In circumstances where a potential juror feels extremely strongly about a certain issue to the extent that they would not be able to reach a verdict of acquittal they should ask to be excused from jury service on that basis.¹⁰

2.12 It is unavoidable that occasionally a member of the jury panel will have some contact with the accused, witnesses or persons associated with them. However, the question of whether it is appropriate for such persons to serve on a jury will depend on the closeness of the contact and extent of the acquired knowledge of the relevant facts and circumstances in a particular case and will be determined by the trial judge. While media reporting does not fall within the scope of the Commission’s current review of jury selection the Commission does acknowledge that media reporting may affect the impartiality of jurors.¹¹

⁶ For a discussion on this point see the New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials: Part One* (32-1999) at 60.

⁷ *Ibid.*

⁸ O’Malley “A Representative and Impartial Jury” (2003) 8:6 *Bar Review* 232 at 233.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See *D v DPP* [1994] 1 IR 465, *Z v DPP* [1994] 2 IR 476, *Magee v O’Dee* [1994] 2 IR 500 and *DPP v Haugh* [2000] 1 IR 184.

2.13 The issue of a representative jury is linked to the issue of impartiality. It has been suggested that “a jury which broadly represents the community is also more likely to be impartial.”¹² However, there seems to be a difficulty in reconciling the notion of a jury representing various community interests being impartial simultaneously. In the United States the concept of “diffused impartiality” seems to reconcile these two competing notions.

“Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case... the broad representative character of the jury should be maintained, partly as assurance of a *diffused impartiality* and partly because sharing in the administration of justice is a phase of civic responsibility”.¹³

2.14 The New Zealand Law Commission noted that trying to reconcile these competing concepts by suggesting that the representation of diverse perspectives and prejudices produces balance.¹⁴ Impartiality in this logic does not mean that individual jurors, representing different community interests, are without prejudice, rather it means that the balance of prejudices or views in the community should be reflected in the jury.¹⁵ In reality juries are more likely to achieve impartiality through the open deliberative process, where all jurors can feel free to discuss their views and have them considered by their fellow jurors. The concepts of “diffused impartiality” and of an “open deliberative process” are concepts very much based on the assumption that all jurors have an equal ability and opportunity to express their opinions and to persuade their fellow jurors. So even where a representative jury is selected the literature on juries suggests that juries are influenced by cultural and social factors.

2.15 In Ireland there have been a number of examples of allegations of bias on the part of jurors. If this bias emerges during the trial it is open to the trial judge to discharge the juror or jury but in circumstances where the bias comes to light following the verdict, as it often does, this provides a convicted person with a ground of appeal.¹⁶ Usually the appeal will rely upon the rule against bias and on the prevailing test of bias, which in Ireland is an objective

¹² New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials: Part One* (32-1999) at 58.

¹³ See *Taylor v Louisiana* 419 US 522, 530–531.

¹⁴ New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials: Part One* (32-1999) at 58.

¹⁵ *Ibid.*

¹⁶ See chapter 8, below.

“reasonable apprehension” test.¹⁷ The question that the appeal court considers “... is whether a reasonable, right-thinking person, would reasonably apprehend that justice was not done on account of whatever vitiating factor emerged”.¹⁸

2.16 A difficult situation that arises is where it emerges that a juror has certain attitudes or holds a particular view of an accused person that indicates that there is a reasonable apprehension that the juror is not impartial. An old example of this is *R v O’Coigley*¹⁹ where a juror shouted at an accused “damned rascals” as he was being brought into the dock. A more recent example of this situation arose in *People (DPP) v Tobin*²⁰ where the defendant was on trial for a number of sexual offences. It emerged that during the jury deliberations a female juror revealed that she had been the victim of sexual abuse. The Court of Criminal Appeal applied the “reasonable apprehension” test and decided to quash the conviction. The basis for the Court of Criminal Appeals decision was that there was a real possibility that the juror’s experience of sexual abuse might influence her decision, thereby affecting the right of the accused to a fair trial.

2.17 Hamilton P. in *Z v DPP*²¹ held that in circumstances where an obstacle to a fair trial was encountered, the responsibility of a trial Judge was to avoid unfairness. Hamilton P. stated that this was:

“...heavy and burdensome but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues save where there is a real risk of the likelihood of an unfair trial. The responsibility is discharged by controlling the procedures of the trial, by adjournments or other interlocutory orders, by rulings on the presumption of innocence, the onus of proof, the admissibility of evidence and especially by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer. More than usual care however is called for in the empanelling of the jury and in the conduct of a trial in cases of this nature.”²²

2.18 *DPP v Haugh*,²³ a Divisional (three judge) decision of the High Court, indicates the reluctance of the Irish judiciary to attempts to shape a jury.²⁴ In

¹⁷ See O’Malley “A Representative and Impartial Jury” (2003) 8:6 *Bar Review* 232 at 233.

¹⁸ *Ibid* at 233-234.

¹⁹ (1798).

²⁰ Court of Criminal Appeal, June 22, 2001.

²¹ *Z v DPP* [1994] 2 IR 476.

²² *Ibid*, at 495.

²³ [2000] 1 IR 184.

this case, the defendant was the former Taoiseach Charles Haughey, who had been charged with allegedly obstructing the work of a Tribunal of Inquiry established with the powers conferred by the *Tribunals of Inquiry (Evidence) Act 1921*. At a preliminary hearing prior to empanelling the jury that was due to try the case in the Circuit Criminal Court, the respondent judge proposed that potential jurors would be asked to fill out a questionnaire that was aimed at identifying any potential bias against the defendant. The Director of Public Prosecutions applied to the High Court to prevent the questionnaire from being posted to potential jurors and the Divisional Court decision granted this application. The Court noted that there was no provision for this approach under the *Juries Act 1976*. And no precedent for it in Irish criminal practice. The Court in *Haugh* made it clear that a trial judge cannot vary the procedures governing a trial on the basis of the notoriety of the defendant or the offence that they are alleged to have committed. Rather, the trial judge is required to ensure that fair procedures are observed through warnings to jurors at the empanelling stage and throughout the trial. It is thus clear that any changes to existing practice are unlikely, still less the potential for the detailed form of psychological profiling adopted in a number of states in the United States of America.

(c) Independence

2.19 The concept of random selection of persons for jury service forms an important part of the framework that seeks to ensure the independence of jury selection. Ordinary citizens hold a diverse range of views, perspectives and life experiences which contribute to the independence of juries. Juries assert their independence through "... the provision of the common sense judgment of the community, as well as providing a safeguard against arbitrary or oppressive government."²⁵ It has been questioned whether juries are in fact independent, insofar as it could be considered a question of degree as jurors can be unconsciously influenced by the judge in a criminal trial. However, the extent to which a jury can be considered to be independent depends also on perspective. It certainly is implicit in the provisions of the *Juries Act 1976* that jurors ought to be independent in carrying out their role.

²⁴ See O'Donnell "The Jury on Trial: Reflections on *DPP v. Haugh*", (2000) 5 *Bar Review* 470.

²⁵ See New Zealand Law Commission. See New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials: Part One* (32-1999) chapter 5 at 57, Findlay *Jury Management in New South Wales* (Australian Institute of Judicial Administration 1994) at 114. See also Derbyshire "The Lamp That Shows That Freedom Lives – Is it Worth the Candle?" [1991] *Criminal Law Review* 740.

(d) Competence

2.20 The case law of the Irish Supreme Court demonstrates an insistence on the need for jury trials to be fair.²⁶ The Supreme Court has interpreted Article 38.5 of the Constitution in conjunction with other constitutional rights to ensure that all trials shall apply fair procedures. The Commission considers that the competency of the jury in criminal trials is an inherent requirement of the Constitution to a fair hearing by an independent and impartial court. The role of a juror is extremely important and is integral to the administration of justice. A jury decides the facts of a case and delivers a verdict as to the criminal liability of a defendant. Therefore, a juror should be capable of paying full attention to the court proceedings and comprehend them. A number of provisions and requirements for eligibility for jury service under the *Juries Act 1976* are in place to identify and exclude individuals considered incapable of discharging the duties of a juror. The basis for this is that only competent persons should be selected for jury service, a matter which the Supreme Court in the *de Burca* case was within the authority of the Óireachtas to regulate. The Commission returns to this in chapter 4, below.

C Citizenship and Demographics in Eligibility for Jury Service

2.21 In this Part, the Commission considers to what extent citizenship should remain a key requirement concerning eligibility for jury service in Ireland.

(1) The 1976 Act and changing demographics in Ireland

2.22 Section 6 of the *Juries Act 1976* provides that every Irish citizen aged 18 years “who is entered in a register of Dáil electors in a jury district shall be qualified and liable to serve as a juror.”²⁷ Section 6 of the 1976 Act links the citizenship requirement to the need to register for Dáil (general) elections, which requires an active step by a citizen in order to make him or her eligible for jury service.

2.23 The connection between Irish citizenship and entry on the Dáil (general) electoral register raises a number of interrelated issues which have been raised already in Ireland,²⁸ and which the Commission considers are worthy of further examination here. The first issue is whether the link with the

²⁶ For a discussion on this see Jackson, Quinn & O’Malley “The Jury System in Contemporary Ireland” in Vidmar (ed) *World Jury Systems* (2nd (ed) Oxford University Press 2000) at 298-299 and Hogan & Whyte *Kelly, the Irish Constitution* (4th (ed) LexisNexis 2003) at 1221.

²⁷ Section 6 of the *Juries Act 1976*, as amended by section 54 of the *Civil Law (Miscellaneous Provisions) Act 2008*.

²⁸ O’Malley “A Representative and Impartial Jury” (2003) 8:6 *Bar Review* 232.

electoral register from which the jury panel is selected may be inappropriate; this is because large numbers of, especially younger, people who are resident and working in the larger cities may be registered to vote in their place of birth. It remains a feature of Irish life in the 21st century that many young people living and working in Dublin or Cork “go home for the weekend” and, at election time, “go home to vote.” Because of this demographic reality, such individuals will find it difficult to be jurors where they are registered to vote (“at home”) and will not be called for jury service where they work and live, thus contributing to the unrepresentative character of juries.²⁹ Indeed, this element of disconnection between the jury pool and the local community has, arguably, been further facilitated since the facility for postal voting was considerably extension under the *Electoral Act 1997*.³⁰

2.24 A second issue is 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*. Most notably, many citizens of the 27 Member States of the European Union are free, under EU law, to live and work in the State. This additional demographic transformation raises the question whether the jury selection pool remains representative of Irish society, given that many long-term residents in the State, who are not Irish citizens, are ineligible for jury selection under the 1976 Act. Thus, it may be questioned whether the use of the register of Dáil electors as the exclusive source list for juror selection can continue to be justified.³¹ As the Commission discusses below, a possible solution to this could be to use the electoral register for European Parliament elections or for local government elections, in respect of which a wider category of residents are eligible to vote.

2.25 A third issue to be considered is whether electoral registers, of whatever type, should continue to be used as the basis for jury selection. In this respect, in a number of other States it has been pointed out that younger people and persons from ethnic minority backgrounds may be less likely to be registered to vote. For this reason, using other source lists, such as driving licence holders or even the telephone directory, might increase the numbers of these groups in the jury pool.³²

²⁹ *Ibid.*, at 233.

³⁰ *Ibid.*

³¹ O’Malley “A Representative and Impartial Jury” (2003) 8:6 *Bar Review* 232 at 233.

³² See Munsterman & Munsterman “The Search for Jury Representativeness” 11 *Justice System Journal* 59 (1986); Kairys, Kadane & Lehoczky “Jury Representativeness: A Mandate for Multiple Source Lists” 65 *California Law Review* 776 (1977).

2.26 The Commission now turns to examine developments in other countries in these connected aspects of jury representativeness, in particular, how other States have considered extending jury service to persons other than citizens.

(2) England and Wales

2.27 Under section 8 of the *Juries Act 1870*, resident aliens were entitled to serve as jurors in England or Wales if they had been domiciled there for 10 years or more. Eligibility for jury service was extensively reviewed in the 1965 *Report of the Departmental Committee on Jury Service*.³³ Arising from the 1965 Report, the 10 years requirement was significantly altered by section 1 of the UK *Juries Act 1974*³⁴ which provides that a person is eligible for jury service in the County, High and Crown courts if:

- "(a) he is for the time being registered as a parliamentary or local government elector and is not less than eighteen nor more than seventy years of age; and
- (b) he has been ordinarily resident in the United Kingdom, the Channel Islands or the Isle of Man for any period of at least five years since attaining the age of thirteen."

2.28 The Auld review received a number of submissions calling for reform of the residency requirements for jury service in England and Wales. However, it was considered that there was "... no compelling case for change...".³⁵

2.29 The Commission considers that it is worth noting that, both before and since the enactment of the 1974 Act, UK law has provided that citizens and residents in the UK are entitled to serve on juries. The effect is that, for example, many Irish citizens who are resident in England for at least five years and who are eligible to vote in local elections are regularly called for jury service in England. Under the *Juries Act 1976* an English citizen resident in Ireland for five years is, however, not eligible to serve on an Irish jury.

³³ Cmnd 2627, 1965. The Committee had been chaired by the English judge Lord Morris of Borth-y-Gest. As noted in Chapter 1, the Morris Committee published its Report after the Committee on Court Practice and Procedure had completed its 1965 *Report on Jury Service*.

³⁴ As amended by the (UK) *Criminal Justice Act 1988*, which inserted the reference to 70 years of age in place of the original reference to 65 in the 1974 Act. Note the original reference to 65 years in the Irish *Juries Act 1976* was removed by the *Civil Law (Miscellaneous Provisions) Act 2008*.

³⁵ Auld *Review of the Criminal Courts of England and Wales* (Home Office 2001) Chapter 5 at 143-145.

(3) Australia

2.30 As of 2009, all the Australian jurisdictions currently require citizenship as an eligibility requirement for jury service.³⁶ The Commission notes that a number of law reform bodies in Australia have considered extending eligibility for jury service to permanent residents.³⁷ In 1991, the (federal) Australian Law Reform Commission (ALRC) considered whether permanent residents should be eligible for jury service, but ultimately concluded that citizenship was the appropriate qualification for jury service.³⁸ The ALRC recommended that juries could be made more representative by encouraging Australian resident to take up citizenship and register on the electoral roll.³⁹ The ALRC noted that this approach had received considerable support in the submissions it had received.⁴⁰

2.31 In New South Wales citizenship is a requirement for jury service. All citizens, as well as British subjects who were enrolled as electors immediately before 26 January 1984, are eligible.⁴¹ The New South Wales Law Reform Commission considered this issue as part of its review of the jury system. In its Issues Paper the New South Wales Law Reform Commission acknowledged that there would be practical difficulties involved in making non-Australian citizens, such as permanent residents, eligible for jury service when they are not included on the electoral roll.⁴² It considered that the lack of a system to provide for making non-citizens eligible for jury service could result in “insurmountable problems in locating such people with an escalation of administrative costs.”⁴³

³⁶ See Law Reform Commission of Western Australia *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (No 99 2009) at 51.

³⁷ See, for example: Supreme Court of Queensland, Litigation Reform Commission, Criminal Procedure Division *Report on Reform of the Jury System in Queensland* (1993); Parliament of Victoria, Law Reform Committee *Final Report on Jury Service in Victoria* (1996), Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007); and Law Reform Commission of Western Australia *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (No 99 2009).

³⁸ Australian Law Reform Commission *Discussion Paper on Multiculturalism: Criminal Law*, (48 1991) at 63.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ See the *Parliamentary Electorates and Elections Act 1912* (NSW) s 20(1)(b) as amended.

⁴² Law Reform Commission for New South Wales *Issue Paper Jury Selection* (No 28 2006) at 19.

⁴³ *Ibid.*

2.32 The New South Wales Law Reform Commission received a number of submissions that supported extending eligibility for jury service to non-citizens. These argued that the exclusion of people from culturally and linguistically diverse backgrounds (who have made Australia their home, but have not yet acquired citizenship) could potentially undermine the representative nature of juries.⁴⁴ Another submission suggested that permitting non-citizens permanently resident in Australia to undertake jury service would be an important symbolic way of addressing the apprehension of bias held by members of minority immigrant groups when charged with criminal offences.⁴⁵ The New South Wales Law Reform Commission ultimately recommended that citizenship should be retained as an eligibility requirement for jury service. The Commission stated that:

“it would be desirable to increase the involvement of some minority groups so as to reinforce the representative nature of juries, it would seem to be impractical and unduly expensive to include permanent residents, due to the absence of any accessible and up to date listing of their names and current addresses... Otherwise, we are satisfied that citizenship should remain the criterion for jury eligibility, since it represents an acceptance of the laws of the community and a commitment to important mutual rights and obligations. We do not see any case for pursuing those who are eligible but neglect to enrol as electors; nor do we see any case for allowing temporary residents to serve as jurors.”⁴⁶

2.33 In coming to this conclusion, the New South Wales Law Reform Commission observed that there was a high uptake of Australian citizenship; and that any apparent underrepresentation of migrant groups could be explained in terms of the eligibility requirement that jurors understand English - and the use of the right of peremptory challenge - rather than that migrant groups had not enrolled as electors.⁴⁷

2.34 In Victoria, the Parliamentary Law Reform Committee, in its review of jury service acknowledged in principle that there was a good argument for allowing permanent residents to be eligible for jury service.⁴⁸ The basis for

⁴⁴ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 27-28.

⁴⁵ *Ibid* 28.

⁴⁶ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 29.

⁴⁷ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007); at 28-29.

⁴⁸ Parliament of Victoria, Law Reform Committee *Final Report Jury Service in Victoria* (1996) at paragraph 3.9-3.11.

removing the citizenship requirement was that the requirement reduced the representativeness of juries.⁴⁹ The Parliamentary Law Reform Committee also noted that the requirement arguably encroached on the right of an accused “to have a trial by his or her peers”.⁵⁰ It was also suggested to the Committee that the requirement of citizenship prevented permanent residents, who were committed to their communities, from participating in the administration of justice.⁵¹ Ultimately, however, the Committee acknowledged that there were administrative difficulties in establishing an accurate database of non-citizen permanent residents and did not recommend any extension.⁵²

2.35 Following this review, reforming legislation in Victoria, the *Juries Act 2000*, has not changed the requirement of citizenship for jury service. Under section 5 of the 2000 Act, eligibility for jury service is open to “every person aged 18 years or above who is enrolled as an elector for the Legislative Assembly and Legislative Council.”⁵³ This position is, at the time of writing, again under review as the Victoria Government has commissioned another review of Victoria’s jury eligibility criteria to ensure juries represent a broader cross-section of the community.⁵⁴

2.36 In 2009, the Law Reform Commission of Western Australia published a Discussion Paper on Jury Eligibility,⁵⁵ in which it provisionally concluded that it “is not convinced that the basic criterion of citizenship for liability for jury service in Western Australia should be changed.”⁵⁶ Its approach was influenced by statistics which indicated a balanced representation of migrant groups undertaking jury service.⁵⁷ It was also influenced, as with the review undertaken in Victoria, by the administrative difficulties “in obtaining an officially verifiable

⁴⁹ *Ibid* at paragraph 3.7.

⁵⁰ *Ibid*.

⁵¹ *Ibid* at paragraph 3.9.

⁵² *Ibid*.

⁵³ Section 5 *Juries Act 2000*.

⁵⁴ The review was commissioned in October 2008: see <http://www.premier.vic.gov.au/attorney-general/victorian-government-to-review-jury-service-eligibility.html>

⁵⁵ Law Reform Commission of Western Australia *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (No 99 2009) at 52. Available at: <http://www.lrc.justice.wa.gov.au/099-DP.html>.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 51-52.

list of non-citizen permanent residents to augment the electoral roll as a source of potential jurors".⁵⁸

(4) New Zealand

2.37 In New Zealand, section 6 of the (NZ) *Juries Act 1981* provides:

"Every person who is currently registered as an elector in accordance with the Electoral Act 1993 is qualified and liable to serve as a juror upon all juries that may be empanelled for any trial within the jury district in which the person resides."

2.38 The text of section 6 is remarkably similar to section 6 of the (Irish) *Juries Act 1976*. A key difference, however, is that, in New Zealand, eligibility to vote in elections not only extends to citizens but also to permanent residents of New Zealand that have "at some time resided continuously in New Zealand for a period of not less than one year".⁵⁹ A second difference is that, in New Zealand section 82 of the *Electoral Act 1993* makes it mandatory for those qualified to vote, including permanent residents, to enroll on the register of electors (failure to do so being a criminal offence). The Electoral Enrolment Centre of New Zealand Post Ltd, the organisation responsible for maintaining the electoral rolls, also draws up jury lists annually.⁶⁰ A computerised system is used to select names at random from the general and Māori electoral rolls for each jury district, and the jury lists are then sent to the appropriate court.

(i) Summary

2.39 All Australian jurisdictions use citizenship as an eligibility requirement for jury service. While a number of reviews of the jury system in Australia and the United Kingdom have considered moving away from the requirement of citizenship as the basis for jury eligibility, it was ultimately decided not to recommend law reform in this regard. A significant factor in this decision has been a recognition of the practical difficulties in compiling a register of non-citizens who met a minimum residency requirement. A different approach has been adopted in New Zealand where citizens and permanent residents are permitted to serve as jurors. There is value in making non-citizen permanent residents eligible for jury service as this category of persons have demonstrated through their permanent residence their commitment to their communities and thereby warrant inclusion on jury lists.

⁵⁸ *Ibid* at 52.

⁵⁹ *Electoral Act 1993* (NZ) section 74(1).

⁶⁰ See New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials: Part One* (32-1999) at 70.

(5) *Citizenship as an Eligibility Requirement for Jury Service in Ireland*

2.40 In this section the Commission considers whether citizenship should continue as an eligibility requirement for jury service in Ireland.

(a) *The Law on Citizenship in Ireland*

2.41 In accordance with the *Irish Nationality and Citizenship Acts 1956 to 2004* every person born on the island of Ireland before 1 January 2005 is entitled to be an Irish citizen. After 1 January 2005 the citizenship of a person born on the island of Ireland is dependant upon the citizenship of their parents at the time of their birth or the residency history of one of the parents prior to the birth.⁶¹ Under the *Irish Nationality and Citizenship Acts 1956 to 2004*, a person born outside Ireland is automatically an Irish citizen by descent, where one parent was an Irish citizen born in Ireland.

2.42 A person who fulfils certain conditions can also apply for Irish citizenship through the naturalisation process. Naturalisation is a process that allows non-nationals to apply to become Irish citizens. The Minister for Justice, Equality and Law Reform decides on applications and the Minister has absolute discretion in granting naturalisation.⁶² The requirements for naturalisation involve being resident in Ireland for at least five years, and being of good character. When these conditions are met an applicant is in a position to apply to the Minister for Justice, Equality and Law Reform for a certificate of naturalisation.⁶³ In certain circumstances the Minister can decide to waive any of the conditions for naturalisation including the residency requirement. These circumstances include applications made by a refugee⁶⁴ or a stateless person⁶⁵. The discretion also applies to persons residing abroad working in the public service, the spouse of an Irish citizen or a naturalised person, or a naturalised parent applying on behalf of a minor.

⁶¹ An information notice explaining the changes that have taken effect since 1 January 2005 is available from the website of the Department of Justice, Equality and Law Reform. Available at: <http://www.inis.gov.ie/en/INIS/Pages/WP07000113>.

⁶² The Minister continues to enjoy this broad discretion even where an applicant meets all of the conditions set out in the legislation.

⁶³ Residence is defined by section 16A of the *Irish Nationality and Citizenship 1956*.

⁶⁴ The applicant must be recognised as a refugee under the 1951 Geneva Convention relating to the Status of refugees.

⁶⁵ The applicant must be recognised as a stateless person under the 1954 United Nations Convention regarding Stateless Persons.

2.43 The Department of Justice Equality and Law Reform indicated that, in 2008, over 11,000 applications for citizenship were submitted.⁶⁶ Out of this number over 3,000 certificates were issued. In 2009 over 15,000 applications for citizenship were made, with over 4,300 certificates issued. According to the Department the majority of applicants applying for citizenship were permanently resident in Ireland. These statistics indicate that there is a large category of persons permanently resident in Ireland who wish to acquire citizenship. This, indeed, is not surprising given that Irish citizenship also brings with it significant benefits within the European Union.

(b) Eligibility to be entered onto the register of Dáil electors

2.44 Irish citizens may vote in every election and referendum held in the State, and are therefore entitled to be entered onto the Register of Electors. Under the *Electoral Act 1997*, as amended (in accordance with the changes made to Article 16.1.2^o of the Constitution), British citizens are entitled to vote at Dáil, European and local elections. However, as the *Juries Act 1976* confines the juries panel to Irish citizens, British citizens are not eligible to be on the juries panel. Other EU citizens are entitled to vote at European and local elections and non-EU citizens are eligible to vote only at local elections.

(c) The Register of Dáil Electors

2.45 Section 10 of the *Juries Act 1976* sets out the method by which candidate jurors are identified by providing that:

“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 7 (1) of the Electoral Act 1963, 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 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 register thereafter.

2.46 Effectively section 10 of the *Juries Act 1976* provides that, once a register of electors is drawn up, the local authorities are required to supply a copy of it to the county registrar.

2.47 According to the Programme for Government an independent Electoral Commission will be established to take responsibility for electoral

⁶⁶ Correspondence with Department of Justice, Equality and Law Reform, 15 December 2009.

administration and oversight.⁶⁷ As part of its remit the Electoral Commission will take charge of the compilation of a new national rolling electoral register.⁶⁸ In 2008 the Joint Oireachtas Committee on the Environment, Heritage and Local Government published *The Future of the Electoral Register in Ireland and Related Matters*.⁶⁹ The Oireachtas Committee in its Report acknowledged that “[t]he Register of Electors is central to our democracy and affects every person in the country.”⁷⁰ The Committee also acknowledged that errors were rampant in the completeness of data held, and in its accuracy. The Joint Committee agreed that the solution to the problems with the register should not come from within the existing system with its proliferation of players.⁷¹ Rather it recommended the drafting of legislation and the establishment of the Office of the National Electoral Officer to carry out a clearly defined mandate, in preparing and maintaining the National Register of Electors, and for the operation of elections.⁷² It recommended the transfer of the existing functions from local authorities to the National Electoral Office and the transfer of the existing role of the Department of the Environment, Heritage and Local Government to the National Electoral Officer.⁷³ It was also recommended that the National Electoral Office be provided with the necessary resources to effectively carry out its mandate.

2.48 There was a recommendation to establish counter-fraud measures and a revision of the existing register onto a centralised IT database.⁷⁴ The Joint Committee Report recommended the provision of adequate resources for the continuous individual registration of eligible persons onto the register.⁷⁵

⁶⁷ See *Programme for Government 2007-2012* (agreed June 2007). Available at: http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Eng%20Prog%20for%20Gov.pdf at 86.

⁶⁸ *Ibid.*

⁶⁹ *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: http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EnvHerLocGov/Reports_2008/22042008-1.doc.

⁷⁰ *Ibid* at 3.

⁷¹ *Ibid* at 18.

⁷² *Ibid.*

⁷³ However, it was recommended that the Department should retain overall responsibility for policy and legislation in electoral matters.

⁷⁴ *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).

⁷⁵ *Ibid.*

While the current inaccuracies and difficulties with the register hamper the effectiveness in drawing up jury lists the Commission considers that the improvements to the register of electors will increase its reliability.

D **The Potential Use of the Register of electors for European and Local Elections**

2.49 As mentioned above a person resident in the State for a period of five years is entitled to make an application for citizenship.⁷⁶ A person granted citizenship is thereby eligible to be entered onto the register of Dáil electors and eligible to be summoned for jury service. However, persons meeting the residency requirements may not want to apply for Irish citizenship, for a variety of reasons. For example, acquiring Irish citizenship may deprive a person of citizenship in their country of origin. Additionally, persons applying for naturalisation in this jurisdiction will be required to undergo a lengthy application process and at the end of the process may not be successful.

2.50 Extending jury selection to non-citizens would significantly broaden the pool of potential jurors and would enhance representativeness. The Commission considers that it would be desirable to draw jury lists from the register of electors generally rather than just from the register of Dáil electors. This in the Commission's view should be linked to the residency requirement for citizenship as outlined above. As jurors are currently drawn from the register of Dáil electors the transition to drawing jury lists from an expanded electoral list will not entail unworkable administrative burdens. The Commission considers that this will be feasible and not unduly administratively burdensome particularly on the basis of the ongoing work in improving the register of electors' accuracy and in eliminating errors and improving the registration process.⁷⁷

2.51 In Ireland permanent residents can be taken from the register for local and European elections in supplementing the persons contained in the Register of Dáil Electors from which jury lists are currently drawn. The Commission considers that the inclusion of non-citizens in the jury pool would be a positive development in enhancing diversity and representativeness of juries. It may also address perceptions of bias from members of ethnic minority groups when facing serious criminal offences.

⁷⁶ The Minister for Justice, Equality and Law Reform has discretion to waive the residency requirement under certain circumstances.

⁷⁷ 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: http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EnvHerLocGov/Reports_2008/22042008-1.doc.

2.52 The Commission is aware that expanding eligibility for jury service in the way that it is provisionally proposing will mean that a greater number of persons ineligible for jury service will be summonsed. However, the Commission considers the summons for jury service and the juror empanelment process will ensure only non-citizens meeting the five year residency requirement will be selected for jury service. This is successfully achieved under the current system in respect of requiring ineligible and disqualified persons summoned for jury service to identify themselves. To further ensure that ineligible persons do not present for juror service, a penalty in the way of a fine should be imposed for those who fail to declare their ineligibility either because of residency or for any other reason. This would be an extension of the existing provision in the Juries Act 1976, which in Section 36(1), makes it an offence to serve as a juror when ineligible.

2.53 According to the 2009/2010 Register of Electors there are 3,128,042 persons registered for Dáil Elections. There are 3,234,155 persons registered for Local elections. This represents an increase of over 106,000 persons. Even allowing for the fact that many of these registered voters may not fulfil the five year residency requirement, this still represents a significant broadening of the potential pool of eligible jurors.

2.54 In view of the comparative analysis concerning developments in many other jurisdictions (including the position under the UK *Juries Act 1974*) the Commission has provisionally concluded that it would be appropriate to extend drawing potential jurors from the register of electors for Dáil, European and local elections. The Commission has also concluded that, in the case of non-Irish citizens drawn from the register of electors, they should satisfy the five year residency eligibility requirement for Irish citizenship in order to qualify for jury service. In addition, bearing in mind the requirement, as set out in the *de Burca* case, that jurors be competent in the sense of being able to follow proceedings, and also from the perspective of ensuring a fair trial (in particular for an accused in a criminal trial under Article 38 of the Constitution), the Commission has also provisionally concluded that such potential non-Irish citizen jurors must be capable of following courts proceedings in one of the official languages of the State, Irish or English.

2.55 *The Commission provisionally recommends that jury panels should be based on the register of electors for Dáil, European and local elections.*

2.56 *The Commission provisionally recommends that 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. The Commission also provisionally recommends that such potential non-Irish citizen jurors must be capable of following courts proceedings in one of the official languages of the State, Irish or English.*

(a) *Supplemented Source Lists*

2.57 In the United States a number of states operate a system of supplementing voter lists with additional lists with a view to enhancing representativeness in the jury pool.⁷⁸ For example, voter lists are supplemented with driver and residential lists.⁷⁹ Whilst in theory multiple source lists may increase the likelihood of selecting a jury that better reflects a wider cross-section of the community, research from the United States indicates that supplemented source lists do not always increase the participation of minority groups in jury service.⁸⁰

2.58 The Law Reform Committee of Victoria in its final Report 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."⁸¹ They recommended that in the interim enrolment as an elector for the Legislative Assembly should continue to be the requirement for eligibility for jury service.

2.59 The English Auld Review recommended that the approach of the United States at Federal and State level in supplementing and crosschecking the electoral roll by reference to other sources should be adopted.⁸² It specifically recommended that lists of drivers from the Vehicle Licensing Authority, the Department for Work and Pensions, Inland Revenue and telephone directories should be used for this purpose.⁸³ It was acknowledged that this would require a merging and constant updating of records from these various sources.⁸⁴ It was also accepted the widening of the net would mean the inclusion of non-Commonwealth citizens who (except for citizens of Ireland) are not entitled to vote and therefore, not entitled to be entered onto the electoral roll.⁸⁵ However, it was considered that this issue could be dealt with at the

⁷⁸ For a discussion on this Bueker "Jury Source Lists: Does Supplementation Really Work?" 82 *Cornell Law Review* 390, 1996-1997.

⁷⁹ *Ibid.*

⁸⁰ Bueker "Jury Source Lists: Does Supplementation Really Work?" 82 *Cornell Law Review* 390, 1996-1997 at 392.

⁸¹ Parliament of Victoria, Law Reform Committee *Final Report Jury Service in Victoria* (1996) see recommendation 4.

⁸² Auld Review of the Criminal Courts of England and Wales (Home Office, 2001) at Chapter 5, at 144.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

summons stage.⁸⁶ It was stated, "...with modern computer technology, it can be done."⁸⁷ The Auld review argued that this "... reform would be an important contributor to juries becoming a better reflection of the community from which they are drawn and would encourage the perception of jury service as a universal civic duty."⁸⁸ The other rationale of the Auld position was that expanding the jury pool would reduce the incidence with which people would be called for jury service. It was also suggested that it would reduce the length of jury service.⁸⁹

2.60 The Auld recommendations for reform of source lists were not adopted by the Government and were not included in the reforming legislation. Indeed, the "Jury Diversity Project" a major piece of research published in 2007 indicated that most current thinking about jury service in the United Kingdom "... is based on myth, not reality."⁹⁰ One of the assumptions identified in the study was that source lists for summoning jurors require reform in order to increase the proportion of ethnic minorities summoned.⁹¹ The study found that ethnic minorities are summoned in proportion to their representation in the local population in nearly all Crown Courts in England and Wales. It is on this basis that it has been suggested that source lists do not require reform in England and Wales.⁹²

2.61 The Commission accepts that supplementing the electoral register with other source lists might increase the depth of the pool of potential jurors. However, the Commission does not consider that such a reform would be practicable. The administrative costs associated with preparing, cross-checking and updating the list would result in questionable reliability and administrative difficulties. The Commission also considers that the ongoing modernisation and improvements to the register of electors means that the register should be retained as the exclusive source from which to draw lists of jurors.

⁸⁶ This is done very effectively in the United States. This seems a very practical way of dealing with the issue as other elegibility issues will be addressed at this stage also.

⁸⁷ Auld *Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at 144.

⁸⁸ *Ibid.*

⁸⁹ Auld *Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at 144.

⁹⁰ See Thomas "Diversity and Fairness in the Jury System" (Ministry of Justice Research Series 2/07 June 2007) at i. Available at: <http://www.justice.gov.uk/publications/docs/JuriesReport2-07-webVersion.pdf>.

⁹¹ *Ibid.*

⁹² *Ibid.*

2.62 *The Commission provisionally recommends that jury lists should not be supplemented or crosschecked with other lists.*

CHAPTER 3 INELIGIBILITY AND EXCUSAL FROM JURY SERVICE

A Introduction

3.01 In this Chapter the Commission considers, firstly, the ineligibility of certain persons from jury service under the *Juries Act 1976*, many for the reason that they are connected with the administration of justice, such as members of An Garda Síochána. The Commission then discusses the very wide category of persons who are excusable as of right under the 1976 Act, many being public servants and professional persons. In Part B the Commission considers general concerns expressed about the levels of ineligibility and excusal from jury service in Ireland. Part C discusses the trend in other States in connection with reforming the law on ineligibility and excusal. In Part D the Commission sets out its detailed proposals concerning the categories of persons currently ineligible for jury service, while in Part E the Commission sets out its detailed proposals as to excusal from jury service.

B Concern with Ineligibility and Excusal from Jury Service

3.02 The Commission notes that, since 2003, the Director of Public Prosecutions has voiced concern as to the ineligibility and excusal provisions in the *Juries Act 1976*:¹

“Questions must also be asked about eligibility for jury service. The Juries Act excludes huge swathes of our citizens. Almost anybody with a professional qualification is either excluded or can claim to be excused. Naturally, most people avail of that provision if they are busy people and have professional lives to get on with. All members of the clergy are excluded. The days when other jurors would be intimidated by the presence of a clergyman in a jury box are over. All

¹ Comments by James Hamilton, Director of Public Prosecutions, to Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights, 8 December 2003, available at <http://www.gov.ie/oireachtas/Committees-29th-Dail/JustEquDefWomRgts.htm>. See also his paper delivered at a Conference on *Rape Law: Victims on Trial?* organised by Dublin Rape Crisis Centre and the Law School Trinity College Dublin, 16 January 2010, discussed at paragraph 15 of the Introduction to this Consultation Paper, above.

dentists, veterinarians and members of the Council of State are excluded. I cannot say why members of the Council of State should be excluded. We should move towards a system in which virtually everybody is included. I would even include lawyers who are not engaged in criminal practice. What one ends up with on a jury is not a group of 12 random citizens; it is a group of people who are very heavily weighted towards the unemployed, students and housewives. It is not, generally speaking, a representative sample. There are some problems about exclusions from jury service."

3.03 Prior to the *Juries Act 1976* the only way to obtain an exemption from jury service was to provide medical certification to the court. The *Juries Act 1976* provided that the County Register should be empowered to decide whether exemptions from jury service should be allowed.² It was considered that the changes in the law would not result in a greater number of persons avoiding jury service. The Minister for Justice at the time of the enactment of the *Juries Act 1976* stated:

"I cannot see that people with the means to serve on juries without any hardship would be able to fool a county registrar that it was a hardship on the grounds of means. The county registrar will have certain means of information to check an application on those grounds. County registrars are men of common sense and I have no doubt that they will inform themselves before they rule on an application. I do not anticipate that any undeserving people will escape their liability in that way."³

3.04 There was concern expressed during the Oireachtas debate on what became the *Juries Act 1976* that a proper investigation into whether an application for exemption from jury service on the basis of financial hardship would be properly investigated by the County Register. There was also concern that persons were attempting to avoid jury service through medical certification. However, it was anticipated that problems with the more flexible exemption system would be avoided on the basis that:

"I do not anticipate that county registrars will be snowed under by applications for exemption. Because of the widening of the franchise [to those aged 18] new people will be coming in and they will be prepared to carry out this new duty. At the moment because it has been falling more frequently on a small class of citizens there was a temptation to seek exemption but I think this will be largely removed.

² Vol 288 Dáil Éireann Debates col 390 (19 February 1976) *Juries Bill 1975 Committee Stage*.

³ *Ibid.*

As in all cases where a new procedure is prescribed, we will have to wait and see what teething troubles arise but I do not anticipate any in that direction.”⁴

3.05 While there has been no comprehensive empirical study of the excusal rate from jury service in Ireland the concerns expressed immediately prior to the enactment of the 1976 Act appear to have been borne out by some recent figures. The public service broadcaster RTÉ obtained information from the Courts Service under the *Freedom of Information Act 1997* that indicated that out of a total of 41,500 persons summoned for jury service in 2007 over 22,000 obtained excusals.⁵ The figures also showed that 15,844 people were disqualified from jury service because of their job, on health grounds or due to their age.⁶ A further 7,018 were excused at the discretion of the county registrar.⁷ An analysis of the statistics from one week in June 2008 showed that 322 persons were excused from jury service.⁸ Of this figure 100 people stated they could not attend due to work commitments, 99 people said they were primary carers and 84 said they could not attend on the basis of travel.⁹ The high rate of excusal is not just the experience in Ireland, but has been the experience in many other jurisdictions also.¹⁰

C Ineligibility and Excusal: The Law Reform Trend

3.06 The trend internationally in reform and review of the jury system has been to view the categories of persons exempted or excusable from jury service as being too wide. For example, the 1994 Australian Institute of Judicial Administration review of jury management in New South Wales stated that list of exemptions was far too wide and the exemptions were difficult to reconcile.¹¹ It was also noted that the existing categories of ineligibility “may not only create a non-representative jury roll, but also reduce the franchise in such a way that

⁴ *Ibid* at 392.

⁵ “High excusal rate for jury service” (RTÉ 23 November 2008). Available at: <http://www.rte.ie/news/2008/1123/jury.html>.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ “High excusal rate for jury service” (RTÉ 23 November 2008). Available at: <http://www.rte.ie/news/2008/1123/jury.html>.

⁹ *Ibid.*

¹⁰ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001) at 63.

¹¹ See Findlay *Jury Management in New South Wales* (Australian Institute of Judicial Administration 1994) at 173.

the burdens of jury service, and its challenges, are not evenly shared among the citizens of New South Wales".¹²

3.07 The approach of bodies reviewing the jury system has been to reduce the number of exemptions provided for in the legislation. In Tasmania, Southern Australia, New South Wales, England and Wales there has been a significant reduction in the categories of those who are ineligible or entitled to claim exemption or excusal from jury service.¹³ These reviews have called into question the rationales underlying the categories of those who are ineligible or exempt from jury service and they have tended to recommend reduction of the categories.¹⁴ In the United States and in England and Wales most or all categories of exemption have been removed and substituted with a system of allowing candidate jurors to be excused for good cause, with or without deferral of jury service to a later time.¹⁵

3.08 The Law Reform Commission of Western Australia is currently carrying out a review of jury selection. The Commission was specifically asked to consider the number of applications for exemption from jury service and the number of applications granted.¹⁶ There has been a concern internationally about the number of persons exempt or excused from jury service and that juries are becoming less representative of the community as a result. There is also a concern that those who remain eligible for jury service carry a greater burden in fulfilling the "important civic duty" of jury service.

3.09 The trend of removing occupational ineligibility for jury service was first introduced in New York in the mid 1990s. In 1993, the New York State Unified Court System launched *the Jury Project* with a view to making the jury system fairer, more efficient and more productive.¹⁷ Its approach in terms of

¹² *Ibid.*

¹³ See *Juries Act 1974* (Eng) section 1, Schedule 1. *Juries Act 2003* (Tas) Schedule 1 and Schedule 2; *Juries Act 1927* (SA) Schedule 3.

¹⁴ See for example. See *Findlay Jury Management in New South Wales* (Australian Institute of Judicial Administration 1994) at 173; Parliament of Victoria, Law Reform Committee *Final Report Jury Service in Victoria* (1996) at paragraph 3.149; *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at paragraph 34, paragraph 40.

¹⁵ See UK *Juries Act 1974* (as amended by the *Criminal Justice Act 2003*), New York, Consolidated Laws, Judiciary Article 16.

¹⁶ The Law Reform Commission of Western Australia also examined ineligibility, excusal and disqualification from jury service. Law Reform Commission of Western Australia *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (No 99 2009).

¹⁷ For a discussion on this see "Jury Reform" (New York State Unified Court System), available at www.nycourts.gov/admin/stateofjudiciary/stojud9/2%20Jury%20reform.pdf.

juror eligibility was aimed at ensuring that juries were more representative of the communities from which they were selected. The New York Jury Project removed all statutory occupational exclusions and exemptions; this also included the removal of age limits. Excusal from jury service was granted on the basis of mental or physical ill health or undue hardship and was decided on a case by case basis.

3.10 In England and Wales the Auld Review¹⁸ recommended that no difference should be drawn between professions or occupations, or between the employed and self-employed, or between the salaried and waged in terms of eligibility for jury service. The Auld Review recommended that everyone should be eligible for jury service, with the exception of mentally ill persons and persons with criminal convictions.

3.11 The recommendations of the Auld Review were implemented in England and Wales in the *Criminal Justice Act 2003*.¹⁹ In England and Wales persons summonsed for jury service make an application for excusal under circumstances where they are unable to undertake jury service or where it would not be in the public interest. Summoning officers of the Jury Central Summoning Bureau (JCSB) in England and Wales consider all deferral and excusal applications. This is done on a case-by-case basis considering the individual merit of the application. The approach of the summoning officers is to be fair to the applicant for excusal, while being consistent to the needs of the court in selecting a representative jury.²⁰ On that basis there is discretion for the summoning officers in England and Wales to refuse an application for excusal in circumstances where reasons for excusal are not deemed sufficient to merit it.²¹ This discretion and flexibility is an important element of the legislation on juries, which is necessary for this system to be workable. An application for excusal from a hospital consultant or a lighthouse keeper whose role cannot be substituted would require the flexibility to view the application sympathetically.

3.12 The reforms implemented in the State of New York and subsequently in England and Wales represents an equal liability approach to jury service. In those jurisdictions this approach was seen as being consistent with the goal of securing broadly representative juries. The Scottish Government in its Consultation document on reform of the jury system states that it "... is clear

¹⁸ See Chapter 4, below.

¹⁹ Auld Review of the Criminal Courts of England and Wales (Home Office 2001 Chapter 5).

²⁰ See Her Majesty's Court Service website at: http://www.hmcourts-service.gov.uk/infoabout/jury_service/deferrals_excusals.htm.

²¹ *Ibid.*

that the objectivity and impartiality of jurors should not be compromised.”²² This reflects a preference for the continued exclusion of certain categories of persons from jury service.

3.13 The New South Wales Law Reform Commission having considered the reforms introduced in jurisdictions such as the State of New York and England and Wales decided that such an approach was not appropriate for its jurisdiction.²³ The Commission adopted a different approach in restricting the categories of persons ineligible for jury service, while retaining others such as persons who have a substantial connection to the criminal justice system. In terms of the categories of persons excusable from jury service, the New South Wales Law Reform Commission recommended that no person should be entitled to excusal solely on the basis of his or her occupation. The Commission considered that it would be most appropriate to decide on excusal on a case-by-case basis.

3.14 There is a lack of research on the operation and composition of juries in this jurisdiction. For that reason the Commission is mindful in recommending reform of the law there is no data to support reform directions, other than consultation, anecdotal evidence and comparative research. A major research project was conducted in England and Wales, which was aimed at providing information on the representativeness of juries.²⁴ The research was based on continuing concerns in the United Kingdom in relation to the under-representation of ethnic minorities on juries. The Jury Diversity Project addressed the key issues of representativeness of the local community summoned for jury service, and the representativeness of those serving as jurors and juries at each Crown Court in England and Wales and the affect of ethnicity on jury decision-making.²⁵ This was the first study in the UK that examined the representative nature of jury service and compared the ethnic profile of jurors summoned and serving at each Crown Court in England and Wales to precise ethnic population profiles for each court. The research also considered the relationship between juror ethnicity and other factors such as gender, age, income, employment, religion, language with a view to examining

²² See “The Modern Scottish Jury in Criminal Trials” (Scottish Government September 2008), at paragraph 4.10. Available at:
<http://www.scotland.gov.uk/Publications/2008/09/17121921/0>.

²³ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at chapters 2, 4, 5 and 6.

²⁴ Thomas “Diversity and Fairness in the Jury System” (Ministry of Justice Research Series 2/07 June 2007). Available at:
<http://www.justice.gov.uk/publications/docs/JuriesReport2-07-webVersion.pdf>. See also Thomas “Exposing the Myths of Jury Service” *Criminal Law Review*: 2008, 6, 415-430.

²⁵ *Ibid* at chapter 1.

how theses affect the performance of jury service. This research also examined whether ethnicity affects the decision making of the jury.²⁶

3.15 The Jury Diversity Project identified in its report a number of different assumptions about the representative nature of jury service. In its Report it suggested that that these assumptions have become entrenched in the United Kingdom, and that they influence reviews of the jury system and policy development in the area. The majority of these assumptions paint a picture of widespread jury service avoidance and unrepresentative juries, even though there was lack of a recent research base to prove or disprove the assumptions. One of the main finding of the Jury Diversity Project was that most current thinking about jury service in the United Kingdom "... is based on myth, not reality."²⁷

3.16 The key myths and realities identified in this research included the belief that black and minority ethnic groups were under-represented among those summoned for jury service in England and Wales. The report found that there was no significant under-representation of black and minority ethnic groups among those summoned for jury service in the 83 of the 84 courts covered in the survey.

3.17 Another assumption identified was that ethnic minorities were more likely than white jurors not to answer summonses, reflecting a greater reluctance to do jury service and a lack of confidence in the fairness of the jury system. However, the research indicated that the main reason affecting non-responses to summonses was high residential mobility and not ethnicity. A survey established that there were no noteworthy differences between black and minority ethnic and white respondents in their readiness to do jury service or support for the jury system. Similarly, the belief that ethnic minorities were under-represented among persons doing jury service was in reality not the case. The analysis showed that, in almost all courts (81 of the 84 surveyed), there was no significant difference between the proportion of black and minority ethnic groups jurors serving and the BME population levels in the local juror catchment area for each court.

3.18 The certainty that there was a prevalent avoidance of jury service by the British public in general was disproved. The report revealed that there is no mass evasion of jury service by the British public. The research revealed that 85% of those summoned replied to their summonses and the vast majority

²⁶ This research used case simulation with real jurors, along with a study of jury verdicts in actual cases.

²⁷ See Thomas "Diversity and Fairness in the Jury System" (Ministry of Justice Research Series 2/07 June 2007) at i. Available at: <http://www.justice.gov.uk/publications/docs/JuriesReport2-07-webVersion.pdf>.

served. The vast majority of Londoners also replied to their summons and served. Where ethnic minorities did not serve, this was primarily due to ineligibility or disqualification (residency or language).

3.19 The perception that the middle classes and the important and clever managed to avoid jury service and that juries are mainly composed of retired and unemployed persons was also called into question. This research did not find an indication that the middle classes or the important and clever in society avoided jury service. In fact, it was established that the highest rates of jury service were among middle to high-income earners and that those in higher status professions were fully represented among selected jurors. The employed were over-represented among selected jurors, and retired and unemployed persons are under-represented. The research also examined whether women and young people were under-represented among serving jurors, and whether the self-employed were virtually exempt from jury service. The study established that jury pools at individual courts closely reflected the local population in terms of gender and age, and the self-employed were represented among serving jurors in direct proportion to their representation in the population.

3.20 An interesting aspect of this research project was survey research that was conducted before and after the changes to juror eligibility came into effect in 2004.²⁸ This research showed that the new rules increased the proportion of those summoned that served from 54% to 64%. Those serving on the date summoned increased by a third and disqualifications fell by a third and excusals fell by a quarter. It is important to note, however, that the changes outlined in the Report did not affect any single socio-economic group. There was one exception to this: the proportion of selected jurors that were aged 65 to 69 doubled from 3% in 2003 to 6% in 2005, after their right of excusal was removed. What is also noteworthy from this research was that the in-depth study of the composition of jury pools at three Crown Courts conducted in 2003 demonstrated that, even before the new rules were brought into force, selected jurors were very much representative of the local community in terms of; ethnicity, gender, income, occupation, religion and age (with the exception of those aged 65-69).

3.21 These research findings indicate that increasing the eligibility for jury selection can positively affect jury representativeness. Racial demographic changes in Ireland are much more recent than those in the United Kingdom; as

²⁸ See Thomas "Diversity and Fairness in the Jury System" (Ministry of Justice Research Series 2/07 June 2007) at iii and chapter 4 at pages 107-110. Available at: <http://www.justice.gov.uk/publications/docs/JuriesReport2-07-webVersion.pdf>.

such the applicability of the research on ethnic representation in this country may not be as useful as other parts of this research.

3.22 This research also noted that the final stage of jury selection is the only stage of the process that does not involve computerised random selection of jurors. There was some evidence that Black and minority ethnic groups' jurors on jury panels appeared to be selected to serve on juries less often than their white counterparts. It was even suggested that this "... may be the result of court clerks inadvertently avoiding reading out juror names that are difficult to pronounce."

3.23 There has been no similar research project undertaken in this jurisdiction. It underscores the point that research is important in challenging commonly held assumptions made in respect of the jury service. In the course of preparation of this Consultation Paper it was suggested to the Commission that there is a significant issue in relation to jury avoidance within the Irish system. This appears to confirm the views expressed on this matter by the Director of Public Prosecutions.²⁹

D Ineligibility from Jury Service

3.24 Part I of the First Schedule to the *Juries Act 1976* lists the following categories of persons and professions ineligible for jury service:

The President of Ireland

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 staff

The Director of Public Prosecutions and members of his staff

Practicing 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

²⁹ See paragraph 3.05, above.

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, Equality and Law Reform

A person in charge of, or employed in, a forensic science laboratory

Members of the Defence Forces, Army Nursing Service and Reserve Defence Force

(1) *Background to Ineligibility for Jury Service*

3.25 The Óireachtas considered that it was imperative that persons falling into the category of ineligible persons should be excluded from jury service. This was underscored by section 36 (1) of the *Juries Act 1976*, which provides that it is a criminal offence for a person to knowingly serve as a juror if they are ineligible.³⁰ During the Óireachtas debate on what became the *Juries Act 1976* the then Minister for Justice gave this explanation for the ineligibility of persons connected to the justice system (which comprise the majority of the categories listed as ineligible):³¹

“The exclusion of these persons is desirable in order to preserve the essentially lay character of juries and also because of the grievance that accused persons in criminal cases might well feel, if the jurors trying them included lawyers or members of the Garda Síochána or other persons connected with the administration of justice.”

3.26 The rationale behind the exclusion of persons working within the justice system from jury service is that such persons could possess information about the case or those involved in prosecuting or defending the case. They could also possess information about the defendant or the victims. There is also a concern that they could have access to computerised records about cases or individuals, which would obviously impact on their impartiality.³² It is the case that no member of a jury should possess information about a case that is not presented at trial as evidence and tested by the prosecution or defence.³³

³⁰ Under section 36(2) it is similarly an offence to serve as a juror if disqualified from jury service.

³¹ Vol 287 *Dáil Éireann Debates* col 1856 (12 February 1975) *Juries Bill 1975* Second Stage.

³² See “The Modern Scottish Jury in Criminal Trials” September 2008, Scottish Government, at paragraph 4.2. Available at:
<http://www.scotland.gov.uk/Publications/2008/09/17121921/0>.

³³ See also chapter 8, below.

3.27 Similar concerns were expressed by the UK Departmental Committee on Jury Service in 1965, which recommended that ineligibility from jury service should apply to persons associated with the administration of law and justice.³⁴ The basis for this position was that it was necessary in the interests of maintaining the perception of impartiality.

3.28 In approaching the list of ineligible persons, the Commission has taken into account the small population in the State and that the relatively small numbers of people connected with the administration of the court system would make it more difficult to maintain an independent and objective jury if all categories of ineligibility were removed. The Commission has therefore not recommended the somewhat more open-ended models now favoured in the UK or USA model, although some adjustments to the list of ineligible categories, as outlined below, is appropriate.

(2) *Discussion of categories of Ineligible Persons under the Juries Act 1976*

3.29 In this section the Commission gives specific consideration to each category of persons ineligible for jury service under the *Juries Act 1976* and makes provisional recommendations as to whether these categories of ineligibility should remain.

(a) *President of Ireland*

3.30 The Office of President was established by the Constitution and her powers and functions are set out in the Constitution. The President represents all the people when undertaking official engagements domestically and abroad and is Supreme Commander of the Irish Defence Forces. The Constitution provides that the functions of the office are not amenable to challenge in any court proceedings. Given the formal constitutional role of the President, the Commission considers that it would not be appropriate for her to be selected for jury service.

3.31 *The Commission provisionally recommends that the President should continue to be ineligible for jury service.*

(b) *Persons holding or who have at any time held any judicial office*

3.32 The First Schedule to the *Juries Act 1976* provides that persons holding or who have at any time held any judicial office within the meaning of the *Courts (Establishment and Constitution) Act 1961* are ineligible for jury service. Thus, all judges and all retired members of the judiciary are ineligible for jury service in this jurisdiction. Judicial officers are ineligible for jury selection

³⁴ *Report of the Departmental Committee on Jury Service* (Home Office, Cmnd 2627, 1965) at paragraph 101.

in all Australian jurisdictions.³⁵ However, in the United States, it is increasingly common for members of the judiciary to undertake jury service.³⁶

3.33 The Auld review recommended removal of this category of ineligibility.³⁷ However, it was acknowledged that there was a practical difficulty with this reform in that:

“potential judge/jurors may often know or be known to the trial judge or advocates or others involved in the trial. This could be regarded as compromising their independence and/or, dependent on their seniority or personality, as inhibiting the judge or advocates in their conduct of the case.”³⁸

3.34 However, the Auld Review considered that these problems could be dealt with on a case-by-case basis and that discretionary excusal was more appropriate than complete ineligibility on the basis of membership of the judiciary.³⁹ The Auld Review also considered that members of the judiciary were not in a different position to other persons connected with the administration of justice.⁴⁰ Therefore, it was considered incorrect not to recommend removal of judges’ ineligibility when recommending removal of ineligibility of other persons connected to the administration of justice.⁴¹ Members of the judiciary are now entitled to serve as jurors in England and Wales as a result of the changes to the rules on jury service introduced by the *Criminal Justice Act 2003*. Guidelines have been produced to cover the deferral of service in circumstances where judicial officers seek excusal on the grounds that they may be known to one of the parties involved in a case.⁴² These

³⁵ See *Jury Act 1977 (NSW)* Schedule 2 item 2; *Juries Act 2003 (Tas)* Schedule 2 cl 2; *Juries Act 2000 (Vic)* Schedule 2 cl 1(b); *Jury Act 1995 (Qld)* section 4(3)(d); *Juries Act 1957 (WA)* Schedule 2 Part 1 cl 1(a)-(ea); *Juries Act 1927 (SA)* Schedule 3 cl 2; *Juries Act 1963 (NT)* Sch 7; *Juries Act 1967 (ACT)* Schedule 2 Part 2.1 items 2, 13, 16.

³⁶ Indeed some members of the judiciary have written about their experiences as jurors, suggesting that the experience provided them with an invaluable insight into operation of a jury, see *Auld Review of the Criminal Courts of England and Wales* (Home Office, 2001) at Chapter 5, at 146-147.

³⁷ See *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at 146-149.

³⁸ *Ibid* at 148.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² “Guidance for summoning officers when considering deferral and excusal applications” (Her Majesty’s Court Service 2009) Available at: <http://www.official-documents.gov.uk/document/other/9780108508400/9780108508400.pdf>.

guidelines encourage the deferral of jury service to a different court, so as to avoid similar reasons for excusal.

3.35 The approach adopted in the United States and England and Wales has not been universally endorsed as the correct approach. The New South Wales Law Reform Commission considered whether judicial officers should be eligible for jury service as part of their review of jury selection and conclude that members of the judiciary should continue to be ineligible for jury service.⁴³

3.36 The geographic concentration of courts, particularly in Dublin, and the relatively small size of the Irish legal profession means that it would be undesirable to permit members of the judiciary to be eligible for jury service. In addition, there would be a strong probability that members of the judiciary would be familiar with the trial judge and would know the barristers and solicitors involved in any given case. Therefore a deferral system such as that in England and Wales would not be successful in resolving the issue.

3.37 *The Commission provisionally recommends that members of the judiciary should continue to be ineligible for jury service.*

3.38 As referred to above the ineligibility of members of the judiciary applies equally to serving and retired members under the *Juries Act 1976*. The New South Wales Law Reform Commission in their Report on reform of jury selection, while recommending that members of the judiciary should not be eligible for jury service, did recommend that retired or former members of the judiciary should be permitted to serve as jurors.⁴⁴ This was subject to a three-year cooling off period from the date of the termination of their last commission as a member of the judiciary. The New South Wales Commission concluded that:

“[t]hey would have no difficulty in performing jury service, subject to the need to apply to be excused if they feel that they are still too close to the judge, or the lawyers, or the parties involved.”⁴⁵

3.39 The New South Wales Commission was influenced in its decision in the satisfactory experiences of jury service reported by judges in the United States and in England and Wales. It was considered that the three-year cooling off period between ineligibility and eligibility provided a sufficient period of removal from direct contact with the criminal justice system and from persons involved in its administration.

⁴³ *Ibid* at 66.

⁴⁴ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 65-70.

⁴⁵ *Ibid* at 65.

3.40 Since 1995, the age of retirement for a member of the Irish judiciary is 70 years of age. The *Civil Law (Miscellaneous Provisions) Act 2008* removed the upper age limit of 70 years of age for jury service, meaning that members of the judiciary once retired would be eligible for jury service. However, the Commission does not see a reform on this area as advantageous and many of the arguments against the eligibility of members of the judiciary set out above are equally compelling in excluding retired members of the judiciary from jury service.

3.41 *The Commission provisionally recommends that retired members of the judiciary should continue to be ineligible for jury service.*

(c) Coroners and deputy coroners

3.42 Coroners are independent public officials whose function is to investigate sudden and unexplained deaths under the *Coroners Act 1962*.⁴⁶ In many cases, coroners will arrange for a post-mortem to be carried out to assist them in reaching a conclusion. Where a coroner believes that a death was violent, unnatural or happened suddenly and from unknown causes, they will hold an inquest to establish the facts of how the person died. The function of the inquest is not to decide if someone is legally responsible for the person's death. Rather the role of the coroner is solely to establish the 'who, when, where and how' of their death. Coroners are not excluded from jury service in the United States. Similarly, coroners are eligible for jury service in England and Wales. However, they are excluded from jury service in all Australian jurisdictions. The New South Wales Law Reform Commission considered whether, coroners should continue to be ineligible from jury service as part of their review of jury selection and concluded that they should continue to be ineligible. Coroners by the nature of their work become familiar with the intimate details of deaths that may become the subject of criminal investigation. The functions of coroners can be likened to the functions of members of the judiciary in a number of ways. As such the Commission considers that many of the rationales underlying the exclusion of members of the judiciary from jury service apply equally to coroners.

3.43 *The Commission provisionally recommends that coroners and deputy coroners should continue to be ineligible for jury service.*

(d) Attorney General and his staff

3.44 The Attorney General and his staff are ineligible for jury service under the *Juries Act 1976*. The Attorney General is the legal adviser to the

⁴⁶ The *Coroners Act 1962* is due to be repealed and replaced by the *Coroners Bill 2007*. On coroners, see generally Farrell, *Coroners: Law and Practice* (Round Hall, 2000).

Government and, as such, he is the chief law officer of the State. The staff of the Office of the Attorney General includes: Advisory Counsel to the Attorney General; the Office of Parliamentary Counsel to the Government (who draft legislation); and the Chief State Solicitor's Office (who represent the Attorney and the State). The Commission considers that as the Attorney General is the chief law officer in the State and given the work undertaken by the different sections of the Attorney General's Office it would be undesirable for such persons to be selected for jury service. However, the Commission has provisionally concluded that persons employed in the Attorney General's Office carrying out administrative work only should be eligible for jury service.

3.45 *The Commission provisionally recommends that the Attorney General and those staff in his Office who undertake work of a legal nature should continue to be ineligible for jury service.*

(e) Director of Public Prosecutions and his staff

3.46 The *Juries Act 1976* excludes the Director of Public Prosecutions and members of his staff from jury service.⁴⁷ The Director's role is to direct and supervise prosecutions on indictment in the courts, and to give general direction and advice to the Garda Síochána concerning summary cases, and specific direction in such cases where requested.

3.47 Members of the Director's staff include the Chief Prosecution Solicitor, who provides a solicitor service within the Office of the Director of Public Prosecutions. The Directing Division consists of barristers and solicitors who examine criminal investigation files and decide whether or not a prosecution should be taken. The Solicitors Division consists of solicitors and legal executives who prepare and conduct cases on behalf of the Director in all courts sitting in Dublin. The Administration Division provides the organisational, infrastructural, administrative and information services required by the Office.

3.48 Bearing in mind these diverse functions concerning criminal prosecutions, the Commission considers that there is a strong argument in favour of continuing to exclude the Director of Public Prosecutions and members of his staff from jury service and the Commission has provisionally concluded that no change should occur in this aspect of eligibility for jury service.

⁴⁷ The Office of the Director of Public Prosecutions was established by the *Prosecution of Offences Act 1974*. The 1974 Act provided for the transfer to the Director of all functions previously performed by the Attorney General in relation to criminal matters and election and referendum petitions.

3.49 *The Commission provisionally recommends that the Director of Public Prosecutions and members of his staff should continue to be ineligible for jury service.*

(f) Practicing solicitors, solicitors' apprentices and barristers

3.50 The Juries Act 1976 provides that practicing barristers and solicitors are ineligible for jury service. The traditional rationale underlying the exclusion of lawyers from jury service is that lawyers have legal knowledge and experience that might result in exerting undue influence on other jurors and dominating jury deliberation. It has even been suggested that lawyers selected for jury service could conceivably usurp the role of the judge.⁴⁸ On the other side of the debate it could be argued that lawyers could assist fellow jurors at the deliberation stage through simplifying and explaining issues about a case.⁴⁹

3.51 The Auld Review expressed the view that it would be unlikely that lawyers would have undue influence over their juror counterparts:

“People no longer defer to professionals or those holding particular office in the way they used to do. Experience in the USA where, in a number of States, judges, lawyers and others holding positions in the criminal justice system have sat as jurors, is that their fellow jurors have not allowed them to dominate their deliberations... A number of them have also commented on how diffident they would have felt about trying to do so since, despite their familiarity with court procedures, they found the role of a juror much more difficult than they had expected.”⁵⁰

3.52 In England and Wales, practicing lawyers are now eligible for jury service, although they are entitled to make an application for excusal or deferral. The current guidelines suggest that any applications on the basis that a juror is known to one of the parties in the trial will in the ordinary course result in a deferral or in the juror being moved to a trial in an alternative court where the excusal grounds may not exist.⁵¹ The Victorian Parliamentary Law Reform Committee's review suggested that the ineligibility of lawyers was originally

⁴⁸ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 72.

⁴⁹ *Ibid.*

⁵⁰ Auld *Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5).

⁵¹ “Guidance for summoning officers when considering deferral and excusal applications” (Her Majesty's Court Service 2009) Available at: <http://www.official-documents.gov.uk/document/other/9780108508400/9780108508400.pdf>.

based on the fact that lawyers in the 19th century were a "... fairly small group with a good network of communication".⁵²

3.53 Lawyers are now eligible for jury service in most States in the United States. The majority of states have eliminated all exemptions from jury service based on profession. A small number of states still exempt lawyers from serving as jurors. However, such lawyers are not ineligible but may be excused from jury service if they make an application for excusal.⁵³ There is some evidence that lawyers eligible for jury service when summoned attempt to evade jury service.⁵⁴

3.54 The New South Wales Law Reform Commission considered that in its view "this category is unjustifiably wide and that lawyers as a class should now be eligible to serve as jurors, subject to ... exceptions".⁵⁵ The exceptions recommended by the New South Wales Law Reform Commission was that "public sector lawyers who are employed or engaged in the provision of legal services in criminal cases, or who hold certain defined offices central to the administration of the criminal justice system" should continue to be excluded from jury service.⁵⁶ These exceptions include the Crown Prosecutor; Public Defender; Director or Deputy Director of Public Prosecutions; Solicitor for Public Prosecutions; Solicitor General; Crown Advocate; or Crown Solicitor. The Commission also recommended that the exclusion of lawyers within this category should expire three years after they cease to hold any such office. The New South Wales Law Reform Commission also recommended that Australian lawyers and paralegals employed or engaged in the public sector in the provision of legal services in criminal cases should continue to be excluded from serving as jurors while so engaged or employed.

3.55 In New Zealand the *Juries Act 1981* significantly reduced the categories of people in occupations who were automatically excluded from jury service. However, under section 8, only barristers and solicitors continued to be excluded. It was considered in New Zealand at the time of enacting the 1981

⁵² Parliament of Victoria, Law Reform Committee *Final Report Jury Service in Victoria* (1996) at paragraph 3.83.

⁵³ See Musterman "Juries Win Again: Citizens Speak" *The Court Manager* Volume 14, (1999).

⁵⁴ For a discussion on lawyers trying to avoid jury service see O'Neill "Accepting Our Duty: The Ethics of Jury Service" *For the Defence*, November (2008). Available at: <http://www.forthedefense.org/CD/Public/FTD/2008/November/2008%20November%20FTD%20-%20The%20Ethics%20of%20Jury%20Service.pdf>.

⁵⁵ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 74.

⁵⁶ *Ibid.*

Act that lawyers, even those who did not practice criminal law, should continue to be excluded. As the New Zealand Law Commission acknowledged, the rationale for this was that "... they might be unduly influential in jury deliberations".⁵⁷

3.56 The New Zealand Law Commission adopted a different approach than that adopted in other jurisdictions that recently reviewed their law on jury selection.⁵⁸ The New Zealand Commission concluded that the exclusion from jury service of barristers and solicitors holding current practicing certificates should remain.⁵⁹ The New Zealand Law Commission in reaching its recommendation were influenced by the likelihood:

"that a jury would naturally look to a lawyer for guidance on both legal and factual issues, so that the role of the judge would be usurped... and the democratic nature of the jury undermined."⁶⁰

3.57 The Commission acknowledges that the legal profession has changed significantly since the original basis for excluding lawyers from jury service was first introduced. There are currently over 8,000 solicitors practising in Ireland, mostly in private practice.⁶¹ Approximately 70% of the 2,000 solicitors' practices in Ireland are small, with one or two solicitors working in the practice which will often have a criminal law element to the work. As to barristers, just over 2,000 persons are members of the Law Library, indicating in broad terms the number in practice.

3.58 The argument in favour of removing the ineligibility of the legal profession from jury service is that it would have the immediate effect of increasing the available pool of jurors by about 10,000 and any suggestion that lay members of a jury would be intimidated or unduly influenced by the presence of a lawyer would seem outdated. Jurors are instructed by the trial

⁵⁷ See New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials: Part One* (No. 32-1999) at 86.

⁵⁸ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69- 2001) at 75-76.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 76.

⁶¹ The Competition Authority, in its *Report on Competition in Professional Services: Solicitors and Barristers* (2006), available at www.tca.ie, noted that there were approximately 210 lawyers per 100,000 people in Ireland. This consists of approximately 172 solicitors and 39 barristers for every 100,000 people. The ratio of solicitors to population is slightly lower than is the case in the United Kingdom, while the ratio of barristers to population is slightly higher. In general, the ratio of lawyers to population is lower in Ireland than in the United Kingdom. See *Byrne and McCutcheon on the Irish Legal System* (5th ed Bloomsbury Professional 2009) para 3.20.

judge to decide cases in accordance with his or her directions and are directed to decide the criminal culpability of the accused in accordance with the evidence presented at trial. As such, arguments that lawyers would dominate jury deliberations and bring their own professional experience to bear are likely to be irrelevant.

3.59 There are persuasive arguments for and against the eligibility of lawyers for jury service. However, the Commission has provisionally formed the view that solicitors and barristers should continue to be ineligible for jury service. The Commission considers that simply restricting eligibility to, for example, solicitors or barristers not practising in the area of criminal law lacks certainty and would result in administrative difficulties. The Commission considers that the ineligibility should also continue to apply to apprentice solicitors.

3.60 *The Commission provisionally recommends that practising barristers, solicitors and solicitors apprentices should continue to be ineligible for jury service.*

3.61 The Commission considers that a significant amount of the rationale relating to the ineligibility of practicing barristers and solicitors does not apply to other persons working in solicitors' offices. Their eligibility for jury service would also assist in broadening the potential jury pool. Therefore, the Commission considers that the ineligibility of "clerks and other persons employed on work of a legal character in solicitors" offices" should no longer apply.

3.62 *The Commission provisionally recommends that clerks and other persons employed on work of a legal character in solicitors' offices should be eligible for jury service.*

(g) Officers attached to a court

3.63 The Commission has provisionally recommended that members of the judiciary should be ineligible for jury service. However, the Commission considers that it can be argued that officers attached to the courts, including those attached to the President of the High Court, would not be sufficiently connected to the criminal justice system to merit their continued ineligibility for jury service. The Commission accordingly invites submissions on this issue.

3.64 *The Commission invites submissions as to whether officers attached to a court are sufficiently connected to the criminal justice system to merit their continued ineligibility for jury service.*

(h) Persons employed to take court records (stenographers)

3.65 The Commission acknowledges that arguments can be made in favour of excluding persons from jury service who regularly provide note-taking or stenography services for court proceedings. At the same time, however, such

persons could also be considered not sufficiently connected to the criminal justice system to merit their continued ineligibility for jury service. The Commission notes in this respect that the ongoing digitisation of court proceedings in criminal matters is likely to remove stenographers from direct involvement in criminal trials. The Commission accordingly invites submissions on this issue.

3.66 *The Commission invites submissions on whether persons employed to take court records (stenographers) are sufficiently connected to the criminal justice system to merit their continued ineligibility for jury service.*

(i) ***Members of the Garda Síochána***

3.67 The Juries Act 1976 excludes members of the Garda Síochána from jury service. There are approximately 14,000 Members of the Gardaí Síochána, 12,000 uniformed and 2,000 plain clothed. As already mentioned the exclusion of Gardaí from jury service was considered desirable in order to preserve the lay character of juries and also on the basis of the grievance that accused persons in a criminal case might feel if one of the jurors was a member of the Garda Síochána.⁶² In that respect, the basis for excluding persons associated with the criminal justice system from jury service lies in the preservation of community confidence in the impartiality of the jury system. In 1965, the UK Departmental Committee on Jury Service also considered that it was essential that public confidence in the impartiality and lay character of the jury was preserved through the exclusion of persons connected to the investigation of crime and law enforcement.⁶³ The Committee held this view strongly suggesting that civilian employees of the police service should also be ineligible on the basis that such persons might be:

"identified with the service through their everyday contact with its members. As such they become influenced by the principles and attitudes of the police, and it would be difficult for them to bring to bear those qualities demanding a completely impartial approach to the problems confronting members of a jury."⁶⁴

3.68 This view was also supported in 1993 by the Royal Commission on Criminal Justice where it was stated that: "[i]t seems to us clearly right that such persons... should be specifically excluded from juries."⁶⁵ It has been suggested

⁶² Vol 287 *Dáil Éireann Debates* 1856 (12 February 1976) *Juries Bill* 1975 Second Stage.

⁶³ See *Report of the Departmental Committee on Jury Service* (Home Office, Cmnd 2627, 1965) at paragraph 100.

⁶⁴ *Ibid.*

⁶⁵ *Royal Commission on Criminal Justice: Crown Court Study* (HMSO, London, 1993).

by one commentator that the position under the *Criminal Justice Act 2003*, which makes police officers eligible, is very difficult to reconcile with these previous reviews:

“[w]hilst the position adopted in the Criminal Justice Act [2003] can be defended, it can be argued that as the [1965 Departmental] Report was so clear in its position that it is difficult to see how such a change could be made... As such, there are those who might consider that there will indeed be at least a perception of bias when serving police officers or those professionally concerned in the administration of law sit on juries.”⁶⁶

3.69 The Auld Review, which recommended the reform that was enacted in the *Criminal Justice Act 2003*, dismissed the suggestion that there was a risk that a police officer would not approach a criminal case with the same openness of mind as someone unconnected with the legal system. Similarly, the Auld Review considered that it was unlikely that the jury would be influenced by the professional status of another juror.⁶⁷

“I do not know why the undoubtedly risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have. Take, for example shopkeepers or house-owners who may have been burgled, or car owners whose cars may have been vandalised, many government and other employees concerned in one way or another with public welfare and people with strong views on various controversial issues, such as legalisation of drugs or euthanasia.”⁶⁸

3.70 The New York Jury Project concluded that the exemption of police officers from jury service was no longer justified on the basis that a large number of cases are not connected to the special training or presumed biases of police officers in that jurisdiction. This is particularly the case in terms of a large number of civil trials in the state of New York.⁶⁹ However, this is not the situation in Ireland where the vast majority of cases requiring juries involve serious criminal offences.

⁶⁶ See Taylor “Juries: Bias Presence of Police Officer or Employee of Crown Prosecution” (2008) *Criminal Law Review* 134-138.

⁶⁷ Auld *Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at 147.

⁶⁸ *Ibid.*

⁶⁹ See Report: *The Jury Project* (Chief Judge of the State of New York 1994) at 32.

3.71 The New South Wales Law Reform Commission considered whether federal and state police officers should be eligible for jury service. Having considered the developments in this area the Commission decided that:

“People who are currently employed or engaged (except on a casual or voluntary basis) in the NSW Police Force, the Australian Federal Police, the Australian Crime Commission, the NSW Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption in law enforcement or criminal investigation, other than clerical, administrative or support staff, should be excluded from jury service. The exclusion should extend for three years after the termination of the relevant position or office.”⁷⁰

3.72 This approach fails to take into account expertise and professional experience that may inform the decision making of a Garda empanelled on a jury. For example, if an accused person is not asked about previous criminal convictions in the course of giving evidence then a lawyer or a Garda might infer that the accused does have a history of criminal convictions, as a person with none normally introduces that fact into evidence. The Scottish Government in its Consultation document on reform of the jury system stated that:

“[i]n a relatively small jurisdiction such as Scotland, the risk of conflicts of interest is real and should be minimised. The wholesale exclusion of those working in the criminal justice system is a response to this. Such individuals have been categorised as *ineligible*, rather than merely *excused*, in order to override any personal inclination to serve.”⁷¹

3.73 *R v Abdroikov, Green and Williamson*⁷² concerned the question of actual or perceptible bias when a serving police officer or solicitor is sitting on the jury.⁷³ The three defendants in this case were tried on indictment on unrelated charges in different courts. All three of the defendants were convicted, and subsequently appealed against their convictions on the basis of

⁷⁰ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 85.

⁷¹ *The Modern Scottish Jury in Criminal Trials* (Scottish Government 2008), at para 4.2, available at: <http://www.scotland.gov.uk/Publications/2008/09/17121921/0>.

⁷² [2007] UKHL 37, [2008] 1 All ER 315.

⁷³ For discussion of the case see: Blom-Cooper “Bias: Malfunction in Judicial Decision-Making” (2009) *Public Law* 199, Taylor “Juries: Bias Presence of Police Officer or Employee of Crown Prosecution” (2008) *Criminal Law Review* 134, and “Case Comment: Police Officers and Lawyers as Jurors: United Kingdom” (2008) 12(2) *International Journal of Evidence & Proof* 160.

actual or perceived bias. The three appeals were heard together as they all related to the same legal issue.

3.74 In *Abdroikov*'s case a serving police officer was selected as a member of the jury. *Abdroikov*'s appeal concerned a minor issue involving one aspect of the evidence of a police witness. While the jury were deliberating the foreman sent a note to the judge revealing that he was a serving police officer and that he was suppose to present to Notting Hill Carnival the following Bank Holiday Monday when the court was not sitting. He expressed concern that he might meet officers who had given evidence in the case. The defence did not object to the case proceeding and the juror was directed to report for duty.

3.75 In *Green*'s case the accused had been stopped and searched by police officers. In the course of this search a police sergeant placed his hands in the *Green*'s pockets and pricked his finger on a used syringe. *Green* was convicted of assault occasioning actual bodily harm and being in possession of a bladed or pointed article. There was a dispute between the accused and the officer in relation to the way in which the search had taken place. After the trial the solicitor for *Green* happened to discover that a police officer had been on the jury. The police officer at the time was stationed at Eltham Police Station that was an operational command unit that fed its work through the Woolwich Crown Court, where the case was tried. It emerged at the appeal that the two officers had previously served in the same police station but had not known each other.

3.76 *Williamson* was convicted of two rape offences and received a sentence of ten years imprisonment. The jury selected for his trial included a solicitor employed by the Crown Prosecution Service. The juror wrote to the court in advance notifying them that he had been employed as such for twenty years and had often prosecuted in Warrington where the trial was held but that he had never been part of a trial in the Crown Court. The defence in the case challenged the juror, on the grounds that he may be potentially biased; however, the judge refused the application. The Crown Prosecution solicitor was subsequently selected for jury service and was chosen as foreperson of the jury.

3.77 The English Court of Appeal rejected all three appeals and they were subsequently further appealed to the UK House of Lords. The House of Lords had to consider whether on the particular facts of each case a fair-minded and informed observer would conclude that there was a real possibility that a jury which included a serving police officer or a Crown Prosecution Service solicitor was biased, having regard to the fact that Parliament in England and Wales decided that such persons were eligible for jury service.

3.78 The House of Lords dismissed the first appeal and allowed the second and third appeals. The House of Lords accepted that most adult human

beings, as a result of their background, education and experience, held certain prejudices and predilections that were conscious or unconscious. However, the House of Lords held that there were safeguards to protect the impartiality of the jury and that when these safeguards operated, did all that could reasonably be done to neutralise those prejudices and predilections to which everyone was prone.

3.79 The first case did not hinge on a contest between the evidence of the police and the evidence of the appellant. As such it was difficult to suggest there was unconscious prejudice, and even if present it would have operated to the disadvantage of the appellant. In addition, it was considered that it made no difference that the officer was the foreman of the jury. As such the House of Lords decided that the Court of Appeal had been correct to dismiss Abdroikov's appeal and upheld the lower court's decision.

3.80 However, there was a difference in *Green*'s case as there was a crucial dispute on the evidence between the appellant and the police officer. Even though the police officer and the juror did not know each other they had shared the same local police background. It was considered that under those set of circumstances that the instinct of a police officer, would be to prefer the evidence of a fellow officer than a defendant with a drug addiction. In the case of the third appellant, no criticism was to be made of the Crown Prosecution Service solicitor. However, the judge had not given serious consideration to the objection of defence counsel to his selection. There is a risk that justice was not seen to be done if a person discharging the important neutral role of juror was in full-time employment by the prosecuting service.

3.81 One of the judges in the House of Lords, Lord Rodger, identified the real difficulties in these situations, even though it is now legally permissible under the 2003 Act.

"Parliament [in enacting the 2003 Act] must have been just as well aware as this House of the bonds of loyalty and of the esprit de corps uniting police officers on the side of law and order. After all, these were precisely the reasons for the previous bar on them serving as jurors. The fair minded observer could not disregard the fact that, knowing this, Parliament has none the less judged it proper in today's world to remove the bar and to rely on the officer's commitment to uphold the law, in these circumstances by complying with their oath or affirmation and following the judge's directions, like any other juror."

3.82 The Auld Review suggested that the trial judge, on a case-by-case basis, should resolve cases of this nature. However, this can only be achieved where the judge is aware of the presence of such jurors and is familiar with any possible connection to the case. The fact that this decision by the House of

Lords was a majority decision suggests that the difference picked out in the cases does not provide any hard and fast rules. Having considered this issue at some length, the Commission has provisionally concluded that, since members of police forces have strong occupational cultures, there is scope for a likelihood of at least a perception of bias if Gardaí were permitted to serve on juries.

3.83 The Commission therefore considers that members of An Garda Síochána should continue to be ineligible for jury service. The Commission has come to this decision on the basis that the overwhelming majority of jury trials in this jurisdiction relate to the prosecution of criminal offences. It is possible that Garda jurors might legitimately have access to information about accused persons which would be inadmissible as evidence at trial and which would not be available to other jurors. Additionally, the Commission considers that it is important to maintain community confidence in the impartiality, fairness and unbiased nature of the jury system. The Commission considers that confidence in trial by jury will be called into question if members of the An Garda Síochána were eligible for selection as jurors. The Commission does not consider that civilians employed by An Garda Síochána, performing entirely administrative functions, should be excluded from jury service.

3.84 *The Commission provisionally recommends that serving members of An Garda Síochána (but not civilians employed by An Garda Síochána, performing entirely administrative functions) should continue to be ineligible for jury service.*

3.85 There is currently no restriction in the 1976 Act on retired member of the Garda Síochána in respect of jury service. The New South Wales Law Reform Commission considered this as part of their review of jury selection and recommended that retired police officers should not be ineligible for jury service. The Commission considers that given the significant number of members of the Garda Síochána it might be desirable that the retired members should continue to be eligible for jury selection.

3.86 Members of An Garda Síochána who have reached the age of 55 and completed 30 years approved service are entitled to retire with a pension. It would be undesirable to restrict the eligibility of this sizeable pool of persons from jury service.

3.87 The Commission considers that there should be a period following retirement during which retired Gardaí should be ineligible to serve in order to ensure that no perception of bias should be allowed to arise. The Commission has therefore come to the provisional view that after a three-year period of retirement from An Garda Síochána retired members should be eligible for jury service. It would be appropriate for retired members of the force to inform the court of their former occupation.

3.88 *The Commission provisionally recommends that retired members of An Garda Síochána should remain eligible for jury service. The Commission also provisionally recommends that retired members of An Garda Síochána should not be eligible for jury service until three years after retirement. The Commission also provisionally recommends that retired Gardaí selected for jury service should inform the court of their former occupation.*

(j) *Prison officers and other persons employed in a prison*

3.89 Under the Juries Act 1976 prison officers and any other persons employed in any juvenile detention centre such as Saint Patrick's Institution or any other place of military custody are ineligible for jury service. This also includes members of visiting committees, chaplains and medical officers. The rationale underlying the exclusion of these categories of persons is the same as for persons connected to the criminal justice system.

3.90 There are a number of reasons as to why persons employed in the prison service should be excluded from jury service. One of the main reasons is that such persons are in regular contact with persons who have been remanded in custody pending trial or who have previously been convicted and sentenced to imprisonment. The Commission considers that the perception of bias and the risk of identification of accused and their prior criminal history are compelling arguments for continuing to exclude this category of persons from jury service.⁷⁴ The New South Wales Law Reform Commission also considered that if a prison officer were to serve on a jury their personal safety within the prison environment might be put at risk. The Commission shares this concern. The Commission accordingly considers that it would be appropriate to continue to exclude this category of persons from jury service.

3.91 *The Commission provisionally recommends that prison officers and other persons employed in a prison or place of detention should continue to be ineligible for jury service.*

(k) *Persons employed in the Probation Service*

3.92 Probation officers work in all of the prisons and places of detention in the State. They advise and assist prisoners in dealing with issues which have led to their offending behaviour and in managing anti-social attitudes, addictions, mental illness, homelessness. They co-ordinate and assist in community based bodies in the provision of services to prisoners. They also work with prisoners in coping with the effects of imprisonment and with preparation of re-settlement in the community. Probation officers also provide assessments and reports to the Department of Justice, Irish Prison Service, the

⁷⁴ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 88.

Parole Board and other bodies as required. Probation officers carry out approximately 5,000 assessments on offenders annually and these assist trial judges in making sentencing decisions in criminal cases.⁷⁵ The two types of reports prepared by probation officers. The first type is a Pre-Sanction Report, which are also known as a probation reports. These assess the suitability of a defendant for a community sanction and examine the issues relevant to reducing offending. The second type of report is a Community Service Report, which assesses the suitability of an offender to do unpaid work as an alternative to prison.

3.93 The Commission considers that the arguments in favour of excluding persons from jury service who are connected to the criminal justice system as outlined above are relevant to this category of persons.

3.94 *The Commission provisionally recommends that persons working in the Probation Service should continue to be ineligible for jury service.*

(l) A person in charge of, or employed in, a forensic science laboratory

3.95 The basis for the exclusion of these categories of persons from jury service is also rooted in their connection to the administration of justice. The Commission acknowledges that the work of persons employed in the Forensic Science Laboratory (which is the principal forensic science laboratory in the State) is generally considered connected to the administration of justice, as it is an office within the Department of Justice, Equality and Law Reform and works closely with members of the Gardaí Síochana. Equally, employees of any other forensic science laboratory are likely to be seen as having, or having had, a connection with either the prosecution or defence in a criminal trial.

3.96 *The Commission provisionally recommends that persons in charge of, or employed in, a forensic science laboratory should continue to be ineligible for jury service.*

(m) Members of the Permanent and Reserve Defence Forces

3.97 The Juries Act 1976 provides that every member of the Permanent Defence Forces, the Army Nursing Service, every member of the Reserve Defence Force (during any period for which he is in receipt of pay for any service or duty) should be ineligible for jury service.

3.98 There are approximately 10,000 persons currently serving in the Permanent Defence Forces.⁷⁶ In the Commission's view, the basis for the ineligibility of members of the Defence Forces is not clear as it does not have a

⁷⁵ See generally the Probation Service website, www.probation.ie/.

⁷⁶ See the Army Website at: <http://www.military.ie/army/>.

sufficient connection to the criminal justice system or to the administration of justice. The removal of this category of ineligibility will significantly enhance the jury pool, easing the burden of service and creating a more broadly representative jury.

3.99 *The Commission provisionally recommends that Members of the Permanent and Reserve Defence Forces should be eligible for jury service.*

E Excusal from Jury Service

(1) *Background to Excusal from Jury Service*

3.100 In 1965, the UK Departmental Committee on Jury Service saw the entitlement to be excused as of right as being available for persons who were suitable for jury service, but due to the importance of their other duties were entitled to excusal from service:

“The duties of some, but not all, of these professions, are so important that it would be against the public interest to compel them to give up their work temporarily in order to act as jurors... equally, individual members of these professions who on particular occasions are able to spare the time should not be prevented, as they are now, from doing so.”⁷⁷

3.101 The UK Departmental Committee also acknowledged that there was great difficulty in making distinctions between those whose work did and did not require excusal from jury service. The Committee identified two grounds appropriate for a person to be excused as of right from jury service. These grounds were where in the public interest:

“the special and personal duties to the state of the individual members of the occupation... [and] the special and personal responsibilities of individual members of the occupation for immediate relief of pain or suffering”.⁷⁸

3.102 The Committee saw the right of excusal as affording certain people “a statutory right to choose to contract out of one of the ordinary responsibilities of citizenship”.⁷⁹ The Committee’s Report stated that there was an expectation that persons excusable as of right would nevertheless choose to elect for jury service. There were similar expectations surrounding the introduction of excuse under the *Juries Act 1976*. The Oireachtas debates on what became the *Juries*

⁷⁷ *Report of the Departmental Committee on Jury Service* (United Kingdom, Home Office, Cmnd 2627, 1965) at paragraph 100.

⁷⁸ *Ibid* at paragraph 148.

⁷⁹ *Ibid* at paragraph 151.

Act 1976 indicate that the basis for permitting certain professions to be excused from jury service was aimed at circumventing excessive interference in the delivery of public services. The *Juries Act 1976* attempted to balance the provision of broadly representative juries and the continuity of essential public services. In this jurisdiction as in others the list of persons excusable as of right has increased with the insertion of more and more occupations meriting inclusion. The Commission acknowledges that the reasons underlying the inclusion of such categories of people may no longer be relevant. Before the introduction of the *Juries Act 1976* County Registers did not have a power to excuse persons from jury service, that power being vested exclusively in judges.⁸⁰ Section 9 of the *Juries Act 1976* conferred a general power on county registrars to excuse any person summoned for jury service for good reason. The then Minister for Justice explained in 1976 that:

“[t]o give a general discretion such as proposed seems clearly desirable, especially now that so many more people will be liable for jury service. This applies especially in the case of women, who may have homes and young children to look after. Similarly, the county registrar might excuse a person for pressing family or business reasons or if he is in ill-health.”⁸¹

3.103 Section 9 of the *Juries Act 1976* also permits a juror who is refused an excusal from the County Register to appeal to the court at which they are summoned to attend and the decision of the judge is deemed to be final on the matter.

(2) *Developments since 1976*

3.104 The Auld review of the criminal courts of 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 covered by the summons.⁸² However, the Auld review concluded that there was no reason why they should be entitled to be excused as of right “simply by virtue of their position”.⁸³

3.105 The Commission notes that most jurisdictions that use trial by jury provide for excusal from service on the basis of “good cause”, “reasonable

⁸⁰ However, in some instances judges delegated the power to excuse to the registrars of their courts. The people who did not attend court in obedience to a summons took the chance that the judge might or might not exempt them.

⁸¹ Vol 288 *Dáil Éireann Debates* col 1859 (19 February 1976) *Juries Bill 1975* Second Stage.

⁸² *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at 150.

⁸³ *Ibid.*

cause”, or “good reason”. In other jurisdictions the categories for excusal are far more limited than Ireland. For example, in Victoria and Tasmania there is only provision for categories of persons disqualified or ineligible for jury service.⁸⁴ Only people over the age of 70 are excused as of right.⁸⁵ The juries’ legislation in Queensland provides for a single category of persons who are ineligible for jury service.⁸⁶ However, there is also a list of criteria for excusing potential jurors.⁸⁷ In England and Wales there are no categories of exemption as of right or ineligibility, only a fairly short list of qualifications, and a list of disqualifications from jury service on the basis of criminal charge or conviction.⁸⁸ The Scottish Government in its 2008 Consultation Document on reform of the jury system stated that:

“[p]erceptions about the risk of conflict of interest may have changed, or become more subtle as probability and seriousness are weighed; and it’s also likely that views on the occupations which should not be disturbed by jury service requirements have moved on. The occupations which are currently listed for excusal might be considered “traditional” occupations which do not fully reflect society’s current priorities.”⁸⁹

3.106 This analysis indicates that there is increasing weight being attached to the argument that persons should not be excused from jury duty on the basis of membership of a particular profession or by holding a particular position.

(3) Persons Excusable from Jury Service in the 1976 Act

3.107 Schedule 1 to the *Juries Act 1976* lists the following categories of persons listed as excusable from jury service:

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

⁸⁴ See *Juries Act 2000* (Vic) section 5(2) and (3), section 8, Schedule 1 and Schedule 2 and *Juries Act 2003* (Tas) section 11.

⁸⁵ See *Juries Act 2003* (Tas) section 11. Persons aged 70 are also entitled to be excused on the basis of “good reason” see *Juries Act 2003* (Tas) section 6, section 9(3), Schedule 1 and Schedule 2.

⁸⁶ See *Jury Act 1995* (Qld) section 4(3).

⁸⁷ *Jury Act 1995* (Qld) section 21.

⁸⁸ See *Juries Act 1974* (Eng) section 1, Schedule 1.

⁸⁹ See “The Modern Scottish Jury in Criminal Trials” (Scottish Government September 2008) at paragraph 4.4. Available at: <http://www.scotland.gov.uk/Publications/2008/09/17121921/0>.

- 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
- Medical practitioners
- Dentists
- Nurses
- Midwives
- Veterinary surgeons
- Pharmaceutical chemists
- A member of the staff of either House of the Oireachtas Heads of Government Departments and Offices and any civil servant on a certificate from the head of his or her Department
- Any civilian employed by the Minister for Defence under section 30(1)(g) of the Defence Act 1954
- 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.
- Whole-time students at any such educational institution
- The secretary to the Commissioners of Irish Lights and any person in the employment of the Commissioners
- Masters of vessels duly licensed pilots and duly licensed aircraft commanders
- Persons aged sixty-five years or upwards and under the age of seventy years

3.108 The Commission considers that the current system of excusal is inefficient. This view is supported with reference to the statistics from the Court Service already referred to which indicate an extremely high prevalence of excusals from jury service. The Commission is also of the opinion that the approach adopted in the *Juries Act 1976* regarding jury excusal is not sustainable, as the range of persons carrying out important public functions across the public service has increased significantly since 1976. The Commission considers that it would be undesirable to undertake a weighting

exercise as to which categories of persons should be eligible for insertion into the list of persons excusable from jury service under the First Schedule of the *Juries Act 1976*. The Commission acknowledges that this is a problem not just for Ireland and that similar concerns are identifiable in other jurisdictions. For example, in Victoria it has been acknowledged that excusal from jury service, broadly based on categories similar to those in the 1976 Act, was the leading cause of under-representation within their jury system.⁹⁰

3.109 It has been suggested to the Commission that the long lists of persons excusable and ineligible for jury service tends to cause much confusion with the public. It seems to be the case that persons excusable as of right often believe that they are ineligible for jury service. The long list of persons excusable contributed to a number of what can be deemed “urban legends” as to ineligibility for jury service. For example, the Commission has received inquiries as to whether it was true that butchers, teachers and psychiatric nurses were ineligible for jury service. The Commission considers that restricting the categories of persons excusable from jury service would contribute to ending confusion as to eligibility for jury service.

(4) Effectiveness of Reform

3.110 It is essential that the reforms to the jury system must be effective in enlarging the jury pool and ensuring that juries are more broadly representative of the Irish society. It has been suggested that the reforms introduced in England and Wales in the *Criminal Justice Act 2003*, where the list system comparable to that currently in the 1976 Act was replaced with an “excusal for cause” approach, have not achieved their objectives. It has been suggested 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.”⁹¹ The extension of liability for jury service will result in enlarging the pool of persons eligible for jury service. However, any benefits this will achieve in terms of more representative juries will dissolve should applications for excusal be granted at approximately the same rate and across the same professions, as is currently the case in this jurisdiction.

3.111 Some of the most common grounds for excusal are on the basis of holiday plans that overlap with the schedule for the trial, illness, doctor or dentist appointments and education commitments. It has been suggested to the

⁹⁰ Parliament of Victoria, Law Reform Committee *Final Report Jury Service in Victoria* (1996) at paragraph 3.147.

⁹¹ See “The Modern Scottish Jury in Criminal Trials” (Scottish Government September 2008) at paragraph 4.13. Available at: <http://www.scotland.gov.uk/Publications/2008/09/17121921/0>.

Commission that in reality these grounds are normally sufficient for excusal and that documentary support of the applications for excusal is often not required in the ordinary course of jury selection. The Commission considers that clear criteria should be required to assess applications for excusal from jury service. A measure of flexibility would also need to be retained so that applications for excusal falling outside should be considered on a case-by-case basis.

3.112 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. Similarly, it is not unreasonable to require medical certification for doctor and dentistry appointments or other evidence that a person can easily obtain or have readily to hand.

3.113 It has been suggested that the removal of restrictions applying to certain occupations and placing all on the same footing may result in an increase in applications for excusal.⁹² If reform of this area resulted in increased excusals on a par with the current levels then the reform is undermined in terms of achieving more broadly representative juries.

3.114 Despite the lack of empirical research on jury service in this jurisdiction, there is broad agreement that the wide range of exemptions significantly reduces the pool of persons eligible for jury service in Ireland. There is a perception that educated professional persons are less likely to serve as jurors. This is supported by the wide-ranging categories of professional people listed in Schedule 1 of the *Juries Act 1976*. The Commission considers that an underrepresentation of professional persons being selected for jury service is not consistent with the goal of achieving juries that are broadly representative of the community. The Commission has accordingly concluded that the categories of persons excusable as of right under the *Juries Act 1976* should be repealed and replaced with a general right of excusal for good cause. The Commission has also provisionally concluded that evidence should be required to support applications for excusal.

3.115 *The Commission provisionally recommends that the categories of persons excusable as of right under the Juries Act 1976 should be repealed and replaced with a general right of excusal for good cause.*

3.116 *The Commission provisionally recommends that evidence should be required to support applications for excusal.*

⁹² *Ibid.*

F Deferral of jury service

3.117 Many jurisdictions have sought to end excessive excusal rates through the introduction of a deferral system. There is a potential concern with the introduction of a deferral system particularly in terms of additional administrative costs. However, the introduction of this system would be effective in ensuring that travel plans or medical appointments would no longer deprive people of an opportunity to undertake jury service.

3.118 Under the 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 of jurors as a juror deferring service is already randomly selected and it is only after random selection that deferral is possible.⁹³ The statistics available would indicate that excusal from jury service is an endemic problem and poses significant administrative problems. A deferral system would serve to reduce the number of people summoned, as the court service will have a record of people who rescheduled jury service for that date.

3.119 The deferral of jury service is likely to encourage greater participation in jury service and the introduction of such a system would more evenly distribute the responsibility of jury service throughout the community. It would serve to reduce the number of persons seeking excusal from jury service and would enhance the experience for jurors who would be facilitated in organizing their affairs and minimizing the inconvenience caused to them, their families and employers.

(1) Comparative Review

3.120 A number of jurisdictions currently provide for a deferral system where a person responding to a summons for jury service is unable to undertake service on the day or days mentioned. Deferral systems for jury service have been introduced in Victoria, South Australia, Tasmania and the Northern Territory. The Law Reform Commission of Western Australia recently recommended the introduction of a deferral system for jury service in that jurisdiction.⁹⁴

⁹³ This view is shared by the Law Reform Commission for New South Wales and the Law Reform Commission of Western Australia. See Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 34 and Law Reform Commission of Western Australia *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (No 99 2009) at 120.

⁹⁴ Law Reform Commission of Western Australia *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (No 99 2009) at 122.

3.121 There is provision for deferral of jury service in England and Wales. Section 9 of the *Juries Act 1974*, as amended, provides for discretionary deferral, in circumstances where a summoned persons “shows to the satisfaction of the appropriate officer that there is good reason why his attendance in pursuance of the summons should be deferred, the appropriate officer may defer his attendance, and, if he does so, he shall vary the days on which that person is summoned to attend and the summons shall have effect accordingly.”⁹⁵ Section 9A(3) of the 1974 Act also provides that the Crown Court Rules should provide a right of “the appropriate officer” to refuse to defer attendance for jury service.

3.122 The New Zealand Law Commission considered the issue of deferral of jury service also as part of their review of jury selection in 2001.⁹⁶ The New Zealand Law Commission recommended that jurors should be allowed to defer their service to a time that is more convenient to them. It was recommended that exact procedures governing the use of deferral should be introduced. The New Zealand Law Commission took a novel approach in recommending that each juror should have the right to defer his or her service once, to a date not more than 12 months in the future. It was recommended that this should not be an absolute right, so that jurors should be required to explain why they are seeking it. One of the submissions referred to by the New Zealand Law Commission was supportive of the automatic right to defer, as it allowed individuals to keep their family and private affairs confidential.⁹⁷ The New Zealand Law Commission recommended that once the deferred date is reached that it should be open to a person to seek a further excusal, although not as of right.⁹⁸ The Law Commission considered that this was a workable position as excusals would not be readily granted to a juror who previously deferred service to a more convenient time.⁹⁹ However, the Commission did suggest that further excusal should be possible where appropriate. This recommendation has been implemented.¹⁰⁰

⁹⁵ *Ibid.*

⁹⁶ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001) at 192.

⁹⁷ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001) at 193.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Section 11 of the *Juries Amendment Act 2008* inserts section 14B and section 14C into the *Juries Act 1981* and provides for deferral of jury service to a period within the following 12 months.

(2) *Length of deferral*

3.123 The juries legislation in Victoria, Northern Territory and Tasmania provides that a person can defer jury service for a period of up to twelve months. However, the legislation in Southern Australia does not expressly provide for a timeframe in which a person is required to defer service. The New South Wales Law Reform Commission in its review of jury selection in 2007 recommended that candidate jurors should be able to defer jury service to a suitable time within the following 12 months.¹⁰¹ As mentioned above the Law Commission for New South Wales also recommended for deferral for a period of up to 12 months.

(3) *The Commission's View*

3.124 The Commission considers that a right of deferral could prove problematic and that an excusal element at the initial deferral stage would be preferable. In circumstances where a deferral is granted, the Commission considers that a timeframe of up to 12 months in which to defer would be appropriate. The Commission acknowledges that the registrar will not always be in a position to provide advice on the court sittings for the forthcoming year. However, the Commission considers that a general timeframe could be provided and exact dates may not be necessary. The Commission considers that deferral should be permitted only on one occasion, following submission of an adequate reason. However, where service of the deferred date is not possible for the juror or where the deferred date conflicts with the courts schedule then a further deferral should be possible. The Commission considers that deferral of jury service on a number of occasions "does not foster public respect for the jury system".¹⁰² As such, appropriate supporting evidence should be provided to the registrar in support of a further request for deferral. The Commission considers that the guidelines recommended to assist in the administration of the excusal system should include a section that covers the administration of the deferral system.

3.125 The Commission provisionally recommends that a deferral date of up to 12 months should be introduced in circumstances where a person is not available to undertake jury service. The Commission also provisionally recommends that a person who defers jury service should be entitled to seek an excusal. The Commission also provisionally recommends that a further deferral should be available to a juror, provided that the application is for good cause. The Commission provisionally recommends that guidelines on excusal should contain a section on the administration of the deferral system.

¹⁰¹ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 134.

¹⁰² *Report: The Jury Project* (Chief Judge of the State of New York 1994) at 36.

CHAPTER 4 CAPACITY TO UNDERTAKE THE DUTIES OF A JUROR

A Introduction

4.01 In this Chapter the Commission focuses primarily on the issue of the capacity of persons to undertake jury service. Under the *Juries Act 1976* as originally enacted, capacity was specifically defined so as to exclude deaf, blind, hearing and sight impaired persons but this has been amended by the *Civil Law (Miscellaneous Provisions) Act 2008* which emphasises the function of the juror rather than the incapacity of any particular group.

4.02 The Commission discusses in this Chapter to what extent the *Juries Act 1976* might be further 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. The Commission recognises in this respect that significant practical and financial considerations as to reasonable accommodation for potential jurors may arise. The Commission discusses these matters against the background of the relevant international human rights standards, notably the 2006 UN Convention on the Rights of Persons with Disabilities. The Commission also discusses the consequential issues that arise in this respect, including issues of fluency in English, which directly concern the capacity of a person to serve on a jury.

B The 1976 Act, as amended, and relevant international standards

(1) *Juries Act 1976, as amended in 2008*

4.03 Under the First Schedule to the *Juries Act 1976* as originally enacted a person was deemed “unfit” and excluded from jury service “because of insufficient capacity to read, deafness or other permanent infirmity is unfit to serve on a jury.” The effect was a general exclusion of deaf persons and, by implication, blind people and persons with a “permanent infirmity” from jury service. Section 64 of the *Civil Law (Miscellaneous Provisions) Act 2008* amended the First Schedule to the 1976 in significant respects. As amended, it is now provided that a person may be excused from jury service where he or she has:

- “(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 The amendments made by the *Civil Law (Miscellaneous Provisions) Act 2008* went some distance in placing the emphasis on a person's capacity to perform the duties of jury service rather than on an automatic exclusion because of any infirmity. This is clearly a great improvement on the 1976 Act as originally enacted but, in the Commission's view, it is open to question whether it goes far enough. Thus, the changes made by the 2008 Act does not provide any guidance as to the meaning of the word 'practicable' or as to what accommodation, if any, ought to be provided for people who require assistance in carrying out the duties of a juror. Although the changes made by the 2008 Act do not specifically refer to blind or deaf jurors, it is arguable that it may still operate, in effect, to prevent such persons from serving on a jury. The changes made by the 2008 Act do not, for example, comprehensively address the issue of capacity as the determining factor and leaves open the possibility of exclusion of persons with capacity on the grounds of impracticality. The Commission turns, therefore, to examine the setting against which the provisions should be assessed, including the international human rights standards involved.

(2) *United Nations Convention on the Rights of Persons with Disabilities*

4.05 The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is the first international legally binding instrument that sets down minimum standards for the protection and safeguarding of the civil, political, social, economic and cultural rights of persons with disabilities throughout the world. Article 13 which deals with access to justice requires States Parties to the Convention to ensure effective access to justice for persons with disabilities on an equal basis with others. This provision includes the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants in the justice system. There is also an obligation under Article 13(2) on States Parties to promote appropriate training for persons working in the field of administration of justice.

4.06 On 26 November 2009 the Council paved the way for the conclusion, by the European Community, of the 2006 UN Convention on the Rights of Persons with Disabilities.¹ Ireland was one of the first countries to sign this

Convention when it opened for signature in 2007. Ireland has not yet ratified the Convention and has not signed the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The State adheres to the approach that it should not ratify treaties until it is considered that Irish domestic law is in general conformity with it. In 2007 a Governmental High-Level and Cross-Departmental Implementation Group was established. The role of this group is to advise the Government on any amendments necessary to the National Disability Strategy to facilitate the ratification of the Convention. It is accepted that there is a significant amount of legislative reform necessary in Ireland before this ratification can occur. In particular, there is a need to introduce capacity legislation in order for Irish law to comply with Article 12 of the Convention.² The eligibility of persons with mental illness and physical disabilities under the *Juries Act 1976* is an issue that needs to be addressed in ensuring that Irish law is compatible with the UNCRPD.

(3) Pending Challenge to the Juries Act 1976

4.07 At the time of writing (March 2010), the High Court judgment in a claim challenging the disqualification of deaf persons from jury service under the *Juries Act 1976*, *Clarke v Galway County Registrar and Attorney General*, is pending. The plaintiff, who has a profound hearing disability, argues that she is entitled to assistance from a sign language interpreter in order to enable her to serve as a juror. The plaintiff sought a number of reliefs including an Order of Certiorari quashing the decision of the County Registrar for County Galway and/or the Court Service excusing her from jury service. She also sought, if necessary, a declaration that the provisions on "Incapable Persons" in Part 1 of the First Schedule to the *Juries Act 1976* as it relates to a hearing impairment or deafness is contrary to the Constitution and/or is incompatible with the provisions of the European Convention on Human Rights within the meaning of the *European Convention on Human Rights Act 2003*. She also sought a declaration that if a question arose regarding the applicant's entitlement or

¹ "Council decides on the European Community becoming a party to the UN Convention on the Rights of Persons with Disabilities (UNCRPD)" (IP/09/1850, Brussels, 30 November 2009). Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1850&format=HTML&aged=0&language=EN&guiLanguage=en>. It is noteworthy that the UNCRPD is the first comprehensive human rights convention to which the European Community is becoming a party to. The decision to become a party to the UNCRPD was taken on the basis of a Commission proposal of 29 August 2008.

² This is the view of the Irish Human Rights Commission. See "Response of the Irish Human Rights Commission to the Request of the Office of the High Commissioner for Human Rights for Information on: Legal Measures for Ratification of the Convention on the Rights of Persons with Disabilities" (IHRC September 2008).

eligibility to undertake jury service under the Juries Act 1976 then it should be a matter for the trial judge to decide in open court.

(4) *The Right to a Fair Trial in Ireland*

4.08 In Ireland Article 38.5 of the Irish Constitution guarantees the right to a jury trial (subject to a number of exceptions). The case law of the Supreme Court demonstrates an insistence on the need for jury trials to be fair.³ Article 38.1 of the Constitution provides that “no person shall be tried on any criminal charge save in due course of law”. The Supreme Court has interpreted this provision in conjunction with other constitutional rights to ensure that all trials shall apply fair procedures.

4.09 The vast majority of jury trials in Ireland involve criminal trials. In a criminal trial it is of paramount importance that both the defence and prosecution are permitted to state their case and to challenge evidence presented by the opposing side. It is a reasonable expectation by both the prosecution and defence that all jurors empanelled will be able to understand all evidence presented. Therefore, the important issue that needs to be considered in including jurors with disabilities is whether their impairment prevents them from participating in jury service. The central concern here is whether the inclusion of such persons on jury panels adversely affects the ability of the jury to deliberate upon the issues referred to it.⁴

C Comparative Study

4.10 Comparative analysis is useful in identifying how persons with impaired capacity can be included in jury panels without prejudice to the accused's right to a fair trial. Developments in other jurisdictions have resulted in the adoption of laws prohibiting the disqualification, exemption or challenge from jury service of blind and deaf people and other candidate jurors with physical disabilities, where such challenges were based solely on their disability. These reforms have given the court the discretion to scrutinise the capacity of people with disabilities for jury service and enhance the representativeness of juries.

(1) *Canada*

³ Jackson, Quinn & O’Malley “The Jury System in Contemporary Ireland” in Vidmar (ed) *World Jury Systems* (2nd ed Oxford University Press 2000) at 298-299.

⁴ This concern was also articulated by the New South Wales Law Reform Commission. Law Reform Commission for New South Wales *Discussion Paper on Blind or Deaf Jurors* (No. 46 2004) at 4.

4.11 In most Provinces and Territories in Canada physical infirmity forms the basis for disqualification from jury service, exemption from jury service or challenge for cause⁵. However, Alberta, British Columbia and New Brunswick amended their laws to permit persons with physical disabilities to serve as jurors under certain conditions. This change in law was complemented with the introduction of provisions that enabled persons with physical disabilities to participate in jury service.⁶

4.12 These reforms at provincial level in Canada have been followed at Federal level. The Canadian Criminal Code was amended in 1997 and empowered the courts to allow a juror with a physical disability to have technical, personal, interpretative or other support services. The Canadian Criminal Code was also amended to allow that persons with physical disability can only be challenged if he or she is physically unable to perform adequately

⁵ The legislation in Manitoba Northwest Territories Nunavut Ontario Yukon provides that a person who possesses a physical or mental infirmity that cannot discharge jury duties is disqualified from serving as a juror. The Courts have construed this statutory language as an absolute disqualification.

⁵ More specifically, these Provinces' statutory provisions disqualifying or exempting a person with physical infirmity do not apply to a person who wishes to serve as a juror and who if aided would be able to see or hear adequately and attend court in adequate comfort, and will receive the assistance of a person or device that the presiding judge considers adequate to enable the person to discharge the duties of a juror. The legislation in British Columbia and New Brunswick provides that a person giving assistance may attend in all the proceedings including the jury deliberations but must not comment on the proceedings and can take part in the proceedings only by assisting the juror as the court directs. Such provision overcomes the legal impediment to the presence of a non-juror (for example, a sign language interpreter) in the jury deliberation room.

⁵ The amendments emanated from a recommendation by the Federal Task Force on Disability Issues and the Federal Justice Department means they cannot discharge jury duties if disqualified from serving as a juror. The Courts have construed this statutory language as an absolute disqualification.

⁶ More specifically, these Provinces' statutory provisions disqualifying or exempting a person with physical infirmity do not apply to a person who wishes to serve as a juror and who if aided would be able to see or hear adequately and attend court in adequate comfort, and will receive the assistance of a person or device that the presiding judge considers adequate to enable the person to discharge the duties of a juror. The legislation in British Columbia and New Brunswick provides that a person giving assistance may attend in all the proceedings including the jury deliberations but must not comment on the proceedings and can take part in the proceedings only by assisting the juror as the court directs. Such provision overcomes the legal impediment to the presence of a non-juror (for example, a sign language interpreter) in the jury deliberation room.

the duties of a juror even with the aid of technical, personal, interpretative or other support services.⁷

(2) England and Wales

4.13 Section 9B of the *Juries Act 1974*, as inserted in 1994, provides that where it appears that on account of physical disability there is a question as to the capacity of a person to serve effectively as a juror, the person may be brought before the judge who must determine whether or not the person should so act. The 1974 Act, as amended, includes a presumption that people with disabilities can serve as jurors:

“The judge must affirm the summons unless he or she is of the opinion that the person will not, on account of his or her disability, be capable of acting effectively as a juror, in which case he must discharge the summons.”

4.14 This section has been used by the courts to discharge jury summonses received by deaf individuals. From the relevant case law there appears to be two main impediments to the application of this section:⁸ First a deaf person must rely on an interpreter during the court proceeding and there is concern that during this process the juror may not appreciate the significance of parts of the oral testimony. As a result there is concern that such a juror will be ineffective in assessing the credibility of witnesses. Second the courts have indicated that there was a need for legislation to permit an interpreter to be present during jury deliberations. This was required to overcome the rule prohibiting a person who was not a juror from retiring with the jury.

(3) New Zealand

4.15 In New Zealand the *Juries Act 1981* excluded persons with “blindness, deafness, or any other permanent physical disability” from jury service. This provision was repealed by the *Juries Amendment Act 2000*. One of the central objectives behind this law reform was the encouragement of greater diversity and representativeness in persons taking part in jury service. It is noteworthy that while persons with physical disabilities are no longer automatically disqualified under the New Zealand juries’ legislation, there are a number of provisions that exclude and exempt persons with physical disabilities from jury service.

4.16 For example, before the jury is sworn, the judge, on his or her own motion, or on application by the registrar, may discharge the summons of a

⁷ The amendments emanated from a recommendation by the Federal Task Force on Disability Issues and the Federal Justice Department.

⁸ *Goby v Wetherill* [1915] 2KB 674; *R v McNeil* [1967] Crim LR 540, CACD; *Re Osman* [1996] 1 Cr App R 126.

person. This can be done where the judge is satisfied that due to physical disability, a candidate juror is not capable of effectively fulfilling the role of a juror. The New Zealand Law Commission in its Report on Juries in Criminal Trials expressed the opinion that the *Juries Amendment Act 2000* adequately addressed the issue of the exclusion of persons with physical disabilities from jury service.⁹ The New Zealand Law Commission also expressed its support for the rationale of the Act which focused on the ability of persons to serve as jurors as opposed to categories of disability.

(4) United States

4.17 In the United States the qualification requirements for jury service are laid down in statute or in court rules both at State and Federal level. At the Federal level a person is not eligible for jury service if they are incapable on the basis of mental or physical infirmity.¹⁰ The statutes in some States used to contain provisions that disqualified persons whose senses of hearing or sight were substantially impaired. For example, in New York the law previously required a juror to be in “possession of his natural faculties”.¹¹ A blind person was automatically disqualified under this provision. This provision has been amended and the law now provides that a person can qualify as a juror if their disability does not prevent them from exercising the duties of a juror.

4.18 The law at Federal level has been reflected in many States where there are uniform provisions that exclude people who are incompetent “by reason of physical or mental ability to render satisfactory jury service”.¹² Courts are at odds as to the scope of these provisions. The early case law interpreted the provisions as imposing a disqualification on blind and deaf persons from jury

⁹ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001) at 77.

¹⁰ 28 USC 1865 (b) (4).

¹¹ New York Judiciary Law 506 (3).

¹² Alabama Code § 12-16-60; Arkansas Code § 16-31-102; Colorado Revised Statutes § 13-71-105; General Statutes of Connecticut § 51-217; Delaware Code § 4509; Hawaii Revised Statutes § 612-4; Maryland Code § 8-207; General Laws of Massachusetts, Chapter 234A § 4; Nebraska Revised Statutes § 25-1601; North Carolina General Statutes § 15A-1212; Vermont Statutes Annotated § 962. Idaho Code § 2-209; Indiana Code § 33-4-5.5-11; Louisiana Code of Criminal Procedure Article 401; Michigan Compiled Laws § 600.1307a; Minnesota Rules of Practice for District Courts, Rule 808; Missouri Revised Statutes § 494.425(9); Nevada Revised Statutes § 6.030; New Hampshire Revised Statutes § 500-A:6; New Jersey Statutes § 2B:20-1; New Mexico Statutes § 38-5-1; New York Judiciary Law § 506; North Dakota Century Code § 27-09.1-04; Rhode Island General Laws § 9-9-1.1; South Carolina Code § 14-7-810; West Virginia Code § 52-1-8.

service.¹³ However, other case law demonstrates a different approach where the courts have interpreted the provision as affording courts discretion in assessing whether a person with a disability is suitable for jury service depending on the individual situation in each case.¹⁴ A growing number of States have reformed their law to prohibit the disqualification of a person from jury service exclusively on the basis of a hearing or sight disability.¹⁵

4.19 In West Virginia there is no prohibition on persons with a physical disability from serving as jurors but a test is provided as to when people with disabilities may be disqualified:

“A person who is physically disabled and can render competent [jury] service with reasonable accommodation shall not be ineligible to act as juror or be dismissed from a jury panel on the basis of disability alone: Provided, that the circuit judge shall, upon motion by either party or upon his or her own motion, disqualify a disabled juror if the circuit judge finds that the nature of potential evidence in the case including, but not limited to, the type or volume of exhibits or the disabled juror’s ability to evaluate a witness or witnesses, unduly inhibits the disabled juror’s ability to evaluate the potential evidence.”¹⁶

4.20 Many States require jurors to have the ability to read and speak in English and/or understand the language.¹⁷ This prerequisite to jury service can

¹³ Law Reform Commission for New South Wales *Discussion Paper on Blind or Deaf Jurors* (No. 46 2004) at 58.

¹⁴ *Into the Jury Box: A Disability Accommodation Guide for State Courts* (American Bar Association 1994).

¹⁵ Alaska Statutes § 09.20.010; Arkansas Code § 16-31-102; California Code of Civil Procedure § 203; General Statutes of Connecticut § 51-217; Florida Statutes § 913.03(2); Oregon Revised Statutes § 10.030.

¹⁶ West Virginia Code § 52-1-8(e).

¹⁷ Alabama Code § 12-16-59; Alaska Statutes § 09.20.010; Arkansas Code § 16-31-102; California Penal Code § 893; Colorado Revised Statutes § 13-71-105; Connecticut General Statutes § 51-217; Delaware Code § 4509; Georgia Code § 15-12-163; Hawaii Revised Statutes § 612-4; Idaho Code § 2-209; Indiana Code § 33-4-5.5-11; Iowa Code § 607A.4; Kentucky Revised Statutes § 29A.080; Louisiana Code of Criminal Procedure Article 401; Maryland Code § 8-207; General Laws of Massachusetts, Chapter 234A § 4; Michigan Compiled Laws § 600.1307a; Minnesota Rules of Practice for District Courts, Rule 808; Missouri Revised Statutes § 494.425(5); Nebraska Revised Statutes § 25-1601; Nevada Revised Statutes § 6.010; New Hampshire Revised Statutes § 500-A:6; New Jersey Statutes § 2B:20-1; New York Judiciary Law § 510; North Carolina General Statutes § 9-3; North Dakota Century Code § 27-09.1-08; Pennsylvania Consolidated Statutes § 4502; South Carolina Code § 14-7-810; South Dakota Codified Laws § 16-13-10; Utah Code § 78-46-7; Vermont Statutes Annotated §

be used to disqualify deaf persons who for example use American Sign Language. However, the general trend is towards removing a general prohibition on the eligibility of persons with physical disabilities for jury service.

(5) *Australia*

4.21 The New South Wales Law Reform Commission examined the issue of deaf and blind jurors, and in their Report ‘Deaf or Blind Jurors’ in 2006 recommended that the legislation governing jury service in New South Wales should be amended to make it clear that people who are blind or deaf should not be prevented from serving on juries solely on the basis of their disability. The New South Wales Commission was of the opinion that such jurors should only be excluded if the evidence indicated that such persons could not fulfil the functions of a juror or where such a juror requested exemption from jury service. The recommendations of the Commission are awaiting implementation.

962; Washington Revised Code § 2.36.070; West Virginia Code § 52-1-8; Wisconsin Statutes § 756.02; Wyoming Statutes § 1-11-101.

(6) Summary

4.22 There has been a significant amount of review and reform internationally of laws restricting persons with a physical disability from participating as jurors in a number of common law jurisdictions. This has often resulted in reform of legislation that had previously placed a general restriction on persons with disabilities undertaking jury service. In many instances, the reformed legislation has provided for judicial discretion to assess the ability of people with disabilities to fulfil the role of juror. This change provides for this judicial discretion to be exercised in a way that does not focus exclusively on the disability of a candidate juror and ensures that jurors lacking the capacity to exercise the role of a juror will not be selected. This approach also ensures that a potential infringement of the right to a fair trial of an accused person is avoided.

4.23 In the Commission's view, there should be no automatic exclusion in this respect, and persons with disabilities who present for jury service should be assessed on the grounds of capacity in the same way as any other person. Persons who lack capacity are not confined to those with physical disabilities but include people with literacy, linguistic and intellectual difficulties and the overriding priority must be the provision of a fair trial.

D Reasonable Accommodation

4.24 Reasonable accommodation for jurors with a disability involves making changes or modifications that will enable such a person to fulfil the duties of a juror.

4.25 The National Disability Authority suggested in their 2002 submission to the Courts Service that "the greatest barrier to equal access and equalisation of opportunity for people with disabilities is that of attitude."¹⁸ The National Disability Authority recommended that all courts should have access to sufficient assistive technology for people with a disability.¹⁹

(1) Deaf and Hearing Impaired Jurors: Reasonable Accommodation

(a) Computer-aided real time transcription (CART)

4.26 Computer aided real-time transcription (CART)²⁰ involves the use of real time software that enables the transcript of proceedings to appear almost

¹⁸ *Submission to the Court Service* (National Disability Authority August 2002) at 6. Available at: www.nda.ie.

¹⁹ *Ibid* at 15.

²⁰ Computer Aided Real-time Transcription is also known as Computer Assisted Real-Time Translation and Communication Access Real-Time Translation.

immediately on a computer monitor just seconds after the words have been spoken. Computer-aided real time transcription (CART) can be used as an alternative to interpreters in assisting deaf jurors. This technology has been used in court proceedings in a number of jurisdictions for many years, and the Commission notes that it has been integrated into the infrastructure of the new Criminal Courts of Justice building complex that opened in Dublin at the end of 2009.

(b) A Loop System

4.27 An example of a reasonable accommodation that would assist hearing impaired persons in undertaking jury service would be the provision of a loop system. A loop system uses the "T" setting on a hearing aid so that the hearing impaired user can hear sounds more clearly by reducing or cutting out background noise. Many public places in Ireland such as theatres, hotels and public buildings, including some courthouse buildings, have fitted loop systems.²¹

(c) Sign Language Interpretation

4.28 In Ireland Irish Sign Language (ISL) is the indigenous language of the deaf community.²² While Irish Sign Language has no formal status in legislation it is referred to in the *Education Act 1998*.²³ Irish Sign Language is the first or preferred language of approximately 5,000 deaf people in Ireland.²⁴ In addition, approximately 40,000 deaf and hearing people use Irish Sign Language as either their first language or in addition to their first language on a daily basis in Ireland.²⁵

4.29 In the leading US case *People v Guzman*²⁶ the Court held that a deaf person was as capable as any other person of understanding legal jargon or any other technical jargon used by expert witnesses. The court based this

²¹ Buildings that use loop systems often indicate the availability of the service with a blue sign with an Ear and a "T" symbol.

²² See the Irish Deaf Society website at:
<http://www.deaf.ie/ISLAcademy/ISLAcademy%20ISL.htm>.

²³ The Irish Deaf Society continue to seek recognition and status for Irish Sign Language in Ireland, particularly in the context of education. The *New Zealand Sign Language Act 2006* officially recognises New Zealand Sign Language (NZSL) as an official language alongside English and Maori.

²⁴ See the Irish Deaf Society website at:
<http://www.deaf.ie/ISLAcademy/ISLAcademy%20ISL.htm>.

²⁵ *Ibid.*

²⁶ *People v Guzman* (1984) 478 NYS 2d 455 at 460.

assessment on the fact that many deaf persons are found in highly technical professions including medicine, engineering and law.²⁷

4.30 There are a number of issues that are of concern in relation to the accreditation of sign language interpreters in Ireland. In 2006, the Citizens Information Board (then known as Comhairle) published a Report entitled *Review of Sign Language Interpretation Services and Service Requirements*²⁸ which identified that accreditation and a formal registration process for interpreters was one of the most urgent priorities in developing sign language interpretation services in Ireland. This Report also stated that accreditation for specialist skills such as legal interpreting has not even begun to be discussed.²⁹

4.31 These are issues that will have to be resolved before sign language interpretation can be used for jurors in this jurisdiction. The comparative analysis below outlines the considerations that must be applied to court interpretation and translation and the need for such services to be carefully regulated and controlled. The comparative analysis also identifies the need to address the matter of the presence of the interpreter in the jury room.

(d) Reasonable Accommodation: International Comparatives

4.32 The Courts in New South Wales provide portable infra-red assistive hearing devices to jurors with hearing impairments.³⁰ These devices amplify court proceedings and assist persons with a hearing impairment to sit as a juror. The Sheriff's Office in New South Wales require that notification be given in advance of a trial of this service is required.

4.33 The *Americans with Disabilities Act* (ADA) provides a comprehensive source of federal civil rights law for people with disabilities in the United States. This Act requires that persons with disabilities are afforded an equal opportunity to access State services. This includes access to State court programmes and services.³¹ The *Americans with Disabilities Act* places an obligation on government agencies including the courts to adapt policies, practices and

²⁷ See for example: www.deaflawyers.com in the United States and www.deaflawyers.org.uk in the United Kingdom.

²⁸ Available at http://www.citizensinformationboard.ie/downloads/Sign_Language_Report.pdf.

²⁹ *Ibid.* The Citizens Information Board (Comhairle) suggested that this should be done in the absence of the base level of accreditation.

³⁰ Law Reform Commission for New South Wales *Discussion Paper on Blind or Deaf Jurors* (No. 46 2004) at 5.

³¹ 42 USC § 12132.

procedures to avoid discrimination unless the modification would fundamentally alter the nature of its services, programs or activities.³²

4.34 The *Americans with Disabilities Act* has been used in cases where people with disabilities have been disqualified from jury service. The Act has influenced judges to give greater access to the jury process by reasonably accommodating persons with disabilities. This has been done while simultaneously ensuring a fair trial.³³ Kansas and Missouri are examples of where States have made provision for reasonable accommodation in this context. This has been done through statute or rules which enable people with disabilities to serve as jurors.³⁴ The American Bar Association Disability (Jury) Accommodation Guide for State Courts holds a comprehensive list of suggested reasonable accommodations that go beyond what is currently provided for in State legislation. For example, it suggests the removal of physical barriers in courthouses, such as modifying the jury box and the deliberation room to make them more accessible to people with disabilities.³⁵

4.35 The New South Wales Law Reform Commission identified CART as having the potential to assist the majority of deaf people.³⁶ CART could be used during jury deliberations, where a court stenographer would transcribe the words of the other jurors so they could be read by the deaf juror. This technology would also provide a suitable means by which a deaf juror could follow the evidence during the proceedings of a trial.

4.36 The New South Wales Law Reform Commission also considered the question of sign language interpreters and translators. It identified that a literal or word for word interpretation of court proceedings was not essential.³⁷ An interpreter does more than provide literal translations of words. Rather an interpreter translates concepts from one cultural context into another.

³² 28 Code of Federal Regulations § 35.130(b)(7).

³³ See for example *People v Caldwell* 603 NYS 2d 713 (1993).

³⁴ See for example, Kansas Statute § 75-4355a --- 75-4355d; Missouri Revised Statutes § 476.750, 476.753. These reasonable accommodation provisions involve supply assistance to jurors with disabilities, such as interpreters for deaf people or readers for the visually impaired persons. These provisions also make available technology such as assistive listening devices, videotext display, open captioning equipment and real-time computer assisted transcription (CART).

³⁵ *Into the Jury Box: A Disability Accommodation Guide for State Courts* (American Bar Association 1994) at 21-37.

³⁶ *Ibid* at 19.

³⁷ *Ibid* at 22.

4.37 The objective of court interpreters is to maintain legal equivalence.³⁸ This requires the interpretation of the original material without edit, synopsis, omission, or addition. This has to be done while “... conserving the language level, style, tone, and intent of the speaker or to render what may be termed the legal equivalence of the source message.”³⁹

4.38 The National Centre for State Courts in the United States developed a model code for professional court interpreters.⁴⁰ Alaska, Arkansas, Colorado, Iowa, Nebraska, Oregon, Utah, Virginia and Wisconsin have adopted this model code.⁴¹ The model code sets out a set of principles regulating court interpretation. The accuracy and completeness principle is set out in these guidelines:

“Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.”⁴²

4.39 The Code of Ethics of the Australian Sign Language Interpreters Association affirms that interpreters should communicate strictly the content of the message and the spirit of the speaker through language that is most readily understood by the person that they are assisting.⁴³ The accuracy of interpretation cannot be measured in an objective manner. Interpretation is not a mechanical process that translates the words of the original language into the exact target language equivalent.⁴⁴

³⁸ Gonzales, Vasques, Mikkelson *Fundamentals of Court of Court Interpretation: Theory Policy and Practice* (California Academic Press 1991) at 16.

³⁹ *Ibid.*

⁴⁰ Hewitt “Court Interpretation: Model Guides for Policy and Practice in the State Courts” (Williamsburg, National Centre for State Courts, 1995) at 197.

⁴¹ Alaska: www.state.ak.us/courts/intcode.pdf
Arkansas: courts.state.ar.us/pdf/0223ci_code.pdf
Colorado: www.courts.state.co.us/chs/hr/interpreters/interpret_code.pdf
Iowa: www.judicial.state.ia.us/district/court_interpreters/Code_of_Conduct/;
Nebraska: court.nol.org/rules/Interpreter.10.pdf,
Oregon: www.ojd.state.or.us/osca/cpsd/interpreter/documents/ethicscode.pdf,
Utah: www.utcourts.gov/resources/rules/ucja/append/h_intprt/apph.htm;
Virginia: www.courts.state.va.us/interpreters/code.html;
Wisconsin: www.wicourts.gov/services/interpreter/ethics.htm.

⁴² Hewitt “Court Interpretation: Model Guides for Policy and Practice in the State Courts” (Williamsburg, National Centre for State Courts, 1995) at 200.

⁴³ “Code of Ethics” (Australian Sign Language Interpreters Association) <http://aslia.com.au/>.

⁴⁴ New South Wales Law Reform Commission *Report Deaf or Blind Jurors* (Report 114 2006) at 25.

4.40 The New South Wales Law Reform Commission considered the issue of whether achieving literal translations as an obstacle to recommending that deaf persons can fulfil the role of a juror and formed the opinion that literal translations did not form an obstacle that would prevent them recommending that deaf persons could serve as jurors.⁴⁵

4.41 This comparative analysis raises the importance of professional regulation and standards before sign language could be included as a reasonable accommodation in any jury system in this jurisdiction.

(2) **Secrecy of Jury Deliberations**

4.42 At common law there is a long established principle that juries deliberate in secret. The general rule of secrecy was articulated in, for example, the English case *Goby v Wetherill*.⁴⁶ The Court held that the jury are entitled and obliged to deliberate in private and that, if a non jury person including an officer of the Court was present for a substantial time during jury deliberations, the verdict was vitiated. The rationale for secrecy in the jury room has been to protect jury deliberations from outside scrutiny.⁴⁷ It also arises from the necessity of protecting jurors from influence by non-jury persons and to support the finality of the jury's verdict. This general common law principle has been affirmed by the Irish courts,⁴⁸ although there has been some criticism of the extreme nature of the rule, in particular having regard to international human rights standards.⁴⁹ Irish courts have not considered the application of the principle in the specific context of, for example, sign language interpreters, but courts in other jurisdictions have decided this issue in contrasting ways, underlining the importance of the need to consider legislation to clarify the position in this jurisdiction.

4.43 In *Eckstein v Kirby*⁵⁰ a US Federal District Court ruled that secrecy must be conserved in order to guarantee a vigorous and candid discussion of the issues during jury deliberations. However, in the United States where this issue has been considered by the courts, some courts have ruled that the rule excluding non-jurors from jury deliberations does not apply to sign language

⁴⁵ *Ibid.*

⁴⁶ [1915] 2 KB 674.

⁴⁷ Cameron, Potter, Young "New Zealand Jury: Towards Reform" Vidmar (ed) *World Jury Systems* (2nd ed) Oxford University Press 2000 at 198.

⁴⁸ For example, the judgment of O'Flaherty J in *O'Callaghan v Attorney General* [1993] 2 IR 17.

⁴⁹ See, for example, Casey, "The Sanctity of Jury Deliberations, Prejudice and Human Rights" (2001) 11(4) *Irish Criminal Law Journal* 16.

⁵⁰ 452 F Supp 1235 (1978).

interpreters.⁵¹ The rule was deemed to apply only to officers of the court who, because of their capacity to influence the jurors, might inhibit free jury deliberation. Practical experience has demonstrated that the anticipated problems of a thirteenth person in the jury room have not manifested. In jurisdictions where deaf people have been empanelled as jurors and interpreters have accompanied them to the jury room, there has never been a breach of confidentiality. In addition, there have been no problems with interpreters breaching the oath of non-involvement, or any problem with the ability of juries in deliberating effectively in the presence of the interpreter. Colorado, Connecticut, Florida, Illinois and West Virginia have reformed their State law through legislation and court rules, which now permits interpreters to assist deaf jurors, in the jury room during deliberations.⁵² The West Virginia Code safeguarded jury deliberations by specifying that the interpreter's role is solely to communicate for the juror with the disability.

4.44 In the United Kingdom, courts took a different view. In *Re Osman*⁵³ the summons of a candidate juror who was deaf was discharged on the basis that he would require an interpreter if empanelled as a juror. The general rule of excluding non-jurors was held to apply and was interpreted as excluding interpreters from the jury room. In *R v A Juror*⁵⁴ a deaf person challenged the *Osman* decision to discharge his summons for jury service. The juror had argued that the approach taken by the court in *Osman* to the presence of an interpreter in the jury room was incorrect and that *Osman* should have been distinguished from the earlier case *Goby v Wetherill*. The English Crown Court dismissed this challenge applying the same reasoning as in *Osman*⁵⁵ (that the assistance of an interpreter or stenographer is needed in order to fulfil the role of a juror). The court rejected the argument that interpreters were different to unauthorised persons as their presence at jury deliberation would facilitate as oppose to inhibit jury deliberations.

4.45 The Auld review of the English criminal courts acknowledged the caution in respect of the presence of a thirteenth person in the jury room.⁵⁶

⁵¹ See for example, *People v Guzman* 478 NYS 455 (1984); *DeLong v Brumbaugh* 703 F Supp 399 (1989); *United States v Dempsey* 830 F2d 1084 (1987).

⁵² Colorado Revised Statutes § 13-71-137; Connecticut Superior Court Rules § 16-1; Florida Statutes § 90.6063; 705 Illinois Compiled Statutes § 315/1(a); West Virginia Code § 52-1-8(e)(1).

⁵³ [1995] 1 WLR 1327.

⁵⁴ Woolwich Crown Court (Judge Anwyl), U19990078, 9 November 1999.

⁵⁵ [1995] 1 WLR 1327.

⁵⁶ Auld *Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at 153.

However, it was suggested that accredited interpreters work to agreed professional standards and that this was sufficient to prevent any attempt to intrude on or breach the confidence of juries' deliberations.

4.46 The danger associated with interpreters disclosing information from jury deliberations has been dealt with in different jurisdictions through the administration of an oath of secrecy or through statutory restriction.

(3) Conclusion

4.47 There is no evidence that law reform permitting deaf or hearing impaired persons to serve as jurors has had negative consequences for jury deliberations. The Law Reform Commission for New South Wales and Macquarie University funded a pilot study that investigated whether people who are deaf can effectively assess court proceedings through sign language interpretation.⁵⁷ The research supported the recommendations of the New South Wales Commission, which proposed that deaf persons should not be excluded from service as jurors solely on the basis of their physical disability.⁵⁸

4.48 The New South Wales Law Reform Commission concluded "that the practice of not allowing deaf people to serve is most likely based on unfounded assumptions about the nature of deafness and the ability of deaf people to comprehend and communicate."⁵⁹ In addition, there is no evidence to conclude that a person is incapable of serving as a juror solely on the basis of deafness or a hearing impairment.

E Blind and Sight Impaired Jurors

4.49 In the region of 7,000 adults were registered as blind on the NCBI register in Ireland. This statistic does not include the persons who have low vision or reduced vision which may be significant enough to affect sight and which cannot be corrected by glasses. This section of the report is concerned with a blind or sight impaired person who is unable to identify a face or read printed or handwritten documents.

(1) Reasonable Accommodation

4.50 A blind or sight impaired person can be reasonably accommodated by having documentary evidence read out during the court proceedings. There are a number of software programs that can almost instantly translate printed

⁵⁷ New South Wales Law Reform Commission *Report Deaf or Blind Jurors* (Report 114 2006) at 14-15.

⁵⁸ *Ibid* at 15.

⁵⁹ New South Wales Law Reform Commission *Report Deaf or Blind Jurors* (Report 114 2006) at 44 and 54.

documents in electronic form into Braille documents which can be printed out by a Braille printer. As most documents are printed they are normally readily available in an electronic format and can therefore be accessible to software which can allow them to be read to blind jurors using high quality synthetic speech. Documents that are not in electronic form can be scanned by software programmes which also read out the contents in high quality synthetic speech.⁶⁰ Other reasonable accommodations of blind or sight impaired persons may include:

- accommodation of guide dogs in the court
- a sighted guide in the court building
- descriptions of visual evidence
- provision of material in an appropriate format
- the provision of juror information in Braille or audio format

(a) Visual Evidence

4.51 There are certain trials where important evidence will be visual in nature. Such trials may restrict a blind or sight impaired person from jury service. However, a juror should not be automatically disqualified if documents, illustrations or photographic evidence will be presented at trial. The reasonable accommodations discussed above such as descriptive aids and technology can be employed to avoid automatic disqualification from service. This approach and rationale was taken by the New South Wales Law Reform Commission, which observed that "... the use of reasonable adjustments provide scope for facilitating the inclusion of a person who is blind or has low vision on the jury panel."⁶¹

(b) Demeanour of Witnesses and the Defendant

4.52 There is a trend internationally towards eroding the significance being attached to evidence of demeanour in court proceedings or of placing too much significance on the manner and appearance of witnesses or reaching conclusions on this basis.⁶² It has been suggested that more than 30 years of deception research has convincingly proved that "... there is nothing as simple

⁶⁰ It should be noted that this software cannot process handwritten documents.

⁶¹ New South Wales Law Reform Commission *Report on Deaf or Blind Jurors* (No 114 2006) at 50.

⁶² *Ibid* at 51.

and obvious as Pinocchio's growing nose, so lie detection is difficult and research also demonstrates that people generally are poor lie detectors.”⁶³

4.53 The New South Wales Law Reform Commission dismissed the argument that a blind or deaf person should be excluded from jury service due to an inability to scrutinise demeanour as it was based on a number of questionable assumptions:

“... first, that demeanour always conveys information that aids in the interpretation of what has been consciously communicated; secondly, that the witness to another’s demeanour can interpret it accurately; and thirdly, that blind and deaf jurors are deprived of the opportunity of detecting demeanour.”⁶⁴

(2) *The Commission’s Conclusions*

4.54 One of the central motivations behind law reform in the area of jury selection has been the encouragement of greater diversity and representativeness in the persons taking part. On this basis the Commission considers that reform of the law in this area fits in with the approach of broadening the jury pool in this jurisdiction. The facilities available at the new Criminal Court Complex makes the adoption of appropriate measures to enable hearing and visually impaired jurors fulfil the role of a juror considerably more straight-forward. The Commission having regard to the international experience and evidence does not consider that the provision of reasonable accommodations to such jurors would significantly increase the cost and duration of a trial.⁶⁵

4.55 The trial judge at the empanelment stage can consider the nature of evidence and length of the trial in order to ensure a fair trial in circumstances where one or more juror members has a physical disability.

4.56 The Commission does not consider that the presence of a sign language interpreter or CART operator would be an intrusive presence in the courtroom or at jury deliberations. The Commission does not consider that the presence of an interpreter is restricted by the 12 person rule for jury deliberations. A sign language interpreter properly trained and accredited working to agreed professional standards should not be prevented from being present to assist a hearing impaired or deaf person during jury deliberations.

⁶³ Vrij & Easton, “Fact or Fiction? Verbal and Behavioural Clues to Detect Deception” (2002) 70 (20 Feb) *Medico-Legal Journal* 29.

⁶⁴ New South Wales Law Reform Commission *Report on Deaf or Blind Jurors* (No 114 2006) at 53.

⁶⁵ See for example, New South Wales Law Reform Commission *Report Deaf or Blind Jurors* (Report 114 2006) at 34-35.

As such it is the Commission's view that the presence of an interpreter will not impinge upon the secrecy of jury deliberations.

4.57 The Commission considers that the ability of a juror to access visual evidence is not necessarily crucial. The literature indicates that visual evidence can be made accessible to blind jurors through reasonable accommodation and as such the Commission considers that blind jurors should not be subject to exclusion from jury service solely on this basis.

4.58 *The Commission provisionally recommends that 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. The Commission also provisionally recommends that it should be open to the trial judge to ultimately make this decision having regard to the nature of the evidence that will be presented during the trial.*

4.59 *The Commission provisionally recommends the provision of reasonable accommodations to hearing and visually impaired jurors to assist them in undertaking the duties of a juror.*

4.60 *The Commission provisionally recommends that a proper system for regulation and control of court interpreters be established.*

4.61 *The Commission provisionally recommends that an oath should be introduced applicable to interpreters and stenographers who assist deaf jurors in interpreting evidence at trial. The oath should include a commitment to upholding the secrecy of jury deliberations.*

4.62 *The Commission provisionally recommends that the Courts Service should prepare Guidelines for the reasonable accommodation of persons with physical disabilities to participate in the jury system.*

4.63 *The Commission provisionally recommends that the Courts Service provide disability awareness training to Court Service personnel dealing with jurors with disabilities.*

(3) *Excusal*

4.64 A number of States in the United States including Georgia, Michigan, Tennessee and Texas exempt in law persons with physical disabilities from jury service.⁶⁶ An exemption has automatic application to any person with a physical disability and differs from an excuse, which is submitted to the court on an individual basis. A number of States have made provision in law for excuses

⁶⁶ Georgia Code § 15-12-1; Michigan Compiled Laws § 600.1307a; Tennessee Code § 22-1-103(7); Texas Government Code § 62.109.

as an alternative to a general exemption from jury service based solely on a physical disability.⁶⁷

4.65 The American Bar Association considered the issue of automatic exemption from jury service and recommended the removal of all such exemptions on the basis that it reduced the representativeness of the jury.⁶⁸ The ABA preferred excuses to exemptions based either on continuing hardship or on the person's ability to receive and evaluate information being so impaired that he or she was unable to perform their duties as jurors.

4.66 This test as outlined by the American Bar Association is phrased in a functional way and focuses on the consequence of the disability as opposed to the cause as being the determining factor. According to the American Bar Association this approach supports personalised assessments rooted in competence as opposed to broad medical terms and stereotypes.⁶⁹

The New South Wales Law Reform Commission called for submission in their Discussion Paper as to whether blind or deaf people, if allowed to serve on juries, should be given the option to be excused.⁷⁰ The New South Wales Commission received a mixed response and ultimately decided that people who are blind or deaf should have an unqualified right to be exempt from jury service.⁷¹ This was opposed by disability groups who believed that deaf and blind persons should not have the choice of whether to serve on a jury or not but should be obliged to serve in the same way as any other citizen.

(4) The Commission's View

4.67 The Commission considered the issue of excusal under the *Juries Act 1976* in chapter 3.⁷² The Commission is of the view that for the purposes of consistency with its approach, an excusal as of right for a physical disability would not be desirable. The Commission considers that a person with a

⁶⁷ Alaska Statutes § 09.20.030; California Rules of Court Rule 860(d)(5); Maine Revised Statutes § 1213(2); Nebraska Revised Statutes § 25-1601; Nevada Revised Statutes § 6.030; New Mexico Statutes § 38-5-11B(1); New York Standards and Administrative Policies (Part 28 Uniform Rules for the Jury System) § 128.6-b(1); Rhode Island General Laws § 9-10-9; Utah Code § 78-45-15; Vermont Statutes Annotated § 962.

⁶⁸ *Into the Jury Box: A Disability Accommodation Guide for State Courts* (American Bar Association 1994) at 10.

⁶⁹ *Ibid.*

⁷⁰ Law Reform Commission for New South Wales *Discussion Paper on Blind or Deaf Jurors* (No 46 2004) at 66-67.

⁷¹ Law Reform Commission for New South Wales *Report on Blind or Deaf Jurors* (No. 114 2006) at 57-58.

⁷² See Chapter 3, above.

physical disability unable to undertake the duties of a juror would be in a position to apply for excusal under the new system.

4.68 *The Commission provisionally recommends that 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.*

F Mental Health and Mental Capacity

4.69 Jury legislation in many States provides that persons who are intellectually disabled and persons diagnosed with a mental disorder are prohibited from undertaking jury service. Under the Part 1 of the First Schedule of the *Juries Act 1976* a person with a mental illness or mental disability is expressly ineligible for jury service. However, there is a requirement that a person with a mental illness or mental disability should be resident in a hospital or “other similar institution” or “regularly attends for treatment by a medical practitioner”. The scope of the ineligibility of persons with mental illness is, from one perspective quite broad, extending to persons attending their general practitioner and receiving medication for anti-depressants for example. On the other hand it would appear to exclude any person not attending a medical practitioner who may nevertheless have a serious incapacitating mental health problem. There is no definition of mental illness or mental disability under the *Juries Act 1976* and the exclusion is based not on capacity but on disability.

4.70 The relevant provision in the 1976 Act excludes from jury service:

“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.”

(1) Comparative Overview

4.71 Most common law jurisdictions exclude persons with intellectual disability arising from mental illness or mental disorders from undertaking jury service. The Victorian Parliamentary Law Reform Committee in considering this issue recommended that people should be ineligible for jury service in circumstances where their “physical, intellectual or mental disability or disorder makes them incapable of effectively performing the functions of a juror”.⁷³ The United Kingdom Departmental Committee on Jury Service considered the eligibility of people with mental or intellectual disabilities in 1965. The Committee in its Report acknowledged that mental and intellectual disabilities

⁷³ Parliament of Victoria, Law Reform Committee *Final Report Jury Service in Victoria* (1996) at paragraph 3.140.

were diverse and often not permanent and that many persons that were “mentally disordered” were not conscious of their conditions. It was on this basis that the Committee recommended that only persons being treated for certain types of mental health problems should be ineligible for jury service. The Report of the Auld Review while recommending sweeping amendments to the eligibility criteria under the *Juries Act 1974*, did not recommend reform of the exclusion of mentally ill persons from jury service. “... everyone should be eligible for jury service, save for the mentally ill, and the law should be amended accordingly”.⁷⁴ There was no discussion as to why mental illness should be retained as a ground of ineligibility and therefore no recommendation that capacity should be determining factor.

4.72 The New Zealand Justice and Electoral Committee conducted an examination of the United Nations Convention on the Rights of Persons with Disabilities, and made a number of recommendations in its Report.⁷⁵ As part of this examination the Committee examined section 67 Section 8(i) of the *Juries Act 1981*.⁷⁶ This provision disqualified a person with a mental disorder from serving on a jury. The provisions of the *Juries Act 1981* relating to the eligibility of persons with mental disorder were accordingly amended⁷⁷. The amendment removed the prohibition for people with a mental disorder undertaking jury service and retained the prohibition on persons with intellectual disability. The *Juries Act 1981* also amended the grounds on which the Registrar could excuse a person from jury service.⁷⁸ The *Juries Act 1981* was amended to permit the trial judge to discharge the jury summons of a person with a physical disability to also cover a juror with a mental disability.

(2) *The Commission’s View*

4.73 The Commission considers that the constitutional right of an accused person to a fair trial requires that competent jurors are selected and empanelled. It is clearly not desirable to permit the selection of persons unable to perform the functions of a juror and on this basis the continued prohibition of

⁷⁴ *Ibid* at paragraph 34.

⁷⁵ “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. Available at: http://www.parliament.nz/NR/rdonlyres/CA9ED2D7-9ECA-4383-97AC-4AF9C6C45439/91779/DBSCH_SCR_4163_6161.pdf.

⁷⁶ *Ibid* at 13.

⁷⁷ *Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008*. Available at: <http://www.legislation.govt.nz/act/public/2008/0064/latest/DLM1404012.html>.

⁷⁸ One of those grounds was physical disability and this ground was amended to also include mental disability.

persons with intellectual disabilities should continue. The *Juries Act 1976* restricts the participation of persons with any mental illness (who is receiving treatment) regardless of the severity of their illness from undertaking jury service. The Commission considers that this is not an appropriate provision as many people being treated for mental health problems will be able to competently discharge the duties of a juror. The Commission also considers that the prohibition is in conflict with the United Nations Convention on the Rights of Persons with Disabilities. As in the case of physical disability, the Commission considers that the overriding consideration should be the capacity of the juror to perform his or her duties and that there should be no automatic exclusion on the grounds of impaired mental health.

4.74 *The Commission provisionally recommends that persons with an intellectual disability should continue to be ineligible for jury service.*

4.75 *The Commission provisionally recommends 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.*

G Literacy, Linguistic Comprehension and Communication Requirements

4.76 It is necessary for jurors to comprehend the evidence presented in court and to be able to communicate with other jurors during the deliberation process. There is no express requirement in the *Juries Act 1976* that requires that a juror be fluent in the English language or that they are able to write. However, there is a requirement that they are able to read. The *Juries Act 1976*, as amended by the *Civil Law (Miscellaneous Provisions) Act 2008*, provides that persons who have “incapacity to read... such that it is not practicable for them to perform the duties of a juror” are ineligible for jury service.⁷⁹ Candidate jurors’ literacy is not tested but there is an obligation under the *Juries Act 1976* to disclose an inability to read. While there is no express English language requirement in order to be eligible for jury service, Courts Service staff dealing with jurors and court registrars play a role in identifying persons summonsed for jury service who are unable to communicate in the English language.

4.77 In this Part the Commission considers whether the current formulation of the language requirement is sufficient or requires reform and whether the current process of identifying jurors who cannot understand the English language is adequate. It has been noted in Chapter 2, above, that demographic transitions in the State have meant that a growing number of non-

⁷⁹ Part 1 First Schedule *Juries Act 1976*.

Irish citizens have become eligible for jury service through acquiring Irish citizenship. The Commission also recommended in Chapter 2 that non-Irish citizen long-term residents meeting a five year residency requirement should be eligible for jury service. As non native English speakers are increasingly becoming eligible for jury service the Commission considers that it may be necessary to introduce a statutory language requirement in order to ensure that jurors are capable of understanding evidence and participating in deliberations.

(1) Comparative Overview

4.78 The majority of common law jurisdictions have provision for a language requirement in order to be eligible for jury service. In Australia every state and territory has a statutory language requirement in place, although the formulation of the test for eligibility varies between jurisdictions. An inability to read or understand English renders a person ineligible for jury service in New South Wales.⁸⁰ The *Jury Act 1995* in Queensland provides for a literacy requirement.⁸¹ The Northern Territory formulated a strict test that disqualifies from jury service all persons unable to read, write and speak the English language.⁸² In the Australian Capital Territory a person is ineligible for jury service if they are unable to read and speak the English language.⁸³ The legislation in Victoria does not require a person to be able to read, however, a statutory requirement to be able communicate in and understand English adequately is in place.⁸⁴ This is also the situation in Tasmania.⁸⁵ In South Australia there is a requirement that a person has sufficient command of the English language in order to properly carry out the duties of a juror.⁸⁶

4.79 In the UK, the Departmental Committee on Jury Service in 1965 considered a number of proposals calling for educational, intelligence or literacy tests as a requirement for inclusion on the list for jury service.⁸⁷ However, the Committee in its Report rejected these proposals. The Report did, however, recommend that persons who found it difficult to read, write, speak or understand English should not be eligible for jury service. The 1986 Roskill Committee Report suggested that the formula in the 1974 Act of "insufficient

⁸⁰ See *Juries Act 1977 (NSW)* schedule 2.

⁸¹ See section 4(k).

⁸² See *Juries Act (NT)* section 10(3)(c).

⁸³ See *Juries Act 1967 (ACT)* section 10.

⁸⁴ See *Juries Act 2000 (Vic)* schedule 2.

⁸⁵ See *Juries Act 2003 (Tas)* schedule 2.

⁸⁶ See *Juries Act 1927 (SA)* section 13(b).

⁸⁷ *Report of the Departmental Committee on Jury Service* (Home Office, Cmnd 2627, 1965) at paragraphs 3 and 6

understanding of English" did not sufficiently meet the recommendations of the Departmental Committee on Jury Service as to literacy.⁸⁸

4.80 The Auld Review also considered the issue of literacy of jurors as part of its review in 2001.⁸⁹ 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."⁹⁰ However, it was the view of Auld that it was becoming increasingly necessary for jurors to have a reasonable grasp of written English. It was also acknowledged that the simplest of cases normally involved exhibited documents and that it was necessary for jurors to be able to understand these. The Auld Review also recommended the increased use of visual aids and written summaries of the issues and of admitted facts and the more prevalent use of written directions. As such it was concluded that the need for jurors to be able to read was becoming greater. The Auld Review expressed concern, as did the Report of the Roskill Committee, 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.⁹¹

4.81 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 was 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. The Auld Review 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."⁹²

4.82 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

⁸⁸ *Fraud Trials Committee Report* (Roskill HMSO, 1986) at paragraphs 7.9 -7.11.

⁸⁹ *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at paragraph 50.

⁹⁰ *Ibid.*

⁹¹ *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at paragraph 50.

⁹² *Ibid.*

communicate in English but have only a limited ability to read.⁹³ 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 would exclude a section of people from jury service that would be capable of discharging the duties of a juror.⁹⁴ The Western Australia Commission 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.⁹⁵ However, the Law Reform Commission of Western Australia considered that in trials involving a significant amount of written evidence it would be necessary for jurors to be able to read.⁹⁶

4.83 In New Zealand candidate jurors are instructed in the jury booklet and introductory video for jurors to advise court staff if they are unable to understand English.⁹⁷ 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 comprehending evidence as English was their second language.⁹⁸ The New Zealand Law Commission was of the opinion that an additional screening process was desirable but impracticable.⁹⁹ However the Commission did 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. The New Zealand Law Commission recommended that in circumstances where it appeared that a juror was unable to do so the trial judge should be advised of the fact. This recommendation may be considered problematical in that it places a burden on jurors to identify their peers as lacking linguistic competency, a criticism that the New Zealand Commission acknowledged. Jurors may be uneasy in doing this and may 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.

⁹³ Law Reform Commission for New South Wales *Issues Paper on Jury Selection* (No 28 2006) at 86.

⁹⁴ Law Refrom Commission of Western Australia *Discussion Paper on Seelction, Eligibility and Exemption of Jurors* (No 99 2009) at 93.

⁹⁵ *Ibid.*

⁹⁶ Law Refrom Commission of Western Australia *Discussion Paper on Seelction, Eligibility and Exemption of Jurors* (No 99 2009) at 93.

⁹⁷ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001) at 78.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

4.84 The New Zealand Law Commission also considered the issue of a literacy requirement for jury service as part of their review of jury service in 2001.¹⁰⁰ The New Zealand Law Commission recommended that there should not be a standard literacy requirement for jurors.¹⁰¹ The rationale of the New Zealand Law Commission was that a significant number of people would not pass such a literacy test, as over a million New Zealand adults were below the minimal level of English literacy competence required to meet the demands of everyday life and 20 per cent of adults have “very poor” literacy skills.¹⁰² The New Zealand Law Commission opposed the introduction of a literacy test as it considered implementation would cause considerable administrative difficulties. It was also considered that the level of literacy that would be required of a juror would probably vary from case to case depending on the amount of written evidence to be given to jurors.¹⁰³

4.85 The Law Reform Commission of Western Australia considered that the informal procedures used by the staff of the Sheriff’s Office in identifying persons with communication and comprehension difficulties were subjective.¹⁰⁴ The Commission proposed that the Sheriff’s Office 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.¹⁰⁵

(2) *The Commission’s View*

4.86 There is no method of identifying persons unable to read under the *Juries Act 1976*. The issue is dealt with in the same way that other grounds of ineligibility are dealt with in that it is assumed that a juror will act in accordance with the summons for jury service and self identify themselves as ineligible for jury service. It has been suggested to the Commission that persons summoned for jury service having difficulty in communicating in English are identified informally by the court registrar. It has also been suggested to the Commission that comprehension difficulties are identified when a person is required to repeat the oath in court and are addressed on a case-by-case basis.

¹⁰⁰ *Ibid* at 81.

¹⁰¹ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001) at 78. at 82.

¹⁰² *Ibid* at 81.

¹⁰³ *Ibid* at 82.

¹⁰⁴ Law Reform Commission of Western Australia *Discussion Paper on Selection, Eligibility and Exemption of Jurors* (No 99 2009) at 95.

¹⁰⁵ *Ibid*.

4.87 The Commission is not in favour of the introduction of testing for literacy. The Commission considers that the only method to test literacy would be through the use of written tests and such testing would be excessively time-consuming and could cause serious embarrassment for jurors undertaking an important civic duty. In addition, there is no evidence to suggest that jurors not capable of reading are presenting for jury service in contravention of their ineligibility under the Juries Act 1976.

4.88 Once the jury is randomly selected in accordance with the *Juries Act 1976* and the panel is together in the jury box the trial judge normally informs the jury about a number of issues such as the estimated length of the trial and other information such as name of the accused person(s) and the nature of the criminal offences. The trial judge uses this opportunity to ensure that the jurors selected are able to undertake the duties of a juror and deals with any remaining excusal issues. The trial judge normally refers to the eligibility requirements at this stage as an opportunity to weed out any ineligible persons. It is at this stage that the trial judge can seek to ensure that any persons with literacy or communication difficulties are excused from jury service and can be particularly careful where the case involves a high level of documentation.

4.89 The Commission is not in favour of the approach adopted by the Law Reform Commission of Western Australia in permitting persons unable to read English to be eligible for jury service. While the Commission can see some merit in the position adopted it is considered that it would be undesirable to have a situation where a fellow juror would assist a person unable to read with written materials as this could impact on the free and open discussion necessary at the deliberation stage.

4.90 The Commission would distinguish between a literacy requirement and a requirement of fluency in English. The Commission believes that a basic fluency in the English language should be introduced as a requirement for eligibility for jury service. The Commission considers that its recommendation in chapter 2 to expand eligibility for jury service to non-citizens fulfilling a residency requirement may result in the summoning of more people unable to speak English for jury service.

4.91 *The Commission provisionally recommends that procedures for the testing of juror literacy should not be introduced. The Commission provisionally recommends that all jurors should have a responsibility to inform the court registrar if they have literacy difficulties and should seek excusal on that ground.*

4.92 *The Commission provisionally recommends that it should be an offence for any person to knowingly present for jury service where their lack of literacy renders them incapable of performing their duties.*

4.93 *The Commission provisionally recommends that a fluency in English should be introduced as a requirement for all persons serving on a jury.*

4.94 *The Commission invites submissions on methods to be used in order to establish that a juror is able to understand and communicate in the English language.*

H Juries and the Irish Language

4.95 In *MacCárthaigh v Éire*¹⁰⁶ the defendant was charged with robbery and he wished to carry out his defence through the Irish language at his trial which was being held in Dublin. He made an application to be tried by a jury who spoke Irish, relying on Article 8 of the Constitution in support of his application. He argued that there was such an entitlement and that the jurors had to be able to understand all of the evidence given in the course of the trial without the assistance of an interpreter. Article 8 of the Constitution states:

1. The Irish language as the national language is the first official language.
2. The English language is recognised as a second official language.
3. Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof."

4.96 The prosecution relied on Article 38.5 of the Constitution, which guarantees the right to trial with a jury. The prosecution also relied on United States case law, where it was held that the principle of random selection of jurors from the community best achieved a representative jury. The applicant's case was postponed while he sought an interlocutory judicial review in the High Court. In the High Court O'Hanlon J held that requiring a jury to be composed of Irish speakers according to the national census would result in excluding the majority of the Irish public from jury service. He noted that at least 75% of the public in Dublin would be excluded and he considered that an even greater number would in reality be excluded.

4.97 On appeal the Supreme Court agreed and held that the applicant did not have a right to be tried by a jury composed of fluent Irish speakers. The Supreme Court in *MacCárthaigh* acknowledged the difficulties in cases where jurors had to interpret the evidence of a defendant. However, the Supreme Court agreed with Hanlon J that the system proposed would exclude the majority of persons from jury service in cases requiring an all Irish speaking

¹⁰⁶ [1999] 1 IR 200.

jury. The Supreme Court also considered that the applicant's proposed system was not consistent with Article 38 of the Constitution.

4.98 There has been criticism of this decision,¹⁰⁷ primarily on the basis that it is not reconcilable with the constitutional position of the Irish language under Article 8 of the Constitution. Parry also criticized the decision on the basis that the "departure from the primary position of Irish being the first official language requires legal provision, and there is nothing explicit in the [1976] Act ... permitting such a departure."¹⁰⁸ However, O'Malley suggests "that the courts reached the right conclusion. A truly representative jury must be drawn from the political community rather from... a particular linguistic one, a factor which is all the more important when the linguistic community is quite small."¹⁰⁹

4.99 The Commission concurs with the approach taken in the *MacCárthaigh* case and considers that it would not be desirable to make provision for all-Irish juries. The Commission considers that confidence in the jury system is best preserved through selecting jurors for all cases from a broad cross-section of the community, including cases where a defendant would prefer an Irish speaking jury. The Commission is also conscious that there would be significant administrative difficulties in selecting a panel of jurors competent in the Irish language particularly in cases being tried outside Irish speaking areas. Additionally, the Commission considers that it is important that persons other than the defendant should be able to comprehend the proceedings in court.¹¹⁰

4.100 *The Commission provisionally recommends that current arrangements for trials involving the Irish language be retained.*

¹⁰⁷ See Parry "An important obligation of citizenship": language, citizenship and jury service" *Legal Studies*, Vol. 27 No. 2, June 2007, 188–215, and Carey "Criminal Trials and Language Rights: Part II" (2003) 13(3) Irish Criminal Law Journal 5.

¹⁰⁸ Parry "An important obligation of citizenship": language, citizenship and jury service" *Legal Studies*, Vol. 27 No. 2, June 2007, 188–215 at 199.

¹⁰⁹ O'Malley *The Criminal Process* (Thomson Reuters 2009) at 817-818.

¹¹⁰ See also to this effect the decision in *Ó Monacháin v An Taoiseach* [1986] IRLM 660.

CHAPTER 5 DISQUALIFICATION FROM JURY SERVICE FOR CERTAIN PRIOR CONVICTIONS

A Introduction

5.01 In this Chapter the Commission considers section 8 of the *Juries Act 1976* which deals with the disqualification of persons from jury service on the basis of prior criminal convictions. In Section B the Commission provides an overview of the history of this type of provision up to the 1976 Act. In Part C the Commission examines the position in other States, and in Part D sets out its provisional recommendations for reform. In Part E, the Commission examines the issue of juror vetting, as this relates directly to the issue of disqualification for certain prior convictions.

B Overview of disqualification for certain prior convictions

(1) Scope of disqualification under 1976 Act

5.02 Section 8 of the *Juries Act 1976* states:

“A person shall be disqualified for jury service if on conviction of an offence in any part of Ireland—

(a) he has at any time been sentenced to imprisonment or penal servitude for life or for a term of five years or more [*or to detention under section 103 of the Children Act, 1908,*¹] or under the corresponding law of Northern Ireland, or

(b) he has at any time in the last ten years—

(i) served any part of a sentence of imprisonment or penal servitude, being, in the case of imprisonment, a sentence for a term of at least three months, or

(ii) served any part of a sentence of detention in Saint Patrick's Institution or in a corresponding institution in Northern Ireland, being a sentence for a term of at least three months.”

¹ Section in italics repealed by the section 5(1) of the *Children Act 2001*.

5.03 Under section 8, persons convicted and sentenced to a term of imprisonment (in Ireland or Northern Ireland) of five years or more are disqualified from jury service for life. Persons who within the previous ten years have been sentenced to a term of imprisonment of at least three months and who served any part of that sentence are similarly disqualified from jury service, until the ten year period following imprisonment expires. Persons under 18 years of age who within the last ten years have been sentenced to a term of imprisonment of at least three months and who served any part of that sentence are similarly disqualified, until the ten year period following imprisonment expires.

5.04 There are competing principles at play in considering any reform of this aspect of the *Juries Act 1976*. First, it is desirable to permit persons with a previous criminal record to be eligible for jury service, where that person has been reintegrated into society.² Second, it is of the utmost importance to ensure the integrity of the criminal justice system, by excluding biased persons from jury service.³ The Commission endeavours to strike the correct balance in resolving these competing principles.

(2) *Rationale for Disqualification of Persons with Prior Criminal Conduct from Jury Service*

5.05 This category of disqualification is justified on the basis that persons who have come into conflict with the law, and particularly those who served a prison sentence, may be hostile towards the state and/or Gardaí, thereby colouring their views of the trial.⁴ There is also a fear that such persons would be unable to remain impartial and that such persons would be susceptible to

² On this point the New Zealand Law Commission referred in 2001 to the emphasis on the “reintegration” of offenders. The Law Commission considered that disqualification from jury service could be viewed as a legal barrier to social and civic participation. The New Zealand Law Commission noted that a criminal conviction should not stand as a continuous reminder to offenders that they are not allowed to actually re-integrate into society. Disqualification from jury service in this regard might persuade persons with previous convictions that any effort to re-integrate is futile. See New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69- 2001) at paragraph 181. The Queensland Criminal Justice Commission pointed out that modern penological theory on rehabilitation and recent legislation on spent convictions does not accord with disqualification from jury service. See Queensland, Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland* (Issues Paper, 1991) at 11.

³ See generally Chapter 2, above.

⁴ The New South Wales Law Reform Commission acknowledged that this rationale might lose some of its strength given that majority verdicts are available in most criminal trials (as has been the case in Ireland since the enactment of the *Criminal Justice Act 1984*). See Law Reform Commission for New South Wales *Issue Paper Jury Selection IP 117* (2006) chapter 4, at 42.

coercion or influence from criminal acquaintances. The New Zealand Law Commission recognised a view that a person who breaks the law should not be permitted to sit in judgment of others.⁵ It acknowledged that this view "... may be seen as stern, it must also be pointed out that a juror known to have a criminal record is likely to be perceived as biased, and therefore exposed to criticism for the verdict."⁶

5.06 An additional rationale for the disqualification of persons with a prior criminal record is that criminality and dishonesty are unsuitable and undesirable characteristics for jurors and these characteristics can be implied on the basis of conviction for criminal conduct. There is a perception that the State is the party that will most likely be opposed to the presence of a person with prior criminal history on a jury panel. However, the Queensland Litigation Reform Commission noted that counsel for the defence might not want to have persons on probation or community service orders serving as jurors, as they might "have a stake in trying to please the authorities".⁷

5.07 The New Zealand Law Commission considered that the appearance of justice was the strongest argument in favour of disqualifying persons with criminal records from jury service.⁸ The Victoria Parliamentary Law Reform Committee when considering this issue as part of its review of the jury system stated that the disqualification of persons who served a prison sentence at any time within the previous 5 years was justified on the basis "... of a probable community expectation that these persons have attributes which are incompatible with jury service".⁹

5.08 The English Royal Commission on Criminal Justice questioned whether the role played by a juror with previous convictions differed from the role played by other jurors in any significant way. Nevertheless, the Royal Commission concluded that any reform of the law in England and Wales would require research on the influence of such jurors on verdicts.¹⁰ However, the

⁵ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) at paragraph 179, at 73.

⁶ *Ibid.*

⁷ Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland* (Report of the Criminal Procedure Division, 1993) at 5.

⁸ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) at paragraph 179. "The need for the appearance of justice is probably the strongest argument in favour of the retention of this exclusion."

⁹ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at paragraph 3.43.

¹⁰ England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 132.

Departmental Committee on Jury Service in 1965 suggested that the anecdotal evidence available indicated that the presence of jurors with previous criminal records did not seem to result in perverse verdicts in England.¹¹

C Comparative Overview

5.09 The Commission notes that the disqualification of convicted persons has generally been based on the length of the sentence and the time that has lapsed since the conviction. This is the situation under section 8 of the *Juries Act 1976*. The comparative analysis also reveals that the detail in the juries legislation varies from jurisdiction to jurisdiction. Ireland is a jurisdiction that specifies a sentence of a particular length as a complete bar to jury service. Other jurisdictions such as Queensland have adopted a very rigid approach through an absolute ban on persons convicted of an indictable offence or sentenced to imprisonment.¹² Other jurisdictions such as Tasmania and Victoria specify that a person must have served a particular period of imprisonment within a certain number of years in order to be ineligible for jury service.¹³

(1) *England and Wales*

5.10 In England and Wales the *Juries Act 1974*, as amended, provides for the disqualification of the following persons from jury service on the basis of prior criminal conduct.

"A person who has at any time been sentenced in the United Kingdom, the Channel Islands or the Isle of Man—

- (a) to imprisonment for life, custody for life or to a term of imprisonment or youth custody of five years or more: or
- (b) to be detained during Her Majesty's pleasure, during the pleasure of the Secretary of State or during the pleasure of the Governor of Northern Ireland.

A person who at any time in the last ten years has, in the United Kingdom or the Channel Islands or the Isle of Man—

¹¹ *Report of the Departmental Committee on Jury Service* (Home Office, Cmnd 2627, 1965) at paragraph 134. Cited in Law Reform Commission for New South Wales *Issue Paper Jury Selection IP 117* (2006) chapter 4 at page 42.

¹² *Jury Act 1995* (Qld) s 4(3)(m) and (n).

¹³ Tasmania: *Juries Act 2003* (Tas) Schedule 1 cl 1(3) 3 months or more for an indictable offence in the past 5 years; Victoria: *Juries Act 2000* (Vic) Schedule 1 cl 2. 3 months or more for any offence in the past 10 years.

- (a) served any part of a sentence of imprisonment, youth custody or detention, or
- (b) been detained in a Borstal institution; or
- (c) had passed on him or (as the case may be) made in respect of him a suspended sentence of imprisonment or order for detention; or
- (d) had made in respect of him a community service order.

A person who at any time in the last five years has, in the United Kingdom or the Channel Islands or the Isle of Man, had made in respect of him a probation order.”

5.11 The Auld Review considered the categories of disqualification for those with a criminal record.¹⁴ It recommended that there should be no change to the categories of those disqualified from jury service under the *Juries Act 1974*. The rationale for this recommendation was that no convincing arguments were put forward that justified a reform of the law.¹⁵ In the Auld Review it was acknowledged that until recently there had been very little verification that persons summoned for jury service met the eligibility requirements for such service.¹⁶ It was noted that in particular, there had been little review of whether candidate jurors had previous convictions. However, this situation has changed with the establishment by the Central Summoning Bureau of an electronic link with the Police National Computer that enables automatic checking on all candidate jurors summoned.¹⁷ The introduction of the PULSE system in this State affords a similar facility for checking potential jurors for previous convictions.

(2) Australia

5.12 Different periods of disqualification apply in Victoria under the *Juries Act 2000*. These depend upon the sentence imposed for the crime. For example, there is a 2 years disqualification for anyone sentenced for the commission of any criminal offence.¹⁸ There is a 5-year disqualification for persons sentenced to imprisonment for a total of less than 3 months.¹⁹ There is a 10-year disqualification period for persons sentenced to imprisonment for a

¹⁴ Auld Review of the Criminal Courts of England and Wales (Home Office, 2001) at Chapter 5.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Juries Act 2000* (Vic) Schedule 1 cl 1-5.

¹⁹ *Ibid.*

total of 3 months or more.²⁰ There is also a disqualification for life for persons convicted of treason or of an indictable offence and sentenced to a period of imprisonment of 3 years or more.²¹

5.13 The jury legislation in New South Wales provides for the disqualification of a person who at any time within the previous 10 years in New South Wales or elsewhere served any part of a sentence of imprisonment (not being imprisonment merely for failure to pay a fine).²² The New South Wales legislation applies irrespective of the seriousness of the offence that led to the sentence.²³ The New South Wales Law Reform Commission ultimately decided in its review that:

“... the reach of the current provision is somewhat broad, and could possibly allow people to serve as jurors who should be excluded for life. At the same time, it may unnecessarily exclude those who need not be excluded for as long as 10 years, for example, those sentenced to a short term of imprisonment for some minor summary offence, and who have not re-offended.”²⁴

5.14 On this basis the NSW Commission recommended that the criterion on disqualification should to be amended to exclude for life of any person who has been sentenced to imprisonment for any offence for which life imprisonment is the maximum available penalty. Interestingly the New South Wales Commission recommended that any offence constituting a “terrorist act” punishable under State or Federal law²⁵ and any public justice offence²⁶ which includes offences relating to interference with the administration of justice, judicial officers, witnesses and jurors, perjury and false statements, should result in disqualification for life.³³ The Commission also recommended the exclusion for 10 years from the date of expiry of any sentence or sentences of

²⁰ *Ibid.*

²¹ *Ibid.*

²² See *Jury Act 1977 (NSW)* Schedule 1 item 1. This 10-year disqualification is similar to those in place in Western Australia and the Northern Territory see Western Australia (5 years): *Juries Act 1957 (WA)* s 5(b)(ii); and Northern Territory (7 years): *Juries Act 1963 (NT)* s 10(3)(a)(ii). Check to see if the revised Juries Bill has been enacted in NSW as of yet.

²³ It is not entirely clear whether the 10-year period of disqualification runs from the time of release on parole or probation, or from the date of expiry of the balance of the term.

²⁴ Law Reform Commission for New South Wales Report *Jury Selection 117* (2007) at paragraph 3.23 pages 43.

²⁵ *Criminal Code (Cth)* Part 5.3.

²⁶ Under Part 7 of the *Crimes Act 1900 (NSW)*.

imprisonment amounting to three years or longer.²⁷ It was also recommended that there should be an exclusion for two years from the date of expiry of any sentence or sentences of imprisonment amounting to less than three years in respect of a summary offence, and aggregating less than six months in respect of any indictable offence. The New South Wales Law Reform Commission stated that a major shortcoming with their disqualification requirement was that it applied irrespective of the seriousness of the offence that resulted in the conviction and sentence.²⁸

(3) *New Zealand*

5.15 The New Zealand Law Commission considered the disqualification of persons from jury service as part of its review of the jury system. Despite having considered the issue of reintegration of persons with prior convictions into society and concerns about restorative justice, the New Zealand Law Commission decided that:

“... on balance... the current provisions are justified. Only serious offenders are permanently excluded; most offenders are excluded for five years, if at all. Considerations of possible bias, the need for the appearance of a neutral jury, and the potential distraction of a juror with recent convictions outweigh the desire for more prompt reintegration... The current provisions excluding persons with certain criminal convictions from jury service should be retained.”²⁹

(4) *Summary*

5.16 The law on disqualification from jury service in other jurisdictions excludes persons convicted of serious criminal offences from jury service although there is no uniform approach to the provisions which vary considerably from jurisdiction to jurisdiction. However, the rationale underlying the disqualification of persons with criminal histories from jury service is similar in the different jurisdictions. There is no common approach on the length of sentence that will result in disqualification from jury service. As pointed out already, a number of jurisdictions disqualify on the basis of whether an offence

²⁷ They also recommended the exclusion for five years from the date of expiry of any sentence or sentences of imprisonment totalling less than three years, but exceeding six months, imposed in respect of an indictable offence.

²⁸ Law Reform Commission for New South Wales Report Jury Selection 117 (2007) at paragraph 3.13 page 40. There is not a similar shortcoming with section 8 of the *Juries Act 1976*.

²⁹ *Ibid.*

is a summary or indictable offence,³⁰ while other jurisdictions make a distinction between the lengths of the sentence or aggregate sentences imposed. In addition to this the periods of possible disqualification vary significantly. In some jurisdictions, such as ours conviction and service of a sentence of imprisonment will lead to a life disqualification or a disqualification for 10 years.³¹ Elsewhere, depending on the nature of the offence, and / or the sentence imposed, the period of disqualification may be one of five years.³² As mentioned above, in Victoria there is a sliding differential scale for disqualification so that different periods of disqualification apply depending upon on the sentence served.

D Reform of the Disqualification Provisions

(1) ***Disqualification on the Length of Sentence v Seriousness of the Crime under the Juries Act 1976***

5.17 The New South Wales Law Reform Commission in its Issues Paper identified that questions “arise as to whether the fact of sentencing or the length of sentence imposed should be the appropriate measure for determining if a person is disqualified.”³³ On this issue the Parliament of Victoria Law Reform Committee suggested that disqualification from jury service should be decided not on the basis of a sentence and imprisonment but rather on the nature of the offence committed. However, the New South Wales Law Reform Commission acknowledged there are “formidable difficulties involved in identifying all of the offences which ought to disqualify a person from serving as a juror.”³⁴ Determining disqualification from jury service on the basis of the seriousness of an offence is a problematic approach as deciding upon which criminal offences are more serious would be a timely and very much subjective exercise. It could also be argued that the seriousness of a criminal offence is best reflected by the sentence imposed by the trial judge (exercising discretion on the basis of the facts of the case).

³⁰ This was the situation in Ireland before the *Juries Act 1976*. Prior to that disqualification from jury service was one of the distinguishing characteristics between a conviction for a felony or a misdemeanour offence.

³¹ In Australia see for example: *Juries Act 2003* (Tas) Schedule 1 cl 1(1)(a); *Juries Act 1957* (WA)Section 5(b)(i); *Juries Act 1927* (SA) s 12(1)(a) and (b); *Jury Act 1995* (Qld) s 4(3).

³² For example, Victoria and Western Australia: *Juries Act 2000* (Vic) Schedule 1 cl 3(a); *Juries Act 1957* (WA) section 5(b)(ii).

³³ Law Reform Commission for New South Wales *Issue Paper Jury Selection IP 117* (2006) chapter 3 at page 46.

³⁴ Law Reform Commission for New South Wales *Issue Paper Jury Selection IP 117* (2006) chapter 3 at page 46.

(2) ***Relevance of proposed spent convictions regime***

5.18 The Commission in its *Report on Spent Convictions*³⁵ considered the law on records of criminal convictions of adults. The Commission noted that currently there is not a system for the removal of old convictions for those over 18 years of age in the State.³⁶ The Report recommended that a limited spent convictions law for adults should be introduced where certain old convictions would not have to be disclosed. The Report noted that certain offences committed when a person was less than 18 years of age are already subject to a spent convictions system under section 258 of the *Children Act 2001*.³⁷ In its Report the Commission recommended that certain types of offences should be excluded completely from the proposed law on spent convictions. This included any offence triable by the Central Criminal Court, such as murder; any sexual offence as defined in the *Sex Offenders Act 2001*; and any other offence where a sentence of more than 6 months (including a suspended sentence) has been imposed in court.

5.19 In the Report, the Commission recommended that the length of time a person must be conviction-free to qualify for the conviction to be regarded as "spent" was 7 years from the date of conviction where a custodial sentence of up to 6 months is imposed; 5 years from the date of conviction where a non-custodial order is made, such as a fine or disqualification. The Commission also recommended that all convictions, including spent convictions, would still be disclosed at a sentencing hearing and in some non-criminal cases such as those involving access to children.

5.20 At the time of writing (March 2010), the *Spent Convictions Bill 2007*, based on the draft Bill in the Commission's Report, is awaiting Committee Stage in the Dáil and it appears that there is widespread consensus in the Oireachtas that a spent convictions regime should be introduced into the State in the near future.

5.21 It is possible to draw analogies between the work of the Commission on spent convictions and the issues being considered in this chapter. The

³⁵ LRC 84-2007.

³⁶ The Commission noted that under the current law if a person has a conviction for a minor public order offence 20 years ago when they were 19 years old, this must be disclosed if a prospective employer asks the question. The Commission emphasised that even very old convictions should always remain relevant – and therefore be disclosed for vetting purposes - when applying for certain sensitive posts, including the supervision or care of children, vulnerable adults or in the context of sensitive public positions, such as those connected with State security or the legal system.

³⁷ These convictions do not have to be disclosed (though they would be disclosed as part of the vetting for sensitive posts).

rationale behind reform of the law on jury disqualification and the introduction of a system of spent convictions has the integration of persons convicted of criminal offences at the heart of the issue. As such the Commission considers it is appropriate to adopt a consistent approach in its recommendations by recommending reform of section 8 of the *Juries Act 1976* to reflect the recommendations made in the *Report on Spent Convictions*, and invites submissions as to what lesser period would be appropriate.

5.22 *The Commission provisionally recommends that the criteria for exclusion from eligibility for jury service should continue to be based on length of sentence rather than on seriousness of the offence. The Commission invites submissions as to whether there should be a reduced period of ineligibility for shorter sentences.*

(3) Disqualification of Young Offenders

5.23 Under section 8(b)(ii) of the *Juries Act 1976* young offenders, those under 18, are disqualified from jury service if they “served any part of a sentence of detention in Saint Patrick’s Institution or in a corresponding institution in Northern Ireland, being a sentence for a term of at least three months.”

5.24 Therefore, under the *Juries Act 1976* an under 18 offender who serves any part of a three-month sentence is disqualified from jury service for ten years. The Victorian Parliamentary Law Reform Committee considered that a disqualification period of 5 years was too long for juvenile offenders.³⁸ The Committee was of the opinion that a period of 2 years from the end of the sentence was a more appropriate disqualification period.³⁹ The Committee considered that there were competing considerations between the “law’s concession to youth” in allowing juvenile offenders “...to put their former offending into the past” and the reality that juveniles “sentenced to detention are often guilty of quite serious criminal conduct”.⁴⁰

5.25 The New South Wales Law Reform Commission considered whether its legislation disqualifying juvenile offenders from jury service for three years ought to be reformed.⁴¹ Submissions received by the New South Wales Commission calling for a reduction in the period of exclusion of young people

³⁸ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at paragraph 3.55.

³⁹ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at paragraph 3.55.

⁴⁰ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at paragraph 3.55.

⁴¹ Law Reform Commission for New South Wales *Issue Paper Jury Selection IP 117* (2006) chapter 4 page 46.

from jury service, mainly made the submission on the basis that it would facilitate rehabilitation and encourage reintegration into society with full rights once juvenile offenders reached the age of 18.⁴² The New South Wales Law Reform Commission recognised "... the force of the argument that the rehabilitation of young offenders, and their reintegration into society as quickly as possible, and with full rights, is important."⁴³ However, the Commission was concerned about the high rate of recidivism among young offenders citing research conducted in that jurisdiction.⁴⁴ The New South Wales Law Reform Commission cited research that:

"... regrettably, [demonstrated] those young people who fall foul of the criminal justice system tend to come from dysfunctional and deprived backgrounds, to have low levels of literacy and to have substance abuse problems. Moreover, many are likely to be living on the streets, disinterested in registering as electors, and difficult to trace because of their itinerant lifestyle."⁴⁵

5.26 For these reasons the New South Wales Law Reform Commission considered that it was unrealistic for such young persons to serve as jurors. However, there was recognition "... that a rehabilitated offender with a background of offending in adolescent years may be better placed than others to understand or interpret offending by similarly situated defendants."⁴⁶ The New South Wales Law Reform Commission considered that the three years disqualification of juvenile offenders was excessive.⁴⁷ Particularly in respect of persons that only committed one offence or are subject to a short-term control order.⁴⁸ Nevertheless, the New South Wales Commission concluded that any

⁴² *Ibid.*

⁴³ Law Reform Commission for New South Wales *Issue Paper Jury Selection IP 117* (2006) chapter 4 page 47.

⁴⁴ Law Reform Commission for New South Wales Report Jury Selection 117 (2007) at paragraph 3.36, page 47. A study of 5,476 young people aged between 10 and 18 years who made their first appearance in the Children's Court in 1995 showed that, by the end of 2003, 68% of them had reappeared at least once in a criminal court. See Chen, Matrugliou, Weatherburn, Hua "The Transition from Juvenile to Adult Criminal Careers, Crime and Justice Bulletin, No 86 (NSW Bureau of Crime Statistics and Research, 2005), 2.

⁴⁵ Reform Commission for New South Wales Report Jury Selection 117 (2007) at paragraph 3.37, page 47-48.

⁴⁶ Reform Commission for New South Wales Report Jury Selection 117 (2007) at paragraph 3.37, page 48.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

reduction in the period of disqualification would amount to “tokenism”.⁴⁹ They also concluded that any change would have minimal impact on the jury pool, and would overlook the pragmatic considerations in relation to juvenile offending and the associated anti-social attitudes. As such the Commission did not recommend any change in the law.

5.27 In Ireland, as the Commission acknowledged in its *Report on Spent Convictions*, certain offences committed when a person was less than 18 years of age are subject to a spent convictions system under section 258 of the *Children Act 2001*.⁵⁰ On this basis the Commission considers that a ten-year disqualification period from jury service is excessive. It is also unclear from the legislation when the ten-year disqualification from jury service begins. Does it begin when at sentencing or on completion of the full sentence or on the date of release from the detention centre?

5.28 In its review of the jury system the New Zealand Law Commission formed the view that a regime for erasing criminal records would not affect the New Zealand law on disqualification from jury service. The New Zealand Law Commission considered that such a development:

“...would not affect our recommendation on this point, as we do not envisage that any such regime would include crimes sufficiently serious to come within the permanent exclusion criteria, or erase records with less than three years delay.”

5.29 *The Commission provisionally recommends that the exclusion period for offenders under the age of 18 should be reduced from the present ten year period. The Commission invites submissions as to what lesser period would be appropriate.*

(4) Pending Criminal Proceedings

5.30 There is no specific provision in the *Juries Act 1976* disqualifying persons from jury service who are released on bail, pending trial or sentence. Other jurisdictions disqualify such persons from jury service. In Australian territories such as New South Wales persons are disqualified where they have been remanded “in custody pending trial or sentence” or released “on bail pending trial or sentence”.⁵¹ The New South Wales Law Reform Commission in their review considered this issue. The Commission recommended the

⁴⁹ Law Reform Commission for New South Wales Report Jury Selection 117 (2007) at paragraph 3.38, page 48.

⁵⁰ These convictions do not have to be disclosed (though they would be disclosed as part of the vetting for sensitive posts).

⁵¹ See *Jury Act 1977 (NSW)* Sch 1 item 3(c).

continued exclusion of person awaiting criminal proceedings. The Commission stated:

“we recognise the importance of the presumption of innocence, we accept that people, whether bailed or not, and even where bail has been dispensed with, should continue to be ineligible to serve on juries when facing trial or sentence themselves. This is because it is difficult to see how they could give a completely detached consideration to the question of the guilt of others. Additionally, we believe that the public confidence in the justice system would be at risk if people facing trial or sentence were to serve on criminal juries.”⁵²

5.31 The English Royal Commission on Criminal Justice articulated their concern that there was a possibility that a person on bail for an offence, similar to the offence that the defendant is to be tried could be selected as a juror.⁵³ The Royal Commission recommended that persons remanded on bail should be ineligible for jury service.⁵⁴ Indeed, this was a concern expressed as part of the Commission’s preliminary consultations on this Consultation Paper. The Victorian Parliamentary Law Reform Committee concluded that the presumption of innocence required that those charged with offences should not be disqualified from jury service. This New Zealand Law Commission reached a similar conclusion in their review of the jury system. The rationale underlying the New Zealand Law Commission’s approach was that disqualification:

“... goes against the principle of the presumption of innocence, and once that is discarded there is no line to prevent the exclusion of, for example, the child, spouse, parent or sibling of an accused or convicted person, who may also have a close and current association with the criminal justice system. Such a person, actually in custody awaiting trial or sentence, could apply for excusal under section 15(1) (b) of the Juries Act... Persons who have been charged with criminal offences but not yet convicted should not be automatically disqualified from jury service for that reason.”⁵⁵

5.32 The New Zealand Commission ultimately decided that this was “a difficult issue but on balance we do not consider that any change is required...

⁵² Law Reform Commission for New South Wales Report Jury Selection 117 (2007) at paragraph 3.65 page 55.

⁵³ England and Wales, *Royal Commission on Criminal Justice* (Report, 1993) at 132.

⁵⁴ *Ibid.*

⁵⁵ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) at paragraph 184, page 74.

Persons who are in this position can be excused on their own application on the grounds already provided in the Act.⁵⁶ The New Zealand Law Commission also acknowledged that the Crown can if appropriate use the peremptory challenge procedure to remove persons awaiting sentence or trial, where considered appropriate.⁵⁷ The Commission accepts that this is a difficult matter on which arguments on both sides can be, and have been, made; and invites submissions on the issue.

5.33 *The Commission invites 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.*

(5) Persons Currently Serving a Sentence

5.34 The Juries Act 1976 does not state whether persons currently serving a prison sentence are disqualified from jury service. The New South Wales Law Reform Commission considered this issue as part of their review and there was general agreement, in the submissions received that persons currently serving sentences of imprisonment should be excluded from jury service.⁵⁸ Although such persons would not be able to undertake jury service in this jurisdiction, in the interests of clarity, this should be set out in any amending legislation.

5.35 *The Commission provisionally recommends that the position of those currently serving sentences of imprisonment should be clarified to make clear their exclusion from jury service.*

(6) Non-custodial punishments

5.36 Section 8 of the Juries Act 1976 replicates comparable provisions that date from over 100 years ago before the advent of a broader range of sentencing options available to trial judges. To that extent the basis for the focus on custodial sentences as the trigger for disqualification does not appear to have been updated to take into account non-custodial sentencing options. The comparable juries legislation in most Australian jurisdictions disqualify people bound by orders of a court in criminal proceedings including parole orders, community service orders, apprehended violence orders and orders disqualifying a person from driving.⁵⁹ However, the Victorian Parliamentary Law Reform Committee recommended the repeal of the provisions that disqualified

⁵⁶ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) at paragraph 184, page 75.

⁵⁷ *Ibid.*

⁵⁸ Law Reform Commission for New South Wales Report Jury Selection 117 (2007) at paragraph 3.1 pages 31.

⁵⁹ See for example New South Wales *Jury Act 1977* (NSW) Schedule 1.

people subject to a community based orders.⁶⁰ The rationale for this recommendation was that “most people would accept that persons in these categories in general should be permitted to serve... unless there is some specific reason for their exclusion”.⁶¹

5.37 The Commission is aware that there are a number of compelling arguments for not disqualifying from jury service persons subject to non-custodial orders. These persons have been determined to be suitable to be resident in and part of their communities. However, the New South Wales Law Reform Commission recommended that a person should be excluded from jury service when he or she is currently bound by an order made in New South Wales or elsewhere, where that order is pursuant to or consequent upon a criminal charge or conviction, with the exception of an order for compensation. In New South Wales this included a wide array of orders.⁶²

(7) Types of non-custodial orders

5.38 The following is a non-exhaustive list of sanctions that can be imposed by a trial judge in addition to or instead of custodial sentences in Ireland.

(a) Suspended sentences

5.39 Suspended sentences arise in circumstances where a trial judge imposes a prison sentence, but decides to suspend the sentence provided that the defendant meets certain conditions such as undergoing treatment for addiction or being of good behavior.

(b) Community service orders

5.40 Community service orders are provided for by the *Criminal Justice (Community Service) Act 1983*. A person subject to a community service order

⁶⁰ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, 1996) at paragraph 3.49.

⁶¹ *Ibid.*

⁶² It includes an apprehended violence order under the *Crimes Act 1900*; a disqualification from driving a motor vehicle, but only where the disqualification is for 12 months or more; an order committing a person to prison for failure to pay a fine, but only so as to disqualify that person during the currency of the imprisonment; a remand in custody pending trial or sentence; a release pending trial or sentence, including a release under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11, whether on bail or not; a bond under s 9 or s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW); a parole order; a community service order; an extended supervision order; an order under anti-terrorism legislation; a probation order; a child protection order; a child protection registration requirement; a non-association or place restriction order; and a requirement to participate in pre-trial diversionary programmes, intervention programmes, circle sentencing or other forms of conferencing.

is required to undertake work that is beneficial to the community and is imposed in substitution for a prison sentence. A judge is required to consider whether an accused person is suitable for community service. In order to determine suitability the judge will consider a probation report and a welfare report.

(c) Fines

5.41 A large number of criminal offences have provisions on the imposition of a fine on an accused person. Very often criminal offences have provisions to impose a fine in conjunction with another punishment, normally imprisonment. A judge will usually specify a period of time within which a fine must be paid. If the fine is not paid within this timeframe a judge may order that the person be sent to prison for a time in default of the payment. In the District Court, the imprisonment for default of payment periods is based on a graduated sliding scale linked to the value of the fine.⁶³ The Commission notes that the *Fines Bill 2009*, currently before the Oireachtas at the time of writing (March 2010), proposes to move significantly away from imprisonment in default of fine, towards attachment for fines and comparable non-custodial measures, with imprisonment as a last resort.

(d) Probation orders and Court Poor Box

5.42 The *Probation of Offenders Act 1907* provides the courts with a method of dealing with first time offenders and offenders considered unlikely to commit future criminal offences. In the District Court, the effect of a probation order is that the person is not deemed to have a criminal conviction. The non-statutory Court Poor Box is another method used by judges in addressing less serious offences in the District Court. A judge of the District Court may order an accused person to pay money either directly into the Court Poor Box or indirectly to a charity. The District Court often uses the Court Poor Box as an alternative to having a conviction recorded. In its *Report on the Court Poor Box: Probation of Offenders*,⁶⁴ the Commission recommended that the Court Poor Box be placed on a statutory basis in the context of a reformed and updated *Probation of Offenders Act 1907*.⁶⁵

(e) Binding Over

5.43 It is well established in this jurisdiction that the courts when hearing criminal matters can bind an accused person to keep the peace and be of good

⁶³ Less than €64 - 5 days; between €64 and €318 - 15 days; between €318 and €635 - 45 days; greater than €635 - 90 days.

⁶⁴ LRC 75-2005.

⁶⁵ The Commission notes that the *Government Legislation Programme January 2010* indicates that the Government proposes to publish a *Probation Services Bill*.

behaviour. This involves the accused person entering into a recognisance, which is a monetary bond, for a specified period of time.⁶⁶

(f) *Restriction on movement orders*

5.44 Under section 101 of the *Criminal Justice Act 2006* a court may impose restriction on movement orders. These orders can be imposed when a person is convicted of offences specified in the *Criminal Justice Act 2006*. There is a requirement of imprisonment of three months or more for a restriction on movement order to be made.⁶⁷ A person subject to a restriction on movement order will be disqualified from jury service, due to the three month prison sentence requirement under the *Criminal Justice Act 2006*.

(g) *Curfews and exclusion orders*

5.45 Judges in this jurisdiction can impose curfews and or exclusion orders as a sentencing option in substitution of a prison sentence. Often, these types of orders take the form of a condition of bail or of a suspended sentence. Very often a curfew or an exclusion order requires a person to be present at a particular address between certain hours of the day or night. Similarly, a judge might make an order banning its subject from entering a certain place or premises, for example a pub.

(h) *Disqualification Orders*

5.46 In this jurisdiction disqualification orders are not punishments *per se*. Rather, a disqualification order amounts to a finding that a person is unfit to perform the function from which they are disqualified. The most obvious and prevalent example of a disqualification order in this jurisdiction is disqualification from driving a motor vehicle. Under Part 7 of the *Companies Act 1990* a person convicted on indictment of a criminal offence related to a company can be disqualified from holding positions related to running a company.⁶⁸ It can be implied that a person subject to a disqualification order may be lacking in competence or a person prone to making poor decisions. Such characteristics are undesirable from a juror selection perspective. The New South Wales Law Reform Commission considered the disqualification of persons disqualified from driving as part of their review of jury selection.⁶⁹ They regarded this category as

⁶⁶ If a person bound to the peace becomes involved in criminal activity within the time stated in the order, they will be required to pay that sum of money specified or face imprisonment.

⁶⁷ These type of orders mainly arise out of public order offences and assault offences.

⁶⁸ For example, disqualification from being a company director.

⁶⁹ Law Reform Commission for New South Wales *Report Jury Selection 117* (2007) at pages 52-53.

problematic, as there are many circumstances in which a person can be disqualified from driving a motor vehicle.⁷⁰

5.47 In New South Wales persons disqualified from driving are excluded from jury service.⁷¹ The goal of the exclusion in New South Wales was to prohibit people convicted for driving under the influence of alcohol from serving as jurors. The rationale of the New South Wales legislature was to exclude persons who are unable to “point to their own good character and general fitness for the task” of serving as a juror. Driving under the influence of alcohol was also regarded as “a highly anti-social act that rarely reaches the stage of a gaol sentence unless it has resulted in either the death of or serious injury to an innocent third party”.⁷² Therefore, it was considered necessary to exclude persons disqualified from driving from jury service. The New South Wales Law Reform Commission concluded that the existence of automatic disqualification provisions for disqualification from driving were sound and should remain part of New South Wales Law. However, the Commission did recommend that on the basis of the number of people potentially affected, disqualification from jury service should only apply where the disqualification is for 12 months or more.⁷³

(i) Compensation

5.48 Under the *Criminal Justice Act 1993* judges have been extended a power to order a convicted person to pay compensation. A trial judge may do this in substitution to or in addition to other sentencing options including imprisonment.⁷⁴

(j) The Commission’s View

5.49 The Commission has considered all of these categories of non-custodial sentencing and does not consider that there are compelling reasons for expanding disqualification from jury service to persons subject to such community based orders. The Commission considers that persons subject to non-custodial orders have been considered suitable to be resident in and part of

⁷⁰ For example, disqualification may arise as a result of road traffic offences or may result as a failure to pay a fine for a motoring offence.

⁷¹ See Law Reform Commission for New South Wales *Report Jury Selection 117* (2007) at page 52.

⁷² *Jury Act 1977 (NSW)* Sch 1 item 3(d). See Law Reform Commission for New South Wales *Report Jury Selection 117* (2007) at page 52.

⁷³ Law Reform Commission for New South Wales *Report Jury Selection 117* (2007) at page 53.

⁷⁴ A judge of the District Court is entitled to order a maximum amount of €6,350; a Circuit Court judge is entitled to order a maximum amount of 38,100. The judges are required to consider the financial position of persons subject to the compensation order and their other financial commitments into account.

their community; as such they should continue to be eligible for jury service. In reaching this conclusion the Commission balanced the need to broaden and make more representative the jury pool against the possible bias of a person serving even a non-custodial sentence.

5.50 *The Commission provisionally recommends that disqualification from jury service should not be extended to persons subject to non-custodial sentences or community based orders. The Commission invites submissions as to whether persons subject to such sentences should be obliged to inform the court of this fact prior to jury empanelling.*

(8) *Criminal Convictions outside the State*

5.51 Section 8 of the *Juries Act 1976* clearly provides for disqualification from jury service not only in respect of offences committed in the State but also in Northern Ireland. The Director of Public Prosecutions has commented: “[w]e do not exclude people who have criminal convictions abroad. Given the numbers of people coming to Ireland, it is time to examine this issue.”⁷⁵ The Commission considers that there is a strong argument in favour of extending the disqualification of persons convicted of criminal offences abroad from being eligible for jury service in this jurisdiction. The Commission considers that the disqualification of such persons should apply in the same way and for the same period of time as disqualification applies to persons convicted of criminal offences in this jurisdiction.

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

E *Jury Vetting*

5.53 Against the general background that section 8 of the *Juries Act 1976* disqualifies certain convicted persons from jury service, in this Part the Commission discusses to what extent jury vetting is a suitable mechanism by which to ensure that disqualified persons are not included on the list of empanelled jurors.

⁷⁵ Comments of James Hamilton, Director of Public Prosecutions, to Joint Committee on Justice, Equality, Defence and Women's Rights, 8 December 2003. Available at: <http://www.gov.ie/oireachtas/Committees-29th-Dail/JustEquDefWomRgts.htm>.

(1) Vetting of Jury Lists

5.54 Some commentators have suggested that the premise on which jury vetting is based is “illogical and unsound”.⁷⁶ It has been argued that it is “inconsistent with the ideals of the jury and its function in the criminal justice system. Vetting undermines some of the central pillars on which public confidence in the jury rests. These central pillars are the jury’s independence, impartiality, and representativeness, obtained through the use of random lay participation.”⁷⁷ The reasons underlying the introduction of jury vetting are rooted in the belief that the process protects the independent and impartial nature of juries through the elimination of biased persons from the jury selection process. However, it has been argued that this “does not stand up to close scrutiny” because it demonstrates little confidence in the ability of jurors to arrive independently at their verdict despite the pressure exerted by a partial juror.⁷⁸ This argument is particularly relevant to Ireland as the provision of majority verdicts means that the jury can return a verdict even if one or more jurors disagrees with it. In addition, it is suggested that it diverges from the principle of random selection and independence by handpicking jurors.⁷⁹

5.55 The issue of vetting or carrying out background checks on prospective jurors has proven to be a controversial issue in some jurisdictions. It emerged in the media that police in Ontario had been carrying out background checks on prospective jurors, at the request of Crown attorneys. The media coverage suggested that extremely personal material was contained in the collated background information.⁸⁰ The Information and Privacy Commissioner of Ontario launched an investigation and analysed the practices of conducting background checks on candidate jurors with a view to establishing whether the practices were permitted or violated the privacy provisions of Canadian law.⁸¹ The Commissioner in her Report found that a third of Crown attorney offices had received personal information about prospective jurors from the police that went beyond what was necessary to determine whether individuals were eligible

⁷⁶ Findlay, “Jury Vetting – The Jury Under Attack” 1983 3 *Legal Studies* 159, at p.163.

⁷⁷ *Ibid.*

⁷⁸ *Ibid*, at page 165.

⁷⁹ *Ibid*, at page 165-166.

⁸⁰ Information included the fact that one of the juror’s fathers was a “drinker”.

⁸¹ “Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report” Information and Privacy Commissioner, Ontario, Canada October 5, 2009, Order PO-2826. Available at: <http://www.ipc.on.ca/english/Decisions-and-Resolutions/Decisions-and-Resolutions-Summary/?id=8303>.

for jury duty.⁸² The Commissioner also concluded that the conducting of background checks on prospective jurors exceeded determining whether these individuals had criminal convictions that may render them ineligible for jury duty under the relevant Canadian juries' legislation and the Criminal Code.⁸³ The Commissioner also determined that both Crown attorneys and the police did not comply with the relevant Canadian privacy legislation.⁸⁴ As discussed in chapter 1 there are many instances where the state attempted to exert influence over the decision making of the jury, through the use of challenges, jury packing and other means. Duff and Findlay have made an analogy between these forms of jury oppression and the advent of jury vetting.

5.56 The Commission considers that jury vetting should not undermine the independence of jury selection and the selection of jurors at random. It is the Commission's view that clear and transparent guidelines as to the vetting of jury lists should be introduced. These guidelines should only extend to providing counsel for the state with information on whether prospective jurors are disqualified from jury service. The Commission considers that vetting of jury panels for disqualified persons has a legitimate purpose in ensuring that only persons eligible for jury service are selected. The Commission is aware that there might be concern that the prosecution may use the process of jury vetting to gain advantage in jury selection. While there is little evidence to suggest that this is the case, the absence of statutory regulation of jury vetting may be of concern.

5.57 The Commission notes that there is no statutory basis in the *Juries Act 1976* for the vetting of jury lists. The Commission is of the view that the vetting of jury lists should be expressly provided for in the legislation governing juries.

5.58 Vetting of jury lists involves a background check on candidate jurors contained on that list in an effort to establish where a person is disqualified from jury service. In 2004 the *Report of the Working Group on Garda Vetting* noted that the Garda Central Vetting Unit receives a list of all persons called for service on a jury panel on a computer printout from the Courts Service.⁸⁵ The list is submitted for verification every 2-3 months and contains approximately 1,600 names, all of which are checked for previous convictions.⁸⁶ More than

⁸² *Ibid.*, at page 8.

⁸³ *Ibid.*, at page 10.

⁸⁴ *Ibid.*. The Commissioner supported her finding with reference to case law dealing with the issue.

⁸⁵ *Working Group on Garda Vetting Report* (2004), at page 27. Available at: <http://www.justice.ie/en/JELR/GardaVetting.pdf/Files/GardaVetting.pdf>.

⁸⁶ *Ibid.*

25% cent of the activities of the Garda Central Vetting Unit is devoted to the vetting of jury lists. The vetting of jury list is not undertaken in a standardised way in this jurisdiction.⁸⁷ The Report of the Working Group on Garda Vetting identified that “the vetting of prospective jurors does not occur uniformly across the jurisdiction” and that it is not undertaken in some districts.⁸⁸

5.59 There are a number of operational issues in relation to the administration of vetting of jury lists. Under the current system the court forwards a jury summons to candidate jurors, this requires a detachment to be returned to the Courts Service on the issue of eligibility, excusal and disqualification. This form does not contain a requirement for the disclosure of a date of birth.⁸⁹ The absence of this information adversely impacts upon the capacity of the Garda Central Vetting Unit “to vet in a professional and thorough manner”.⁹⁰ For example, the Garda Central Vetting Unit cannot determine if a candidate juror is disqualified where a father and son residing at the same address have the same first name in circumstances where a conviction is recorded against one of them because it is not possible to distinguish between the two persons. The Commission considers that it would be appropriate for an amendment to the relevant form to enable the Garda Central Vetting Unit administer the vetting process more effectively.

5.60 The Commission notes that the 2004 *Report of the Working Group on Garda Vetting* recommended that the work of the Garda Central Vetting Unit be placed on a modern statutory footing. The Commission has previously supported that recommendation⁹¹ and very much welcomes the recent commitment of the Government to introduce a *Garda Vetting Bill*.⁹²

5.61 Jury vetting is done in order to collect information that will inform a decision on whether to challenge a potential juror or not. The Gardaí is the only organisation that has the resources to vet a jury panel in order to establish whether a juror failed to disclose a criminal conviction, which would render them disqualified under the *Juries Act 1976*. While the *Juries Act 1976* does not set out a role for the Gardaí in this regard, in practice it appears that the Gardaí may in some instances vet jury panels prior to a trial.

⁸⁷ *Ibid*, at page 47.

⁸⁸ *Ibid*.

⁸⁹ The form is entitled “Form J.2”.

⁹⁰ *Ibid*, at 46.

⁹¹ *Report on Spent Convictions* (LRC 84-2007).

⁹² *Government Legislation Programme*, January 2010, available at www.taoiseach.ie.

5.62 In *The People (DPP) v Dundon & Others*⁹³ the Court of Criminal Appeal examined a number of complaints regarding the manner in which the jury was empanelled in the defendants' trial. During the empanelling of the jury the prosecution exhausted all their challenges without cause (peremptory challenges) provided for in the *Juries Act 1976*. The prosecution then sought to challenge a further juror for cause. The prosecution raised an objection to this juror on the basis that a family member had a criminal conviction. However, this juror was not required to stand down. The applicants on appeal argued that this clearly indicated that the prosecution, through the Gardaí, had carried out some sort 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, therefore, the accused did not receive due process.

5.63 As mentioned already the *Juries Act 1976* does not provide for the vetting of a jury panel. However, section 16 (1) of the 1976 Act 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 the jury shall be entitled to a copy free of charge on application to the county registrar."

5.64 The Court of Criminal Appeal noted that the vetting process used in the trial was unclear and 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."⁹⁴ However, the Court held that it was sufficient to say that no authority was cited in the appeal that would prohibit the making of reasonable enquiries.⁹⁵ The Court of Criminal Appeal held that there was not a resultant prejudice to the applicants as the challenge was disallowed.

5.65 The comments of the Court of Criminal Appeal in the *Dundon* case indicates that there is a degree of uncertainty regarding the challenge for cause procedure. The Court of Criminal Appeal indicated that a party to a case is not prohibited from making reasonable enquiries about the suitability of a candidate juror for jury service. The Court found unconvincing the applicant's "equality of arms" argument in terms of resources.

5.66 The Commission notes that in Ireland the Oireachtas had put in place safeguards against jurors who may be corrupt or biased or intimidated. One

⁹³ [2007] IECCA 64.

⁹⁴ *Ibid.*

⁹⁵ The Court acknowledged that the challenge for cause may have arisen as a result of a mistake by a member of the Gardaí, as to the name of a particular juror with a known criminal.

such safeguard is the provision of majority verdicts, in section 25 of the *Criminal Justice Act 1984*.⁹⁶ A second, admittedly very different, safeguard is the threat of criminal sanction against disqualified or ineligible persons who serve on juries.⁹⁷ Given the judgment of the Court of Criminal Appeal, it could be argued that the vetting of jurors amounts to a normal function performed by the Gardaí, as the practice detects or indeed prevents the commission of a crime under the *Juries Act 1976*. The Commission has accordingly provisionally concluded that provision for vetting of juries, solely for the purpose of ensuring that disqualified jurors are not included on the empanelling list for jurors, be included in any reformed juries legislation. The Commission has also provisionally concluded that the Garda Central Vetting Unit alone should be empowered (as is currently the position) to provide information as to whether a potential juror is disqualified from jury service under any equivalent of section 8 of the *Juries Act 1976*.

5.67 *The Commission provisionally recommends that provision for vetting of juries, to ensure that disqualified jurors are not included on the empanelling list for jurors, be included in juries legislation. The Commission also provisionally recommends that the Garda Central Vetting Unit alone should be empowered to provide information as to whether a potential juror is disqualified from jury service.*

⁹⁶ In *O'Callaghan v Attorney General* [1993] 2 IR 17 the Supreme Court upheld the constitutionality of section 25 of the 1984 Act.

⁹⁷ The criminal sanctions are contained in section 36 of the *Juries Act 1976* as amended by the *Civil Law (Miscellaneous Provisions) Act 2008*.

CHAPTER 6 PEREMPTORY CHALLENGES AND CHALLENGE FOR CAUSE

A Introduction

6.01 In this chapter the Commission considers challenges to jurors, with particular emphasis on peremptory challenges. In Part B the Commission provides an overview of the law on juror challenges in Ireland as it was found in the *Juries Act 1927* and the extent to which this was altered in the *Juries Act 1976*. In Part C the Commission sets out a comparative analysis of the use of peremptory challenges and the reforms adopted in other States. In Part D the Commission outlines the arguments for and against the abolition of peremptory challenges. In Part E the Commission sets out its reform options and provisional recommendations.

B Irish law on challenges from the 1927 Act to the 1976 Act

(1) Challenges in the Juries Act 1927

6.02 As discussed in Chapter 1, above, historically there were two types of challenges to jurors, challenge to the array and a challenge to the polls. A challenge to the array involved a challenge to the entire panel of jurors; while a challenge to the polls involved a challenge to a specific member of the jury panel. Section 55 of the *Juries Act 1927* abolished challenges to the array. Section 56 of the *Juries Act 1927* also provided for the abolition of challenge to the polls, with the exception of where it was permitted in the 1927 Act. Although the 1927 Act did not confer, in formal terms, a power on the State to peremptory challenge, section 59 of the 1927 Act placed the common law power of the prosecution to “stand by” on a statutory footing.¹ Section 59 provided that the prosecution could “direct without cause shown any juror who has not been challenged to stand-by and thereupon such juror shall not then be sworn of the jury.” As this could be used in respect of an unlimited number of jurors, the effect of this statutory “stand by” power was similar in nature to the right of peremptory challenge. However, section 59 of the 1927 Act also provided that a

¹ The Commission has discussed in Chapter 1, above, the abuse of the Crown’s power to “stand by”, in particular during the 19th century.

person asked to “stand by” could be included in a jury if there was an incomplete jury at the end of the selection process.

(2) 1965 Report on Jury Challenges

6.03 In its 1965 *Report on Jury Challenges*,² the Committee on Court Practice and Procedure 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*,³ the Committee recommended that the system should be extended and that joint challenges be abolished. This would have the effect “that each party [in a civil action], and each accused person, would be enabled to challenge a given number of jurors without being restricted in any way by the challenges of a co-plaintiff, co-defendant or co-accused as the case may be.”⁴ The Committee recommended that, in that context, each party in a civil action, each accused and the prosecution should have five challenges without cause.⁵

6.04 As to the prosecution’s right to “stand-by” jurors, which as the Commission discussed in Chapter 1, above, had been abused in the 19th century to engineer “jury packing,” the Committee was “satisfied that the present right of the Attorney General⁶ to ‘stand-by’ jurors [in section 59 of the 1927 Act] is exercised properly and sparingly. No suggestion to the contrary has reached the Committee.”⁷ In light of its recommendation concerning challenges without cause, the Committee considered “that the special position of the Attorney General should be preserved. The Committee accordingly recommend that the right of the Attorney General to ‘stand-by’ jurors should be continued in

² 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 from pp.1-48, and the Fourth Interim Report *Jury Challenges* running from pp.51-55.

³ Discussed generally in Chapter 1, above.

⁴ Committee on Court Practice and Procedure, Fourth Interim Report *Jury Challenges* (Pr.8577, November 1965), at p.53.

⁵ *Ibid.*

⁶ At that time, the Attorney General was the prosecuting authority in major criminal trials. Since the enactment of the *Prosecution of Offences Act 1974*, this function has almost exclusively been a matter for the Director of Public Prosecutions.

⁷ Committee on Court Practice and Procedure, Fourth Interim Report *Jury Challenges* (Pr.8577, November 1965), p.53.

its present form.”⁸ One member of the Committee stated, in a Reservation to the Report, that the prosecution’s right to “stand-by” should not be retained in order to ensure equality between the prosecution and defence.⁹ In effect, this minority view was adopted in the *Juries Act 1976* which does not contain any equivalent of section 59 of the 1927 Act.

6.05 As to challenges for cause shown, the Committee considered that no general change should be made, but recommended that, in a trial where the circumstances “may have affected large numbers of persons” the trial judge should “remind members of the jury panel to disclose any interest which they may have in the case.”¹⁰

(3) ***Juries Act 1976***

6.06 Section 20 of the *Juries Act 1976* provides for peremptory challenges¹¹; while section 21 sets out the challenge for cause procedure.¹² The 1976 Act permits the prosecution and defendant, in all criminal trials, seven peremptory challenges. A peremptory challenge allows the prosecution or defence to object to any juror without requiring them to outline any reasons for the objection. Where a juror has been lawfully challenged without cause they will not be empanelled as a juror. As already indicated, the 1976 Act contains no equivalent of the provisions in section 59 of the 1927 Act concerning the prosecution’s right to “stand by” jurors. In that respect, under the 1976 Act, the prosecution and defence are on an equal footing.

6.07 Each accused person is entitled to seven peremptory challenges, therefore, when two accused persons are tried together they are entitled of 14 challenges and the prosecution is also entitled to seven challenges. There is a suggestion that the use of peremptory challenges can lead to inefficiency in jury

⁸ *Ibid.*

⁹ *Ibid.*, at p.55 (President of the District Court, Justice Cathal Ó Floinn),

¹⁰ Committee on Court Practice and Procedure, Fourth Interim Report *Jury Challenges* at p.54. The Committee was influenced in this respect by the issues that arose in *The People (Attorney General) v Singer* (1961) 1 Frewen 214, a trial involving what would now be described as an alleged “Ponzi scheme” in which a large number of people were said to have been affected. It emerged after the trial had begun that one of the jurors had been affected by the scheme in this case, which necessitated a re-trial. The defendant was found not guilty in the re-trial.

¹¹ Section 20 (1) of the *Juries Act 1976* provides for peremptory challenges in civil cases.

¹² Similarly section 21 (1) of the *Juries Act 1976* provides for challenge for cause in civil cases.

selection. Taking the example of two co-accused a panel of at least 33¹³ is required to empanel a jury of 12 jurors.

6.08 The prosecution and an accused are entitled to an unlimited number of challenges to jurors with cause shown under section 21 of the *Juries Act 1976*. Where a challenge for cause is made “such cause shall be shown immediately upon the challenge being made and the judge shall then allow or disallow the challenge as he shall think proper.”¹⁴ The challenge for cause procedure under section 21 of the *Juries Act 1976* appears to be seldom used.¹⁵ It would appear to the Commission from discussions leading to the preparation of this Consultation Paper that the majority of counsel, whether for the prosecution or the accused, prefer to rely on the peremptory challenge procedure.

6.09 The decision in *The People (Attorney General) v Lehman (No.2)*¹⁶ indicated that counsel cannot question a candidate juror with a view to establishing whether a right to challenge for cause could be exercised. Similarly the Divisional High Court held in *DPP v Haugh*¹⁷ that a trial judge did not have the power under the *Juries Act 1976* to question a candidate juror. In considering whether a trial judge had any power under the 1976 Act to request a jury to respond to a questionnaire in order to achieve an impartial jury Laffoy J stated:

“The implication of a power which would permit the trial judge or the parties to interrogate citizens, who apparently qualify for jury service, either *en masse* or individually if selected on the ballot is not open because it would run counter to the clear scheme of the Act of 1976.”¹⁸

6.10 In *R v Williams*¹⁹ the English Court of Appeal held that denial of the right to peremptory challenge was a sufficient ground to quash the subsequent criminal conviction. The advantage that peremptory challenges offer over challenges for cause is that they are less demanding, in that counsel do not have

¹³ 7 challenges from the prosecution + 7 challenges from first accused + 7 challenges from second accused + 12 other jurors = 33 panel. The jury pool required could be much larger if there are challenges for cause, or if jurors are excused for personal reasons.

¹⁴ Section 21 (3) of the *Juries Act 1976*.

¹⁵ See O’Malley *The Criminal Process* (Round Hall, 2009), Chapter 20.

¹⁶ [1947] IR 137 at 141.

¹⁷ [2000] 1 IR 184 at 204.

¹⁸ *Ibid.*

¹⁹ *R v Williams* (1925) 19 Cr. App. R. 67.

to publicly articulate their reasons for considering a juror unsuitable for jury service. It is normal practice for the judge empanelling juries in this jurisdiction to explain to jurors the peremptory challenge procedure, and that a challenge should not be taken personally. The New Zealand Law Commission noted that “[t]his takes most of the sting out of peremptory challenges, and the Commission would endorse this practice.”²⁰

C Comparative Overview of Challenges

(1) England and Wales

6.11 The *Criminal Justice Act 1925* provided for 25 peremptory challenges. This number was reduced by the *Criminal Justice Act 1977* to 3 challenges. The right of peremptory challenge was eventually abolished in England and Wales by way of the *Criminal Justice Act 1988*.²¹ Its abolition is suggested to be a response to a number of well publicised trials where co-accused defendants, pooled their peremptory challenges together, in order to select a jury that would be perceived to be more favourable to them.²²

6.12 For example, in a trial of eight Royal Air Force men in 1986, counsel for the accused allegedly agreed to use the right of peremptory challenge to ensure that the jury was composed young men.²³ The rationale for this was to exclude older men who may have served in the armed forces, as they were perceived as potentially unsympathetic to the defendants. All the defendants were acquitted by the jury, although the composition of the jury may not have been relevant to the acquittal. The Roskill Fraud Trials Committee recommended in its Report published in 1986 that peremptory challenges be abolished in fraud cases.²⁴ The decision to abolish peremptory challenges that subsequently followed has received much criticism. Particularly, because

²⁰ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) at 88.

²¹ Section 118 of the *Criminal Justice Act 1988*.

²² Lloyd-Bostock “The Jury in the United Kingdom: Juries and Jury Research in Context” in Davies, Lloyd-Bostock, McMurran, and Wilson *Psychology, Law and Criminal Justice: International Developments in Research and Practice* (1996) 349 at 353.

²³ This case involved criminal charges under the *Official Secrets Act*. For a discussion on this case see Gobert “The Peremptory Challenge - An Obituary” [1989] *Criminal Law Review*: 528.

²⁴ *Fraud Trials Committee Report* (London: 1986).

research conducted by Vennard and Riley for the Home Office found no evidence of co-accused pooling their peremptory challenges.²⁵

6.13 In England and Wales the Crown retains the right to stand jurors by. However, it can only do this in very narrow circumstances. According to a practise note the Crown can only use the power where:²⁶

- A properly authorised jury check, which is only carried out in cases connected to national security or terrorism, discovers information that justifies the use of the right to stand by, and the Attorney General personally authorises the standby;
- The candidate juror is clearly inappropriate and where the counsel for the accused agrees that the exercise by the prosecution of the right to stand by would be appropriate.

6.14 There has been no empirical research on peremptory challenges since their abolition. However, research was undertaken by the Royal Commission on Criminal Justice and published in 1993.²⁷ This research revealed that a 56% of defence barristers thought that peremptory challenges should be restored. According to the Royal Commission 56% of prosecution barristers, and a large majority of judges 82% did not favour the reintroduction of peremptory challenges.

(2) *Northern Ireland*

6.15 In contrast to the reform in England and Wales the right to peremptory challenge has been retained in Northern Ireland. The *Juries (Northern Ireland) Order 1996*²⁸ provides for peremptory challenges in both criminal and civil cases. Under section 15 of the 1996 Order, a person arraigned on indictment can challenge not more than twelve jurors without cause and an unlimited number of jurors for cause. Section 15(2) provides that the prosecution can challenge only for cause, while section 15(3) requires the trial judge to decide whether a juror should stand down following a challenge for cause.

²⁵ See Vennard and Riley "The Use of Peremptory Challenge and Stand By of Jurors and Their Relationship to Trial Outcome" *Criminal Law Review*: [1988] 731 at 732.

²⁶ Practice Note [1988] 3 All ER 1086.

²⁷ Zander and Henderson "Royal Commission on Criminal Justice: Crown Court Study" (London: HMSO, London, 1993).

²⁸ SI 1996/No.1141 (NI 6). The note "NI 6" indicates that, in the pre-1998 devolution setting, the 1996 Order in Council is the equivalent of an Act in Northern Ireland.

(3) *United States*

6.16 Problems associated with peremptory challenge have been considered for a long time in the United States of America. In *Strauder v West Virginia*²⁹ the US Supreme Court held that the legal exclusion of African Americans from jury service was unconstitutional. In *Swain v Alabama*³⁰ the Supreme Court held that a systematic use of peremptory challenge could violate the equal protection clause contained in the Fourteenth Amendment to the US Constitution. However, the Supreme Court set out a strict empirical test in order to support such a finding. The Supreme Court required that the defence would have to establish that the prosecution removed jurors who survived challenges for cause "... with the result that no Negroes ever serve on petit juries".

6.17 The Supreme Court addressed the strictness of the test in *Baston v Kentucky*.³¹ In this case a majority of the Supreme Court held that once a defendant argues a *prima facie* case of racial discrimination then the burden of proof is shifted to the State. The State is then required to provide a neutral explanation for the reasoning in challenging the juror.³² Race motivated peremptory challenges by an accused are similarly prohibited.³³ The case law was further developed in the United States in *JEB v Alabama*³⁴ where it was held that use of peremptory challenges to veto jurors on the basis of gender also constituted to a violation of the Equal Protection Clause in the US Constitution.

6.18 There is support both judicially and academically in the United States for the abolition of peremptory challenges.³⁵ The Supreme Court have certainly taken steps "towards eliminating the shameful practice of racial discrimination in the selection of juries". However, the Supreme Court has indicated that "[an]

²⁹ 100 US 303 (1880).

³⁰ 380 US 202 (1965). This decision has received much criticism and is believed by many commentators to be unjust. The case concerned a black defendant who was convicted of rape by an all white jury. The defendant was subsequently sentenced to death. The Supreme Court heard arguments that the prosecutor had used peremptory strikes against all of the black jurors, which resulted in empanelling an all white jury. The Supreme Court held that Swain's claim failed as a matter of proof.

³¹ 476 US 79 (1986).

³² In this regards a claim that a juror will be sympathetic to an accused on the basis of their shared ethnic origin will be rejected.

³³ *Georgia v McCollum* 505 US 42 (1992).

³⁴ 511 U.S. 127 (1994).

³⁵ See for example, "Peremptory Challenges: Technology Should Kill Them". 2004 (3) *Law, Probability and Risk* 1.

institution like the peremptory challenge... is part of the fabric of our jury system [and] should not be casually set aside.”³⁶ Bray argues that consideration of the hundreds of years of racism in the United States and “analyzing the reasons for maintaining this tool for racist practices provides ample support for “casting aside” the peremptory challenge in a way that is anything but “casual””.³⁷

(4) Canada

6.19 Section 634 of the Canadian Criminal Code sets out the law on peremptory challenges; while section 638 of the code sets out the law on challenges for cause. A juror may be challenged peremptorily whether or not the juror has been challenged for cause.³⁸ The prosecutor and the accused are each entitled to 20 peremptory challenges, where an accused is charged with high treason or first degree murder.³⁹ 12 peremptory challenges are available where the accused is charged with an offence where the sentence of imprisonment is a term exceeding five years.⁴⁰ Under section 634 2 (c) 4 peremptory challenges are available for all other offences. The Canadian Criminal Code also provides that where there are two or more counts in an indictment to be tried together, “... the prosecutor and the accused are each entitled only to the number of peremptory challenges provided in respect of the count for which the greatest number of peremptory challenges is available.”⁴¹ Where there are joint trials of two or more accused, each accused is entitled to the number of peremptory challenges to which the accused would be entitled if tried alone; and the prosecutor is entitled to the total number of peremptory challenges available to all the accused.⁴²

6.20 The use of peremptory challenges has not been without controversy in Canada. The *R. v Gayle*⁴³ decision was the first time an appellate Canadian court considered the use of peremptory challenges to impede the selection of racial minorities for jury service.⁴⁴ The Court in this case indicated in *obiter*

³⁶ See Burger C.J. *Baston v Kentucky* 476 US 79 (1986) at 113.

³⁷ Bray “Reaching the Final Chapter in the Story of Peremptory Challenges” UCLA Law Review 517 1992-1993 at 568.

³⁸ Section 634 (1) Canadian Criminal Code.

³⁹ Section 634 (2) (a) Canadian Criminal Code.

⁴⁰ Section 634 (2) (b) Canadian Criminal Code.

⁴¹ Section 634 (3) Canadian Criminal Code.

⁴² Section 634 (4) Canadian Criminal Code.

⁴³ (2001) 54 O.R. (3d) 36.

⁴⁴ For a discussion on this case see Morton “Two Conceptions of Representativeness in the Canadian Jury Selection process: A Case Comment on *R. v Gayle*”. *Toronto Faculty Law Review*: (2006) 105.

dicta that, where the Crown use of peremptory challenges to exclude minorities from jury service or undermine the representativeness of a jury, their actions will be subject to review and constraint.⁴⁵

(5) Australia

6.21 All Australian states provide for the right of peremptory challenge of jurors in their law. There has been some reform that has seen the number of peremptory challenges available reduced. In New South Wales both the defence and the prosecution can exercise the right of peremptory challenge. However, previously the prosecution were able to exercise the power to request jurors to "stand by". The accused is entitled to three peremptory challenges, and the prosecution is similarly entitled to three peremptory challenges for each person prosecuted. Thus, in a trial with two defendants, the accused are each entitled to three peremptory challenges, and the Crown would be entitled to six. The New South Wales Commission noted that this:

"...means that for that trial, excluding the possibility of additional challenges for cause, or the need to excuse individual jurors who show personal cause to be excused, a panel of at least 24 people is required in practice in order to empanel a jury of 12 people. For each additional accused, the size of the required panel must be increased by at least six more people. It may be necessary to have an even larger panel if the Crown and the prosecution agree to increase the number of peremptory challenges, although the fact of any such agreement is not normally known until a case is called on for trial."⁴⁶

6.22 The New South Wales Law Reform Commission considered the use of peremptory challenges as part of their review of jury selection.⁴⁷ The issue was also considered as part of the Commission's review published in 1987.⁴⁸ The New South Wales Commission considered the competing arguments in relation to the relevance of the right to peremptory challenge. The Commission in its Report from 1986 recommended its retention, in addition to a number of minor amendments.⁴⁹ In its review published in 2007 the New South Wales

⁴⁵ See (2001) 54 O.R. (3d) 36, Sharpe J. at 66.

⁴⁶ New South Wales Law Reform Commission *Report Jury Selection* (No 117 2007) at 173-174.

⁴⁷ New South Wales Law Reform Commission *Report Jury Selection* (No 117 2007) at 181.

⁴⁸ New South Wales Law Reform Commission *Report on Criminal Procedure: The Jury in a Criminal Trial* (No 48 1986) at 4.57-4.73.

⁴⁹ New South Wales Law Reform Commission *Report on Criminal Procedure: The Jury in a Criminal Trial* (No 48 1986) at 4.57-4.73. For example, the Commission recommended that challenges available to each defendant should be reduced from 20 in murder cases, and eight in other cases, to the current number. The

Law Reform Commission identified the following law reform alternatives to the complete abolition of peremptory challenge:⁵⁰

- not allowing trial counsel to agree to enlarge the permitted number of peremptory challenges;
- further reduction of the number of peremptory challenges, for example, to one per party, so as to cater for the case of someone who is manifestly unfitted to serve but who has not been excluded either in the lead up to empanelment or by the judge;
- removal of that right in civil jury trials since it is rarely, if ever, used; and
- removing the right in the case of special hearings involving defendants who have been found unfit to stand trial, where an election is made for jury trial (the default position being that such hearings are by judge alone).

6.23 The New South Wales Commission ultimately recommended that the right to peremptory challenge jurors should be retained.⁵¹ The rationale of the Commission was the general support that existed for the retention of peremptory challenge. The Commission stated that:

“... we confine ourselves to the suggestion that the ability of trial counsel to agree to an extension of the statutory number of challenges should be subject to leave being given by the judge, pursuant to application made before the date fixed for trial. This would have the advantage of avoiding the need for the Sheriff to assemble an unnecessarily large panel against the contingency of counsel agreeing to enlarge the number of challenges.”⁵²

6.24 It was also recommended that the continued availability of the right of peremptory challenge should be kept under review, to ensure that it does advance the fairness of trial by jury, and does not involve a distortion of the process.⁵³ The Commission in their Report identified a number of issues surrounding the use of peremptory challenge and suggested that the procedure

Commission also recommended that the Crown should be entitled an equal number of challenges available to the accused

⁵⁰ New South Wales Law Reform Commission *Report Jury Selection* (No 117 2007) at 180-181.

⁵¹ New South Wales Law Reform Commission *Report Jury Selection* (No 117 2007) recommendation 43 at 181.

⁵² New South Wales Law Reform Commission *Report Jury Selection* (No 117 2007) recommendation 43 at 181.

⁵³ New South Wales Law Reform Commission *Report Jury Selection* (No 117 2007) recommendation 44 at 181.

should be monitored and abolished if it is assessed not to serve any legitimate purpose.⁵⁴

6.25 In Victoria the three methods that exist to challenge a candidate juror are; peremptory right of challenge, challenge for cause and the Crown's right to stand aside. 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 the right in the Crown of peremptory challenge.⁵⁵ The Victoria Law Reform Committee also considered whether guidelines should be introduced regarding the use of standing aside by the Crown. The Committee concluded that there is a need for accessible guidelines governing the Crown's peremptory challenge of prospective jurors. It recommended that the Director of Public Prosecutions should publish guidelines on its use.⁵⁶

6.26 Under section 38 (a) of the *Juries Act 2000* the Crown has the right to stand aside 6 potential jurors, if only 1 person is arraigned in the trial; or 10 potential jurors⁵⁷, if 2 persons are arraigned in the trial; or 4 potential jurors for each person arraigned in the trial⁵⁸ where 3 or more persons are arraigned.⁵⁹ Under section 39 of the 2000 Act each accused person is allowed to challenge peremptorily 6 potential jurors⁶⁰, if only 1 person is arraigned in the trial; or 5 potential jurors⁶¹, if 2 persons are arraigned in the trial; or 4 potential jurors, if 3 or more persons are arraigned in the trial.⁶²

⁵⁴ New South Wales Law Reform Commission *Report Jury Selection* (No 117 2007) at 175.

⁵⁵ Parliament of Victoria Law Reform Committee Final Report Jury Service in Victoria (1996) recommendation number 80.

⁵⁶ Parliament of Victoria Law Reform Committee Final Report Jury Service in Victoria (1996) recommendation number 81.

⁵⁷ Under 38 (b).

⁵⁸ 38 (c).

⁵⁹ Under the Act the requirement to stand aside must be made as the potential juror comes to take his or her seat and before he or she takes it and a candidate juror who has been required to stand aside by the Crown under this section 38 continues to be a member of the panel selected or allocated by the pool supervisor for the trial.

⁶⁰ Under section 39 (a).

⁶¹ 39 (b).

⁶² 39(c).

(6) Hong Kong

6.27 In Hong Kong both the defence and prosecution are entitled to challenge up to five jurors without cause, or an unlimited number of jurors where cause is shown.⁶³ The prosecution is entitled to "stand-by" candidate jurors, so that they can consider the challenge until the panel of jurors is exhausted. Section 6 of the *Jury Ordinance* provides that a juror who is not qualified or liable to serve as a juror, or is exempt from service, may be challenged. In Hong Kong the Court has considerable discretion in excluding persons from jury service during the trial, at any time prior to the verdict. The court can discharge a juror if it considers that the discharge is in the interests of justice or in the interests of the juror to do so.⁶⁴ The Law Reform Commission of Hong Kong produced a Consultation Paper in 2008 that considered reform to the *Jury Ordinance*.⁶⁵ However, the Commission did not make any recommendations for law reform in this area.

(7) New Zealand

6.28 Under section 24 of the *Juries Act 1981* the prosecution and defence are entitled to use peremptory challenges without giving any reason for its use. The prosecution and defence can each challenge 6 potential jurors without cause. In trials involving more than one defendant, the Crown has a maximum of 12 challenges, while defence counsel may challenge 6 potential jurors for each defendant. Under section 27 of the *Juries Act 1981* a trial judge can direct a potential juror to stand by until all the other jurors are called and challenged.⁶⁶ This normally occurs where the potential juror advises the judge of a difficulty, or following an application of one of the parties where the opposing party consents. The trial judge may also stand by jurors on his or her own initiative when satisfied that it is in the interests of justice to do so. This power does not impose any limit in terms of the number of potential jurors that can be stood by. This power is similar to the right of peremptory challenge in that the trial judge is not required to outline the reasoning for standing by.

6.29 The New Zealand Law Commission considered peremptory challenges as part its review of the jury system in 2001.⁶⁷ In its *Discussion Paper on Juries in Criminal Trials* it stated that in its view "... it cannot be

⁶³ Section 29 *Jury Ordinance* (Cap 3).

⁶⁴ Section 25(1) *Jury Ordinance* (Cap 3).

⁶⁵ Law Reform Commission of Hong Kong *Consultation Paper on Criteria for Service as Jurors* (2008).

⁶⁶ For a discussion on this see New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials Part One*, 32-1999 at 93.

⁶⁷ See New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69- 2001) chapter 7, 83-97.

demonstrated that the exercise of peremptory challenges meets any of its purported rationales.⁶⁸ The New Zealand Law Commission considered a number of law reform options in relation to peremptory challenges.⁶⁹ These included abolishing the peremptory challenge together with modifying the challenge for cause, and providing better information for the exercise of challenges; reducing the number of peremptory challenges; providing guidelines for the exercise of peremptory challenges; reforming the practice of jury vetting.⁷⁰ However, in its Report the Commission recommended that peremptory challenges should be retained. The Commission considered that peremptory challenges permit the defence to eliminate persons they perceived, rightly or wrongly, to be potentially prejudiced against the defence and this provided the defendant with a measure of control over the jury composition. It was considered that if this measure was removed, an accused might view subsequent conviction as being unjust. It was acknowledged that peremptory challenges allow prosecutors to eliminate, speedily people considered to be biased or prejudiced and exclude “obvious misfits”.

6.30 The New Zealand Law Commission also identified the affording to the accused a degree of influence regarding the composition of the jury as an important rationale underlying peremptory challenges.⁷¹ The commission also pointed out that this degree of control enabled greater acceptance of the jury's verdict as fair.⁷² The New Zealand Commission noted that if the right of peremptory challenge was abolished the challenge for cause procedure would need to be used with greater frequency. However, the Commission suggested that its use would not necessarily be to the extent as in the United States.⁷³ The Commission expressed the view that a system that involved more challenges for cause would significantly add to the length and cost of a trial.⁷⁴ It also suggested that it would encourage the growth of a trial consulting industry and that could result in the invasion of the privacy of jurors.⁷⁵ As such the Commission considered that prohibition of peremptory challenge was only

⁶⁸ For a discussion on this see New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials Part One*, 32-1999 at 93 100.

⁶⁹ *Ibid.* at 86.

⁷⁰ *Ibid.*

⁷¹ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) chapter 7, at 85.

⁷² *Ibid.*

⁷³ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) chapter 7, at 87-88.

⁷⁴ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) chapter 7, at 88 and 96-97.

⁷⁵ *Ibid.*

acceptable where there was a manifest need for it, which they considered was not the case.⁷⁶ A senior member of the judiciary made the following submission to the Law Commission:

“I was in practice in the Criminal Courts for 20 years and was a Judge for 30 years and the challenge for cause has only been used once in Auckland to my recollection. The reason is that it is too risky unless one can prove something which is 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.”⁷⁷

6.31 The New Zealand Commission also considered whether there should be guidelines governing the use of peremptory challenge. The submissions received by the Commission did not support the introduction of strict guidelines, as there would be no way in which to monitor whether the guidelines were adhered to. It was also identified that peremptory challenges, by their definition are challenges without cause, therefore, the suggestion of introducing guidelines as such was contradictory. The Commission recommended that such guidelines should not apply to the defence. However, the Commission considered that “... for the purposes of prosecution counsel, the Solicitor-General’s Prosecution Guidelines be amended to include an explanation of the bases on which it is or is not appropriate to use the peremptory challenge.” The Commission concluded that binding guidelines regarding the use of peremptory challenge was unnecessary and unworkable. However, the Commission stated that the guidelines should contain an explanation of the grounds on the use the peremptory challenge was appropriate.

6.32 The New Zealand Commission considered a reduction in the number of peremptory challenges. The majority of the submissions received by the New Zealand Commission opposed this reform option, especially as there was little evidence available that suggested that the reform would address the issue.⁷⁸ The Commission formed the opinion that a reduction in the number of peremptory challenges “... would probably do no harm”; it nevertheless decided not to recommend a reduction from the 6 challenges available under New Zealand law.⁷⁹ The Commission stated that it would not support such a change

⁷⁶ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) chapter 7, at 88.

⁷⁷ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) chapter 7, at 88-89.

⁷⁸ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) chapter 7, at 90.

⁷⁹ *Ibid*, at 91.

even in cases with multiple defendants because although defendants are sometimes tried together for the sake of convenience, they usually each have their own counsel and they must each retain equal rights.⁸⁰ The New Zealand Commission also considered whether a trial judge should be empowered to discharge a jury, when peremptory challenges have been exercised in a way that created a potential for unfairness.⁸¹ The New Zealand Commission felt that clarification and codification of this power would be beneficial. It noted that all submissions were opposed to this proposal, as the trial judge would have no actual information on which to make such a ruling. The Commission formed the opinion that a specific power of this nature was unnecessary. However, the Commission did recommend elsewhere in the Report to expand the power of a trial judge to discharge a jury.

(8) Summary

6.33 The reviews of the jurisdictions discussed above reveals that reform of the law on peremptory challenges has resulted in different approaches. Law reform agencies have tended not to recommend abolition of peremptory challenges; instead they have opted to recommend a reduction in the number of peremptory challenges, the use of guidelines, or recommended no change in the law at all.

D Peremptory Challenges: The Arguments For and Against

6.34 The literature on peremptory challenge and the submissions that the Commission received from its consultation on the *Third Programme of Law Reform* and preliminary consultations identified that they can impact upon the process of juror selection in harmful ways. The current President of the UK Supreme Court, Lord Phillips, commenting in 1996 on the abolition of peremptory challenges noted that jury selection had become a quick and straightforward process. Lord Phillips stated:

“The peremptory challenge when used to attempt to tailor a jury having regard to the perception of defence counsel as to the type of juror who would or would not be favourable to the defence case or the defendant was inappropriate, unattractive and, I suspect, usually misguided.”⁸²

⁸⁰ *Ibid.*

⁸¹ The New South Wales Commission argued that this power already existed, deriving from the intrinsic authority of the court, although the power was seldom used in Australia.

⁸² Phillips “Challenge for Cause” (1996) 26 *Victoria University of Wellington Law Review* 479.

6.35 However, Lord Phillips did identify one problem in relation to the abolition of the right of peremptory challenge.

"Sometimes one has only to look at a juror, or to hear the manner in which the oath is read, to appreciate that the juror is totally unsuitable to be entrusted with the responsibility for determining a verdict or any responsibility. In the past defence counsel could be expected to challenge such a juror. In a recent case, it was only the combined weight of defence counsel that persuaded prosecuting counsel that it was appropriate for the prosecution to exercise their right to stand by such a juror. It is certainly easier and less embarrassing for the defence to exclude the obviously inadequate juror by peremptory challenge."⁸³

(1) *Arguments for the Abolition of Peremptory Challenges*

(a) *The potential of peremptory challenges to cause juror frustration and humiliation*

6.36 Peremptory challenges can frustrate candidate jurors and challenges may also cause embarrassment and offence. Indeed a juror may feel that their character is being called into question or that they are in some way unrepresentative of the general community.⁸⁴ Where a juror is peremptorily challenged the juror is likely to feel that his or her time has been wasted. This is particularly the case where a jury has been waiting a number of hours in court in response to their summons. As peremptory challenges are exercised in open court, this adds to the sense of humiliation. The implication of this is that these jurors may be less enthusiastic about jury service and unwilling to attend for jury service in the future if summonsed.

(b) *The arbitrary nature of the challenge*

6.37 Research on peremptory challenges suggests that it is extremely difficult, if not impossible, for counsel to forecast the beliefs, morals and attitudes of a candidate juror on the basis of gender, age or ethnic origin.⁸⁵ The complex dynamics of jury deliberations means that it is extremely difficult to predict the verdict of juries. It is also contended that peremptory challenge does not provide a procedural safeguard in achieving an impartial jury, due to the fact that it entails haphazard challenges. Therefore, an argument that peremptory

⁸³ *Ibid.*

⁸⁴ New South Wales Law Reform Commission *Report Jury Selection* (No 117 2007) at 176.

⁸⁵ See for example, Kagehiro and Laufer (eds), *Handbook of Psychology and Law* (Springer-Verlag, New York, 1992).

challenges should remain as they are perceived as a procedural safeguard that ensures a rigorous process of jury selection is inaccurate.

(c) *The inefficiency of Peremptory Challenges*

6.38 The Commission is not aware of any empirical research in this jurisdiction which has examined the prevalence of peremptory challenges. During the preliminary consultations on this Consultation Paper legal practitioners identified the frequent use of the right of peremptory challenges.⁸⁶ A high prevalence of peremptory challenge impacts upon the efficiency of jury selection as it means that a larger jury pool is required to select juries. This adds to the overall cost of jury selection due to the additional administrative costs, and the additional juror summons required quite apart from the cost of days lost at work for the economy generally.

(d) *Peremptory Challenges do not create representative juries and provide scope for discrimination*

6.39 In jurisdictions such as the United States peremptory challenges have been criticised for facilitating discrimination against persons from minority groups. It has been identified that prosecutors may use peremptory challenges to exclude persons from the same minority group as the accused, as they fear that the juror may be sympathetic to the accused. For example, the New Zealand Law Commission identified that prosecutors were more likely to challenge persons of Māori heritage.⁸⁷ These challenges were often based on assumptions, stereotypes and prejudices.⁸⁸ It is also noteworthy; counsel for an accused person may attempt to exclude candidate jurors belonging to the majority group from jury service.⁸⁹ As O’Malley identified, there is a concern that peremptory challenges are used by the defence in cases dealing with sexual offences, to exclude a particular gender from the jury.⁹⁰ However, it can be argued that any imbalance can be addressed by the prosecution through the use of their peremptory challenges under the *Juries Act 1976*. However, this argument only holds up where there is one defendant, as several defendants when tried together can distort the gender balance of the jury completely.⁹¹

⁸⁶ In New Zealand research indicated that 36.5% of balloted candidate jurors were peremptorily challenged by the defence and prosecution.

⁸⁷ New Zealand Law Commission *Report on Juries in Criminal Trials* (Report 69-2001) at 84.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ See O’Malley *The Criminal Process* (Round Hall 2009), Chapter 20.

⁹¹ *Ibid.*

6.40 As people from ethnic minority groups are less likely to be on a jury panel, it has been argued that peremptory challenges are a very effective way to exclude them from juries. Peremptory challenge will be to the advantage of counsel wishing to exclude minority representation on the jury. This can be done to disadvantage either the accused or complainant, as a minority representation would be perceived to favour them. It can also be argued that a jury selected purely at random from a jury panel is likely to be more representative than one produced following the exercise of 12 peremptory challenges. Peremptory challenges if abolished would prevent the defence and prosecution from excluding candidate jurors for racial, social or gender reasons. Its abolition would also ensure that counsel for both the defence and the DPP would clearly set out proper reasons under a reformed challenge for cause procedure. As the New Zealand Commission identified this would "... eliminate the advantage of counsel who seek to exclude members of minorities over counsel who seek to include them, thereby better protecting the interests of minority groups by improving their representation on juries."⁹²

(e) *The exploitation of peremptory challenges by potential jurors*

6.41 From preliminary discussions by the Commission with criminal law practitioners there is some anecdotal evidence that some potential jurors may seek to provoke peremptory challenges in order to avoid jury service. It has been suggested that some jurors may dress or act in a particular way that will result in a challenge without cause. It has also been suggested that a well dressed candidate juror, for example wearing a suit, is more likely to be peremptorily challenged by counsel for the defence, while it has been suggested that a "dressed down" juror is more likely to provoke a challenge without cause from the prosecution.⁹³ It has also been suggested that a juror wearing the Fáinne or a Pioneer badge are likely to encourage a peremptory challenge.⁹⁴

⁹² New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials Part One*, 32-1999 at 101.

⁹³ This approach in avoiding jury service is not confined to this jurisdiction. The New South Wales Law Reform Commission acknowledged that wearing a Services League badge or a business suit would almost certainly attract a defence challenge, unless the accused was a returned member of the Defence Forces or a business person. The Commission noted that more extreme behaviour and dress may now be required to encourage a challenge, however, it acknowledged that the potential for this remains. See New South Wales Law Reform Commission *Report Jury Selection* (No 117-2007) at 179.

⁹⁴ The Fáinne is the name of a pin badge worn to show fluency in the Irish language, or a willingness to speak it. The Pioneer badge is worn by members of the Pioneer Total Abstinence Association of the Sacred Heart, indicating a commitment to abstain from alcohol for life.

(f) *Challenge for cause is a sufficient alternative to meet the needs of justice*

6.42 Peremptory challenges are fundamentally an arbitrary exercise that is reliant upon guesswork and uncertain mythologies as to those who may best react to the case of the prosecution or defence.⁹⁵ This does not ensure that a fair, impartial, or representative jury is selected and empanelled. It can be argued that peremptory challenges may have the opposite effect. As such the most appropriate way to challenge jurors is to do so where there is cause.

(g) *Peremptory challenge is an ineffective tool in weeding out biased jurors*

6.43 It has been suggested during the Commission's discussion with practitioners that peremptory challenges have been used not only to eliminate biased jurors, but also to empanel juries that are perceived to be more sympathetic to the counsel exercising peremptory challenges. The argument can be made that peremptory challenges are used by both counsel for the defence and prosecution, and as a result a balance is struck. However, it is suggested that such an argument fails to consider the difference in information and resources available to both sides.⁹⁶ Indeed, such an argument also fails to consider that peremptory challenges have been used to great effect in empanelling biased jurors in the United States, discussed above. It is also the case that often little is known about candidate jurors. In Ireland the name, address and perhaps the occupation of the juror is all that is known. As such the appropriateness of peremptory challenges as an effective tool in weeding out biased jurors is doubtful.

(2) *Arguments against the Abolition of Peremptory Challenges*

(a) *Challenge for cause is not a sufficient alternative to peremptory challenge in meeting the needs of justice*

6.44 It has been argued that challenge for cause is ineffective and can on occasion be an inappropriate way to challenge jurors. It has also been suggested that members of the judiciary can be hostile to use of challenge for cause. In this regard peremptory challenges are an important remedial action where a judge refuses to grant a challenge for cause. Peremptory challenges are an important tool in ensuring justice and provide an easy remedy where there is judicial error in refusing to grant a challenge for cause. Additionally, it is difficult to provide evidence to support a challenge for cause and this may result

⁹⁵ New South Wales Law Reform Commission *Report Jury Selection* (No 117-2007) at 177.

⁹⁶ See for example, Gobert "The Peremptory Challenge - An Obituary" [1989] *Criminal Law Review*: 528 at 529-530.

in greater inefficiency and cause embarrassment for jurors. As such the abolition of the right of peremptory challenge is undesirable.

(b) *The involvement of the accused in the use of peremptory challenges*

6.45 Another reason for the retention of peremptory challenges is the confidence inspired in the accused as a result of the control afforded to the accused and his counsel over the composition of the jury.⁹⁷ It has been suggested that this is beneficial as it inspires confidence in both the defendant and the public as regards the jury, the soundness of its verdict and in the criminal justice system as a whole. While faith and confidence in the verdicts of juries is important and desirable, measuring confidence presents difficulties, particularly in measuring it in respect of peremptory challenges. The New Zealand Law Commission acknowledged that:

“... in the absence of any unfettered input – save the number of challenges – criticism may be expected from those disappointed by jury decisions. Such criticism may be difficult to counter against the backdrop of a right removed, unless the removal of the right were undertaken for pressing reasons.”⁹⁸

6.46 The New South Wales Law Reform Commission noted in their Report the value of the right “... lies in its participatory aspect, so far as it theoretically allows the defendant to have an involvement in the empanelment.”⁹⁹ However, these arguments are based on an assumption that an accused has input into the peremptory challenge process. It has been suggested that the accused very often has little input into the process or is uninterested in the process. It has also been suggested that peremptory challenges are “... a survival from earlier conditions in which a litigant could be expected to have general knowledge of most jurors’ reputations”¹⁰⁰. This refers to the origins of the challenge which are not relevant today.

⁹⁷ This was identified by the New Zealand Law Commission in their work on the criminal jury.

⁹⁸ New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials Part One*, 32-1999 at 99.

⁹⁹ New South Wales Law Reform Commission *Report Jury Selection* (No 117-2007) at 177 and NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, (No 48-1986) 4.59-4.68.

¹⁰⁰ Cornish, *The Jury* (Allen Lane, The Penguin Press, 1968) at 47 cited in New South Wales Law Reform Commission *Report Jury Selection* (No 117-2007) at 180.

(c) *Peremptory challenge can assist in securing a representative jury*

6.47 It has been argued that peremptory challenge allows defence counsel to try to improve representation of minorities who are possibly excluded or under-represented in the selection process. There is evidence that in the United Kingdom before peremptory challenges were abolished, the procedure was one way in which the prosecution and defence collaborated in increasing the numbers of people from ethnic minority groups on juries. There is no evidence that a similar approach has been used in Ireland. Equally there is no evidence that peremptory challenges have been used to exclude people from minority groups from jury service.

(d) *Peremptory challenges ensure that competent and impartial jurors are selected*

6.48 The removal of candidate jurors that are biased is one of the most significant arguments for the retention of peremptory challenges. It is suggested that peremptory challenge is one of the principal safeguards in achieving an impartial jury.¹⁰¹ Supporters of the peremptory challenge such as Gobert argue that lawyers through experience are able to identify jurors who are biased.¹⁰² The New Zealand Law Commission pointed out the belief that biased jurors can or are removed through the exercise of the peremptory challenge is likely to be important to the accused and the general public.¹⁰³

E The Commission's View

(1) *Peremptory Challenge*

6.49 In other jurisdictions it has been identified that a removal of the right of peremptory challenge would require the introduction of another procedure to enable the elimination of biased candidate jurors. An obvious approach would be to reform the challenge for cause procedure in a way that would make it easier to use and more effective. However, the Commission considers that use of challenge for cause is difficult to do in open court where there is a risk of intimidation.¹⁰⁴ The lack of reliable information on candidate jurors explains the popular use of peremptory challenges, as it circumvents having to set out reasons for the challenge. The New Zealand Commission considered that

¹⁰¹ See for example, Gobert "The Peremptory Challenge - An Obituary" [1989] *Criminal Law Review*: 528.

¹⁰² *Ibid.*

¹⁰³ New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials Part One*, 32-1999 at 100.

¹⁰⁴ See for example *The People (DPP) v Dundon & Others* [2007] IECCA 64.

"better information about potential jurors available to both counsels on an equal basis, would be essential to any effective reform of the challenge for cause procedure."¹⁰⁵ To that end the use of questionnaires and limited questioning of candidate jurors would provide counsel for the prosecution and defence with information on which to challenge jurors. However, the Commission is not in favour of such a reform as it would serve to defeat some of the rationale behind any recommendation of abolishing peremptory challenges. For example, the improvements in terms of efficiency and cost would not only be eroded but possibly increased. Additionally, it is foreseeable that if challenge for cause was the only procedure available to counsel then they would seek to expand the procedure. In *DPP v Haugh*¹⁰⁶ the Divisional High Court held that a trial judge did not have the power to instruct jurors to complete questionnaires. Laffoy J stated:¹⁰⁷

"... it would only be appropriate to imply such a power [from the *Juries Act 1976*] if one could conclude that it would be efficacious in fulfilling the objective of producing an impartial jury. In the absence of any sanction to ensure any compliance, let alone proper or truthful compliance, with the request, no such conclusion is open... [T]he scheme of the Act of 1976 is to repose trust in a citizen called on to do jury service to self-assess his qualification and competence, which, in my view, includes his capacity to render an impartial verdict, and rely on his integrity".

6.50 The Commission considers that peremptory challenges permit the defence to eliminate persons they perceive rightly or wrongly, to be potentially prejudiced against the defence, giving the defendant a measure of control over the jury composition. If this measure were removed, an accused might view their subsequent conviction as being unjust. The Commission believes that peremptory challenges also allow the prosecutor to efficiently eliminate persons perceived to be biased or prejudiced. The preliminary consultations undertaken by the Commission on this project indicate that there is broad support for the retention of peremptory challenges among the legal profession. The Commission considers that a removal of the right of peremptory challenge may also conflict with the Constitutional guarantee under Article 38.5. The Commission has identified that there has been a trend in reducing the number of peremptory challenges available to counsel. The Commission acknowledges that there is merit on both sides of the arguments advanced for the abolition and retention of peremptory challenges.

¹⁰⁵ New Zealand Law Commission *Discussion Paper on Juries in Criminal Trials Part One*, 32-1999 at 102.

¹⁰⁶ [2000] 1 IR 184.

¹⁰⁷ *Ibid* at 204.

6.51 However, Commission considers that a reduction of the number of challenges available to both the prosecution and the defence is a desirable law reform option. This approach allows counsel to exclude jurors they perceive to be biased, while simultaneously making it more difficult for the manipulation of the racial or gender composition of a jury. Consideration needs to be given to the appropriate number of peremptory challenges that ought to be permitted. The Commission provisionally forms the view that a reduction of seven peremptory challenges to five may be appropriate but invites submissions on this suggested reform. It is the Commission's view that any reduction should apply to the number of peremptory challenges available to the defence and prosecution.

6.52 *The Commission provisionally recommends that peremptory challenges should be retained.*

6.53 *The Commission invites submissions as to whether the number of peremptory challenges should be reduced from seven.*

(2) Challenge for Cause

6.54 While the Commission has acknowledged that the challenge for cause provision is rarely used the Commission considers that this procedure continues to serve an important purpose, in particular in circumstances where the defence or prosecution exhaust all their peremptory challenges. The Commission adds that it concurs with the view expressed by the Divisional High Court in *DPP v Haugh*¹⁰⁸ that permitting the questioning of candidate jurors by means of a written questionnaire would not be a desirable or necessary law reform, and considers that peremptory challenges should continue to be the primary procedure for the challenge to candidate jurors.

6.55 *The Commission provisionally recommends that the challenge for cause procedure should be retained in its current form.*

6.56 *The Commission provisionally recommends that the questioning of candidate jurors by means of a written questionnaire as a method of informing the process of challenge for cause should continue to be prohibited.*

(3) Guidelines on the use of Peremptory Challenge

6.57 The Commission does not consider that the development of statutory, enforceable, guidelines on the use of peremptory challenge would be a useful reform as there would be no clear basis on which to monitor compliance with the guidelines, as such challenges by their definition are challenges without cause. However, the Commission does consider that guidelines may be useful in assisting counsel in making a decision on whether it

¹⁰⁸ [2000] 1 IR 184.

is appropriate to make a peremptory challenge. The Commission is of the view that such guidelines should only apply to the prosecution and not to the defence.

6.58 *The Commission provisionally recommends that the Director of Public Prosecutions should develop guidelines on when it is appropriate for counsel for the prosecution to use peremptory challenges.*

CHAPTER 7 PAYMENT FOR JURY SERVICE

A Introduction

7.01 In this Chapter the Commission discusses the issue of remuneration of jurors. The issue arises in two ways. First, who bears the cost of an employee's absence from work during jury service, and secondly, who bears the cost of out of pocket expenses incurred by jurors by having to attend jury duty? In Ireland, employers are obliged to pay employees whilst they are on jury service and there is no system for out of pocket expenses which must be borne by the juror.

7.02 The question of juror expenses was raised in the Oireachtas debate on the amendments made to the *Juries Act 1976* in what became the *Civil Law (Miscellaneous Provisions) Act 2008*. The issue was also raised with the Commission during the public consultation on the Commission's *Third Programme of Law Reform 2008-2014*. The Commission considers how jury service can be further valued in terms of arrangements to address possible financial hardship for jurors, especially those who are not employees.

B Employers and jury service

7.03 Section 29 of the *Juries Act 1976* provides that:

“(1) For the purposes of any contract of service or apprenticeship or any agreement collateral thereto (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 is absent from his 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.”

7.04 Section 29 essentially provides that the time spent on jury service is to be treated as if the employee were actually employed. Therefore, persons in

employment who attend for jury service are entitled to be paid while they are away from work.¹

7.05 It has been argued that the financial burden of jury service should not be placed upon employers 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 State². The New Zealand Law Commission was of the opinion that this issue was a matter for policy determination.³ They described the question of who should pay for an acknowledged social benefit as a "... vexed political issue". However, the New Zealand Commission did acknowledge that putting the cost on to employers for long periods of jury service placed a significant burden on them, particularly in respect of small businesses. There is a concern that employers may seek to have their staff excused from jury service rather than paying for their employees' absence. This raises concerns in terms of achieving a representative jury.

7.06 In 2008 the Central Statistics Office's figures for employment indicated that 56% of employment in Ireland was in small business environments.⁴ In total 1,175,800 people worked at small workplaces and 839,300 were employees in these small businesses.⁵

7.07 An employer may have to incur substantial additional loss through hiring a temporary replacement or paying overtime to other employees as a result of a colleague being engaged in jury service. The New South Wales Law Reform Commission received a number of submissions as part of their review calling for payments to be made to employers who suffer these types of financial loss.⁶ While the NZ Commission acknowledged that there was some attraction in making provisions for such employers, ultimately it was not in favour of recommending such a reform.

7.08 The rationale behind the New South Wales Law Reform Commissions approach was that the financial hardship caused to an employer

¹ There should be no loss of any other employment rights while a person undertakes jury service. The County Registrar will provide a certificate of attendance on request. See www.courts.ie.

² Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 219.

³ New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001) at 188.

⁴ "Small Business in Ireland" (Central Statistics Office, May 2009). Available at: http://www.cso.ie/newsevents/pr_smallbusireland08.htm.

⁵ *Ibid.*

⁶ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 229.

could be cited as a reason for making an application to be excused for good cause. Such an application would be considered favourably where a trial was envisaged to be lengthy. The Commission also considered that small businesses or private practices frequently hired locums or replacement staff for reasons other than jury duty, such as illness and holidays. As such the Commission could not "... see any justification for treating jury duty as other than a normal workplace event, whether the juror be an employee, or a person in private practice, or a principal of a small business."⁷ The Commission considered as a preferable solution, extending the exemption from jury service to any employee of a small business who had served jury duty in the previous 12 month period. Such an approach would go some way towards addressing the inconvenience or expenditure suffered by employers and at least allow it to be regarded as a once-off liability.

C Small Business Owners and Self-employed Jurors

7.09 The issue of loss of income is particularly relevant to small business owners and self-employed persons. The international evidence suggests that candidate jurors from these categories often cite the financial hardship that jury service would cause in support of an application to be excused from jury service.⁸ While there is no research in this jurisdiction that details the prevalence of this problem, anecdotal evidence seems to support the suggestion that excusals granted on account of economic hardship, is a significant issue and that self-employed people are underrepresented. The Director of Public Prosecutions has referred to the overrepresentation of unemployed persons on juries in this jurisdiction.⁹

7.10 It would be desirable to increase the numbers of self-employed persons participating in jury service. The data on self-employed persons from the Central Statistics Office indicates that in Ireland in 2008; 216,600 persons were self-employed and 107,900 are self-employed with employees, which is a significant number of persons that could potentially enhance the jury pool.¹⁰ The decision on remuneration for jury service is ultimately a policy decision for Government. However, given the financial burdens placed on self-employed persons and the potential benefit of increased participation in jury service,

⁷ Law Reform Commission for New South Wales *Report on Jury Selection* (No 117 2007) at 230.

⁸ 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.

⁹ *The Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights* (Direct of Public Prosecutions (DPP) comments 8/12/2003).

¹⁰ These figures include farming and the public sector, as well as business sectors.

consideration should be given to ways in which the participation of self-employed persons can be encouraged.

7.11 One way of alleviating the burden would be through the use of tax credits. A person ordinarily resident and domiciled in Ireland who is liable to pay income tax is entitled to claim certain tax credits and deductions. A tax credit could be made available to self-employed jurors. Such a tax credit could be based on length of jury service and could allow them to deduct the cost to them or to their business of the days lost through jury duty.

7.12 There are a number of difficulties with this proposition. Firstly, self employed persons and small businesses that are not earning above a taxable income would get no allowance for jury service at all. Such people are the least able to bear any additional cost and would therefore still be excluded from the jury system. Secondly, a tax credit system would effectively pass the financial burden of jury duty back to the State.

7.13 A better solution would be the use of insurance to protect employers and the self employed from losses incurred because of jury service. A number of insurance companies provide, as part of their general insurance cover, remuneration for selection for jury service. This cover can arise as part of a home cover policy or a legal protection policy. This policy will pay salary or wages for the time that a policyholder is off work while on jury service. The cover extends to each half or whole day lost in circumstances where a person cannot recover the costs from his or her employer and includes time spent travelling to and from the courts.

7.14 It would be desirable for both self-employed persons and employers to avail of cover for loss of earnings arising out of jury service as part of their general insurance cover in the same way as they protect against other eventualities such as sickness or injury. The full cost of the premiums paid would be tax deductible and therefore the actual cost would be spread over the entire employer community instead of falling on the employers or self-employed persons actually engaged in jury trials. This could potentially enhance the participation of self-employed and professional persons in jury service and would reduce the validity of the financial loss argument when seeking excusal. Whilst the Commission does not consider that it would be appropriate to require mandatory insurance in this context, it would recommend that financial loss be recognised by the courts as something that is capable of being mitigated and therefore not a reason for repeated excusals.

7.15 *The Commission invites submissions on the provision of a tax credit to self-employed persons summoned for jury service.*

7.16 *The Commission invites submissions on the use of insurance cover for jury service as a means of alleviating the potential injustice of requiring*

employers and the self employed to carry the cost of jury duty and as a means of limiting the use of the financial hardship argument when seeking excusals.

D Payment for Jury Service

(1) Committee on Court Practice and Procedure

7.17 The 1965 Report of the Committee on Court Practice and Procedure *Jury Service* recommended that jurors “should be remunerated on a reasonable basis [and that] this cost should be borne by the State.” The Committee recommended that this should include any overnight accommodation certified by the trial judge.¹¹ This was not implemented in the *Juries Act 1976*.

(2) Juries Act 1976

7.18 Under the *Juries Act 1976* there is no provision for compensating jurors who are summoned for or subsequently selected for jury service. There is no compensation available to meet the expenses incurred by jurors apart from lunch and hotel accommodation when necessary. Section 29 of the *Juries Act 1976* provides that the time spent on jury service is to be treated as if an employee were actually employed. In the same way, anybody in receipt of social welfare will continue to receive their full payment during jury duty. The position in Ireland is that any out of pocket expenses incurred have to be carried by the juror him or herself. This can be a heavy burden for persons on limited income and could in some cases make it impossible for them to participate in the jury system.

(3) Comparative analysis of payment for jury service

7.19 The comparative analysis set out below explores how different jurisdictions have dealt with paying expenses to jurors. These jurisdictions do not have the same policies with regard to juror's remuneration and therefore some jurors will be entirely dependent on expenses for recouping the cost of service whilst for others, expenses are only intended to cover out of pocket costs.

¹¹ Committee on Court Practice and Procedure, Second Interim Report *Jury Service* (Pr.8328, March 1965), p.14. The Report is discussed in detail in Chapter 1, above.

(a) Northern Ireland

7.20 Jurors in Northern Ireland are entitled to claim for loss of earnings or benefits and for expenses as the result of attendance for jury service¹². A juror is entitled to a travel allowance for public transport or for the use of their private vehicle. This also covers taxi costs where prior approval has been given by the Juries Officer. Payments for parking fees are available where it has been reasonably incurred. A juror is also entitled to a meal allowance where a meal is not provided by the Court Service.

(b) England and Wales

7.21 In the England and Wales there is provision for the payment of allowances to jurors and for the payment of travel expenses and subsistence.¹³ Jurors are also permitted to claim for any financial loss suffered as a direct result of jury service. The financial loss allowance can cover loss of earnings or benefits, fees paid to carers or child minders, or other payments which were made solely because of jury service.

(c) Scotland

7.22 In Scotland jurors are entitled to payment in respect of loss of earnings or benefits, travel, subsistence, childminding/babysitting expenses and some other expenses incurred as a result of jury service.¹⁴ The entitlement for loss of earnings or benefits is for the period of jury service and where the employer does not pay the jurors wages or where a benefit is withdrawn and where the juror suffers financial loss. This is particularly relevant to self-employed persons as they may have to hire a locum for the period. Under the Scottish system a juror must request that the benefit office or employer complete and stamp a certificate in order to receive payment. A self-employed juror is required to provide evidence of their earnings.¹⁵

7.23 The travel allowance is for the cost of travelling from home or work to the court for jury service. The amount payable depends upon whether public or private transport is used. If a juror requires a taxi they are required to seek approval from the Sheriff Clerk in advance. The Sheriff Clerk must be satisfied

¹² See the *Juries (Northern Ireland) Order 1996* (SI 1996 No. 1141, N.I. 6 and (1996) No. 269 *Juries Juries Regulations (Northern Ireland)*.

¹³ The *Juries Act 1974* as amended by the *Criminal Justice Act 2003* regulates the payments available to jurors.

¹⁴ The *Juries Act 1949* Part II Scotland as amended by Statutory Instrument 1999 No. 1820 *The Scotland Act 1998 (Consequential Modifications) (No.2) Order 1999*.

¹⁵ Inland Revenue self-assessment tax return or certified accounts for the previous year are sufficient.

that no other kind of transport available. The subsistence allowance covers the extra expense of meals and other out-of-pocket expenses paid by jurors during the course of their service.

7.24 The childminding allowance is an extra expense and if a juror normally employs a childminder, the allowance will be paid if court attendance means that a juror has to employ him or her for longer than usual. If the childminder is unregistered, the jury office only pays £1 an hour per child. A juror is entitled to claim for any other unusual expenses.

7.25 In these three neighbouring jurisdictions there is no automatic right to be paid by employers whilst on jury duty and therefore an expenses system is necessary to counteract this.

(d) Australia

7.26 In Victoria jurors are entitled to allowances for attendance and travel.¹⁶ A daily allowance (regardless of whether the juror has actually served or not) is payable for the first 6 days. In Victoria, a juror who resides outside the jury district for Melbourne is eligible for an allowance for travelling to court from their residence. In New South Wales, the daily attendance allowance payable to jurors varies according to the length of the trial.¹⁷ These payments are made to all jurors at the same rate regardless of their employment status. Therefore, retired and unemployed persons are given the same allowance as those who are in employment (but who are unpaid by their employers during jury service).¹⁸ This allowance is paid in full to those in receipt of unemployment and other benefits. The *Jury Regulation 2004* provides travelling expenses for jurors.¹⁹

(e) New Zealand

7.27 In New Zealand jurors receive a flat rate payment for jury service. They are also paid for their travel expenses on public transport. There is increased payment for jurors in exceptional circumstances.²⁰ Under the *Jury Rules*, jurors are also entitled to claim for the actual and reasonable costs of childcare that they incur as a result of jury service.²¹ The New Zealand Law

¹⁶ See *Juries Act 2000* (section 51 Part 7 – Remuneration and Allowances for Jury Service) and *Juries (Fees, Remuneration and Allowances) Regulations 2001* (section 6, Rate of remuneration and allowances for jury service).

¹⁷ *Jury Regulation 2004* (NSW) Schedule 1 Scale A.

¹⁸ This allowance is treated as income for tax and social security purposes.

¹⁹ *Jury Regulation 2004* (NSW) Schedule 1 Scale B.

²⁰ See http://www.justice.govt.nz/pubs/courts/jury_service.html

²¹ *Jury Rules 1990* (NZ) r 28(6).

Commission examined the issue of juror payment in its review of its jury system.²² The Commission recommended that jurors should continue to be paid at a flat rate as set out in the *Jury Rules 1990*.²³ The Commission also recommended that where a juror can demonstrate actual financial loss in excess of that flat rate, the registrar should have the discretion to increase the payment to cover or contribute to the juror's actual loss.²⁴ In addition, 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.

(f) United States

7.28 The United States federal courts provide payment for jury service in respect of both grand juries and petit juries.²⁵ Jurors sitting on federal cases are paid a flat daily rate for jury service. Employees of the federal government are paid their regular salary in lieu of this fee. 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.²⁶

7.29 All States in the US have passed laws that protect employees from discharge as a result of absence for attending jury service.²⁷ In addition, a number of states have introduced laws that provide a daily allowance for jury service.²⁸ These laws 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.

7.30 The American Legislative Exchange Council (ALEC) has developed model legislation entitled the *Jury Patriotism Act*. This Act seeks to ease the suffering experienced by jurors, particularly those who serve on long trials and

²² New Zealand Law Commission *Report on Juries in Criminal Trials* (No. 69 2001).

²³ *Ibid* at 190.

²⁴ *Ibid*.

²⁵ Section 1871 of Title 28 of the United States Code. Available at: http://www.law.cornell.edu/uscode/html/uscode28/usc_sec_28_00001871---000-.html.

²⁶ *Ibid*.

²⁷ See for example: FLA. STAT. § 40.271 (LA. REV. STAT. ANN. § 23:965 NEV, REV. STAT. § 6.190 (N.C. GEN STAT. § 9-32 S.C. CODE ANN. § 41-1-70). However, the protections afforded to jurors differ from state to state.

²⁸ Alabama, Arkansas, Colorado, Connecticut, Georgia, Louisiana, Massachusetts, Nebraska, New Jersey, New York, Ohio, Tennessee and Wisconsin and the District of Columbia.

is aimed at supporting the available pool of jurors²⁹. One of the provisions of the *Jury Patriotism Act* is the creation of a court administered Lengthy Trial Fund. This fund is supported by revenue from court filing fees and jurors can apply for compensation for lost wages. Since 2003 14 states have passed some version of the Act that includes the Lengthy Trial Fund. These include Alabama, Arizona, Colorado, Indiana, Louisiana, Maryland, Mississippi, Missouri, New Mexico, Ohio, Oklahoma, Texas, Utah and Vermont.³⁰ The law is currently (March 2010) under review in the Illinois and Tennessee state legislatures.

7.31 In Florida there is no state law that requires that employers pay their employees while they undertake jury service.³¹ The Florida Jury Innovations Committee in its Report considered that "... it is neither wise policy nor feasible to mandate that employers pay their employees while on jury duty".³² The rationale for this approach was that Florida significantly reduced the time that jurors were required to serve on juries, through the use of a one day / one trial jury management system.³³ Under this system, most employees would have to serve no more than one day a year on jury duty. Under statute jurors if not paid by their employer are entitled to a modest daily payment.³⁴ Section 40.271 of the Florida Statute, prohibits employers from dismissing their employees from jury service. This provision also provides that threats of dismissal from employment will be deemed contempt of court and permits employees to pursue civil actions if dismissed by their employers.

(4) *Appreciation of Jurors*

²⁹ See:
http://www.alec.org/AM/Template.cfm?Section=Civil_Justice&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=1&ContentID=5667.

³⁰ Garcia "A Greater Good: Jury Duty, Payment and Your Job" (Washington Post, June 7 2007). Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/06/AR2007060601839.html>

³¹ For example, Broward County Ordinance (Chapter 1 Section 1-9) a number of large corporations based in Florida elect to pay their employees while they are undertaking jury service.

³² *Final Report: Jury Innovations Committee* (Judicial Management Council Supreme Court of Florida 2001) at 85.

³³ This means that once a juror reports for jury service and is not selected to serve at the end of the first day, they are not required to report for service the next day. However, if selected a juror is required to serve until the end of the trial. The average length of a jury trial in Miami-Dade County is three days. See "Jury Service" (Clerk of Courts of Miami-Dade County). Available at: <http://www.miamidadeclerk.com/dadecoc/jury.asp#jury3>.

³⁴ Statute 40.24 (Title V, Chapter 40).

7.32 There are other ways to acknowledge the important role that jurors play in the legal system in addition to payment. For example, at the end of a trial it is normal practice for the presiding judge in an Irish court to thank the members of the jury for performing jury service and perhaps excuse them from jury service for a number of years. Usually there is also an acknowledgement of the importance of their role within the legal system. In some courts in the United States the role of jurors is acknowledged in more visible ways. For example, jurors are presented with certificates of jury service, souvenirs or letters of thanks from the trial judge.³⁵ Some courts even organise thank you parties for jurors.

7.33 The Auld Review recommended that a standard letter of thanks signed by the trial judge may be “a suitable and pleasing way of recording in more permanent form what may be a memorable and unique experience for many”.³⁶

7.34 The Commission recognises that there is an argument that jury service benefits the justice system, and as such the costs should be borne by the State. This was also the view of the Committee on Court Practice and Procedure in its 1965 Report, discussed above. The introduction of a system of payment for jury service would involve the creation, delivery and management of a new system that would need to take account of the circumstances of all persons selected for jury service. The introduction of a new system would need to be administered by the Courts Service and would require significant additional funding from the Department of Finance. The comparative material outlined above illustrates the complexities of introducing juror remuneration and the possibilities for fraud and abuse of the system.

7.35 The Commission acknowledges that the financial burden of jury service under the *Juries Act 1976* is placed upon employers in this jurisdiction and whilst it would not recommend changing that position, it would suggest ways in which the burden could be spread over all employers and self-employed so as to minimize the impact for any particular jury server.

7.36 The Commission is mindful of the hardship that even minor additional expenses can cause to persons with limited disposable income. It would therefore seek submissions on whether a system of expenses should be introduced to cover the cost of transport, childcare and dependent care that

³⁵ The Michigan Supreme Court demonstrated the importance of jury service through staging a juror appreciation month across Michigan Courts in July 2007. See <http://courts.michigan.gov/supremecourt/press/JAM2.pdf>. Juror Appreciation Week is celebrated state wide in Californian Courts annually. See <http://www.courtinfo.ca.gov/jury/jaw.htm>.

³⁶ See *Auld Review of the Criminal Courts of England and Wales* (Home Office 2001 Chapter 5) at 224-225.

would allow greater participation in the jury system by women, students and the economically disadvantaged in our community. This could be achieved by either a modest flat rate per day which would have the advantage of being administratively straightforward, and/or, a vouched expenses scheme where persons could be reimbursed their reasonably incurred costs. The Commission has not done a cost analysis of this proposal but on the face of it, it does not believe that this would present a significant financial burden to the State and it would encourage wider participation in the jury process.

7.37 *The Commission provisionally recommends that there should not be a system in which jurors are paid by the State for their services.*

7.38 *The Commission provisionally recommends that the current system of payment for jury service under section 29 of the Juries Act 1976 should be retained.*

7.39 *The Commission invites 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.*

CHAPTER 8 JUROR MISCONDUCT AND JURY TAMPERING

A Introduction

8.01 In this Chapter the Commission considers the issue of juror misconduct, in particular where jurors consider information not presented as evidence at trial. The emergence of wireless technology and the proliferation of Internet use now make it possible for jurors to obtain a significant amount of information about a defendant and about the crime with which they are charged should they so wish.

8.02 The Commission's comparative analysis of the jury system in other common law jurisdictions reveals that the issue of jurors who obtain information independently of the court is emerging as a significant matter of concern. Key to this discussion is the impact that the consideration of such information has on the defendant's right to a fair trial and what should be the appropriate law reform response. The Commission considers the various options that have been developed in other States and makes provisional recommendations for reform.

8.03 The Commission also discusses in this Chapter the connected issue of to what extent jury tampering is affected by the manner in which the jury selection process is carried out, particularly in terms of the current provisions in the *Juries Act 1976* which facilitate inspection of the jury panel.

B The Right to a Fair Trial and Directions to Jurors

8.04 It is standard practice in all common law jurisdictions for trial judges to give directions to the jury instructing them that they must try the case on the evidence presented in court, and not be influenced by any external matters or obtain information elsewhere. However, it is evident from the Commission's comparative review in this Chapter that jurors may sometimes either fail to understand or simply disregard these directions.

(1) The Right to a Fair Trial

8.05 As already mentioned the Internet provides users with ready access to a broad display of material including media reports, court judgments, legal databases and blogs. Before the widespread availability of the Internet a juror who sought media reports or court judgments or information about a defendant,

needed to spend a significant number of hours and indeed money in retrieving such information from libraries. This information, now readily available can be highly prejudicial, and has the potential to impact on the right to a fair trial.

8.06 It is well established that jurors are required to reach their verdict through consideration of the evidence that is deemed admissible by the trial judge. This is connected with the right of an accused person to a fair trial. As Denham J in *Kelly v O'Neill*¹ noted:

“The test for the court is as to whether there was a real risk that an accused would not receive a fair trial. To enable an accused person obtain a fair trial not only should the trial be conducted in accordance with fair procedures but the jury should reach its verdict by reference only to evidence admitted at the trial and not by reference to facts, alleged or otherwise, contained in statements or opinions aired by the media outside the trial...”²

8.07 Denham J in her judgment in *Kelly v O'Neill* also noted that media is part of everyday life and that reporting of events including court cases, has increased in this the “Information Age”.

“Coverage varies from national broadsheets, tabloids, television and radio to similar publications from organisations which sweep the globe. And then there is the internet! People are exposed to national and international media. Such coverage should be a fair balance between protecting the administration of justice and the right of freedom of expression. If there is a doubt the balance should be tipped in favour of the administration of justice, of a fair trial.”

8.08 The courts in a number of cases have considered the affect of pre-trial publicity on jurors. For example, in *Attorney General v X*³ it was held 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* Denham J suggested that this recognised “the robustness of the Irish jury... and the administration of justice proceeded.”

8.09 In the leading case on juror bias *People (DPP) v Tobin*⁴ a juror in a sex offence trial revealed during jury deliberations that she had experienced sexual abuse. The trial judge was informed of this and was assured by the

¹ [2000] 1 I.L.R.M. 507. See also *Z. v. Director of Public Prosecutions* [1994] 2 IR 476 ; [1994] 2 ILRM 481.

² [2000] 1 I.L.R.M. 507 at 522.

³ [1992] 1 IR 1.

⁴ Court of Criminal Appeal, 22 June 2001.

foreman that the disclosure of the female juror had no impact on her impartiality and the trial judge refused to discharge the jury. The Court of Criminal Appeal 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 subconsciously influenced by her experience of abuse and that this might also have an influence on her fellow jurors. Importantly the Court of Criminal Appeal in its decision in this case did not rule out the possibility of a considered and carefully worded special direction to the jury dealing with this type of problem avoiding the alternative of discharging the jury.

(2) *Juror Misconduct in Ireland*

8.10 There is no readily available evidence that indicates that juror misconduct is a prevalent issue in Ireland. Section 19 of the *Juries Act 1976* provides that an oath should be administered to the jurors. The oath states:

..."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."

8.11 The oath requires jurors to decide the guilt of an accused person exclusively on the basis of the evidence presented at trial. However, the oath is insufficient in addressing the concerns of trial judges about jurors conducting their own research and on occasion trial judges have felt it necessary to give a specific direction to jurors not to engage in independent research about a case. For example, in November 2008 Judge O'Donnabhain in a trial at Limerick Circuit Criminal Court cautioned a jury not to use Internet search engines to access information regarding the trial on which they were empanelled.⁵ Specifically Judge O'Donnabhain instructed the jurors to stay free of outside influences and "not Google things" during the trial; this instruction was made as part of a general media warning.⁶ While there is little evidence to suggest a problem with juror misconduct of this nature the issue was also raised with the Commission as part of its Consultation on its *Third Programme of Law Reform 2008-2014*.

(3) *The Secrecy of Jury Deliberations*

8.12 The Commission previously considered whether it was desirable to preserve the secrecy of jury deliberations.⁷ The Commission concluded that

⁵ See "Judge warns jury not to 'Google' trial", 26 November 2008. Available at: <http://www.independent.ie/national-news/judge-warns-jury-not-to-google-trial-1552747.html>.

⁶ *Ibid.*

⁷ See *Report on Contempt of Court* (LRC 47-1994) at 7.14. *Consultation Paper on Contempt of Court* (LRC CP July 1991).

under the present law a juror is prohibited from giving evidence in any proceedings, (including an appeal from the jury's verdict) as to what took place in the jury room. However, the Commission noted that in some circumstances an examination of what took place in the jury room is permitted. Among the circumstances where Commission considered that a disclosure of what happened in the jury room would be permitted, was in relation to a miscarriage of justice.⁸ Clearly a situation where a defendant was convicted on the basis of evidence obtained by a juror independently of the Court would sufficiently fall with the category miscarriage of justice.

(4) *The Assumption that Jurors Act Properly in Arriving at their Verdict*

8.13 There are many examples of jurors acting improperly. However, despite a significant number of incidences of juror misconduct the issue has largely not been explored in the literature on juries and has been largely ignored by legislators. This has been explained by one commentator who stated that the issue:

“... of jury impropriety in the courtroom and/or during deliberations have troubled the criminal justice system for years. However, these cases, whether reported or not, have so far eluded extensive discussion. We are sensitive to threats to the jury system and conscious of the growing need to safeguard the historical institution of the jury from attack.”⁹

8.14 The reluctance to discuss the issue of juror misconduct is also coupled with an assumption that jurors will behave as expected, and will only consider the evidence that is presented at trial. This approach is evident in the statements of McHugh J in *Gilbert v The Queen*¹⁰ where it was stated that:

“The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge’s directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no-one – accused, trial judge or member of the public – could have any confidence in any verdict of a criminal jury or of the criminal justice system whenever it involves a jury trial. If it was

⁸ The Commission did suggest that the law of contempt should not penalise any disclosure relating to miscarriages of justice in the jury-room.

⁹ Haralambous “Reviewing Jury Misconduct” (2008) 172 *Justice of the Peace* 592 (*Journal of Magisterial and Local Government Law*).

¹⁰ (2000) 201 CLR 414 at 425.

rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials... In my respectful opinion, the fundamental assumption of a criminal jury trial requires us to proceed on the basis that the jury acted in this case on the evidence and in accordance with the trial judge's directions ...”

- 8.15 Similarly Gleeson CJ in *R v VPH*¹¹ stated that the
“... jury will be given appropriate directions to confine their attention to the evidence that is put before them. Our entire system of the administration of criminal justice depends upon the assumption that jurors understand and comply with directions of that character.”

- 8.16 However, there has been criticism of the failure to address situations where jurors misbehave. It has to be acknowledged that juries like judges, are human and as such they can misbehave and indeed make errors. As noted by one commentator “... it seems obvious to me that a justice system that fails to guard against these risks is seriously deficient. At one time, the quasi-sacred nature of the jury verdict was used to oppose the creation of a right of appeal for the convicted defendant: a context in which today it seems absurd. To me, it seems equally unconvincing when used today as an argument against the right of appeal by the prosecution.”¹²

C Comparative Analysis

- 8.17 In this section the Commission considers the instances of jurors engaging in misconduct. The situation in New South Wales is of particular interest as the issue of juror misconduct was highlighted in a number of high profile cases, which resulted in reform of the New South Wales jury legislation.

(1) **United States**

- 8.18 In the United States there are a significant number of examples of jurors engaging in inappropriate conduct. One case involved the trial of terrorism suspects for the African embassy bombings.¹³ In this case a juror

¹¹ Court of Criminal Appeal, 4 March 1994.

¹² Spencer “Does our Present Criminal Appeal System Make Sense” (2006) *Criminal Law Review* 667, at 688.

¹³ See Weiser “3 Seek Retrial In Bombing Of Embassies” New York Tim 23 January, 2004.

Available at:
<http://query.nytimes.com/gst/fullpage.html?res=9500E1DF1E39F930A15752C0A>

allegedly carried out independent research via the Internet. It also emerged that two other jurors consulted their pastors in relation to the death penalty.¹⁴ The issue of jurors conducting research is not an entirely new phenomenon in the United States. In *Nowogorski v. Ford Motor Co.*¹⁵ the verdict of an Alabama Court was reversed when it was discovered that a juror brought a dictionary into the jury deliberations.

8.19 An alternate juror was removed from a jury panel in June 2007 in a capital murder case in Broward County in Florida.¹⁶ Prosecutors conducting Internet searches discovered blog posts from the juror. When questioned by the trial judge, she indicated that she unaware that the direction by the trial judge about reading newspaper articles about the case and discussing the case extended to her Internet comments.¹⁷ Another juror in Florida empanelled in a manslaughter case allegedly used his iPhone to research the meaning of the word “prudence” during deliberations.¹⁸ In *New Hampshire v. Goupi*¹⁹ the New Hampshire Supreme Court considered the conviction of a rapist who challenged his conviction on the basis that the foreman of the jury posted a blog complaining about having to show up for jury duty to deal with what he deemed the local riffraff.²⁰ New Hampshire Supreme Court declined to reverse the conviction, as the other jurors had not read the blog, and because the blogging juror assured the court he had followed his instructions once empanelled as a juror.

8.20 Another example of a juror engaging in blogging arose in California. The Court in this case held the juror in contempt of court for posting information about the trial to the blog.²¹ In the blog the foreperson used his camera phone

9629C8B63.

¹⁴ *Ibid.*

¹⁵ 579 So. 2d 586 (Ala. 1993).

¹⁶ Neil “Blogging Juror Booted in Murder Case” (American Bar Association Journal, June 2007). Available at:
http://www.abajournal.com/news/blogging_juror_booted_in_murder_case.

¹⁷ *Ibid.*

¹⁸ See Silvernail “Internet Surfing Jurors” Marsh, Rickard and Bryan P.C. Available at: <http://www.mrblaw.com/CM/TechnologyAndTheTrialLawyer/INTERNET-SURFING-JURORS.asp>.

¹⁹ No. 2005-444.

²⁰ For a discussion of this case see McDonough, “Blogger’s Posts Don’t Equal Juror Misconduct”, American Bar Association Journal Report, October 6, 2006.

²¹ See Silvernail “Internet Surfing Jurors” Marsh, Rickard and Bryan P.C. Available at: <http://www.mrblaw.com/CM/TechnologyAndTheTrialLawyer/INTERNET-SURFING-JURORS.asp>.

to take a picture of the murder weapon, which he then posted to his blog. The blog also contained criticisms of the judge's staff and complained about the excessive length of the trial.²²

8.21 The applicants in *Tanner v United States*²³ were convicted on various counts of fraud. Before sentencing they filed a motion, seeking a continuance of the sentencing date, permission to interview jurors, an evidentiary hearing, and a new trial. One of the applicant's lawyers received an unsolicited telephone call from one of the trial jurors, informing him that several jurors consumed alcohol during the lunch breaks throughout the trial. As a result of this some of the jurors slept in the afternoons during the trial. The District Court concluded that juror testimony on intoxication was inadmissible under Federal evidence rules on impeaching the jury's verdict.²⁴ The case was ultimately appealed to the Supreme Court where the applicants argued that juror alcohol and drug consumption during the course of the trial should be deemed an "outside influence" and fall within one of the exceptions to the bar against juror testimony for purposes of impeaching the jury's verdict. The United States Supreme Court in a 5-4 decision decided that Federal Rule of Evidence 606(b) barred juror testimony relating to consumption of alcohol and drugs by jurors during the trial.

(2) ***England and Wales***

8.22 In England and Wales there have also been a number of high profile cases of juror misconduct. A number of these cases involve jurors accessing information about a defendant or trial independently of the Court. One such case was where a female juror was arrested for contempt of court after it was alleged that she was listening to an iPod during a murder trial at Blackfriars Crown Court in 2007.²⁵ The allegation arose after a fellow juror sent the trial judge a note expressing concern that the juror had been listening to an iPod under her hijab while the defendant was giving evidence. As a result the trial Judge discharged the juror. It was also reported that the juror in question had previously demonstrated indifference to jury service, by attempting to avoid jury service on three occasions and repeatedly arriving late at court. It was reported in the media that the contempt of court charge against the juror was not pursued, and she was not subjected to any criminal sanction.²⁶

²² *Ibid.*

²³ 483 US 107 (1987).

²⁴ *Federal Rules of Evidence* Rule 606(b).

²⁵ Malvern, "Muslim Juror Listened to iPod Under Hijab" *The Times*, July 10, 2007. Available at: <http://www.timesonline.co.uk/tol/news/uk/crime/article2051212.ece>,

²⁶ *Ibid.*

8.23 In *R v Boseley*²⁷ a man convicted of rape was given bail by the trial judge pending sentence, when it was discovered that jurors had been conducting their own experiments in the jury room, and doodling while in the jury box.²⁸ The jury purchased five pairs of female undergarments and "tested" them in the jury room to see how easily they could be torn. The trial Judge in this case was concerned that jurors had taken into account issues that were not presented as evidence at trial.

8.24 The cases of *R v Marshall*, *R v Crump*²⁹ concerned two men convicted of various different offences against which they appealed. It emerged after the jury had delivered its verdict that some printed material downloaded from the Internet was found in the jury room. The material originated from three different sources; the Crown Prosecution Service, a criminal defence solicitors' practice and a Home Office website. The material dealt with a number of issues relating to charging and sentencing practice and in relation to the offences charged. It was argued by the appellants that the jury members had 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 dismissed their appeal. However, the Court of Appeal stated that a jury's access and use of additional material could in principle be regarded as an irregularity that could render a conviction unsafe.

8.25 Another recent example of jurors engaging in their own research in England involved a case at Newcastle Crown Court in August 2008.³⁰ On the sixth day of the trial the Judge was handed a document from the jury that contained 37 questions about the case, with an appendix of maps attached.³¹ The trial judge made enquiries and it emerged that one of the 12 jurors conducted his own investigation into the case. This research included a visit to the death scene where he took photographs, measured a fence that was at the heart of the evidence and researched forensic science techniques via the Internet. It also emerged that the man discussed his findings with fellow jurors in the court canteen before they asked for their questions to be forwarded to the judge. The list of questions included requests for recordings of interviews in

²⁷ Unreported, Worcester Crown Court, July 31, 2008. See "Rapist Bailed After Jury's Error" BBC News, July 31, 2007. Available at: <http://news.bbc.co.uk/1/hi/england/hereford/worcs/6924190.stm>,

²⁸ Sketching was found in the waste paper basket which raised questions as to the attentiveness of the jurors.

²⁹ [2007] EWCA Crim. 35.

³⁰ Norfolk "Manslaughter trial collapses after juror turns amateur sleuth" 20 August 2008. Available at: <http://www.timesonline.co.uk/tol/news/uk/article4569040.ece>.

³¹ The trial involved an 18- accused of causing the death of a taxi driver who suffered a heart attack during a struggle over an unpaid fare.

addition to information about mobile phone records, bank statements, DNA tests and the clothing that the defendant wore at the time of the incident. The questions also indicated that the juror acquired other information about the case that was not presented to the jury by the prosecution or the defence. According to media reports when the trial judge sought an explanation for his conduct, the juror said that he had carried out his own research, as he wanted to “get a feel for the case” and wanted to ensure that the jurors delivered the correct verdict.³²

8.26 Another case of juror misconduct arose at the closing stages of a fraud trial.³³ The jurors in this case paid a collective visit to a pub to celebrate the 21st birthday of one of the jurors. The jurors returned to the court drunk, and “started fondling one another lecherously in the jury box.”³⁴ In *R v Young*³⁵ 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.

8.27 There has been no legal response in England and Wales to these incidences of juror misconduct. The UK House of Lords in a majority decision in *R v Mirza*³⁶ held that the law of England should continue to adhere to the rule that the jury’s deliberations remain confidential. However, the Court did state that there was scope for improvement in respect of empanelling juries. Lord Hope suggested:

“The 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 which occurs while they are deliberating.”

8.28 In *R v Smith; R v Mercieca*³⁷ a juror wrote a letter to the trial judge expressing concern in relation to the conduct of certain jurors. The House of Lords in this case reiterated the general rule that the court will not investigate, or receive evidence about, anything said in the course of the jury’s deliberations while they are considering their verdict in their retiring room.³⁸ There is a firm rule that after the verdict has been delivered evidence directed to matters

³² Norfolk “Manslaughter trial collapses after juror turns amateur sleuth” 20 August 2008. Available at: <http://www.timesonline.co.uk/tol/news/uk/article4569040.ece>.

³³ Cited in Spencer, JR “Does our Present Criminal Appeal System Make Sense” *Criminal Law Review*: 2006, Aug, 667-694, at 688.

³⁴ *Ibid.*

³⁵ [1995] 2 Cr App R 379.

³⁶ See English Practice Direction “*Crown Court: Guidance to Jurors*” [2004] 1 WLR 665.

³⁷ [2005] UKHL12.

³⁸ See *Ellis v Deheer* [1922] 2 KB 113, 117-118, *R v Miah* [1997] 2 Cr App R 12 at 18; *R v Mirza*.

intrinsic to the deliberations of jurors is inadmissible. The UK House of Lords so held in *R v Mirza*. The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by “extraneous influences”. See for example circumstances where jurors had contact with other persons who may have passed on information which should not have been before the jury.³⁹

8.29 When complaints have been made during the course of trials of improper behaviour or bias on the part of jurors, judges have on occasion given further instructions to the jury and/or asked them if they feel able to continue with the case and give verdicts in the proper manner. This course should only be taken with the whole jury present and it is an irregularity to question individual jurors in the absence of the others about their ability to bring in a true verdict according to the evidence: *R v Orgles*.⁴⁰ The House of Lords allowed the appeal. Lord Carswell held that the trial judge was correct to assume the authenticity of the letter and to proceed on that basis. It was held that it would not have been appropriate for him to question the jurors about the contents of the letter and he was not required to question the jurors. The House of Lords held that if he had questioned the jurors he inevitably would have had to question the jurors about their deliberations and whether the defendant was guilty of any of the offences charged. Lord Carswell stated that:

“[t]heir individual views or arguments will not be revealed to the court, which will be informed simply of the jury's laconic verdict. This encourages the collective and cohesive deliberation and reconciliation of differing views which ... (is) an important feature of the jury's work. It also protects individual jurors from exposure to pressure to explain the reasons which had actuated them individually to arrive at their verdicts... The second factor is that in those fortunately rare cases where the court is informed that there has been some misconduct on the part of jurors or irregularity in the way in which their deliberations have been carried out, it should have as effective means as the circumstances will permit of ascertaining what has gone wrong and taking steps to rectify it. The present appeal concerns the second of these factors and the way in which such investigation can be carried out while preserving the first factor intact.”⁴¹

8.30 It was held that in this case the judge's direction to the jury fell short of what was required. Lord Carswell stated:

³⁹ *R v Blackwell* [1995] 2 Cr App R 625 and *R v Oke* [1997] Crim LR 898.

⁴⁰ [1994] 1 WLR 108

⁴¹ At paragraph 7.

"I do consider, however, that the direction was insufficiently comprehensive or emphatic. 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. I am unable to regard the directions given as having covered these areas with sufficient particularity and emphasis, and I consider that the jury required stronger and more detailed guidance and instruction. Without that it is difficult to be satisfied that the discussion in the jury room was conducted thenceforth in the proper manner."⁴²

8.31 The decisions in *R v Mirza*, *R v Smith* and *R v Mercieca* indicate that the English courts are unwilling to look behind the veil of jury secrecy. Jury secrecy is regarded as being central in maintaining public confidence in the criminal justice system and in protecting jurors and ensuring frankness in their deliberations. Secrecy is also seen as important in ensuring the finality of verdicts reached by juries. Lifting the veil of secrecy would require the introduction of safeguards to protect jurors and the criminal justice system. However, this does not fall into the scope of the Commission's current work.

(3) Scotland

8.32 In *Sinclair v HMA*⁴³ the appellant was indicted to stand trial for the rape and murder of two young women in October 1977.⁴⁴ The appellant in this case contended that certain pre-trial publicity about him and about the offences with which he was charged meant that a fair trial could not reasonably be expected. Central to this contention was that information could be accessed through the Internet, which was extremely prejudicial, and this material could not be restricted before or during the trial which meant that a fair trial was impossible. There was a significant amount of information on the Internet, which was prejudicial to the appellant in this case. Evidence was produced in court, which demonstrated that a Google search of the appellant's name yielded a considerable number of results. The Google results included access to material that claimed that the appellant had been responsible for the "world's end murders". There had been in excess of one million hits on that site in the months leading up to the trial of the appellant.⁴⁵

⁴² At paragraph 26.

⁴³ [2007] HCJAC 27.

⁴⁴ These murders were known as the "world's end murders".

⁴⁵ For a discussion of this case see "Case Comment: Fair Trial and Pre-Trial Publicity" (2008) *Communications Law* 13(2), 58-59.

8.33 The Lord Justice General in *Sinclair v HMA*⁴⁶ stated that the availability of the Internet and its increasing use by members of the public, including jurors, presented challenges for the administration of justice. However, in *Sinclair v HMA*⁴⁷ the Court was satisfied that, it could reasonably be expected that the appellant's trial would not be rendered unfair by prejudicial material coming at a significant time to the knowledge of one or more of the jurors at his trial.

(4) Australia

8.34 The jurors in a long running Australian drugs trial were discharged after it emerged that some jurors spent more time playing Su Doku than they had listening to the evidence.⁴⁸ The case at the Sydney District Court involved two defendants who faced life sentences if convicted for conspiring to make a large amount of amphetamines. One of the defendants was also charged with further firearms and drug possession offences. The judge in this case had previously commended the jurors for their diligence through studious note taking.⁴⁹

8.35 The misconduct in this case came to light after the accused noticed, while giving evidence, that some of the jurors were writing vertically rather than horizontally. The jury foreperson admitted that 4 or 5 jurors had been playing the game since the second week of the trial. She claimed that playing the puzzle helped her to concentrate. The trial judge discharged the jury in this case. It was estimated that 1 million Australian dollars, in terms of lawyers' fees, staff wages and court running costs were wasted as a result of the discharge.

(a) Case Law on Juror Misbehaviour in New South Wales

8.36 In *R v K*⁵⁰ the New South Wales Court of Criminal Appeal considered the validity of a murder verdict after it emerged that jurors accessed incriminating evidence about an accused via the Internet. This emerged after a verdict was reached, when jurors went to a nearby hotel for a drink where they encountered counsel for the defendant. It was at this encounter that the defence was informed by a juror that some of the jurors discovered through use of the Internet that the defendant had been accused of murdering his second wife, and that the current trial was a retrial, in relation to the alleged murder of

⁴⁶ [2007] HCJAC 27.

⁴⁷ [2007] HCJAC 27.

⁴⁸ "Su Doku-loving jurors force judge to abandon major drugs trial" *The Times*, June 11, 2008.

⁴⁹ *Ibid.*

⁵⁰ [2003] NSWCCA 406 (23 December 2003)

his first wife.⁵¹ The trial judge had instructed the jury to disregard any information apart from evidence presented at trial. However, there was no specific direction from the trial judge to refrain from engaging in Internet research about the accused and the case. The accused challenged his conviction on this basis. The New South Wales Court of Criminal Appeal allowed the appeal.

8.37 The Court of Criminal Appeal in its judgment acknowledged the need to review the legislation governing juries, suggesting that it should be an offence for jurors to conduct research about the accused and the case. The Court of Criminal Appeal also suggested that a direction be given about such research in addition to the normal direction about disregarding any publicity about the case. It was also suggested that an explanation for this should be communicated to jurors.

"The extent of information regarding criminal investigations and trials online through media reports, legal databases and judgment systems of the court and its use are of ongoing importance. There may be need to review and to amend the Jury Act in order to protect the jury system by making it an offence for jurors to conduct external inquiries about an accused or the case as well as the need to discourage any such practice by appropriate directions. The direction which is now routinely given at the start of a trial, to the effect that the jury should not take into account any publicity of which they may be aware, should be extended to include an instruction that they should not undertake any independent research, by internet or otherwise and a suitable explanation given as to why they should not do so."⁵²

8.38 In *R v Skaf*⁵³ the appellants in this case appealed against convictions following their joint trial in the New South Wales District Court by a jury.⁵⁴ One of the grounds on which the appeal was based was that the trial miscarried as a result of two jurors attending the scene of the alleged crime and investigating the state of the lighting at the scene of the alleged crime.⁵⁵ In this particular

⁵¹ *Ibid*, at page 2.

⁵² [2003] NSWCCA 406 (23 December 2003) at pages 2-3.

⁵³ [2004] NSWCCA 37.

⁵⁴ Bilal Skaf was convicted of two counts of aggravated sexual intercourse without consent. His brother, Mohammed Skaf, was convicted of one count of being an accessory before the fact to his brother's two counts.

⁵⁵ This investigation by the juror account information obtained when he visited the park, where the crimes were committed, and this evidence was not admitted as evidence at trial.

case, the New South Wales Court of Criminal Appeal held “regrettably” there must be a new trial and in respect of both appellants the misconduct of the jurors caused the trial to miscarry. The Court of Criminal Appeal outlined the gravity of the jurors’ actions in this case.

“We put aside the issue whether the conduct of the jurors amounted to a contempt of court. That matter lies outside the questions for determination in these appeals. We mention it only to indicate, for the information of jurors in other trials, the potential seriousness with which the law views this type of misconduct. It seems to us that what has been revealed in the present case does not amount in itself to a departure from fundamental requirements as to the procedure of a criminal trial before judge and jury... Rather, the characterisation of the proven incident is that some (at least) of the jury had regard to information that was not evidence in the trial, or otherwise properly put before them by the judge to the knowledge of the parties. Such information as the jurors obtained was not evidence and it was obtained in circumstances amounting to a want of procedural fairness (denial of natural justice) in that the accused were unable to test the material, comment upon it or call evidence to rebut or qualify it. The Court needs to weigh the possible prejudicial impact of this extrinsic information upon the minds and deliberations of (at least) the two jurors directly involved.”⁵⁶

8.39 The Court of Criminal Appeal acknowledged that directions to the jury should be moulded to the circumstances of the particular trial. The Court also noted that in certain trials it is preferable that information and directions are not delivered in a single block.⁵⁷ The Court expressed concern about the role of jurors changing from impartial deliberators of evidence presented at trial, to investigators. The Court recommended that the rules in New South Wales should be amended to include additional reasons for not undertaking external research into the law, or the factual background of the case. The reasons the Court of Appeal suggested were that such research posed the risk of taking the jurors to legal principles that do not apply, or to incomplete or inaccurate

⁵⁵ [2004] NSWCCA 37, at paragraphs 239-241.

⁵⁵ *Ibid*, at paragraph 281.

⁵⁵ *Ibid*, at paragraph 282.came to light when a solicitor, unconnected with the parties, wrote to the Public Defender with information about a conversation with a man known to her. This man gave her the impression that he had taken into account information obtained when he visited the park, where the crimes were committed, and this evidence was not admitted as evidence at trial.

⁵⁶ [2004] NSWCCA 37, at paragraphs 239-241.

⁵⁷ *Ibid*, at paragraph 281.

commentary or statements.⁵⁸ The Court of Criminal Appeal recommended that the other reason for not discussing the case with anyone other than fellow jurors should be explained is that, almost inevitably, third persons would wish to contribute observations that have no value, as they will not have heard or seen the evidence, or received the judges binding directions, and they will not be subject to the oath to which jurors are subject.”⁵⁹

8.40 The Court of Criminal Appeal also recommended that it would be useful to add to the jury directions, an instruction that they should not, either individually or as a group, make any private visit to the scene of the alleged offence.⁶⁰ Also jurors should be directed not to attempt any private experiment concerning any aspect of the case, or to request that another person do so on their behalf. The Court also recommended that jurors should be informed that the only circumstances in which experiments are permitted is by way of evidence, which is presented in the presence of all jurors, the legal representatives of the parties, and the judge. According to the Court it should be pointed out to jurors that this allows differences in the crime scene or in the circumstances of the experiment, to be pointed out to the jury in the course of the evidence. The Court also stated that where a juror becomes aware that a fellow juror carried out an experiment or independent inquiries about the offence or defendant, this should be brought immediately to the attention of the trial judge. Similarly, during jury deliberations where evidence has found its way into the jury room that was not presented at trial, jurors should be instructed to bring this to the attention of the trial judge.

8.41 The New South Wales Court of Criminal Appeal outlined the rationale for this as follows:

“the reason why it is necessary for any such matter to be brought to the immediate attention of the judge, is that, unless it is known before the end of the trial, then it may not be possible to put matters right, with the consequence that an injustice may occur, or that it may become necessary for there to be a discharge of the jury, and a retrial directed.”

8.42 The New South Wales Court of Criminal Appeal expressed the opinion that the *Jury Act 1995* should be expanded to provide that private inquiries, views and experiments conducted by jurors, be a criminal offence.⁶¹

⁵⁸ *Ibid*, at paragraph 282.

⁵⁹ *Ibid*, at paragraph 282.

⁶⁰ *Ibid*, at paragraph 284.

⁶¹ Paragraph 285. The practice direction stated: “any behaviour among the jurors or by others affecting the jurors, that causes concern”.

The Court of Criminal Appeal also considered that the Practice Direction (issued following the decision of the UK House of Lords in *R v Mirza*) was too general.

"We believe that the generality of this direction could cause difficulties in that it may lead to matters being brought to attention, which would involve inappropriate criticism of fellow jurors, including aspects of disagreement or expressions of forceful views of the kind which are understandable elements in jury discussions. We would prefer that the direction be expressed in more specific terms, so as to avoid uncertainty and so as not to be the occasion for the disclosure of jury deliberations."

8.43 In *R v Forbes*⁶² the Court of Criminal Appeal had to consider whether the trial of the appellant miscarried on a number of grounds. The first was that the misconduct of a juror occurred prior to the verdict and the second was that the trial judge failed to fully direct the jury as to the reasons why they should not carry out their own research and/or consider material other than evidence admitted at the trial.

8.44 This case again illustrates problems with jurors conducting research on issues connected to the trial. The juror misconduct in this case related to an incident that occurred during the trial when a juror was found in possession of two publications, one about guns, the second a brochure predominantly about ammunition.⁶³ The judge had instructed the jurors in the proscribed way in relation to evidence to be considered. The Counsel for the appellant at his trial applied for the jury to be discharged because possession of the material inferred flouting of the judge's direction and that the juror was willing to consider evidence not present at trial.⁶⁴ It was also contended that there was a real possibility that the juror would share the knowledge he had acquired with other jurors.⁶⁵

8.45 The trial judge refused to discharge the jury until the publications were reviewed. Counsel for the defence was happy after reviewing the publications that they did not touch on any of the issues at stake at trial and as such there was no renewal of the application to discharge the jury on that basis. It was held in this case that the trial judge had addressed the irregularity through the directions given to the jury. The Court of Criminal Appeal was satisfied that these were sufficient to avert any possibility of a miscarriage of justice. The Court of Criminal Appeal also rejected the second ground of

⁶² [2005] NSWCCA 377 (4 November 2005).

⁶³ *Ibid*, at paragraph 15.

⁶⁴ *Ibid*, at paragraph 19.

⁶⁵ *Ibid*.

appeal that the trial judge failed to "... enunciate the reasons why a juror should not do his or her own research."⁶⁶ The Court of Criminal Appeal held that the trial judge had reiterated on many occasions, that it was essential that they decide the case only on the evidence in the trial. The Court considered the directions given by the trial judge to the jury were in accordance with their decisions in *R v K* and *R v Staf*.

8.46 *R v Fajka*⁶⁷ also highlights the difficulties posed by juror misconduct. In this case the trial judge instructed jurors not to conduct their own investigations including Internet searches, and not to discuss the case outside of jury deliberations. The trial ran for 24 days and the jury was in the process of deliberating its verdict when the foreman informed the judge, in a written note, that one of the jurors had admitted to conducting research on the case via the internet. The investigating juror accessed a case that involved a relative of the accused who was charged with the same incident but tried separately. It also emerged that a second juror viewed the exterior of the hotel, discussed details of the case with their spouse and formed an opinion. As a result the trial judge discharged the jury.⁶⁸

(b) Legal Responses in New South Wales

8.47 Following the judgments in *R v. K*⁶⁹, *Regina v Bilal Skaf* and *Regina v Mohammed Skaf*⁷⁰ there was much debate and consultation in New South Wales as to the appropriate legal reforms to address the issues raised in these cases.⁷¹ It was ultimately decided to amend the *Jury Act 1977* by introducing a new criminal offence prohibiting jurors from conducting their own inquiries during trials. In the Second Reading Speech on the reforming provisions there was reference to the juror misconduct cases:

"recent cases have demonstrated the danger in a jury's verdict being determined not by the evidence and the relevant law, but by external

⁶⁶ *Ibid*, at paragraph 46.

⁶⁷ [2004] NSWCCA 166.

⁶⁸ It is noteworthy that the trial had cost the public more than 1 million Australian dollars. It was estimated that the daily cost of the trial was \$40,000 and one witness travelled from Britain for the trial.

⁶⁹ [2003] NSWCCA 406 (23 December 2003)

⁷⁰ [2004] NSWCCA 37.

⁷¹ For a discussion of the case law and the legislative response see Johns "Trial by Jury: Recent Developments" (NSW Parliamentary Library Research Service Briefing Paper No 4/05).

Available at:

[http://parliament.nsw.gov.au/prod/parlment/publications.nsf/0/D59919F0C2742272CA256FDB0009956E/\\$File/jury%20and%20index.pdf](http://parliament.nsw.gov.au/prod/parlment/publications.nsf/0/D59919F0C2742272CA256FDB0009956E/$File/jury%20and%20index.pdf).

factors, such as personal experiments or inquiries or prejudicial material bearing on the case. It is a fundamental principle of our criminal law system that an accused is given a fair trial and is judged on the evidence given in court... The bill will discourage jury misconduct and improve the procedures for investigating jury misconduct without discouraging participation in this important civic duty... There are three main legislative provisions to these amendments. Firstly, the bill creates a new offence of jurors conducting their own inquiries. Secondly, the bill expands the scope of the current offences of soliciting information from a juror and jurors disclosing information. Thirdly, and importantly, the bill empowers the Office of the Sheriff to investigate jury irregularities and report back to the court.”⁷²

(c) New South Wales: Jury Amendment Act 2004 and Jury Act 1977

8.48 The provisions introduced to deal with juror misconduct under the *Jury Amendment Act 2004* NSW were subsequently included in the *Jury Act 1977* NSW.⁷³ Section 55DA of the *Jury Act 1977* provides that a judge may examine a juror on oath to determine whether a juror has engaged in any conduct that may constitute a contravention of section 68C (which prohibits a juror in a criminal trial from making an inquiry for the purpose of obtaining information about the accused).⁷⁴

8.49 Section 68B of the *Jury Act 1977* deals with the disclosure of information by jurors. Specifically this section makes it an offence for a juror to wilfully disclose to any person *during* the trial information about; the deliberations of the jury; or how a juror/jury formed any opinion or conclusion in relation to an issue arising in the trial.⁷⁵ The maximum penalty that a juror is

⁷² Tony Stewart MP, *Jury Amendment Bill*, Second Reading Speech, *NSWPD*, 27 October 2004, p 12097.

⁷³ The *Jury Amendment Act 2004* was repealed on 8 June 2005. However, the sections dealing referred to here are now included in the principal piece of legislation the *Jury Act 1977*.

⁷⁴ The Second Reading speech indicated that a juror would be unable to refuse to answer questions from the judge on the basis that the answers may incriminate the juror. However, the answers given cannot be used against the juror in a future prosecution (thus retaining the longstanding protection against self-incrimination). The Speech also indicated that the juror could still be prosecuted on the basis of other evidence, such as the evidence from other jurors. It was suggested in the Second Reading Speech that in most cases other evidence against the juror would be likely as the trial judge’s questioning normally follows on from information given to the judge. See Tony Stewart MP, *Jury Amendment Bill*, Second Reading Speech, *NSWPD*, 27 October 2004, page 12097.

⁷⁵ The exception to this section is where a juror discloses information to another juror, or where the judge consents to a disclosure.

liable for is a fine of 20 penalty units (\$2200). Section 68B also provides that where a juror or former juror, discloses or offers to disclose information about those same matters for monetary gain, the maximum penalty rises to 50 penalty units (\$5500).⁷⁶ Section 68C of the *Jury Act 1977* deals with inquiries made by a juror about trial matters.⁷⁷ The legislation specifically prohibits jurors from making inquiries about the accused, or any other matters relevant to the trial. The penalty for making such inquiries is significant; a maximum penalty is 50 penalty units and/or two years imprisonment. This provision is designed to provide an appropriate deterrent to jurors who are tempted to disregard the directions of a judge in relation to what evidence to consider in their deliberations.⁷⁸

8.50 Section 68C (4) 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. Usefully, a definition of what constitutes “making an inquiry” was included in section 68C(5) of the Act 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,
- causing someone else to make an inquiry.

8.51 The final amendments to the *Jury Act 1977* following the controversial cases discussed above is now contained in Section 73A, which concerns investigation by the Sheriff of jury irregularities. The section provides that where there is reason to suspect that the verdict of a jury in a criminal trial may have been affected as a result of improper conduct by a juror, the Sheriff may, with the consent or at the request of the Supreme Court or District Court, investigate the matter and report to the court on the outcome of the investigation.

⁷⁶ Under section 68B ‘deliberations’ of the jury is defined to include statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.

⁷⁷ The section provides that it applies to juror from the time they are sworn in as a juror, until they are discharged by the trial judge.

⁷⁸ It is important to note that section 68C of the *Jury Act 1977* 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 stop a juror from making an inquiry authorised by the court.

(5) European Court of Human Rights Case Law

8.52 The circumstances giving rise to *Gregory v United Kingdom*⁷⁹ were that a black person had been tried for robbery. Two hours into jury deliberations a note was passed from the jury to the judge, that stated "[j]ury showing racial overtones. One member to be excused." The trial judge brought the note to the attention of the prosecution and defence counsel. This was done in the absence of the jury. The trial judge decided to recall the jury and issue a strongly worded and clear direction on their duty to return a verdict exclusively on the basis of the evidence presented. The jury deliberated and the accused was convicted on the basis of a 10 to 2 majority decision.

8.53 The applicant brought a case before the European Court of Human Rights arguing that he had been denied a fair trial under Article 6 of the European Convention on Human Rights. The applicant accepted that the trial judge was prohibited in law from undertaking an investigation into juror bias, and that the note did not establish subjective bias. However, the applicant argued that the trial judge should have discharged the jury or at a minimum in open court made enquires whether the jury felt that they were able to return a verdict on the basis of the evidence presented at trial. The Court reached the conclusion that the response of the trial judge in discussing the note with counsel for the defence and prosecution and issuing his direction was sufficient to dismiss doubts as to the impartiality of the jury. As such the Court held by eight votes to one that there had been no violation of Article 6 of the European Convention on Human Rights.

8.54 In *Sander v United Kingdom*⁸⁰ the European Court of Human Rights distinguished its decision in *Gregory*. The *Sander* case involved circumstances where it was alleged that some jurors had made racist remarks and jokes in the trial of two Asian defendants. A juror wrote a note to the trial judge in relation to the racist jokes and expressed concern that the defendants might be convicted on the basis of their race, thereby not receiving a fair trial. The trial judge asked the juror who wrote the note not to join the other jurors and then discussed the note with counsel for the defence and prosecution. The trial judge then recalled all jurors back to court and informed them of the complaint received.

8.55 The trial judge reminded the jurors of their oath and asked the jury to consider overnight whether they could decide the case solely on the basis of the evidence presented and put aside any prejudices and indicate whether they could do so in writing. The following morning the trial judge received two letters one was from the jury as a whole that contested the allegation that a racist joke had been made at all. The letter also reaffirmed their commitment to reaching a

⁷⁹ [1997] ECHR 22299/93.

⁸⁰ 8 B.H.R.C. 279 (2000).

verdict exclusively on the basis of the evidence presented. The other letter was from an individual juror who made an admission of making racist jokes. However, the juror denied that he was racially biased. Considering these letters the trial judge did not discharge the jury. Subsequently the jury convicted one of the defendants. The European Court of Human Rights in this case held that the note from the second juror admitting the racist jokes was insufficient in and of itself to establish subjective bias. However, the Court held that the facts of the case did establish objective bias and as such there was a breach of Article 6 of the Convention.

8.56 The European Court of Human Rights considered that the letter from all of the jurors that refuted the allegations was not sufficient to doubt the first note informing the judge of racial basis. This was obviously the case as the letter from all of the jurors contested the allegation and the juror who wrote to the judge admitting making racial jokes also signed the collective letter. The collective letter could also be called into question as racist attitudes or beliefs are not normally admitted to. Particularly, in the context of a group of persons performing an important civic obligation such as jury service. The European Court of Human Rights also considered that the direction of the judge was inadequate in addressing the reasonable impression that there was a lack of impartiality as was indicated by the first note. The Court did not consider that the trial judges redirection was a sufficient response as jurors would be unable to change racist attitudes or biases overnight, regardless of its construction and strength. The European Court of Human Rights considered that the trial judge should have responded:

"… in a more robust manner than merely seeking vague reassurances that the jurors could set aside their prejudices and try the case solely on the evidence. By failing to do so, the judge did not provide sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court."

8.57 There is a general rule that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room. The House of Lords referred to the exception to this rule in circumstances where an allegation is made that tends to show that the jury as a whole did not deliberate or decided the case by other means such as drawing lots or tossing a coin. The House of Lords stated that this conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all.⁸¹ The House of Lords in *R v Mirza* held that section 8(1) of the *Contempt of Court Act 1981* did not prohibit the court carrying out necessary investigations into other

⁸¹ See Lord Hope of Craighead in *R v Mirza*, at paragraph 123.

irregularities relating to the jury's consideration of the case. The House of Lords in *R v Mirza* all expressed the view that the court received credible evidence in relation to bias or other irregularities the trial judge can investigate the situation and deal with the allegations as the situation require.

8.58 In *The People (DPP) v McDonagh*⁸² the Court of Criminal Appeal considered an application for leave to appeal a conviction for murder. One of the grounds of appeal related to the manner in which the jury was kept. Two Gardaí were sworn as jury keepers and the Court of Criminal Appeal acknowledged that they were not provided with much in the way of instructions on how to keep the jury. One of the Gardaí was experienced in this role, although he received no formal training in relation to the job. The Court of Criminal Appeal accepted that the Gardaí did not understand that their role involved more than preventing interference with the jury. In this case it emerged that the at least one of the Gardaí discussed the case with the jury or part of the jury at their request. The discussion was of a vague kind as to the approach of the jurors to their deliberations. The Court of Criminal Appeal stated that:

“only the trial judge is entitled to give the jury assistance, directions, hints or any other indications as to how they are to approach their essential function. Even taking the most benevolent view of what was said, in particular to the juror described as A.B., in that lady’s bedroom, the fact is that the topic, that is to say the topic of how the jury address going about their deliberations, should not be mentioned in any terms to the jurors by the jury keepers and, therefore, the question of what exactly the somewhat vague phrases used mean may not arise.”

8.59 The Court of Criminal Appeal acknowledged in its judgment that the Gardaí had not intentionally sought “to suborn the jury, in the sense of trying to produce any particular verdict, nor did they, on the evidence of the juror who made the complaint about the Gardaí, discuss the case with the jury or any part of the jury even when one of the jury made an inquiry of them that might naturally have led to such discussion.”

8.60 However, the Court did assert that the role of the Gardaí was to “look after” the jurors in preserving their peace, preventing them from separating and preventing anybody from approaching them, and generally ensuring that the jurors had the conditions necessary for carrying out their work. The Court stated that these functions were “inconsistent with becoming a drinking companion and is even more inconsistent with positively encouraging some of them, as would appeared to have happened, not to retire to bed as they had

⁸² [2003] 4 IR 417.

intended to do but to stay up and have more drinks." Hardiman J, while acknowledging that the foreman of the jury initiated the situation, through an invitation to the Gardaí to join the members of the jury for a drink, stated that it was the duty of the "jury keeper" and in particular the more experienced jury keeper to decline such invitations. He noted that the jurors had less reason than the Gardaí "to know what the propriety of the situation requires and unfortunately this was not done". There was an exchange of what was described as:

"war time stories about other cases. Whether this was a reference to "war stories" in the American phrase, about other cases or not, I do not know. The fact is that the jury keeper, while no doubt maintaining perfect politeness and pleasantness, is there to keep the jury and not to join them in their deliberations or in their more relaxed hours and that should not have occurred."

8.61 It also emerged in this case that one of the Gardaí heard two of female jurors talking in their bedroom, joined them and spent a considerable period of time talking to the two jurors. One of them left and returned to her room, the "jury keeper" stayed in the room with the other juror for an additional lengthy period of time. It was acknowledged that there was "some level of physical contact" between the female juror and the Garda and that some statements were made in relation to how the juror should approach deliberations. The juror was upset by what occurred. She left the room and went to the other female juror's room and asked her to accompany her back to her bedroom and the Garda left at this stage. The Court of Criminal Appeal assessed from the statements that it received that "it cannot have been earlier the five o'clock when he left". The Court of Criminal Appeal considered that in addition to the inappropriate nature of the events it was also an inappropriate intrusion into the available time for sleep. The Court of Criminal Appeal applied the objective test set out in *The People (DPP) v Tobin*⁸³ in deciding whether the conviction should be quashed on the basis that of what had occurred. The Court of Criminal Appeal held that "...it would be wrong the result entirely on the individual members of An Garda Síochána sent to keep the jury." However, it was considered a significant factor and the Court of Criminal Appeal quashed the conviction.

⁸³ [2001] 3 IR 469 at 478.

(6) Conclusion on Comparative Analysis

8.62 The comparative analysis above reveals that there are many instances where jurors have engaged in improper conduct. One of the overarching issues is that the juror misconduct in a large number of the instances discussed above came to light after the jury delivered its verdict and was discovered only by chance. The New South Wales legal response discussed above represents an attempt to deter jurors from engaging in research through making such conduct unlawful.

D The Necessity of Law Reform in Ireland

8.63 As already referred to there has been little evidence that the problem of juror misconduct has been a significant issue in this jurisdiction and as such reform of the current law might not be necessary. However, where such misconduct does occur it can have serious financial consequences for the State and can greatly undermine confidence in the justice system. A criminal contempt is committed where there is interference with the administration of justice.⁸⁴ The type of juror misconduct discussed in this chapter can easily be seen as an interference with the administration of justice. Should an incident of juror misconduct arise it would be open to a judge to deal with a juror by way of the law on contempt of court. Therefore, the law on contempt of court could be used to deal with issues of juror misconduct when they are brought to the attention of the trial judge.⁸⁵ The law reforms introduced in New South Wales were aimed primarily to serve as a deterrent to jurors from engaging in making independent inquiries about the accused and the case. The introduction of a specific criminal offence for engaging in such conduct aims to be an effective tool in communicating to jurors the importance of not accessing evidence that is extraneous to the evidence presented in court. Arguably the creation of such an offence is more effective than dealing with such conduct by way of the law on contempt of court after the verdict is handed down.

8.64 The consequences of a jury requiring to be discharged because of some deliberate or inadvertent breach of the rules can be expensive both in terms of money and in terms of damage to the standing and respect for the

⁸⁴ Where there is an allegation of criminal contempt, the person charged can be summoned to court to answer the charge. This procedure is known as the attachment and can be taken by a judge or by the Director of Public Prosecutions. The Commission acknowledged in its Report on Contempt of Court that responsibility for the administration of justice under the Constitution is vested solely in judges who are independent.

⁸⁵ This could apply in respect juror misconduct in both criminal and civil cases. For an outline of the law on contempt of court see the Commission's *Report on Contempt of Court* (LRC 47-1994).

criminal justice system. The Commission would therefore recommend legislation in line with the New South Wales provisions that would alert jurors to the importance of their understanding and adhering to the rule that they must decide the case purely on the evidence presented.

8.65 In addition, there is the real possibility of a miscarriage of justice where private inquiries by jurors lead to verdicts that are ill-informed and misguided.

(1) *Offence prohibiting jurors conducting independent inquiries*

8.66 A reform measure on the lines of the New South Wales legislation could be introduced by creating a new offence to prohibit jurors from conducting their own inquiries during trials. This could be achieved by making a further amendment to the *Juries Act 1976*. This offence would act as a deterrent to jurors and further remind them that they must not conduct their own experiments or investigations, or consult other material, including internet sources. The Commission could recommend that the prohibition should last until after the jury has given its verdict or the trial judge has discharged the juror. The punishment for this offence could include a fine or sentence or both.

8.67 The *Juries Act 1976*⁸⁶ provides that “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 shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €500.” Similarly, a person unable to serve in compliance with a summons for jury service due to drink or drugs is liable on summary conviction of a fine not exceeding €500. Under section 36(1) of the *Juries Act 1976* any person who serves on a jury knowing that he is ineligible for service shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €500. Similarly, under section 36(2) any person who serves on a jury knowing that he is disqualified shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €2,000.

(2) *Reformulation of the Trial Judge’s Directions to the Jury*

8.68 In New South Wales, trial judges now give specific instructions to jurors in respect of not conducting experiments or Internet research. Trial judges in this State could, the Commission considers, give this direction as part of a general media warning to jurors. As already discussed, some members of the judiciary already feel that it is necessary to make specific reference to Internet research as part of the general media warning to jurors. These

⁸⁶ The Civil Law (Miscellaneous Provisions) Act 2008 increased the applicable fines for offences under the *Juries Act 1976*.

directions could be given to jurors and further supported by a criminal offence that criminalised a juror who disregarded the direction.

8.69 *The Commission provisionally recommends that legislation be introduced to make it a criminal offence for a juror to disclose matters discussed in the jury room or to make inquiries about matters arising in the course of a trial beyond the evidence presented.*

8.70 *The Commission recommends that the Courts Service provide to jurors information explaining why independent investigations or internet searches about a case should not be undertaken.*

8.71 *The Commission invites submissions as to whether a trial judge's directions should be reformulated specifically to cover juror misconduct in all trials.*

E Jury Tampering

8.72 The other main situation where the verdict of the jury may not be arrived at properly is where external factors interfere with jurors. As with the case law on juror misbehaviour discussed above, external interference with juries can happen in many diverse ways. As also already discussed above the reaction to these interferences will depend upon the phase of the trial the incident is discovered and the seriousness of the interference. The interference with a jury with a view to influencing its deliberation is a criminal offence. This offence was referred to as embracery and covered any attempt to corrupt or influence jurors.⁸⁷ As O'Malley notes the English and Irish courts no longer use the offence of embracery in responding to cases of jury intimidation, preferring instead to use general offences relating to perverting or obstructing the course of justice or contempt of court.⁸⁸

8.73 It would be open to a trial judge to discharge a jury in circumstances where it is considered that "the interference is such as to create a real danger of an unsafe verdict or to form the basis for so-called objective bias which arises when an objective observer, aware of the facts, might reasonably apprehend that justice has not been done."⁸⁹ In *People (DPP) v Mulder*⁹⁰ the foreman of the jury informed the court that a juror had been approached by a person connected to the case and that they felt intimidated and uncomfortable as a result of the incident. The Court of Criminal stated that:

⁸⁷ O'Malley *The Criminal Process* (Round Hall 2009) at 837.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ [2007] IECCA 63.

"While courts should be reluctant to discharge a jury because of individual incidents involving communication with a juror the nature of this intervention and the cumulative effect of the incidents and the conflict to some extent in the reports given to the judge would have all led an observer to be concerned that there would be a risk of an unfair trial. There may be cases where even if that were so, this court might be in a position to decide at the end that in actual fact there was a fair trial. However, in the nature of things that is not possible here. Having regard therefore to the factual history which I have given and having regard also to the fact that the judge applied the wrong legal test, the court took the view reluctantly that there must be a new trial. The appeal was, therefore, allowed."⁹¹

8.74 The Court of Criminal Appeal considered that the trial judge in this case should have taken immediate action to address the incidents of improper contact with the jury. This case illustrates that a conviction of an accused can be quashed on the basis that an objective observer might have a reasonable apprehension that the intimidation might affect at least one juror. However, this does not mean that every communication with a juror must inevitably lead to discharge of the jury or lead to the quashing of their verdict as unsafe if not discharged.

8.75 Intrinsic to the issue of jury interference is the question of jury privacy and there are different approaches to the issue of privacy of jurors. The United States Supreme Court has not yet addressed this issue in its case law. However, in a recent decision of the Pennsylvania Supreme Court decided that the First Amendment of the United States Constitution required the disclosure of the names of jurors.⁹²

"First, with respect to the value of openness in criminal trials, a trial by jury and public access to criminal trials serve the same function ... ensuring the fairness of the judicial process. From the earliest days of this country, it was believed that the jury was the best way to assure a fair trial... Likewise, public scrutiny of the criminal justice system enhances the quality and safeguards the integrity of the fact-finding process, "with benefits to both the defendant and to society as a whole." ... Openness also fosters an appearance of fairness, which increases public respect for the criminal justice system as a whole. "And in the broadest terms, public access to criminal trials permits the public to participate in and serves as a check upon the

⁹¹ *Ibid.*

⁹² See *Commonwealth v Long* 2007 WL 1574157 (Pa. 2007). Available at: <http://www.courts.state.pa.us/OpPosting/Supreme/out/J-15A&B-2006mo.pdf>.

judicial process –an essential component in our structure of self government.” ... While these considerations weigh in favor of disclosing jurors’ names and addresses, we believe that revealing impaneled jurors’ names is sufficient. Openness is fostered by the public knowledge of who is on the impaneled jury. Armed with such knowledge, the public can confirm the impartiality of the jury, which acts as an additional check upon the prosecutorial and judicial process.”⁹³

8.76 There is an issue in relation to disclosure of the personal information of a juror. There are obviously concerns that a defendant can use information to access and intimidate members of the jury. There is also a concern that jurors may be uncomfortable with the use of their name in court and may be fearful for their personal safety when empanelled for criminal trials. This could lead to apprehension or reluctance to undertake jury service. However, there is no evidence to suggest that this is a widespread problem in this jurisdiction.

8.77 Section 50 of the *Juries Act 1927* made provision for the inspection of a jury panel and this provision was reworked by section 16 of the *Juries Act 1976*. Section 16(1) of the *Juries Act 1976* provides that “... [e]very 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.” Under section 16(2) an accused person is entitled to exercise their right to inspect the panel at any time between the issue of the summonses and the close of the trial or the time when it is no longer possible to have a trial with a jury. Section 16(4) also provides that the right of an accused to inspect the panel and a right to be shown (on request) all alterations to the panel and the names of any persons summoned under section 14 of the *Juries Act 1976* and to be told of any excusals. It should be noted that section 16 of the *Juries Act 1976* does not confer a right for the accused person to be provided with the names of the jurors selected, rather it only confers an entitlement to access the names of persons summoned for jury service. In practice a solicitor for an accused person will offer to examine the panel of candidate jurors with their client in advance of jury selection, so as to identify whether any persons on the panel are known to the accused. The Director of Public Prosecutions expressed concern with the right of defendants under section 16 of the *Juries Act 1976*.⁹⁴ In particular, the DPP was concerned with the protection of jurors from intimidation. The DPP was concerned with the access of defence counsel to

⁹³ *Ibid*, at 16-17.

⁹⁴ Comments of James Hamilton, Director of Public Prosecutions, Joint Committee on Justice, Equality, Defence and Women’s Rights, 8 December 2003.

"not just the names, but the addresses of jurors" and raised the question as to whether jurors should be anonymous.⁹⁵

8.78 While there has been concern expressed in this jurisdiction in relation to jury tampering during the course of a trial, it has been suggested that "the evidence of the existence of jury-tampering is largely anecdotal. In fact the main problem arises in relation to witness intimidation".⁹⁶ It was also suggested in the debates on what became the *Criminal Justice (Amendment) Act 2009* that there were no proven cases of jury intimidation and that the real issue was witness intimidation.⁹⁷ However, the Minister for Justice suggested that there was recent evidence from the Gardaí of "of jury intimidation, interference and threats", which was "more surreptitious than witness intimidation".⁹⁸ The Irish Human Rights Commission acknowledged that jury intimidation could undermine the normal administration of justice.⁹⁹ However, the Human Rights Commission expressed the view that jury intimidation in Ireland did not warrant the extension of the powers of the Special Criminal Court as ultimately enacted in the *Criminal Justice (Amendment) Act 2009*.¹⁰⁰ The Human Rights Commission identified a number of intermediate measures that could be examined with a view to protecting jurors. Some of the measures identified by the Human Rights Commission included anonymous juries, screening the jury from public view, protection of the jury during the trial or locating the jury in a different place from where the trial is being held with communication by video link.¹⁰¹ Given the complexity of the many issues raised in this area, the Commission has not yet formulated a view on what reforms would be appropriate bearing in mind the relatively limited focus of this project on jury service. Nonetheless, the Commission considers that the issue is worthy of further exploration in the context of the preparation of the Commission's Report to follow this Consultation Paper. In that respect, the Commission considers that

⁹⁵ *Ibid.*

⁹⁶ Donson "Trial by Jury to be removed for organised crime offences" Centre for Criminal Justice and Human Rights, University College Cork, July 2009. Available at: <http://www.ucc.ie/law/blogs/ccjhr/2009/07/trial-by-jury-to-be-removed-for.html>.

⁹⁷ *Dáil Debates* 10 July 2009 p.690.

⁹⁸ *Ibid* at page 691.

⁹⁹ "IHRC says blanket extension of Special Criminal Court powers to deal with organised crime not human rights compliant" Irish Human Rights Commission, Press Release 30 June 2009. Available at: http://www.ihrc.ie/press_releases/newsarticle.asp?NID=311&NCID=12&T=N&Print=1.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

it should proceed at this stage by inviting submissions as to whether the right to inspect the jury panel should be amended in some manner with a view to reinforcing public confidence in the jury decision-making process.

8.79 *The Commission invites submissions as to whether the right to inspect the jury panel should be amended with a view to reinforcing public confidence in the jury decision-making process.*

CHAPTER 9 SUMMARY OF PROVISIONAL RECOMMENDATIONS

The provisional recommendations made by the Commission in this Consultation Paper are as follows.

9.01 The Commission provisionally recommends that jury panels should be based on the register of electors for Dáil, European and local elections. [paragraph 2.55]

9.02 The Commission provisionally recommends that 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. The Commission also provisionally recommends that such potential non-Irish citizen jurors must be capable of following courts proceedings in one of the official languages of the State, Irish or English. [paragraph 2.56]

9.03 The Commission provisionally recommends that jury lists should not be supplemented or crosschecked with other lists. [paragraph 2.62]

9.04 The Commission provisionally recommends that the President should continue to be ineligible for jury service. [paragraph 3.31]

9.05 The Commission provisionally recommends that members of the judiciary should continue to be ineligible for jury service. [paragraph 3.37]

9.06 The Commission provisionally recommends that retired members of the judiciary should continue to be ineligible for jury service. [paragraph 3.41]

9.07 The Commission provisionally recommends that coroners and deputy coroners should continue to be ineligible for jury service. [paragraph 3.43]

9.08 The Commission provisionally recommends that the Attorney General and those staff in his Office who undertake work of a legal nature should continue to be ineligible for jury service. [paragraph 3.45]

9.09 The Commission provisionally recommends that the Director of Public Prosecutions and members of his staff should continue to be ineligible for jury service. [paragraph 3.49]

9.10 The Commission provisionally recommends that practising barristers, solicitors and solicitors apprentices should continue to be ineligible for jury service. [paragraph 3.60]

9.11 The Commission provisionally recommends that clerks and other persons employed on work of a legal character in solicitors' offices should be eligible for jury service. [paragraph 3.62]

9.12 The Commission invites submissions as to whether officers attached to a court are sufficiently connected to the criminal justice system to merit their continued ineligibility for jury service. [paragraph 3.64]

9.13 The Commission invites submissions on whether persons employed to take court records (stenographers) are sufficiently connected to the criminal justice system to merit their continued ineligibility for jury service. [paragraph 3.66]

9.14 The Commission provisionally recommends that serving members of An Garda Síochána (but not civilians employed by An Garda Síochána, performing entirely administrative functions) should continue to be ineligible for jury service. [paragraph 3.84]

9.15 The Commission provisionally recommends that retired members of An Garda Síochána should remain eligible for jury service. The Commission also provisionally recommends that retired members of An Garda Síochána should not be eligible for jury service until three years after retirement. The Commission also provisionally recommends that retired Gardaí selected for jury service should inform the court of their former occupation. [paragraph 3.88]

9.16 The Commission provisionally recommends that prison officers and other persons employed in a prison or place of detention should continue to be ineligible for jury service. [paragraph 3.91]

9.17 The Commission provisionally recommends that persons working in the Probation Service should continue to be ineligible for jury service. [paragraph 3.94]

9.18 The Commission provisionally recommends that persons in charge of, or employed in, a forensic science laboratory should continue to be ineligible for jury service. [paragraph 3.96]

9.19 The Commission provisionally recommends that Members of the Permanent and Reserve Defence Forces should be eligible for jury service. [paragraph 3.99]

9.20 The Commission provisionally recommends that the categories of persons excusable as of right under the Juries Act 1976 should be repealed and replaced with a general right of excusal for good cause. [paragraph 3.115]

9.21 The Commission provisionally recommends that evidence should be required to support applications for excusal. [paragraph 3.116]

9.22 The Commission provisionally recommends that a deferral date of up to 12 months should be introduced in circumstances where a person is not available to undertake jury service. The Commission also provisionally recommends that a person who defers jury service should be entitled to seek an excusal. The Commission also provisionally recommends that a further deferral should be available to a juror, provided that the application is for good cause. The Commission provisionally recommends that guidelines on excusal should contain a section on the administration of the deferral system. [paragraph 3.125]

9.23 The Commission provisionally recommends that 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. The Commission also provisionally recommends that it should be open to the trial judge to ultimately make this decision having regard to the nature of the evidence that will be presented during the trial. [paragraph 4.58]

9.24 The Commission provisionally recommends the provision of reasonable accommodations to hearing and visually impaired jurors to assist them in undertaking the duties of a juror. [paragraph 4.59]

9.25 The Commission provisionally recommends that a proper system for regulation and control of court interpreters be established. [paragraph 4.60]

9.26 The Commission provisionally recommends that an oath should be introduced applicable to interpreters and stenographers who assist deaf jurors in interpreting evidence at trial. The oath should include a commitment to upholding the secrecy of jury deliberations. [paragraph 4.61]

9.27 The Commission provisionally recommends that the Courts Service should prepare Guidelines for the reasonable accommodation of persons with physical disabilities to participate in the jury system. [paragraph 4.62]

9.28 The Commission provisionally recommends that the Courts Service provide disability awareness training to Court Service personnel dealing with jurors with disabilities. [paragraph 4.63]

9.29 The Commission provisionally recommends that 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. [paragraph 4.68]

9.30 The Commission provisionally recommends that persons with an intellectual disability should continue to be ineligible for jury service. [paragraph 4.74]

9.31 The Commission provisionally recommends 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. [paragraph 4.75]

9.32 The Commission provisionally recommends that procedures for the testing of juror literacy should not be introduced. The Commission provisionally recommends that all jurors should have a responsibility to inform the court registrar if they have literacy difficulties and should seek excusal on that ground. [paragraph 4.91]

9.33 The Commission provisionally recommends that it should be an offence for any person to knowingly present for jury service where their lack of literacy renders them incapable of performing their duties. [paragraph 4.92]

9.34 The Commission provisionally recommends that a fluency in English should be introduced as a requirement for all persons serving on a jury. [paragraph 4.93]

9.35 The Commission invites submissions on methods to be used in order to establish that a juror is able to understand and communicate in the English language. [paragraph 4.94]

9.36 The Commission provisionally recommends that current arrangements for trials involving the Irish language be retained. [paragraph 4.100]

9.37 The Commission provisionally recommends that the criteria for exclusion from eligibility for jury service should continue to be based on length of sentence rather than on seriousness of the offence. The Commission invites submissions as to whether there should be a reduced period of ineligibility for shorter sentences. [paragraph 5.22]

9.38 The Commission provisionally recommends that the exclusion period for offenders under the age of 18 should be reduced from the present ten year period. The Commission invites submissions as to what lesser period would be appropriate. [paragraph 5.29]

9.39 The Commission invites 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. [paragraph 5.33]

9.40 The Commission provisionally recommends that the position of those currently serving sentences of imprisonment should be clarified to make clear their exclusion from jury service. [paragraph 5.35]

9.41 The Commission provisionally recommends that disqualification from jury service should not be extended to persons subject to non-custodial sentences or community based orders. The Commission invites submissions as

to whether persons subject to such sentences should be obliged to inform the court of this fact prior to jury empanelling. [paragraph 5.50]

9.42 The Commission provisionally recommends that persons convicted of criminal offences outside the States should be disqualified from jury service. The Commission provisionally recommends that disqualification of persons convicted of criminal offences abroad should apply in the same way and for the same period of time as disqualification as it applies to persons convicted of criminal offences in this jurisdiction. [paragraph 5.52]

9.43 The Commission provisionally recommends that provision for vetting of juries, to ensure that disqualified jurors are not included on the empanelling list for jurors, be included in juries legislation. The Commission also provisionally recommends that the Garda Central Vetting Unit alone should be empowered to provide information as to whether a potential juror is disqualified from jury service. [paragraph 5.67]

9.44 The Commission provisionally recommends that peremptory challenges should be retained. [paragraph 6.52]

9.45 The Commission invites submissions as to whether the number of peremptory challenges should be reduced from seven. [paragraph 6.53]

9.46 The Commission provisionally recommends that the challenge for cause procedure should be retained in its current form. [paragraph 6.55]

9.47 The Commission provisionally recommends that the questioning of candidate jurors by means of a written questionnaire as a method of informing the process of challenge for cause should continue to be prohibited. [paragraph 6.56]

9.48 The Commission provisionally recommends that the Director of Public Prosecutions should develop guidelines on when it is appropriate for counsel for the prosecution to use peremptory challenges. [paragraph 6.58]

9.49 The Commission invites submissions on the provision of a tax credit to self-employed persons summoned for jury service. [paragraph 7.15]

9.50 The Commission invites submissions on the use of insurance cover for jury service as a means of alleviating the potential injustice of requiring employers and the self employed to carry the cost of jury duty and as a means of limiting the use of the financial hardship argument when seeking excusals. [paragraph 7.16]

9.51 The Commission provisionally recommends that there should not be a system in which jurors are paid by the State for their services. [paragraph 7.37]

9.52 The Commission provisionally recommends that the current system of payment for jury service under section 29 of the Juries Act 1976 should be retained. [paragraph 7.38]

9.53 The Commission invites 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. [paragraph 7.39]

9.54 The Commission provisionally recommends that legislation be introduced to make it a criminal offence for a juror to disclose matters discussed in the jury room or to make inquiries about matters arising in the course of a trial beyond the evidence presented. [paragraph 8.69]

9.55 The Commission recommends that the Courts Service provide to jurors information explaining why independent investigations or internet searches about a case should not be undertaken. [paragraph 8.70]

9.56 The Commission invites submissions as to whether a trial judge's directions should be reformulated specifically to cover juror misconduct in all trials. [paragraph 8.71]

9.57 The Commission invites submissions as to whether the right to inspect the jury panel should be amended with a view to reinforcing public confidence in the jury decision-making process. [paragraph 8.79]

Number 4 of 1976

JURIES ACT 1976**ARRANGEMENT OF SECTIONS****PART I
PRELIMINARY**

1. Short title
2. Interpretation
3. Expenses
4. Repeals

**PART II
QUALIFICATION AND LIABILITY FOR SERVICE AS A JUROR**

5. Jury districts
6. Qualification and liability for jury service
7. Ineligibility
8. Disqualifications
9. Excusal from service

**PART III
SELECTION AND SERVICE OF JURORS**

10. Supply of electoral registers
11. Empanelling of jurors
12. Summoning of jurors
13. Service of jury summons
14. Summoning of jurors to make up deficiency
15. Selection of jury from panel

16. Inspection of jury panel
17. Mode of swearing a jury
18. Administration of oath to jurors
19. Forms of oath to be taken by jurors
20. Challenges without cause shown
21. Challenges for cause shown
22. View by jury
23. Death or discharge of juror during trial
24. Discontinuance of juror's service
25. Separation of jurors during trial
26. Non-effect of appeals as to electoral register on jury service

PART IV GENERAL

27. Administrative instructions
28. Person standing mute
29. Jury service by employees and apprentices
30. Commission *de lunatico inquirendo*
31. Liability to serve on coroner's jury
32. Non-application of provisions to coroner's inquests
33. Restriction of functions of sheriff

PART V OFFENCES

34. Failure of juror to attend court, etc.
35. False statements by or on behalf of juror
36. Service by ineligible or disqualified person
37. Refusal to be sworn by juror

FIRST SCHEDULE PERSONS INELIGIBLE AND PERSONS EXCUSABLE AS OF RIGHT

PART I PERSONS INELIGIBLE PART II PERSONS EXCUSABLE AS OF RIGHT

SECOND SCHEDULE REPEALS

JURIES ACT 1976

AN ACT TO AMEND THE LAW RELATING TO JURIES [2nd March, 1976]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS: —

PART I

PRELIMINARY

Short title

1. — This Act may be cited as the Juries Act 1976.

Explanatory note on commencement.

As the 1976 Act contains no commencement provision, it came into force on its signature by the President, on 2 March 1976. The amendments to the 1976 Act made by the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008) came into force on 1 January 2009: see *Civil Law (Miscellaneous Provisions) Act 2008 (Commencement) Order 2008* (SI No.274 of 2008).

Interpretation

2. — (1) In this Act —

“county” means an administrative county ;

“jury summons” means a summons under section 12 ;

“the Minister” means the Minister for Justice.

(2) References in this Act to any enactment shall be construed as references to that enactment as amended or extended by any subsequent enactment, including this Act .

(3) (a) A reference in this Act to a section or Schedule means a reference to a section of, or a Schedule to, this Act , unless it is indicated that reference to some other enactment is intended.

(b) A reference in this Act to a subsection is a reference to the subsection of the section in which the reference occurs unless it is indicated that reference to some other provision is intended.

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.

Repeals

4. — Each enactment mentioned in the Second Schedule is hereby repealed to the extent specified in column (3) of that Schedule.

Part II

QUALIFICATION AND LIABILITY 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

Subsection (1) was amended by section 28 of the *Local Government (Dublin) Act 1993* (No.31 of 1993), with effect from 1 January 1994: *Local Government (Dublin) Act 1993 (Commencement) Order 1993* (S.I. No.400 of 1993).

Qualification and liability for jury service

6. — Subject to the provisions of this Act, every citizen aged eighteen years or upwards [...] who is entered in a register of Dáil electors in a jury district 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, unless he is for the time being ineligible or disqualified for jury service.

Explanatory note

The words “and under the age of seventy years” (which appeared after “upwards” and before “who”) were deleted by section 54 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

Ineligibility

7. — The persons specified in Part I of the First Schedule shall be ineligible for jury service.

Disqualification

8. — A person shall be disqualified for jury service if on conviction of an offence in any part of Ireland—

(a) he has at any time been sentenced to imprisonment or penal servitude for life or for a term of five years or more or to detention under section 103 of the Children Act 1908, or under the corresponding law of Northern Ireland, or

(b) he has at any time in the last ten years—

(i) served any part of a sentence of imprisonment or penal servitude, being, in the case of imprisonment, a sentence for a term of at least three months, or

(ii) served any part of a sentence of detention in Saint Patrick’s Institution or in a corresponding institution in Northern Ireland, being a sentence for

a term of at least three months.

Explanatory note

The *Children Act 1908* was repealed and replaced by the *Children Act 2001* (No.24 of 2001).

Excusal from service

9. — (1) A county registrar shall excuse any person whom he has summoned as a juror under this Act if—

- (a) that person is one of the persons specified in Part II of the First Schedule and informs the county registrar of his wish to be excused, or
- (b) that person shows to the satisfaction of the county registrar that he has served on a jury, or duly attended to serve on a jury, in the three years ending with the service of the summons on him, or
- (c) 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 from jury service for a period that has not terminated.

(2) A county registrar may excuse any person whom he 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 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 behalf.

(4) A person whom the county registrar has refused to excuse may appeal against the refusal to the court at which he 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. 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.

Part III

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 7(1) of the Electoral Act, 1963, 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 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 register thereafter.

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 register or registers delivered to him under section 10 (omitting persons whom he knows or believes not to be qualified as jurors).

Explanatory note

The words “one or more courts within a jury district” were substituted for “each court” by section 55 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 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) to thereafter 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.]

(2) A jury summons served on a person under this section shall be accompanied by a notice informing him—

(a) of the effect of sections 6, 7, 8, 9 (1), 35 and 36, and

(b) that he may make representations to the county registrar with a view to obtaining a withdrawal of the summons, if for any reason he is not qualified for jury service or wishes or is entitled to be excused.

Explanatory note

Subsection (1) was substituted by section 56 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

Service of jury summons

13.—(1) A jury summons may be sent by post or delivered by hand.

(2) For the purposes of section 18 of the Interpretation Act 1937, a letter containing a jury summons shall be deemed to be properly addressed if it is addressed to the juror at, his address as shown in the current register of Dáil 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 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 behalf or a member of the Garda Síochána that he 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 behalf, officer of a court or member of the Garda Síochána and to be signed by him 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

Subsection (3)(c) was substituted by section 57 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

The *Interpretation Act 1937* was repealed and replaced by the *Interpretation Act 2005*.

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.

Selection of jury from panel

15. — (1) The selection of persons empanelled as jurors to serve on a particular jury shall be made by balloting in open court.

(2) 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 that section .

(3) 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 he shall invite any person who knows that he is not qualified to serve or who is in doubt as to whether he 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 is selected on the ballot.

(4) The foreman 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.

Inspection of jury panel

16. — (1) 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.

(2) The rights under subsection (1) shall be exercisable at any time between the issue of the summonses and the close of the trial or the time when it is no longer possible to have a trial with a jury.

(3) 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

.

(4) 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.

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 him to take the Testament in his hand and shall administer the oath to him 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 objection immediately after his name is called out and before the administration of the oath to him has begun.

(4) Every challenge of a juror shall be made immediately after his name is called out and before the administration of the oath to him 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 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.

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 the words so spoken by him.

(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 has a religious belief but that he 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.

(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 is entitled to take the oath in some other manner.

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) [...]

(3) Whenever the issue to be tried is not one of the issues hereinbefore expressly provided for, 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

Subsection (2) was repealed by the *Criminal Law (Insanity) Act 2006* (No.11 of 2006), s.24 (Schedule 2) with effect from 1 June 2006: *Criminal Law (Insanity) Act 2006 (Commencement) Order 2006* (S.I. No.273 of 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 seven 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 seven jurors and no more.

(3) Whenever a juror is lawfully challenged without cause shown, he shall not be included in the jury.

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 he 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.

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 him 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 shall give such directions as appear to him to be expedient for the purpose of preventing undue communication with the jurors during the execution of the order.

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 his 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 thereby reduced below ten, 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.

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 should give that direction.

[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

Section substituted by section 58 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 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 8 of the Electoral Act 1963 (which relates to appeals regarding the register of electors).

Part IV

GENERAL

Administrative instructions

27. — With a view to securing consistency in the administration of this Act, the Minister 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 Minister 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.

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 is mute of malice or by the visitation of God shall be decided by the judge and, if the judge is not satisfied that he is mute by the visitation of God, the judge shall direct a plea of not guilty to be entered for him.

Jury service by employees and apprentices

29. — (1) For the purposes of any contract of service or apprenticeship or any agreement collateral thereto (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 is absent from his 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.

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.

Liability to serve on coroner's jury

31. — Every citizen of the age of eighteen years or upwards [...] 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 is ineligible or disqualified under this Act for jury service or is among the persons specified in Part II of the First Schedule.

Explanatory note

The words “and under the age of sixty-five years” (after “upwards”) were deleted by section 59 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

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.

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 notwithstanding anything in section 12 of the Court Officers Act 1945 (which refers to the duties of sheriffs) or in any order made thereunder.

Part V

OFFENCES

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 shall be guilty of an offence and shall be 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, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding [€500].

(3) Except in a case to which section 14 applies, a person shall not be guilty of an offence under subsection (1) in respect of failure to attend in compliance with a summons unless the summons was served at least fourteen days before the date specified therein for his first attendance.

Explanatory note

In subsections (1) and (2) the figure “€500” substituted for “€63.49 [£50]” by section 60 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

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 behalf a false representation to the county registrar or any person acting on his behalf, or to a judge, with the intention of evading jury service, he shall be guilty of an offence and shall be 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 shall be guilty of an offence and shall be 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 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 a 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 on summary conviction to a fine not exceeding [€500].

Explanatory note

In subsections (1), (2) and (3) “€500” substituted for “€63.49 [£50]” by section 61 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

Service by ineligible or disqualified person

36. — (1) Any person who serves on a jury knowing that he is ineligible for service shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding [€500].

(2) Any person who serves on a jury knowing that he is disqualified shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding [€2,000].

Explanatory note

In subsection (1), “€500” substituted for “€63.49 [£50]” and, in subsection (2), “€2,000” substituted for “€253.94 [£200]” by section 62 of the *Civil Law*

(Miscellaneous Provisions) Act 2008 (No.14 of 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 shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding [€500].

Explanatory note

“€500” substituted for “€63.49 [£50]” by section 63 of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

Sections 7, 9, 31.

FIRST SCHEDULE
PERSONS INELIGIBLE AND PERSONS EXCUSABLE AS OF
RIGHT

PART I
PERSONS INELIGIBLE

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 (No.38).

Coroners, deputy coroners and persons appointed under section 5(2) of the Local Authorities (Officers and Employees) Act 1926 (No.39) to fill the office of coroner temporarily.

The Attorney General and members of his staff.

The Director of Public Prosecutions and members of his 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 and officers and other persons employed in any office attached to a court or attached to the President of the High Court.

Persons employed from time to time in any court for the purpose of taking a record of the proceedings of the court.

Members of the Garda Síochána.

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 (No. 11) or in any place in which persons are kept in military custody pursuant to section 2 of the Prisons Act 1972 (No.7) or in any place specified to be used as a prison under section 3 of the latter Act, chaplains and medical officers of, and members of visiting committees for, any such establishment or place.

Persons employed in the welfare service of the Department of Justice.

A person in charge of, or employed in, a forensic science laboratory.

Members of the Defence Forces

Every member of the Permanent Defence Force, including the Army Nursing Service.

Every member of the Reserve Defence Force during any period during which he is in receipt of pay for any service or duty as a member of the Reserve Defence Force.

[Other persons

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.]

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.

Explanatory note

Heading “Incapable persons” and text substituted by section 64(a) of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

PART II
PERSONS EXCUSABLE AS OF RIGHT

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 persons if actually practising their profession and registered (including provisionally or temporarily registered), enrolled or certified under the statutory provisions relating to that profession:

- Medical practitioners;
- Dentists;
- Nurses;
- Midwives;
- Veterinary surgeons;
- Pharmaceutical chemists.

A member of the staff of either House of the Oireachtas on a certificate from the Clerk of that House that it would be contrary to the public interest for the member to have to serve as a juror because he performs essential and urgent services of public importance that cannot reasonably be performed by another or postponed.

Heads of Government Departments and Offices and any civil servant on a certificate from the head of his Department or Office that it would be contrary to the public interest for the civil servant to have to serve as a juror because he performs essential and urgent services of public importance that cannot reasonably be performed by another or postponed.

Any civilian employed by the Minister for Defence under section 30 (1) (g) of the Defence Act 1954 (No.18) on a certificate from the Secretary of the Department of Defence that it would be contrary to the public interest for the civilian to have to serve as a juror because he performs essential and urgent services of public importance that cannot reasonably be performed by another or postponed.

Chief officers of local authorities for the purposes of the Local Government Act 1941 (No.23), health boards established under the Health Act 1970 (No.1) and harbour authorities within the meaning of the Harbours Act 1946 (No.9) and any employee of a local authority, health board or harbour authority on a certificate from its chief officer that it would be contrary to the public interest for the employee to have to serve as a juror because he performs essential and urgent services of public importance that cannot reasonably be performed by another or postponed.

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 such head or principal teacher that the person concerned performs services in the institution that cannot

reasonably be performed by another or postponed.

Whole-time students at any such educational institution as is mentioned in the preceding paragraph .

The secretary to the Commissioners of Irish Lights and any person in the employment of the Commissioners on a certificate from the secretary that the person concerned performs services for the Commissioners that cannot reasonably be performed by another or postponed.

Masters of vessels duly licensed pilots and duly licensed aircraft commanders.

Persons aged sixty-five years or upwards [...].

Explanatory note

The words “and under the age of seventy years” (after “upwards”) deleted from last sentence by section 64(b) of the *Civil Law (Miscellaneous Provisions) Act 2008* (No.14 of 2008).

Section 4.

SECOND SCHEDULE

REPEALS

Number and Year (1)	Short Title (2)	Extent of repeal (3)
1908, c.48	Post Office Act 1908	In section 43, the words "or on any jury or inquest,".
1919, c.71 Sex Disqualification (Removal) Act 1919.		So much of section 1 as empowers a judge to order an all-male or all-female jury.
No. 23 of 1927 Juries Act 1927.		The whole Act.
No. 27 of 1930 Local Government (Dublin Act) 1930.		Section 23 (4).

No. 48 of 1936 Courts of Justice Act 1936.	Section 80.
No. 21 of 1940 Local Government (Dublin) (Amendment) Act 1940.	Section 9 (3).
No. 24 of 1945 Juries Act 1945.	The whole Act.
No. 18 of 1954 Defence Act 1954.	Section 105.
No. 11 of 1961 Juries Act 1961.	The whole Act.
No. 9 of 1962 Coroners Act 1962.	Sections 42 and 59.
No. 19 of 1963 Electoral Act 1963.	In section 7 (1), the words "after consultation with the Minister for Justice,". Sections 7(2) (b), (6) and (8) and 8(5).
No. 5 of 1964 Criminal Justice Act 1964.	Section 7.



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.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to legislative changes.

€15

ADDRESS
35-39 Shelbourne Road Dublin 4 Ireland

TELEPHONE

+353 1 6377600

FAX

+353 1 6377601

EMAIL

info@lawreform.ie

WEBSITE

www.lawreform.ie

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