

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

CRITERIA FOR SERVICE AS JURORS

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June 2010

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CONTENTS

<i>Chapter</i>	<i>Page</i>
Preface	1
Introduction	1
Terms of reference	1
The sub-committee	2
1. Existing law and practice in Hong Kong	4
Introduction	4
Origins of the jury system	4
The history of the jury system in Hong Kong	5
The jury system today	7
<i>Use of the jury</i>	7
<i>The provisional list of jurors</i>	8
<i>Compilation of the list</i>	10
<i>Qualifications and disabilities</i>	11
<i>Formation of and empanelling the jury</i>	12
<i>Challenge and discharge of jurors</i>	14
<i>Majority verdicts</i>	15
<i>Confidentiality of jurors' discussions in jury room</i>	15
2. The law in other jurisdictions	16
Introduction	16
Australia	16
<i>New South Wales</i>	16
<i>Victoria</i>	18

Chapter	Page
Canada	22
<i>Alberta</i>	22
England and Wales	25
<i>Juries Act 1974</i>	25
Ireland	26
<i>Juries Act 1976</i>	26
New Zealand	29
<i>Juries Act 1981</i>	29
Northern Ireland	32
<i>Juries (Northern Ireland) Order 1996</i>	32
Scotland	36
<i>Qualifications for jury service</i>	36
<i>Exemptions from jury service</i>	36
United States of America	38
<i>California</i>	40
3. Common law position	46
Introduction	46
Age	46
Residency	48
Good character	49
Language competence and educational standard	53
Disability	60
<i>Deafness</i>	60
<i>Blindness</i>	64
Ineligibility and excusals	70
4. Issues for consideration and reforms in other jurisdictions	74
Introduction	74
"Trial by one's peers" and the representativeness of the jury	75
<i>The representativeness of the jury in Hong Kong</i>	78
Age requirements	79
<i>Lower age limit</i>	79
<i>Upper age limit</i>	80
Residency requirements	82
Good character	83
<i>Criminal records</i>	83
<i>Undischarged bankrupts</i>	86
Education requirements	87
Disability	89
The issue of bias	96

Chapter	Page
5. Recommendations for reform	98
Introduction	98
Qualifications for jury service	99
<i>"A person who has reached 21 years of age, but not 65 years of age"</i>	99
<i>"A person who ... is a resident of Hong Kong"</i>	103
<i>"The person is of good character"</i>	105
<i>"The person has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings"</i>	109
<i>"The person is of sound mind and not afflicted by blindness, deafness or other disability preventing the person from serving as a juror"</i>	117
Form of notice of jury service	121
Exemptions from jury service under section 5 of the Jury Ordinance	122
Our proposed categories for exemption	127
<i>"(a) members of the Executive or Legislative Council"</i>	127
<i>"(ab) justices of the peace"</i>	128
<i>"(b) any public officer who is –</i>	129
(i) <i>a judge, deputy judge, District Judge, deputy District Judge, Registrar, Senior Deputy Registrar, Deputy Registrar, Assistant Registrar, coroner or magistrate"</i>	
<i>"(b) any public officer who is -</i>	131
(ii) <i>a presiding officer, adjudicator or member of any tribunal established by law;</i>	
(iii) <i>an officer or member of the staff of any court or tribunal established by law, if his work is mainly concerned with the day to day administration of the court or tribunal."</i>	
<i>"(b) any public officer who is -</i>	131
(iv) <i>a legal officer within the meaning of section 2 of the Legal Officers Ordinance (Cap 87);</i>	
(v) <i>serving in the Department of Justice, the Legal Aid Department, the Official Receiver's Office or the Intellectual Property Department"</i>	
<i>"(b) any public officer who is -</i>	132
(vi) <i>a member of the Hong Kong Police Force, the Immigration Service, the Customs and Excise Service or the Fire Services Department, including a person holding any post specified in the Seventh Schedule to the Fire Services Ordinance (Cap 95);</i>	
(vii) <i>an officer of the Correctional Services Department"</i>	

Chapter	Page
"(b) any public officer who is - (viii) a member of the Government Flying Service"	132
"(b) any public officer who is - (ix) the Commissioner, Deputy Commissioner or an officer of the Independent Commission Against Corruption; (x) carrying out duties in the Hong Kong Police Force, the Immigration Department, the Customs and Excise Department, the Fire Services Department, the Correctional Services Department, the Government Flying Service or the Independent Commission Against Corruption"	133
"(b) any public officer who is - (xi) serving in a training or apprentice rank"	134
"(b) any public officer who is - (xii) appointed as the principal probation officer, or as a probation officer, under the Probation of Offenders Ordinance (Cap 298); (xiii) a social worker employed full-time in any reformatory school established under the Reformatory Schools Ordinance (Cap 225), any place of detention appointed under the Juvenile Offenders Ordinance (Cap 226), or any approved institution within the meaning of the Probation of Offenders Ordinance (Cap 298)"	134
"(c) consuls, vice-consuls, and officers of equivalent status, of governments of foreign states and such salaried functionaries of such governments as are nationals of such governments and are not carrying on business in Hong Kong, and the spouses and dependent children of such persons"	135
"(d) barristers-at-law and solicitors in actual practice, and their clerks"	135
"(e) persons duly registered as or deemed to be medical practitioners under the Medical Registration Ordinance (Cap 161), persons duly registered as dentists under the Dentists Registration Ordinance (Cap 156) and persons duly registered under the Veterinary Surgeons Registration Ordinance (Cap 529)"	136
"(f) editors of daily newspapers in Hong Kong and such members of their staffs in respect of whom the Registrar is satisfied that jury service would disrupt the publication of such newspapers"	137
"(g) chemists and druggists actually carrying on business as such"	138

Chapter	Page
"(h) <i>clergymen, priests, and ministers of any Christian congregation or Jewish congregation functioning in Hong Kong;</i>	138
(ha) <i>imams of and persons holding similar positions in any Muslim congregation functioning in Hong Kong;</i>	
(hb) <i>priests of and persons holding similar positions in any Hindu congregation functioning in Hong Kong"</i>	
"(i) <i>full time students of any school, college, university, polytechnic, technical institute, industrial training centre or other educational (including vocational education) institution"</i>	139
"(j) <i>officers employed on full pay in the naval, military or air services of the Hong Kong Garrison"</i>	139
"(k) <i>pilots licensed under the Pilotage Ordinance (Cap 84), and the master and members of the crew of any ship;</i>	139
(l) <i>pilots, navigators, wireless operators and other full-time members of the crews of passenger or mail or commercial aircraft"</i>	
"(m) <i>members of the Hong Kong Auxiliary Police Force and persons summoned to act or enrolled or appointed as special constables under any enactment: Provided that any person claiming exemption under this paragraph may be required by the Registrar to produce a certificate from the Commissioner of Police in proof of such exemption"</i>	140
"(n) <i>persons who are vowed and full-time members of any religious orders living in monasteries, convents or other such religious communities"</i>	140
"(o) <i>the spouse of -</i>	141
(i) <i>the Chief Justice;</i>	
(ia) <i>a judge of the Court of Final Appeal;</i>	
(ib) <i>the Chief Judge;</i>	
(ii) <i>a Justice of Appeal;</i>	
(iii) <i>a judge of the Court of First Instance; and</i>	
(iv) <i>a coroner"</i>	
"(p) <i>spouses of members of the Hong Kong Garrison serving on full pay"</i>	141
"(r) <i>the Legal Adviser of the Legislative Council Secretariat and any of his assistants who is in the full time employment of the Legislative Council Commission and is a barrister or a solicitor as defined in the Legal Practitioners Ordinance (Cap 159)"</i>	141
<i>Additional categories</i>	142
<i>Other comments received during consultation</i>	146

Chapter	Page
6. Summary of recommendations	147

Annexes

1. List of those who responded to the consultation paper	153
2. Existing exemptions from jury service under section 5 of the Jury Ordinance (Cap 3)	155
3. Notice of jury service: Form 2 of the Schedule to the Jury Ordinance (Cap 3)	158

Preface

Introduction

1. The existing legislative rules and administrative practices that apply to the appointment of jurors require that, among other things, a juror must be a resident of Hong Kong, between 21 and 65 years of age, not afflicted by blindness, deafness or other disability preventing him from serving as a juror, be of good character, and have "*a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings.*"¹ The legislation is silent as to how that linguistic competence is to be measured, but the administrative practice has been to exclude from the jury pool those with an educational attainment below Form 7, or its equivalent. The legislation is equally mute as to what constitutes "good character" or "residence" for jury purposes.

2. The question of whether the existing criteria for jury service are appropriate was raised by members of the Legislative Council in April 1997, and has been subsequently raised by both the Law Society and the Hong Kong Bar Association. The question also arises as to whether the criteria should be set out with greater clarity and precision.

Terms of reference

3. In June 2003, the Chief Justice and the Secretary for Justice directed the Law Reform Commission:

"To review the present criteria for service as jurors in relation to:

- (a) education requirement;*
- (b) age requirement;*
- (c) residency requirement;*
- (d) good character; and*
- (e) exemption on disability grounds*

set out in section 4(1) of the Jury Ordinance (Cap 3), and to review the exemptions from jury service set out in section 5 of that Ordinance, and to recommend such changes in the law and practice as may be considered appropriate."

¹ Section 4(1)(c) of the Jury Ordinance (Cap 3).

The sub-committee

4. The Juries Sub-committee was appointed in October 2003 to examine and advise on the present criteria for service as jurors and to make proposals for reform. The members of the sub-committee are:

Hon Mr Justice Woo, GBS, V-P (Chairman)	Vice President Court of Appeal of the High Court
Hon Mr Justice Stock, V-P	Vice President Court of Appeal of the High Court
Hon Mr Justice Pang	Judge Court of First Instance of the High Court
Hon Mr Justice Tong	Judge Court of First Instance of the High Court
Mr Lawrence Lok, SC	Senior Counsel
Mr Jonathan Midgley	Partner Haldanes, Solicitors
Mr Arthur Luk, SC	Senior Counsel Deputy Director of Public Prosecutions
Ms Alice Chung	Assistant Director of Legal Aid
Mr Jason Yeung	Company Secretary Bank of China Hong Kong Limited
Mr Andrew Tse	Former Principal of the John F Kennedy Centre

Ms Judy Cheung, Senior Government Counsel in the Law Reform Commission Secretariat, was the secretary to the sub-committee from October 2003 to June 2009.

5. The sub-committee considered the reference over the course of 14 meetings between October 2003 and January 2010. On 28 January 2008, in order to seek views and comments from the community, the sub-committee issued a consultation paper setting out its initial proposals on the reference. Sixty-eight written responses were received, many making substantive comments on the issues addressed in the consultation paper. With the exception of one recommendation,² the proposals were generally supported,

² Six hundred pro-forma submissions were received from members of the medical profession, objecting to the proposal in the consultation paper to remove medical practitioners and dentists from the list of those currently automatically excluded from jury service.

subject to some reservations in relation to particular proposals. In the following chapters, we consider the various comments and observations which were made on both the recommendations and the issues discussed in the consultation paper.

6. The consultation exercise elicited responses from a wide range of individuals and organisations, whose names are listed at Annex 1. We wish to express our thanks to all those who responded to the consultation paper, or who contributed at other times during the course of this project.

Chapter 1

Existing law and practice in Hong Kong

Introduction

1.1 In this chapter, we look at the origins of the jury system and some of its key features. We also examine the existing statutory provisions under the Jury Ordinance (Cap 3) governing the qualifications for jury service.

Origins of the jury system

1.2 The jury has been described as "*a peculiarly English institution*", unknown in civil law jurisdictions. Its form today gives little hint of its origins:

"It began as something quite different and the nature of its origin is shown by its name. A juror was a man who was compelled by the King to take an oath. It was the Normans who 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. The oath then was so strong a guarantor of veracity that, provided that the men who were compelled so to answer were the men who must know the truth about a matter, there could be no better way of getting at the facts. ... It was King Henry II who was directly responsible for turning the jury into an instrument for doing justice and Pope Innocent III who was directly responsible for its development as a peculiarly English institution. ... A jury which gave the King information for administrative purposes could also be used to give him information which would enable him to decide a dispute. ... Henry ordained that in a dispute about the title to land a litigant might obtain a royal writ to have a jury summoned to decide the matter. The character of the jurors was not thereby altered. They were drawn from the neighbourhood who were taken to have knowledge of all the relevant facts (anyone who was ignorant was rejected) and were bound to answer upon their oath and according to their knowledge which of the two disputants was entitled to the land. When a party got twelve oaths in his favour, he won. This is the origin of the trial jury, though there was as yet no sort of trial in the modern sense. ... It began by the parties putting their case, but not really distinguishing between pleadings, evidence and argument. It ended with the jury as it is today – a body whose strict duty it is to 'hearken to the evidence' and return a verdict accordingly,

*excluding from their minds all that they have not heard in open court. ... Jurors are still drawn from the neighbourhood, but only because it would be inconvenient for them to be brought from afar. ... In theory the jury is still an instrument used by the judge to help him to arrive at a right decision No doubt the easiest way of explaining the modern relationship between judge and jury is to start from the hypothesis that the law is for one and the facts for the other. ... Judges give their reasons, either so as to satisfy the parties or because they themselves want to justify their judgments. Even arbitrators detail their findings of fact. The jury just says yes or no. ...*¹

The history of the jury system in Hong Kong

1.3 The jury system was introduced to Hong Kong in 1845 by an Ordinance for the Regulation of Jurors and Juries. This adopted the features of the English criminal justice system and, like all subsequent legislation, required jurors to be residents of Hong Kong.

1.4 In contrast to the position in England, the 1845 Ordinance stipulated that the jury was to comprise six men, rather than twelve. This was because of the "*smallness of the population*", for it would cause "*very great hardship and inconvenience*" to the colonial inhabitants of Hong Kong to require a jury of twelve.² In 1864, the size of the jury was increased to seven³ and in 1986 legislation was enacted which empowered a judge to begin a trial with nine jurors if he or she thought it appropriate.⁴

1.5 The authors of *Juries: A Hong Kong Perspective* provide an outline of the qualifications required of Hong Kong jurors in earlier days:

"Despite recognising the difficulty of securing sufficient jurors, the original ordinance of 1845 imposed a financial qualification for jury service (akin to the property qualification which existed in England at the time). Under section 2, it was necessary either to hold property (as owner or tenant) with a monthly value of \$25 or upwards, or to be in receipt of a salary of more than \$1000 per annum. Four years later, because 'considerable difficulty has been experienced in supplying an adequate Panel of Common Jurors', the income qualification was reduced from \$1000 to \$500 (Ordinance No. 4 of 1849). In 1851, a further ordinance dropped both the property and income qualifications altogether, simply requiring the juror to be a 'good and sufficient

¹ Sir Patrick Devlin, *Trial by Jury*, Stevens & Sons Limited, 1956, pp 5-13.

² Ordinance No 7 of 1845, section 1.

³ Ordinance No 11 of 1864, section 2.

⁴ The Jury (Amendment) Ordinance (No 3 of 1986). See Peter Duff, Mark Findlay, Carla Howarth, Chan Tsang-fai, *Juries: A Hong Kong Perspective*, Hong Kong University Press, 1992, at 38: "*In anticipation of the forthcoming Carrion Case, which involved the trial of a complicated commercial fraud, legislation was hurriedly passed to allow the court to increase the size of the jury to nine.*"

person' (No. 4 of 1851, s. 2). This was over one hundred years before the property qualification was abandoned in England. The next and last major extension to the jury franchise in Hong Kong occurred in 1947 when women became eligible for service (Ordinance No. 37 of 1947).

The 1845 ordinance created exemptions for government employees, lawyers, doctors, clergymen, service personnel and employees of the East India Company. ... Over the years, the list of exemptions has expanded considerably However, one extremely significant addition to the list of those exempted from jury service is worthy of further discussion. The 1851 Ordinance disqualified 'any person ignorant of the English language' ..."⁵

1.6 The evolutionary development of the jury system from one requiring jurors to satisfy certain financial qualifications (holding property or belonging to a certain income group) before they could serve, to one without any property and income qualifications suggests that the jury system in Hong Kong, in line with most common law jurisdictions, reflects the principle of a right to a "trial by a jury of one's peers" to safeguard the liberty of the subject. Jurisdictions which adopt this concept of a right to "a trial by one's peers" include Canada, England (manifested in the Magna Carta 1297, chapter 29⁶) and Victoria (by section 391 of the Crimes Act 1958⁷). This right is further entrenched in Canada under the Canadian Charter of Rights and Freedoms, which forms part of the Canadian Constitution, though it is a right which can be expressly waived by the accused.

1.7 Section 2 of the 1851 Ordinance provided no guidance as to who might be considered a "*good and sufficient person*" for jury purposes. That uncertainty of statutory meaning continues to the present day, when the current Jury Ordinance's reference to "good character" is undefined. We will examine this provision and other qualifications now required of a juror later in this report.

⁵ Peter Duff, Mark Findlay, Carla Howarth, Chan Tsang-fai, *Juries: A Hong Kong Perspective*, Hong Kong University Press, 1992, pp 38-39.

⁶ "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right."

⁷ "If any person arraigned on any indictment or presentment pleads thereto 'Not Guilty', he shall without further form be deemed to have put himself upon the country for trial; and subject to section 391A the jury for his trial shall in the usual manner be impanelled accordingly."

The jury system today

Use of the jury

1.8 The jury is most commonly used in criminal trials. All criminal trials in the Court of First Instance must be held with a jury.⁸ Jury trial is not available for offences designated as summary offences which are usually minor offences. Summary offences are tried summarily before a magistrate whose sentencing jurisdiction in respect of a single offence is limited to two years' imprisonment. More serious offences are indictable offences which are only triable on indictment. An offence is triable only upon indictment if the Ordinance that creates the offence declares it to be treason, or the words "upon indictment" or "on indictment" appear in the statutory provision.⁹ Trials on indictment are held either before a judge of the Court of First Instance and a jury, or before the District Court where the judge sits alone. The limit of the District Court's sentencing jurisdiction is seven years' imprisonment¹⁰ whereas the Court of First Instance's jurisdiction is unrestricted, entitling it to pass the maximum sentences allowed by law. Thus, the most serious offences are tried in the Court of First Instance, and not in an inferior court. The offences that must be tried in the Court of First Instance are listed in Part III of the Second Schedule to the Magistrates Ordinance (Cap 227):

- (i) Any offence which is punishable with death;
- (ii) Any offence which is punishable with imprisonment for life, except an offence against section 37C (offence by crew, etc, of ship carrying unauthorized entrants) or 37D (arranging passage to Hong Kong of unauthorized entrants) of the Immigration Ordinance (Cap 115), an offence against section 53 (causing explosion likely to endanger life or property) or 123 (intercourse with girl under 13) of the Crimes Ordinance (Cap 200), an offence against Part VIII of the Crimes Ordinance (Cap 200) such as destroying or damaging data held in another person's computer or computer storage medium, an offence against section 4 (trafficking in dangerous drug of a high quantity) or 6 (manufacture of dangerous drug) of the Dangerous Drugs Ordinance (Cap 134), an offence against section 10 (robbery) or 12 (aggravated burglary) of the Theft Ordinance (Cap 210), section 17 (shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm), 28 (causing bodily injury by gunpowder, etc) or 29 (causing gunpowder to explode, etc, or throwing corrosive fluid, with intent to do grievous bodily harm) of the Offences against the Person Ordinance (Cap 212) or section 16 (possession of arms or ammunition with intent to endanger life), 17 (resisting arrest with or committing offence while in possession of arms or ammunition or imitation firearm) or 18 (carrying arms or

⁸ Section 41(2), Criminal Procedure Ordinance (Cap 221).

⁹ Section 14A, Criminal Procedure Ordinance (Cap 221)

¹⁰ Section 82(2)(a), District Court Ordinance (Cap 336).

ammunition or imitation firearm with criminal intent) of the Firearms and Ammunition Ordinance (Cap 238);

- (iii) Any offence against section 21 (trading, etc, with pirates) or 22 (being found on board piratical vessel and unable to prove non-complicity) of the Crimes Ordinance (Cap 200);
- (iv) Misprision of treason;
- (v) Blasphemy and offences against religion;
- (vi) Composing, printing or publishing blasphemous, seditious or defamatory libels; and
- (vii) Genocide and any conspiracy or incitement to commit genocide.

1.9 The usual characteristics of an offence triable with a jury are that it is an offence of the most serious kind which is prescribed by statute to be heard in the Court of First Instance, or that the likely sentence upon conviction exceeds seven years' imprisonment, or that it is in the public interest that the case should be tried before a judge and a jury.

1.10 The jury is also available in limited circumstances in a civil trial. Where a claim arises in respect of libel, slander, malicious prosecution, false imprisonment or sedition, the action must be tried with a jury, "*unless the Court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.*"¹¹

1.11 The Coroners Ordinance (Cap 504) also provides for a death inquest to be held with a jury in specified circumstances.¹² Where a person dies whilst in official custody, a coroner must hold an inquest with a jury.¹³ Where a person dies suddenly; by accident or violence; or under suspicious circumstances; or the dead body of a person is found in or brought into Hong Kong, a coroner has a discretion to hold an inquest with a jury.¹⁴ While a jury in trials in the Court of First Instance usually consists of seven jurors, the size of the jury in a coroner's inquest is five.¹⁵

The provisional list of jurors

1.12 The Commissioner of Registration appointed under section 2 of the Registration of Persons Ordinance (Cap 177) is empowered by section 7 of the Jury Ordinance (Cap 3) to compile a provisional list of jurors.

¹¹ Section 33A, the High Court Ordinance (Cap 4).

¹² Part IV, Coroners Ordinance (Cap 504).

¹³ Section 15, Coroners Ordinance (Cap 504).

¹⁴ Section 14, Coroners Ordinance (Cap 504).

¹⁵ Section 23, Coroners Ordinance (Cap 504).

1.13 Section 7(1) of the Jury Ordinance requires the Commissioner of Registration to cause to be served¹⁶ a notice (Form 2 in the Schedule to the Ordinance) on any person who appears to the Commissioner to be qualified to serve as a juror under section 4 (which sets out the criteria for service as a juror) and who is not exempt from service as a juror under section 5. A person who has been served with a notice who wishes to claim exemption from jury service must within 14 days notify the Registrar in writing of the grounds upon which he claims exemption.¹⁷

1.14 Section 5 of the Jury Ordinance specifies the categories of persons to be exempted from jury service. Those exempted include the following persons:

- Members of the Executive Council or Legislative Council;
- Justices of the Peace;
- Public officers, including judges, Government legal officers, officers in the law enforcement agencies, officers in the Correctional Services Department, etc;
- Consuls, vice-consuls, etc;
- Barristers and solicitors in actual practice and their clerks;
- Registered doctors and dentists;
- Members of the clergy;
- Full-time students; and
- Members of the crew of ships or aircraft.

The full list of exemptions can be found at Annex 2 to this report.

1.15 The reasoning behind the exclusion of some of these groups from jury service has been explained as follows:

*"Judges, barristers, solicitors, etc, might exert too great an influence over their lay colleagues on a jury, police officers could be suspected of bias towards the prosecution, and conversely, probation officers could favour the defence. The exclusion of the clergy is a little surprising, and may spring from a feeling that a clergyman, by reason of his vocation, would not wish to sit in judgment on others."*¹⁸

¹⁶ This role has been taken by the Registrar of the High Court since 1988.

¹⁷ Section 7(2) of the Jury Ordinance (Cap 3).

¹⁸ John Sprack, *Emmins on Criminal Procedure* (Oxford University Press, 2002), at 261.

Compilation of the list

1.16 In practice, it is the Registrar of the High Court who maintains the provisional list of jurors, using information provided by the Commissioner of Registration.

1.17 When a member of the public applies for an identity card, either for the first time or for a replacement, the registration officer in the Immigration Department will consider whether the applicant meets the qualification requirements set out in section 4 of the Jury Ordinance (Cap 3) for inclusion in the provisional list of jurors, if the applicant is not already on the list. In broad terms, persons between the age of 21 and 65 who have attained an educational level of at least Form 7 (or its equivalent) will be treated as qualified, as long as they are not exempted persons under section 5 of the Jury Ordinance. Applicants for an identity card are required by the Immigration Department to report their education level by checking one of two boxes, "Secondary and below" or "Matriculated and above", on the registration form. Subject to the other criteria for jury service being met, the Commissioner for Registration will include all those who have indicated an education level of "Matriculated and above" in the list of potential jurors which is passed to the Registrar of the High Court.

1.18 The upshot is that inclusion on the jury list is dependant on the individual's own assessment of his education level. Whether "matriculated" includes a person who enters Form 7 but leaves without completing that year is undefined. The Commissioner of Registration's office has indicated, however, that in their experience there is seldom any question raised about this aspect of the registration form.¹⁹

1.19 In addition to identifying suitably qualified persons from among those applying for identity cards, the Commissioner of Registration also annually requests the eight local universities (the Chinese University of Hong Kong, the City University of Hong Kong, the Hong Kong Baptist University, the Hong Kong Polytechnic University, the Hong Kong Shue Yan University, the Hong Kong University of Science and Technology, Lingnan University and the University of Hong Kong) and the three other tertiary education institutions (the Hong Kong Academy for Performing Arts, the Hong Kong Institute of Education and the Open University of Hong Kong) to provide a list of their graduates. The Commissioner then seeks up-to-date personal details from those graduates to enable him to consider whether they should be included in the provisional list of jurors. The Commissioner will also inform the graduates that they are no longer exempt from service as jurors as they have ceased to be full-time students.

1.20 Any updated information on those already included on the list (such as change of address, or death of persons identified as qualified), together with information on newly identified potential jurors, is forwarded to the Registrar of the High Court on a weekly basis. The Registrar of the High

¹⁹ In an email of 24 November 2009 to the Secretary of the Law Reform Commission.

Court will also forward to the Commissioner on a monthly basis the names of those who should be deleted from the provisional list (for instance, persons who have reached 65 years of age and who are therefore no longer qualified, those suffering from disabilities, etc).

Qualifications and disabilities

1.21 The criteria for service as a juror are set out in section 4 of the Jury Ordinance (Cap 3). A person is liable to serve as a juror if he:

- has reached 21 years of age, but not 65 years of age;
- is a resident of Hong Kong;
- is of sound mind and not afflicted by blindness, deafness or other disability preventing him from serving as a juror;
- is of good character; and
- has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings.

1.22 The requisite length of residence or stay in Hong Kong is not specified. In practice, the Commissioner of Registration will place the name of any person who satisfies the other criteria (and who is not exempted under section 5 of the Ordinance) on the provisional list of jurors as long as that person is at that time resident in Hong Kong. Foreign domestic helpers, so far as they meet the requirements stipulated in section 4, are also included in the list compiled by the Commissioner. Tourists, visitors, and illegal immigrants are excluded by the Commissioner in the application of this section.

1.23 Any person who is eligible for inclusion in the list as a potential juror will be presumed by the Commissioner to be of sound mind, unless there is evidence to the contrary. A person who is blind or deaf will not be included in the list of jurors only when his blindness or deafness comes to the notice of the registration officer.

1.24 It should be noted that the "good character" requirement in section 4 is not defined in the Ordinance and no mechanism is provided for determining whether a juror is of "good character" or not. In practice, no steps are taken by the Commissioner to assess a person's character before including him in the provisional list of jurors.

1.25 In relation to the language requirement for service as a juror, section 4A(1)(a) of the Jury Ordinance empowers the Registrar of the High Court or the Commissioner of Registration to require any person to supply them with the name and identity card number of any person who has "*obtained a grade of pass*" in "*an English language examination or a Chinese*

language examination or part of such examination as may be so specified".²⁰ Section 4A(4)(a) defines an English language examination to mean "an examination of English language or an examination conducted in the English language". Section 4A(4)(b) provides a similar definition in respect of a Chinese language examination. The effect appears to be that any person who has passed an examination in *any* subject (not just language), conducted in either English or Chinese, could be treated as a potential juror. In practice, the Registrar includes on the provisional list of jurors only those who have "attained" an educational level of Form 7. Every student who enters Form 7 education will receive a school report card issued by the school at the end of that year, whether or not he completes the year of study or sits the final examinations. Every student who enters Form 7 is therefore regarded for these purposes as having "attained" that educational level.

1.26 The Court of First Instance or a coroner may, on its own motion or on the application of the Registrar or of any interested party, discharge any person summoned to serve as a juror who is unable to satisfy the court or the coroner that the person's knowledge of the language in which the proceedings are to be conducted is sufficient to enable the person to understand the proceedings.²¹

1.27 The court also has power to exempt a juror on application and for cause under section 28 of the Jury Ordinance. Under that section, the Registrar may excuse a person who has been summoned from attending on a jury if that person shows in writing to the satisfaction of the Registrar that there is a good reason why he should be excused from so attending. In such circumstances, the Registrar must produce to the court the person's application to be excused from attendance. Every application for exemption by a potential juror on the ground of language inadequacy is dealt with on a case by case basis. The applicant will be asked to produce his public examination results of proof of his education level. It is the Registrar (or Jury Master) who will decide or not to grant the exemption.

Formation of and empanelling the jury

1.28 The Registrar of the High Court maintains a provisional list of jurors, consisting of all those persons qualified in Hong Kong. This, as previously explained, is based on information forwarded by the Commissioner of Registration. This list is updated by the Registrar of the High Court in alternate years,²² and is made available for inspection.²³ Any person who wishes to have his name deleted from the list upon being served notice (Form 2) of his inclusion in the list, or to have his name added, may make written

²⁰ In addition, under section 4A(1)(b), the Registrar or the Commissioner may require any person to provide such information as they consider necessary to enable them to determine whether any person has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the relevant proceedings.

²¹ Section 4(2), Jury Ordinance (Cap 3).

²² Section 7(3), Jury Ordinance (Cap 3).

²³ Section 10, Jury Ordinance (Cap 3).

application for cause between 1 and 14 October of the year of publication of the list.²⁴

1.29 Whenever it is necessary to summon a jury, the Registrar of the High Court will select from the list of jurors, by ballot or by any other method of random selection, the number of persons which a judge has directed should form a panel.²⁵ The Registrar then issues a summons to each person so chosen, requiring him to appear on the day specified in the summons. If for any reason a juror who has been selected cannot be served the summons, the Registrar will select a replacement juror to complete the panel.²⁶ The Registrar may pass over persons whom he believes to be exempt, disqualified, or dead.²⁷

1.30 The panel must attend and serve for such period as directed by the judge. No juror will be excused from attendance and service unless and until discharged by the judge in respect of any case in which he has been called to serve as a juror.²⁸

1.31 The Registrar of the High Court will arrange for numbers corresponding to the names of all the jurors summoned to form a panel to be printed on separate cards of equal size and put in a box. The clerk of the court, in open court, then draws cards from the box until a jury is formed.²⁹ The Registrar will not issue jury summonses to those persons who have undertaken jury service, or have been called for service, at any time within the preceding two years.³⁰

1.32 The Registrar of the High Court provides the trial judge with the names and occupations of the persons summoned, whereas the prosecution and defence are only provided with a list of names of the persons summoned.

1.33 Each juror selected will step into the jury box and take the juror's oath (or affirmation) individually. The prosecution (or plaintiff) or defence may only object to a juror before he takes the oath or affirmation. Other than section 29 (which provides that an accused person on trial may challenge up to five jurors without cause and any number for cause), the Jury Ordinance contains no provisions relating to challenges and many principles and procedures derive from common law. After the jury have been sworn, they remain in court until the evidence has been presented, the judge has summed up the evidence and has left the case with the jury. If, however, the court adjourns during the hearing of the case (either during the sitting or at the end of a day's sitting), the judge may either allow the jury to disperse, or may direct that they be removed in charge of an officer of the court "to some

²⁴ Section 9(2), Jury Ordinance (Cap 3).

²⁵ Section 13(1), Jury Ordinance (Cap 3).

²⁶ Section 13(1), Jury Ordinance (Cap 3).

²⁷ Section 16, Jury Ordinance (Cap3).

²⁸ Section 13(1), Jury Ordinance (Cap 3).

²⁹ Section 21, Jury Ordinance (Cap 3).

³⁰ Section 17, Jury Ordinance (Cap 3).

convenient place, there to take refreshment and rest", until the court reassembles.³¹

1.34 The usual practice is to summon more jurors for service than are likely to be required. If, however, a full jury cannot be made up from those on the jury panel, the court may summon, without written notice, any "*fit and proper persons*" among the bystanders or others (called "talesmen") who "*can be speedily procured*" to make up the full number of the jury.³²

1.35 The jury consists of seven members in all civil and criminal trials and all inquiries into the idiocy, lunacy, or unsoundness of mind of any person, except where the court orders that the jury will consist of nine persons.³³ In the case of a coroner's inquest, five jurors are selected by the coroner by ballot from the panel. The coroner may require a fit and proper person or bystander to serve as a juror, provided that that person is not exempted from jury service under section 5 of the Jury Ordinance (Cap 3).³⁴

Challenge and discharge of jurors

1.36 The court or a coroner may discharge any person summoned to serve as a juror if the court or the coroner is not satisfied that the person's knowledge of the language in which the proceedings are to be conducted is sufficient to enable him to understand the proceedings. This discharge may be made on the court's or coroner's own motion, or on the application of the Registrar or of any interested party.³⁵

1.37 In the process of selecting jury members from the panel, each accused (or counsel representing him) can challenge up to five jurors without giving a reason, or any number of jurors where a reason is given.³⁶ The prosecution is entitled to "stand-by" prospective jurors, that is, to postpone consideration of the cause of challenge until the panel of jurors in waiting is exhausted. If a person summoned as a juror is not qualified or liable to serve as a juror, or is exempt from service, that would be good cause for challenge, and he must be discharged if challenged on that basis.³⁷ However, if no such challenge is made, the person's appointment to the jury cannot be a ground for subsequently challenging any verdict given by the jury.³⁸

1.38 There is also considerable discretionary power for the court to exclude persons from jury service during the trial at any time prior to the verdict. The court may discharge a juror if it is in the interests of justice or the juror to do so.³⁹ Where a member of the jury dies or is discharged by the

³¹ Section 22, Jury Ordinance (Cap 3).

³² Section 30, Jury Ordinance (Cap 3).

³³ Section 3, Jury Ordinance (Cap 3).

³⁴ Section 23, Coroners Ordinance (Cap 504).

³⁵ Section 4(2), Jury Ordinance (Cap 3).

³⁶ Section 29, Jury Ordinance (Cap 3).

³⁷ Section 6, Jury Ordinance (Cap 3).

³⁸ As above.

³⁹ Section 25(1), Jury Ordinance (Cap 3)

court, the jury would nevertheless be considered as remaining properly constituted for all the purposes of the action or indictment then being tried.⁴⁰ The death or discharge of a juror obviously reduces the number of members of the jury, but section 25(4) of the Jury Ordinance requires that in any civil or criminal trial the number of members of the jury must not be less than five.

Majority verdicts

1.39 In a civil trial, the verdict is by a majority of the jurors serving at the time the verdict is given. In other words, if the number of members of the jury has been reduced by death or discharge, the verdict will be by a majority of the remaining jurors.⁴¹

1.40 In a criminal trial, where a jury consists of seven persons, the jury's decision has to be reached by a majority of not less than five members, even if the number of jurors has been reduced to six by death or discharge. In the case of a jury of nine persons, the verdict must be by a majority of not less than seven. If the number of jurors has been reduced to eight, the verdict must be by a majority of six, and if the number of members has been reduced to six or seven, then the majority must be not less than five. If the number of jurors has been reduced to five, the verdict has to be unanimous.⁴²

1.41 When it appears to the court that the jury cannot agree upon a verdict, either unanimously or by majority, the court must discharge the jury, and empanel a new jury. The case will then be tried as if it was for the first time.⁴³

Confidentiality of jurors' discussions in jury room

1.42 It is a matter of public policy that no enquiry should be made into what might have happened in the jury room. It was held in *R v Bean*⁴⁴ that the court ought not to entertain evidence of what occurred in the jury room. This is a rule of practice based on public policy, and the sanctity of discussions in the jury room should not be infringed.

⁴⁰ Section 25(3), Jury Ordinance (Cap 3).

⁴¹ Section 24(2), Jury Ordinance (Cap 3).

⁴² Section 24(3), Jury Ordinance (Cap 3).

⁴³ Section 27, Jury Ordinance (Cap 27).

⁴⁴ [1991] Crim L R 843.

Chapter 2

The law in other jurisdictions

Introduction

2.1 We examine in this chapter the law in a number of jurisdictions which adopt the jury system. In some jurisdictions which formerly used the jury, its use has been abolished. In South Africa, for instance, jury trial was abolished in 1969.¹ Likewise, the jury system was abolished in Singapore in 1969 and in Malaysia in 1995.²

Australia

New South Wales

Jury Act 1977

2.2 Currently, every person (aged 18 years or above) who is enrolled as an elector for the Legislative Assembly of New South Wales is qualified and liable to serve as a juror.³ A person is not qualified or liable to serve as a juror if that person is, for the time being, disqualified from serving as a juror, being a person referred to in Schedule 1, or ineligible to serve as a juror, being a person referred to in Schedule 2.⁴

2.3 Schedule 1 of the Jury Act 1977 lists those persons who are disqualified from serving as jurors by virtue of section 6(a):

- (1) A person who at any time within the last 10 years in New South Wales or elsewhere has served any part of a sentence of imprisonment (not being imprisonment merely for failure to pay a fine);
- (2) A person who at any time within the last three years in New South Wales or elsewhere has been found guilty of an offence and detained in a detention centre or other institution for juvenile offenders (not being detention merely for failure to pay a fine); or

¹ Neil Vidmar, *World Jury Systems* (Oxford University Press, 2000), 425.

² Neil Vidmar, *World Jury Systems* (Oxford University Press, 2000), 426.

³ Section 5, Jury Act 1977.

⁴ Section 6, Jury Act 1977.

- (3) A person who is currently bound by an order made in New South Wales or elsewhere pursuant to a criminal charge or conviction, not including an order for compensation, but including the following:
 - (a) a parole order, a community service order, an apprehended violence order and an order disqualifying the person from driving a motor vehicle,
 - (b) an order committing the person to prison for failure to pay a fine, or
 - (c) a recognizance to be of good behaviour or to keep the peace, a remand in custody pending trial or sentence and a release on bail pending trial or sentence.

2.4 Schedule 2 of the Jury Act 1977 sets out the persons who are ineligible to serve as jurors by virtue of section 6(b):

- (1) The Governor;
- (2) A judicial officer (within the meaning of the Judicial Officers Act 1986);
- (3) A coroner;
- (4) A member or officer of the Executive Council;
- (5) A member of the Legislative Council or Legislative Assembly;
- (6) Officers and other staff of either or both of the Houses of Parliament;
- (7) A legal practitioner (whether or not an Australian legal practitioner);
- (8) A person employed or engaged (except on a casual or voluntary basis) in the public sector in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration;
- (9) The Ombudsman and a Deputy Ombudsman;
- (10) A person who at any time has been a judicial officer within the meaning of the Judicial Officers Act 1986 or a coroner, police officer, Crown Prosecutor, Public Defender, Director or Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions;
- (11) A person who is unable to read or understand English; or
- (12) A person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror.

2.5 Persons who are entitled to be exempted from serving as jurors under section 7 are set out in Schedule 3 of the Jury act 1977:⁵

- (1) Clergy;
- (2) Vowed members of any religious order;

⁵ Section 7, Jury Act 1977.

- (3) Persons practising as dentists;
- (4) Persons practising as pharmacists;
- (5) Persons practising as medical practitioners;
- (6) Mining managers and under-managers of mines;
- (7) A person employed or engaged (except on a casual or voluntary basis) in the provision of fire, ambulance, rescue, or other emergency services, whether or not in the public sector;
- (8) Persons who are at least 70 years old;
- (9) Pregnant women;
- (10) A person who has the care, custody and control of children under the age of 18 years (other than children who have ceased attending school), and who, if exempted, would be the only person exempt under this item in respect of those children;
- (11) A person who resides with, and has full-time care of, a person who is sick, infirm or disabled;
- (12) A person who resides more than 56 kilometres from the place at which the person is required to serve;
- (13) A person who:
 - (a) within the three years that end on the date of the person's claim for exemption, attended court in accordance with a summons and served as a juror, or
 - (b) within the 12 months that end on the date of the person's claim for exemption, attended court in accordance with a summons and who was prepared to, but did not, serve as a juror; and
- (14) A person who is entitled to be exempted under section 39 on account of previous lengthy jury service.

Victoria

Juries Act 2000

2.6 Every person aged 18 years or above who is enrolled as an elector for the Legislative Assembly and Legislative Council is qualified and liable for jury service.⁶

2.7 Schedule 1 of the Juries Act 2000 specifies the persons who are disqualified from jury service by virtue of section 5(2):

- (1) A person who has been convicted, in Victoria or another jurisdiction, of treason or one or more indictable offences and sentenced to –
 - (a) imprisonment for a term or terms in the aggregate of three years or more; or

⁶ Section 5(1), Juries Act 2000.

- (b) a period of detention, for three years or more, under a hospital security order made under section 93 of the Sentencing Act 1991 or an equivalent order in another jurisdiction –

but any conviction of an offence in respect of which a free pardon has been granted must be disregarded.

- (2) A person who within the last 10 years has been, in Victoria or another jurisdiction –

- (a) sentenced to imprisonment for a term or terms in the aggregate of three months or more (excluding a suspended sentence of imprisonment); or
- (b) ordered to be detained, for a period of three months or more, under a hospital security order made under section 93 of the Sentencing Act 1991 or an equivalent order in another Jurisdiction,

but any conviction of an offence in respect of which a free pardon has been granted must be disregarded.

- (3) A person who within the last five years, in Victoria or another jurisdiction –

- (a) has been sentenced to imprisonment for a term or terms in the aggregate of less than three months; or
- (b) has been ordered to be detained, for a period of less than three months under a hospital security order made under section 93 of the Sentencing Act 1991 or an equivalent order in another jurisdiction; or
- (c) has served a sentence of imprisonment by way of intensive correction in the community, or an equivalent sentence in another jurisdiction; or
- (d) has been sentenced to a suspended sentence of imprisonment; or
- (e) has served a sentence of detention in a youth training centre or youth residential centre or an equivalent sentence in another jurisdiction,

but any conviction of an offence in respect of which a free pardon has been granted must be disregarded.

- (4) A person in respect of whom a court in Victoria (including the Magistrates' Court) or another jurisdiction, has, within the last five years, made a community-based order, or an equivalent order in another jurisdiction, but any conviction, or finding of guilt, of an offence in respect of which a free pardon has been granted must be disregarded.
- (5) A person who within the last two years —
 - (a) has been sentenced by a court, in Victoria (including the Magistrates' Court) or another jurisdiction, for an offence; or
 - (b) has been released on the giving of an undertaking under section 72 or 75 of the Sentencing Act 1991, or an equivalent undertaking in another jurisdiction.
- (6) A person who has been charged with an indictable offence and is released on bail in respect of that offence.
- (7) A person who is remanded in custody in respect of an alleged offence.
- (8) A person who has been declared bankrupt and has not obtained a discharge.

2.8 Schedule 2 of the Juries Act 2000 sets out the persons who are ineligible for jury service by virtue of section 5(3):

- (1) A person who is or, within the last 10 years, has been -
 - (a) the Governor or the Official Secretary to the Governor;
 - (b) a judge, a magistrate or the holder of any other judicial office;
 - (c) a member of the Police Appeals Board;
 - (d) a bail justice;
 - (e) admitted to legal practice in Victoria;
 - (f) a person employed or engaged (whether on a paid or voluntary basis) in the public sector within the meaning of the Public Sector Management and Employment Act 1998 in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration;
 - (g) a member of the police force;

- (h) the Secretary to the Department of Justice or the Department of Human Services;
 - (i) a member of the Legislative Assembly or Legislative Council;
 - (j) the Auditor-General;
 - (k) the Ombudsman or the Acting Ombudsman;
 - (l) an employee of the Ombudsman;
 - (la) the Director, Police Integrity or Acting Director, Police Integrity;
 - (lb) an employee in the Office of Police Integrity;
 - (lc) the Special Investigations Monitor or acting Special Investigations Monitor;
 - (ld) an employee in the office of the Special Investigations Monitor;
 - (m) a person employed as a Government shorthand writer or court reporter or in connection with any court recording service.
- (2) A person who is:
- (a) the Electoral Commissioner;
 - (b) the Legal Ombudsman or an acting Legal Ombudsman;
 - (c) employed by a person admitted to legal practice in Victoria in connection with legal practice.
- (3) A person who:
- (a) has a physical disability that renders the person incapable of performing the duties of jury service;
 - (b) is a patient within the meaning of the Mental Health Act 1986;
 - (c) has an intellectual disability within the meaning of the Intellectually Disabled Persons' Services Act 1986;
 - (d) is a represented person within the meaning of the Guardianship and Administration Act 1986;

- (e) is subject to a supervision order under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997;
- (f) is unable to communicate in or understand the English language adequately.

2.9 A person who attends for jury service or serves on a jury may be exempted by the Juries Commissioner from jury service in certain circumstances for any period, not exceeding three years.⁷ The court may also discharge a juror or a jury during or at the conclusion of a trial if the trial has required the attendance of the juror or jurors for a lengthy period; or for other good reason.⁸ The Juries Commissioner may excuse a person permanently from jury service,⁹ or excuse a person from jury service for good reason.¹⁰ Good reason for excusals includes illness or poor health, incapacity, long distance to travel to attend for jury service, substantial hardship to the person resulting from his attendance for jury service, substantial financial hardship resulting from the person's attendance for jury service, substantial inconvenience to the public resulting from the person's attendance for jury service, the advanced age of the person, the person is a practising member of a religious society or order the beliefs or principles of which are incompatible with jury service, any other matter of special urgency or importance. However, a person who has been exempted from jury service or excused from jury service may waive that exemption or excuse by written notice to the Juries Commissioner.

Canada

Alberta

Jury Act (Chapter J-3 of the Revised Statutes of Alberta 2000)

2.10 The provisions of this Act¹¹ apply to both civil and criminal proceedings tried by a jury in Alberta.¹² Section 3 of the Jury Act provides that every person is qualified to serve as a juror if he is:

- (a) resident in Alberta,
- (b) a Canadian citizen, and
- (c) 18 years of age or older.

⁷ Section 13(1), Juries Act 2000.

⁸ Section 13(2), Juries Act 2000.

⁹ Section 9, Juries Act 2000. Section 9(3) provides that the Commissioner may permanently excuse a person "for good reason", which includes, but is not limited to, continuing poor health, disability, and advanced age.

¹⁰ Section 8, Juries Act 2000.

¹¹ Revising the Jury Act, Chapter J-2.1 of the Statutes of Alberta, 1982.

¹² Section 2, Jury Act 2000.

- 2.11 Persons who are excluded from jury service are:
- "(a) members of the Privy Council, the Senate and the House of Commons of Canada;*
 - (b) members of the Legislative Assembly of Alberta and the Executive Council;*
 - (c) members of the council of a municipality or members of a board of trustees of a school district or school division;*
 - (d) judges of the Provincial Court, justices of the Court of Appeal and Court of Queen's Bench and justices of the peace, whether retired or not;*
 - (e) barristers and solicitors, whether or not they are practising, and students-at-law;*
 - (f) medical examiners under the Fatality Inquiries Act;*
 - (g) officers and employees of the Legislative Assembly of Alberta;*
 - (h) persons who*
 - (i) have been convicted of a criminal offence for which a pardon has not been granted, or*
 - (ii) are currently charged with a criminal offence;¹³*
 - (i) witnesses summoned to attend before the Legislative Assembly or a committee of the Legislative Assembly during the period that their attendance is required;*
 - (j) persons confined in an institution;*
 - (k) persons engaged in the administration of justice, including*
 - (i) members and employees of any police service,*
 - (ii) probation officers,*
 - (iii) employees of the Department of Justice, and*

¹³ This sub-section has been amended by the Jury Amendment Act 2008 (which is not yet in force) to replace the previous reference to persons convicted of a criminal offence for which a sentence of imprisonment exceeding 12 months could have been imposed.

- (iv) *employees of the Department of Justice of Canada or the Department of the Solicitor General of Canada.*¹⁴

2.12 The following persons are exempted from service as jurors:

- "(a) a person whose conscience or religious vows preclude the person from serving on a jury;*
- (b) a person who has served on a jury within the 2 years preceding the person's summons to serve on a jury;*
- (c) a person for whom service on a jury will cause severe hardship in respect of the person's health or livelihood or in respect of any legal or moral obligations the person may have to others;*
- (d) a person who does not reside within a reasonable distance of the place where the proceedings are to be tried;*
- (e) a person who suffers from a physical, mental or other infirmity that is incompatible with the discharge of the duties of a juror;*
- (f) a person who is unable to understand, speak or read the language in which the trial is to be conducted;*
- (g) a person whose service on a jury would be contrary to the public interest by reason of that person's performance of urgent and essential services of public importance that cannot reasonably be rescheduled or performed by another during that person's absence;*
- (h) a person 65 years of age or over.*¹⁵

2.13 A person who suffers from a physical infirmity may serve on a jury, if he wishes to, provided that he:

- "(a) if aided would be able to see and hear adequately and to attend court in adequate comfort, and (b) will receive the assistance of a person, a device or altered physical surroundings that the Court considers adequate to enable the person to discharge the duties of a juror.*¹⁶

It should be noted that a person giving assistance to the infirm person under category (b) may, as directed by the Court, attend with and assist the juror in

¹⁴ Section 4, Jury Act 2000.

¹⁵ Section 5(1), Jury Act 2000.

¹⁶ Section 6(1)(a), (b), Jury Act 2000.

all the proceedings, including the deliberations of the jury,¹⁷ though he should not comment on the proceedings and should take part in the proceedings only by assisting the juror as the Court directs.¹⁸

England and Wales

Juries Act 1974

2.14 Currently, every person is qualified to serve as a juror in the Crown Court, the High Court and county courts if he is registered as a parliamentary or local government elector and is not less than 18 nor more than 70 years of age;¹⁹ 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 13;²⁰ he is not a mentally disordered person;²¹ and he is not disqualified for jury service. "Mentally disordered person" means any person listed in Part I of the Schedule to the Juries Act 1974.²²

2.15 Part 2 of Schedule 1 lists those persons who are disqualified from jury service.²³

- "5. *A person who is on bail in criminal proceedings (within the meaning of the Bail Act 1976).*
6. *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, detention for life or custody for life,*
 - (b) *to detention during her Majesty's pleasure or during the pleasure of the Secretary of State,*
 - (c) *to imprisonment for public protection or detention for public protection,*
 - (d) *to an extended sentence under section 227 or 228 of the Criminal Justice Act 2003 or section 210A of the Criminal Procedure (Scotland) Act 1995, or*
 - (e) *to a term of imprisonment of five years or more or a term of detention of five years or more.*
7. *A person who at any time in the last ten years has —*

¹⁷ Section 6(2), Jury Act 2000.

¹⁸ Section 6(3), Jury Act 2000.

¹⁹ Section 1(1)(a), Juries Act 1974.

²⁰ Section 1(1)(b), Juries Act 1974.

²¹ Section 1(1)(c), Juries Act 1974.

²² Section 1(2), Juries Act 1974.

²³ Section 1(3), Juries Act 1974.

- (a) *in the United Kingdom, the Channel Islands or the Isle of Man —*
- (i) *served any part of a sentence of imprisonment or a sentence of detention, or*
- (ii) *had passed on him a suspended sentence of imprisonment or had made in respect of him a suspended order for detention,*
- (b) *in England and Wales, had made in respect of him a community order under section 177 of the Criminal Justice Act 2003, a community rehabilitation order, a community punishment order, a community punishment and rehabilitation order, a drug treatment and testing order or a drug abstinence order, or*
- (c) *had made in respect of him any corresponding order under the law of Scotland, Northern Ireland, the Isle of Man or any of the Channel Islands.*¹²⁴

Ireland

Juries Act 1976

2.16 Section 6 of the Act provides that every citizen aged 18 years or over who is entered in a register of D'ail electors in a jury district shall be qualified and liable to serve as a juror.²⁵ An upper age limit of 70 previously applied but this was removed by the Civil Law (Miscellaneous Provisions) Act 2008. However, the right of excusal for persons over the age of 65 is retained.

2.17 Persons who are ineligible for jury service are specified in Part 1²⁶ of the First Schedule of the Juries Act 1976 as:

- Persons concerned with the administration of justice, including persons holding or who have at any time held any judicial office; coroners, deputy coroners; the Attorney General and members of his staff; the Director of Public Prosecutions and members of his staff; barristers and solicitors; 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; prison officers and other persons employed in any prison or in any place in which persons are kept in military custody; persons employed in the

²⁴ Part 2, Schedule 1, Juries Act 1974.

²⁵ Section 6, Juries Act 1976.

²⁶ Amended by section 64 of the Civil Law (Miscellaneous Provisions) Act 2008.

welfare service of the Department of Justice; and a person in charge of, or employed in, a forensic science laboratory;

- Members of the Defence Forces, including members of the Permanent Defence Force and Reserve Defence Force and Army Nursing Service; or
- "Other persons", who are defined as 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.

- "Incapable persons", who are defined as persons who because of insufficient capacity to read, deafness or other permanent infirmity are unfit to serve on a jury.

2.18 A person would be disqualified from 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.¹²⁷

2.19 A county registrar may excuse any person whom he has summoned as a juror 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

²⁷

Section 8, Juries Act 1976.

- (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.*²⁸

2.20 When a person is required to be in attendance as a juror at a court during a sitting, the judge has the same duty or discretion as that imposed or conferred on the county registrar 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.²⁹

2.21 Part II of the First Schedule specifies persons who are excusable as of right. They include:

- (i) Members of either House of the Oireachtas;
- (ii) Members of the Council of State;
- (iii) The Comptroller and Auditor General;
- (iv) A person in Holy Orders;
- (v) A regular minister of any religious denomination or community;
- (vi) Members of any religious order living in a monastery, convent or other religious community;
- (vii) Medical practitioners, dentists, nurses, midwives, veterinary surgeons, and pharmaceutical chemists;
- (viii) A member of the staff of either House of the Oireachtas;
- (ix) Heads of Government Departments and Offices and any civil servant;
- (x) Any civilian employed by the Minister for Defence;
- (xi) Chief officers of local authorities, health boards and harbour authorities and any employee of a local authority, health board or harbour authority;

²⁸ Section 9(1)(a),(b) and (c), Juries Act 1976.
²⁹ Section 9(7), Juries Act 1976.

- (xii) 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;
- (xiii) Whole-time students at any such educational institution as is mentioned in the preceding paragraph;
- (xiv) The secretary to the Commissioners of Irish Lights and any person in the employment of the Commissioners;
- (xv) Masters of vessels, duly licensed pilots and duly licensed aircraft commanders; and
- (xvi) Persons aged 65 years or above.

New Zealand

Juries Act 1981

2.22 Every person who is currently registered as an elector is qualified and liable to serve as a juror.³⁰ Persons who are not qualified to serve on jury service are:

- "(a) Any one who, at any time, has been sentenced to imprisonment for life or for a term of 3 years or more, or to preventive detention.*
- (b) Any one who, at any time within the preceding 5 years, has been sentenced to imprisonment for a term of 3 months or more, or to corrective training."³¹*

2.23 Section 8 of the Act sets out the categories of persons who would not be required to undertake jury service. They are:

- "(aa) the Governor General³²*
- (a) Members of the Executive Council of New Zealand;*
- (b) Members of the House of Representatives;*
- (c) Judges of the High Court, Masters of the High Court, Judges of the Employment Court, Judges and Commissioners of the Maori Land Court, District Court Judges and Community Magistrates;*

³⁰ Section 6, Juries Act 1981.

³¹ Section 7, Juries Act 1981.

³² Inserted by s.6(1) of the Juries Amendment Act 2008.

- (d) *Visiting Justices under Corrections Act 2004, and members of the Parole Board;*
- (e) *Justices who have agreed to make themselves available from time to time to exercise the summary jurisdiction of District Courts;*
- (f) *Lawyers within the meaning of the Lawyers and Conveyancers Act 2006;*³³
- (g) *Employees of the Police, and Traffic Officers;*³⁴
- (h) *An employee of the Public Service who is employed -*
 - (i) *in the Ministry of Justice; or*
 - (ii) *in the Department of Corrections; or*
 - (iv) *as an officer of the High Court or of a District Court;*
or
- (haa) *Employees of the Legal Services Agency continued by section 91 of the Legal Services Act 2000 (but nothing in this paragraph applies to members of –*
 - (i) *the Board of that Agency; or*
 - (ii) *the Review Panel established under section 62 of that Act; or*
 - (iii) *the Public Advisory Committee established under Part 7 of that Act);*³⁵
- (ha) *a party to a management contract entered into under section 4A of the Penal institutions Act 1954 or to a security contract entered into under section 166 of the Corrections Act 2004; or*
- (hb) *a security officer within the meaning of section 3(1) of the Corrections Act 2004;*
- (k) *persons with an intellectual disability.*³⁶

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Substituted by s.348 of the Lawyers and Conveyancers Act 2006.

Amended by s.130(1) of the Policing Act 2008.

Inserted by section.6(3) of the Juries Amendment Act 2008.

It should be noted that paragraph (h)(iii) (officers of any penal institution or pre-release hostel or work centre) was repealed, as from 1 October 2003, by the State Sector Amendment Act 2003, and paragraph (j) (persons who are incapable of serving because of blindness, deafness, or any other permanent physical infirmity) was repealed, as from 30 July 2000, by the Juries Amendment Act 2000.

2.24 Section 2 of the Act provides that "Intellectual disability" has the same meaning as in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, which defines the term as follows:

- "(1) A person has an intellectual disability if the person has a permanent impairment that –*
- (a) results in significantly sub-average general intelligence; and*
 - (b) results in significant deficits in adaptive functioning, as measured by tests generally used by clinicians, ...*
 - (c) became apparent during the developmental period of the person.³⁷*

The developmental period of a person generally finishes when the person turns 18 years.³⁸

2.25 It should be noted that section 15(1) of the Act empowers the Registrar to excuse a person summoned to attend as a juror *on any occasion*, if attendance *on that occasion* would cause or result in undue hardship or serious inconvenience to that person, or to any other person, or to the general public, owing to the nature of that person's occupation or business, or of any special and pressing commitment arising in the course of that person's occupation or business; or that person's disability; or that person's state of health, or family commitments, or other personal circumstances. "Disability" is defined in section 2 of the Act as including visual or aural impairment.

2.26 Further, a person summoned to attend as a juror on any occasion may, on application, be excused by the Registrar from attending on that occasion if that person:

- "(a) Is a practising member of a religious sect or order that holds service as a juror to be incompatible with its tenets; or*
- (aa) Is of or over the age of 65; or*
- (b) Had served, or (having been summoned) has attended for service, as a juror at any time within the preceding period of 2 years; or*
- (c) Has been excused from jury service for a period that has not yet expired.³⁹*

³⁷ Section 7(1), Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

³⁸ Section 7(5), Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

³⁹ Section 15(2), Juries Act 1981.

2.27 A judge may also excuse a person from attending as a juror on any occasion, on application made to him, on any ground on which the Registrar could have excused that person under section 15 of the Act, whether or not the Registrar had declined to excuse that person under that section.⁴⁰ A judge may also discharge the summons of a person to serve as a juror, on that person's application, or on that judge's own motion, if the judge is satisfied that, because of physical disability or language difficulty, the person is not capable of acting effectively as a juror.⁴¹ The discharge may apply to the whole period for which the person is summoned, or to a particular proceeding.⁴² An application to discharge the summons must be heard in private, and the judge may conduct the hearing and consider such evidence as he thinks fit.⁴³

2.28 It is worth noting that a judge may discharge a juror if the judge considers that the juror is incapable of performing, or continuing to perform, his duty as a juror in the case.⁴⁴ The discharge of a juror under section 22 would not affect his liability to serve on any other jury.⁴⁵

Northern Ireland

2.29 Jurors hear the more serious criminal cases in the Crown Court. They may also be required to serve in a coroner's court and in some civil cases.

Juries (Northern Ireland) Order 1996

2.30 Currently, the selection and summoning of juries are governed by the Juries (Northern Ireland) Order 1996 Order ("the 1996 Order"). Every person aged between 18 and 70 who is registered as an elector is qualified and liable for jury service. Jurors are chosen at random from the electoral register. The 1996 Order provides that certain categories of persons may be disqualified or ineligible for, or excused from, jury service.

Persons disqualified for jury service

2.31 Schedule 1 of the 1996 Order sets out the persons who are disqualified for jury service:

- "1. Any person who has at any time been convicted by a court in the United Kingdom, the Channel Islands or the Isle of Man and sentenced —*

⁴⁰ Section 16, Juries Act 1981.

⁴¹ Section 16AA (1), Juries Act 1981.

⁴² Section 16AA(2), Juries Act 1981.

⁴³ Section 16AA(4), Juries Act 1981.

⁴⁴ New section 22 of the Juries Act 1981, as substituted by section.15(1) of the Juries Amendment Act 2008.

⁴⁵ Section 22A, Juries Act 1981.

- (a) *to imprisonment for life or for a term of five years or more; or*
 - (b) *to be detained during Her Majesty's pleasure or during the pleasure of the Secretary of State or during the pleasure of the Governor of Northern Ireland.*
2. *Any person who at any time in the last ten years has in the United Kingdom or the Channel Islands or the Isle of Man—*
- (a) *served any part of a sentence of imprisonment or detention; or*
 - (b) *been detained in a young offenders centre;*
 - (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.*
3. *Any person who at any time in the last five years has, in the United Kingdom or the Channel Islands or the Isle of Man, been placed on probation.*⁴⁶

Persons ineligible for jury service

2.32 Schedule 2 of the 1996 Order sets out three groups of categories of persons who are ineligible for jury service: those concerned with the administration of justice; those in the defence forces; and “other persons”. The first group consists of:

- Persons holding or who have at any time held any paid, judicial, or other office belonging to any court of justice in Northern Ireland.
- Justices of the peace.
- Members of juvenile court panels.
- The Chairman or President, the Vice-Chairman or Vice-President and the registrar and assistant registrar of any Tribunal.
- Barristers at law and solicitors whether or not in actual practice as such.
- Solicitors' clerks.
- Students of the Inn of Court of Northern Ireland or of the Law Society of Northern Ireland.

⁴⁶ Article 3(3) of the Juries (Northern Ireland) Order 1996.

- The Director of Public Prosecutions for Northern Ireland and the members of his staff.
- Officers of the Northern Ireland Office or of the Lord Chancellor's Department.
- Members of the Northern Ireland Court Service.
- Governors, chaplains and other officers of, and members of boards of visitors or visiting committees for, a prison, juvenile justice centre, attendance centre, remand centre or young offenders centre.
- The warden or a member of the staff of a bail hostel.
- Members of the Probation Board for Northern Ireland.
- Probation officers and persons appointed to assist them.
- A person appointed for the purposes of Article 7(6) of the Treatment of Offenders (Northern Ireland) Order 1976.
- Police officers and any other person employed in any capacity by virtue of which he has the powers and privileges of a constable.
- Members and staff of the Policing Board.
- Members of the National Criminal Intelligence Service, members of the Service Authority for the National Criminal Intelligence Service and persons employed by the Authority.
- The Police Ombudsman for Northern Ireland and persons employed by him.
- Persons in charge of, or employed in, a forensic science laboratory.
- Prisoner custody officers within the meaning of section 122(1) of the Criminal Justice and Public Order Act 1994.
- Members and employees of the Criminal Cases Review Commission.
- Persons who at any time within the past ten years have been persons falling within any of the foregoing descriptions (except the first) of persons concerned with the administration of justice.

2.33 The second group of categories of persons excluded is described as “*The Forces*” and consists of:

- Persons serving on full pay as members of any of the naval, military or air forces of the Crown raised in the United Kingdom.
- Members of the Royal Irish Regiment.

2.34 Under the third group of “other persons” are:

- Persons suffering from mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986.
- Persons unable to understand the English language.⁴⁷

⁴⁷ Article 3(3) of the Juries (Northern Ireland) Order 1996.

Persons excusable from jury service

2.35 Schedule 3 of the Juries (Northern Ireland) Order 1996 sets out the categories of persons excusable from jury service as of right:

"Parliament

- *Peers and peeresses entitled to receive writs of summons to attend the House of Lords.*
- *Members of the House of Commons.*

Northern Ireland Assembly

- *Members of the Northern Ireland Assembly.*
- *Officers and servants of the Northern Ireland Assembly.*

European Parliament

- *Representatives to the European Parliament.*

Public officials

- *The Assembly of Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints.*
- *Persons in the Northern Ireland Civil Service receiving a salary on a scale the maximum of which is not lower than the maximum of the Grade 5 scale.*
- *The Chief Electoral Officer and persons appointed to assist him.*
- *The Comptroller and Auditor General for Northern Ireland.*
- *The Secretary and any Director of the Northern Ireland Audit Office.*
- *Officers employed in any capacity by the Commissioners of Customs and Excise, or Commissioners of Inland Revenue.*
- *Officers in charge of a head office in Northern Ireland of a department of the Government of the United Kingdom.*
- *Inspectors of schools.*
- *Inspectors appointed under section 123 of the Mines Act (Northern Ireland) 1969.*

Clergy, etc.

- *A person in Holy Orders and a regular minister of any religious denomination.*
- *Vowed members of any religious order living in a monastery, convent or other religious community.*
- *Practising members of a religious society or order the tenets or beliefs of which are incompatible with jury service.*

Professions

- *Professors and members of the teaching staff of a university or institution of further education and full-time teachers in any school.*

- *Masters of vessels, duly licensed pilots and lighthouse keepers.*
- *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 and veterinary practitioners;*
 - ✧ *pharmaceutical chemists.*

Persons aged between 65 and 70 years."

Scotland

Qualifications for jury service

2.36 The basic qualifications for jury service in Scotland, as provided in section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, are the same as those in England and Wales, save that the maximum age for jury service is 65, as opposed to 70 in England and Wales.

Exemptions from jury service

2.37 Exemptions from jury service in Scotland may arise because an individual is ineligible, disqualified or excused. Excusal may be as of right or discretionary.

2.38 The categories of those ineligible, disqualified or excused are set out at Parts I to III of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. Those who are *ineligible* include persons receiving medical treatment for mental disorder (as defined in the Mental Health (Scotland) Act 1984) and those subject to guardianship under the Adults with Incapacity (Scotland) Act 2000. These categories are similar to those which apply in England and Wales, but Part I of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 adds members of the Judiciary and anyone who, at any time within the 10 years immediately preceding the date at which their eligibility for jury service is being considered, have come within any of the categories listed in this group. Others concerned with the administration of justice, including advocates and solicitors (whether in actual practice or not), Procurators Fiscal, police officers and court staff concerned with the day-to-day administration of the court, are also ineligible for jury service, as are any persons who, at any time within the five years immediately preceding the date at which their eligibility for jury service is being considered, have come within any of these categories.

2.39 The Scottish position in regard to ineligibility differs from that in England and Wales, where the only categories of otherwise qualified persons who are ineligible for jury service are the mentally disordered.

2.40 Those disqualified from jury service in Scotland include any person who has at any time been sentenced in the United Kingdom, the Channel Islands or the Isle of Man to life imprisonment or a term of five years or more, or who has served any part of a sentence of imprisonment or detention of three months or more and is not yet a rehabilitated person for the purposes of the Rehabilitation of Offenders Act 1974.⁴⁸ In addition, persons who are on bail in connection with criminal proceedings in any part of the United Kingdom are disqualified, as are persons who have been convicted and been the subject of a probation, drug testing, restriction of liberty or community order, and who are not rehabilitated persons for the purposes of the Rehabilitation of Offenders Act 1974.⁴⁹

2.41 These provisions are broadly similar to those which apply in England and Wales, though in England a person is disqualified if he has in the last ten years in the United Kingdom, the Channel Islands or the Isle of Man served any part of a sentence of imprisonment or detention (regardless of its length) or been the subject of a community, community rehabilitation, community punishment, drug treatment and testing, or drug abstinence order.

2.42 Part III of the Schedule to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 lists the persons who are excusable from jury service as of right. These include members and officers of the House of Lords or the House of Commons, members of the Scottish Parliament, the Scottish Executive or the Welsh National Assembly, and representatives to the European Parliament. In addition, the list includes full-time serving members of the armed services and their associated nursing services. Practising medical practitioners, dentists, nurses, midwives, pharmaceutical chemists and vets are also excusable as of right, as are persons in holy orders, regular ministers of any religious denomination and vowed members of any religious order living in a monastery, convent or other religious community. In respect of jury service in criminal proceedings, persons who are practising members of religious societies or orders which have beliefs which are incompatible with jury service are excusable. Finally, if a person has served on a jury or attended for jury service within the previous five years he is excusable as of right.

2.43 Section 1(5) of the 1980 Act provides for discretionary excusal by the court of any person from jury service where the person cited to attend for jury service satisfies the clerk of the court that there is a "good reason" why he should be excused. In the absence of exceptional circumstances, section 1(5A) requires the clerk of court to cite a person for jury service within one year of being excused under section 1(5).

⁴⁸ Part II of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.

⁴⁹ Part II of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.

2.44 Section 86(1) of the Criminal Procedure (Scotland) Act 1995 requires the court to excuse a juror before he is sworn to serve on the jury if the parties jointly apply for him to be excused.

2.45 The Scottish provisions in respect of excusal are in marked contrast to those in England and Wales, where the Criminal Justice Act 2003 removed any excusals as of right. Section 8 of the Juries Act 1974 entitles a person to be excused from jury service in England if he has served on a jury within the preceding two years. The basis for discretionary excusal in England is broadly similar to that in Scotland.

United States of America

2.46 The Victorian Law Reform Committee pointed out the significance of the jury in the American legal system:

*"The United States of America has inherited the fundamental characteristics of its legal system from England. Perhaps the single characteristic which gives shape to much of the rest of the legal system is the reception of the institution of the jury. The function of the jury has always been to ensure that the substantive law is thoroughly applied and that parties to any law suit receive a fair trial."*⁵⁰

2.47 The defendant's right to trial by jury is enshrined in the American constitution. In delivering the opinion of the Supreme Court in *Duncan v Louisiana*, Mr Justice White made the following comments:

*"... Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. ... The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. ... Our conclusion is that in the American states, as in the federal judicial system, a general grant of jury trial for serious offences is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."*⁵¹

2.48 The Victorian Law Committee had the following observations on the concept of representativeness in the US jury system:

"In the United States today, it is common to describe the ideal jury as a body truly representative of the community. ... Both Federal and State legislation requires that every citizen must

⁵⁰ Victorian Law Reform Committee, *Jury Service in Victoria Final Report*, Vol 2 (1997), para 7.1.
⁵¹ 391 U.S.145 (1968), paras 154-158.

*have an equal opportunity to perform jury service. ... The lists from which juries are made up must be constantly reformed to ensure that they are representative and inclusive of the eligible adult population.*⁵²

2.49 The US federal legislation on jury trials provides that *"no citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, colour, religion, sex, national origin, or economic status.*⁵³

2.50 The federal legislation lays down the eligibility criteria for jury service, and this is mirrored by most States in their respective statutes. A person would be deemed to be qualified to serve on grand and petit juries in the district court unless he:

- "(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;*
- (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;*
- (3) is unable to speak the English language;*
- (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or*
- (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.*⁵⁴

2.51 The following persons are *"barred from jury service on the ground that they are exempt"*:⁵⁵

- "(A) members in active service in the Armed Forces of the United States;*
- (B) members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession;*

⁵² Victorian Law Reform Committee, *Jury Service in Victoria Final Report, Vol 2* (1997), para 7.30.

⁵³ Title 28 USC Chapter 121, Juries; Trials by Jury, section 1862.

⁵⁴ Title 28 USC Chapter 121, Juries; Trials by Jury, section 1865.

⁵⁵ Title 28 USC Chapter 121, Juries; Trials by Jury, section 1863(6).

- (C) *public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties.*⁵⁶

2.52 A person summoned to serve on a jury may be excused or excluded in certain circumstances. He may be:

- "(1) *excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service ... or, if the court's jury selection plan so provides, the name of such person shall be reinserted into the qualified jury wheel for selection ... , or*
- (2) *excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or*
- (3) *excluded upon peremptory challenge as provided by law, or*
- (4) *excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or*
- (5) *excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.*⁵⁷

California

Penal Code

2.53 Section 893 of the Penal Code (dealing with criminal procedure and related matters) governs the qualification of members of the grand jury.⁵⁸

⁵⁶ Title 28 USC Chapter 121, Juries; Trials by Jury, section 1863(6).

⁵⁷ Title 28 USC Chapter 121, Juries; Trials by Jury, section 1866(c).

⁵⁸ Section 888 of the Penal Code provides that "A grand jury is a body of the required number of persons returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offences committed or triable within the county. Each grand jury or, if more than one has been duly empanelled pursuant to Sections 904.5 to 904.9, inclusive, one grand jury in each county, shall be charged and sworn to investigate or inquire into county

"(a) A person is competent to act as a grand juror only if he possesses each of the following qualifications:

- (1) He is a citizen of the United States of the age of 18 years or older who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned.*
- (2) He is in possession of his natural faculties, of ordinary intelligence, of sound judgment, and of fair character.*
- (3) He is possessed of sufficient knowledge of the English language.*

(b) A person is not competent to act as a grand juror if any of the following apply:

- (1) The person is serving as a trial juror in any court of this state.*
- (2) The person has been discharged as a grand juror in any court of this state within one year.*
- (3) The person has been convicted of malfeasance in office or any felony or other high crime.*
- (4) The person is serving as an elected public officer."*

Code of Civil Procedure

2.54 Chapter 1 of Title 3 of the Code of Civil Procedure, known as the Trial Jury Selection and Management Act, deals with the selection of jurors, and the formation of trial juries, for both civil and criminal cases, in all trial courts of the state.⁵⁹ Juries are of three kinds: grand juries, trial juries, and juries of inquest.⁶⁰

2.55 Section 203 governs the qualification of prospective trial jurors. It provides as follows:

"(a) All persons are eligible and qualified to be prospective trial jurors, except the following:

matters of civil concern, such as the needs of county officers, including the abolition or creation of offices for, the purchase, lease, or sale of equipment for, or changes in the method or system of, performing the duties of the agencies subject to investigation pursuant to Section 914.1"

⁵⁹ Section 192, Code of Civil Procedure.

⁶⁰ Section 193, Code of Civil Procedure.

- (1) *Persons who are not citizens of the United States.*
 - (2) *Persons who are less than 18 years of age.*
 - (3) *Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.*
 - (4) *Persons who are not residents of the jurisdiction wherein they are summoned to serve.*
 - (5) *Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.*
 - (6) *Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.*
 - (7) *Persons who are serving as grand or trial jurors in any court of this state.*
 - (8) *Persons who are the subject of conservatorship.*
- (b) *No person shall be excluded from eligibility for jury service in the State of California, for any reason other than those reasons provided by this section."*

2.56 Section 204 makes provision for the exemption and excusal of jurors:

- "(a) *No eligible person shall be exempt from service as a trial juror by reason of occupation, race, colour, religion, sex, national origin, economic status, or sexual orientation, or for any other reason. No person shall be excused from service as a trial juror except as specified in subdivision (b).*
- (b) *An eligible person may be excused from jury service only for undue hardship, upon themselves or upon the public, as defined by the Judicial Council."*

2.57 A person may be required to complete a questionnaire if a jury commissioner requires him to do so for the purpose of ensuring a fair cross

section of the population is represented in the jury. Section 205 provides the following:

- "(a) *If a jury commissioner requires a person to complete a questionnaire, the questionnaire shall ask only questions related to juror identification, qualification, and ability to serve as a prospective juror.*
- (b) *Except as ordered by the court, the questionnaire referred to in subdivision (a) shall be used solely for qualifying prospective jurors, and for management of the jury system, and not for assisting in the courtroom voir dire process of selecting trial jurors for specific cases.*
- (c) *The court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary for assisting in the voir dire process or to ascertain whether a fair cross section of the population is represented as required by law, if such procedures are established by local court rule.*
- (d) *The trial judge may direct a prospective juror to complete additional questionnaires as proposed by counsel in a particular case to assist the voir dire process."*

2.58 Section 208 provides that the jury commissioner should hear the excuses of jurors summoned, in accordance with the standards prescribed by the Judicial Council. It is also a matter for the jury commissioner's discretion whether to accept an excuse section 204(b) without a personal appearance. All excuses must be in writing, setting forth the basis of the request, and signed by the juror.

2.59 The jury commissioner should randomly select jurors for jury panels to be sent to courtrooms for what is referred to as "*voir dire*".⁶¹ This is an examination of the potential jurors by, first, the judge, and then counsel for each party. No peace officer should be selected for *voir dire* in criminal matters.⁶²

2.60 A trial jury consists of 12 persons, except that in civil actions and cases of misdemeanour, it may consist of 12 or any number less than 12 upon which the parties agree.⁶³

2.61 In order to ensure a fair and impartial jury in civil jury trials, an examination process of jurors is provided in the Code of Civil Procedure:

⁶¹ Section 219(a), Code of Civil Procedure.

⁶² Section 219(b), Code of Civil Procedure.

⁶³ Section 220, Code of Civil Procedure.

"To select a fair and impartial jury in civil jury trials, the trial judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination should not preclude additional non-repetitive or non-duplicative questioning in the same area by counsel.

The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed. ...⁶⁴

2.62 For criminal cases, the examination process is governed by section 223:

"In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause."

⁶⁴ Section 222.5, Code of Civil Procedure.

2.63 Section 203(a)(6) of the Code of Civil Procedure provides that:

"no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

Section 224 further provides the following In relation to disabled jurors:

- "(a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.*
- (b) As used in this section, 'service provider' includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.*
- (c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. ...⁶⁵*

⁶⁵

Subdivision (f) of section 754 of the Evidence Code provides that: *"For purposes of this section, "qualified interpreter" means an interpreter who has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired."*

Chapter 3

Common law position

Introduction

3.1 This chapter looks at the common law position in relation to the various qualifying criteria for jury service, and the exemptions from service on disability grounds.

Age

3.2 In *R v Tremearne*,¹ an 1826 case of perjury in England, a boy who was not on the panel of jurors and who was under age, answered for his father when the latter was called. The son was sworn and served on the jury in his father's place. The court subsequently held that this was a fatal objection and that there had been a mistrial. Abbott CJ said:

*"But in the present case, the person who appeared in the name of his father, and served on the jury, was not qualified by estate so to do, and had not arrived at the age which the law considers necessary to give competent knowledge to sit in judgment. ... Looking at these particular circumstances in this case, I think that we ought, in a sound exercise of our discretion, to make the rule for a new trial absolute."*²

3.3 The distinction between disqualification and exemption on the grounds of age was discussed in *Denis Dowling Mulcahy v R*.³ The court held that where a juror's age exceeded sixty years, that fact only operated in his favour as an exemption, but was not a ground for challenge as a personal qualification. Mr Justice Willes said:

"... the judges are of the opinion that the challenge to James Booth upon the ground of age ought not to have been allowed. Infancy has been considered a ground of disqualification on account of probable deficiency of understanding (propter defectum). ... Being over the prescribed age has been considered only a ground for not returning the juryman, and there is no known head of challenge (certainly not that of propter defectum) under which objection can be made to a juryman over the prescribed age, if otherwise competent. ... A

¹ 108 ER 95.

² 108 ER 95, at 96.

³ 1868 [L R] 3 HL 306.

*like construction ought to be put upon the present Jury Act. ... Is, then, the personal quality of being over sixty a want of qualification, or only a personal ground of exemption? It should seem the latter. The statute, being in the affirmative, leaves infants disqualified as at the common law. Aliens, convicts of treason felony ... are specially disqualified by section 3. ... Persons of sixty and upwards are, by the first section, forbidden to be returned by the sheriff in words no more stringent than those of the Statute of Westminster, which were held not to disqualify, or even exempt, after return made. And the enactment dealing in terms with qualification as 'qualification in respect of property' is, in effect, that persons qualified as to property ... shall if under sixty be liable to serve, and if over sixty shall be not disqualified, but for their age sake relieved in the manner specified. The challenge to James Booth was, therefore, rightly overruled."*⁴

3.4 In the US case of *Michael Anthony Chivers v the State of Texas*⁵ in 1990, the prosecution used its right to strike out potential jurors to achieve a jury composed of older members. The prosecutor explained to the trial court why he considered the age of the jurors to be important:

*"Additionally, Juror Number 8 was a young male. What I am looking for in this panel is – generally speaking are established, preferably older or more established people in the community, and because of the case being based on circumstantial evidence ... I'm looking for what I believe to be educated people."*⁶

The trial court's judgment was subsequently reversed on appeal, but this was because the prosecution did not provide a racially neutral explanation for one of its peremptory challenges. The importance of the age of the jurors was not questioned in either the trial or appeal court.

3.5 In *Devlin Darnell James v The State of Texas*,⁷ the prosecution explained to the court that they wanted an older jury to judge a case involving young persons *"in a shooting over a drug transaction"*. The prosecution consistently struck out all potential jurors under the age of thirty, regardless of race. The court accepted that age may be a legitimate neutral reason for a peremptory challenge, and determined that the prosecution had not engaged in purposeful discrimination based on race in the exercise of its peremptory challenges.

⁴ 1868 [L R] 3 HL 306, at 314-315.

⁵ 796 SW2D 539.

⁶ 796 SW2D 539, at 541.

⁷ Case No 06-04-00155-CR.

Residency

3.6 A residency requirement to act as a juror dates back at least as far as 1828 in England, where it was held in *R v Sutton*⁸ that "*alienage is a ground of challenge to a juror*", but that "*if a party has an opportunity of making his challenge, and neglects it, he cannot afterwards make the objection*".

3.7 In the US case of *Michael Anthony Chivers v the State of Texas*,⁹ the prosecutor expressed concern about one juror's length of stay in the community. He explained that his strike of that particular juror (Stone) was because he did not feel that Stone was established in the community and "*has only been living in the community for five years.*" The Court of Appeals of Texas held that the prosecutor's explanation for striking Stone did not give a plausible, racially-neutral reason and said:

*"Unlike Murray [another juror also struck by the prosecutor], who had no job, Stone had held a job for the past five years. Finally, while Murray lived in Dallas County for only one and one-half months, Stone resided in Dallas County for five years. Thus, Stone was significantly more established in the community than Murray."*¹⁰

3.8 The issue of residence was considered in the Hong Kong case of *Norcross v Registrar of the Supreme Court*.¹¹ The applicant was a citizen of the United States of America. He was a sales manager of a Hong Kong company who was required to travel extensively. Over the years he had spent considerable time in Hong Kong. Between 1985 and 1989, he had spent 144 days in Hong Kong in 1986, and 32 days in 1989. The duration of each stay varied, but the single longest period of stay was 28 days and the shortest was one day. As he had received permission to remain in Hong Kong in excess of 180 days, he was not an exempt person and was required to register under the Registration of Persons Regulations, and be issued with a Hong Kong identity card. Mr Norcross's name was therefore put on the list of common jurors. Mr Norcross applied to have his name removed on the basis that he was not liable to serve as a juror as he was not resident in Hong Kong. The Registrar refused to remove Mr Norcross's name from the list.

3.9 Bokhary J, in granting the general exemption to the applicant, said:

"'Resident' does not mean 'exclusively resident'. ...

The duty to serve on a jury does not end with the question of residence. By virtue of the power given to the Court under s.28(1)(b) of the Jury Ordinance, the Court may – on application

⁸ (1828) 8 B & C 417.

⁹ 796 SW2D 539.

¹⁰ 796 SW2D 539, at 543.

¹¹ HCMP003606/1990.

and on cause being shown – remove the name of any person from the list of common jurors or the list of special jurors or both. So the fact that somebody is on the list or lists because he is resident here does not mean that he may not obtain general exemption from jury service. ...

Although he is resident here, his residence here is of such a nature that it would be inordinately inconvenient to him to be liable to serve on a jury here. It is right that one should have regard to, among other things, his convenience. Of course that is not the only consideration. There is also the public interest to be considered. But one must remember that it is not to the advantage of the administration of justice generally to have on juries persons to whom jury service is unduly onerous."¹²

Good character

3.10 In *Rex v Kelly*,¹³ the appellant was convicted of murder. After his trial, it came to light that one of the jurors had been convicted of receiving stolen goods and sentenced to one month's imprisonment five years before. The juror's name appeared in the jurors' book as that of a person qualified and liable to serve as a juror, and his appointment to the jury had not been challenged. The appellant argued that the juror in question was disqualified from serving and that the trial was therefore a mistrial.

3.11 In delivering the appeal court's judgment, Lord Goddard CJ said:

"Although one would not expect a person disqualified, for instance, because he had been convicted of an infamous crime to disclose that fact by claiming that he was disqualified, it seems to us that, as the Juries Act 1870 imposed a disqualification, whether the person concerned claimed or did not claim exemption does not matter: if his name is included in the jurors' book, he is liable to serve. It is true that his name might have been taken out if he had objected; and it is true that his name might not have been included if the registration officer had been aware of his conviction; but it seems to us that the Act provides in terms that a person whose name appears in the jurors' book is liable to serve as a juror, and that that, again, is an answer to the present objection.

There remains always the right of the accused person to challenge either peremptorily or, if he has exhausted his peremptory challenges, for cause. This right remains unaffected, but, it is asked, how could he challenge if he did not know? It is also contended that the cases show that, where

¹² HCMP003606/1990, at 4 - 5.

¹³ [1950] 2 KB 164.

information has come to the knowledge of the accused person after conviction with regard to the qualification of a juror, effect has been given to it by the court and the trial treated as a nullity. It is true that there are such cases, but, so far as this court can ascertain, they have all been cases where there has been either impersonation of a juror or a mistake as to the identity of a juror."¹⁴

3.12 In *R v Mason*,¹⁵ before the applicant's trial, the police had checked the local criminal records and, unknown to the defence, had supplied the prosecution with the names of those called for jury service who had been convicted of criminal offences. When the jury was being empanelled, the prosecution asked four members of the panel to "stand by for the Crown"¹⁶ Three of those had criminal convictions, although at least one of them was not disqualified by his conviction from jury service. The applicant was convicted and applied for leave to appeal against conviction. Issue was taken as to whether the prosecution had wrongly used the particulars of the convictions to ask some members of the panel to "stand by for the Crown" who were not disqualified by their convictions from serving as jurors.

3.13 Counsel for the applicant submitted, *inter alia*, that on its true construction the Juries Act 1974 envisaged that all who were qualified to serve as jurors in the Crown Court should be allowed to do so unless they were ineligible or disqualified or excused under Schedule 1 to that Act. The Court of Appeal considered this argument misconceived, and explained that before 1974 prosecuting counsel, without showing cause, could ask a member of the jury panel to "stand by for the Crown", and the trial judge could refuse to allow a member of the panel to be sworn, even though there had been no challenge by either party. Far from altering the old law, section 21(5) of the Juries Act 1974 had confirmed it.

3.14 The Court of Appeal summarised the rights of different parties to a jury trial with regard to peremptory challenge as follows:

"For centuries the law has provided by enactment who are qualified to serve as jurors, and has left the judges and the parties to criminal cases to decide which members of a jury panel were suitable to serve on a jury to try a particular case. To this extent the random selection of jurors has always been subject to qualification. Defendants have long had rights to peremptory challenges and to challenges for cause; prosecuting counsel for centuries have had the right to ask that a member of

¹⁴ [1950] 2 KB 164, at 173.

¹⁵ [1981] QB 881.

¹⁶ The term "stand by for the Crown" refers to a procedure dating from the time when the Crown did not have the right to make peremptory challenges (that is, challenges without giving a reason). The Crown was instead given an unlimited right to request prospective jurors, as they were balloted, to "stand by for the Crown". These people would then not be sworn as jurors but would, in effect, go to the back of the queue. Only if the prospective jurors remaining were insufficient to complete a jury would the people "stood by" be balloted again. If the Crown wished to exclude them on this second occasion, it was required to show cause.

the panel should stand by for the Crown and to show cause why someone should not serve on a jury; and trial judges, as an aspect of their duty to see that there is a fair trial, have had a right to intervene to ensure that a competent jury is empanelled."¹⁷

3.15 The Court of Appeal refused the application. In delivering the judgment, Lawton LJ said:

"In our judgment, the practice of the past is founded on common sense. A juror may be qualified to sit on juries generally, but may not be suitable to try a particular case. An example put to ... [counsel for the applicant] during argument shows this. X is charged with unlawfully wounding a gamekeeper whilst out poaching. The prosecution's case is that he was a member of a gang at the material time. When the jury comes to be empanelled one member of the panel is found to have a number of convictions for poaching (not amounting to disqualifications) all in the petty sessional division where the gamekeeper worked. In our judgment, to allow such a man to serve on that jury would be an affront to justice. He would be unlikely to be impartial; and, although he would be only one of 12, he could be expected to press his point of view; and its effect upon his fellow-jurors would depend upon his persuasive powers and their receptiveness to suggestion. The prospect of the case being tried according to the evidence would, in our judgment, be materially reduced."¹⁸

3.16 In *R v Richardson*,¹⁹ the applicant appealed against his conviction on the ground that one of the jurors was disqualified from jury service. Part II of Schedule I to the Juries Act 1974 included in the classes of persons disqualified from jury service "a person who at any time in the last five years has in the UK . . . had made in respect of him a probation order." The juror in question was subject to a Community Rehabilitation Order and was thus in effect on probation. The juror did not contact the Jury Summoning Bureau to advise them of his convictions, nor did he raise with the Bureau or with any staff member at the Crown Court any question as to his eligibility to sit as a juror. In this regard, the court referred specifically to section 18 of the Juries Act 1974, which provides:

"(1) No judgment after verdict in any trial by jury in any court shall be stayed or reversed by reason –

(a) that the provisions of this Act about the summoning or empanelling of jurors, or the

¹⁷ *R v Mason* [1981] QB 881, at 887.

¹⁸ *R v Mason* [1981] QB 881, at 888.

¹⁹ [2004] EWCA Crim 2997.

selection of jurors by ballot, have not been complied with, or

(b) that a juror was not qualified in accordance with section 1 of this Act, or

(c) that any juror was misnamed or misdescribed, or

(d) that any juror was unfit to serve.

(2) Subsection (1)(a) above shall not apply to any irregularity if objection is taken at, or as soon as practicable after, the time it occurs and the irregularity is not corrected. ..."

3.17 Clarke LJ reiterated in the judgment that:

"The question is whether the verdicts were safe. ... [T]he mere fact of disqualification does not by itself justify the conclusion that the verdict is unsafe by reason of the express terms of s 18 of the Juries Act 1974. The cases show that there must either be some direct evidence or some evidence from which the inference can be drawn that the verdict is unsafe. ... Section 18(1) begins:

'No judgment after verdict in any trial by jury . . . '

It does not refer only to verdicts which are unanimous. It must have been intended to include both unanimous and majority verdicts since in s 17 of the same Act, as we have already observed, Parliament provided for majority verdicts."²⁰

3.18 The court in *R v Richardson* also considered a number of cases in which problems of this kind had arisen in the past, and was of the view that the appeal case of *R v Bliss*²¹ provided the fullest consideration of the decided cases. In that case, Garland J said:

"It appears to us that the principle which emerges from these cases is that this Court will not interfere with the verdict of a jury unless there is either evidence pointing directly to the fact or evidence from which a proper inference may be drawn that the defendant may have been prejudiced or may not in fact have received a fair trial."²²

3.19 Garland J referred to the case of *Chapman and Lauday*,²³ and said:

²⁰ [2004] EWCA Crim 2997, paras 18 - 20.

²¹ (1987) 84 Cr App Rep 1.

²² (1987) 84 Cr App Rep 1, at 6.

²³ (1976) 63 Cr App Rep 75.

"The effect of section 18 was considered some 10 years ago in Chapman and Lauday, where after a verdict had been returned it was found that one of the jurors was exceedingly deaf and had only heard at best about half of the proceedings. This Court held that not only was section 18 a complete answer to that particular difficulty but that had the juror's disability been known he could have been discharged, or alternatively he could have decided to take no part in the proceedings and the jury could after deliberations have returned a majority verdict of 11:1. However, this Court did go on to relate the provision of the Juries Act 1974, to which I have referred, to the Criminal Appeal Act 1968 and pointed out for any deficiency in a member of the jury to afford grounds for quashing a conviction, it had to constitute either a material irregularity in the course of the trial or render the verdict unsafe and unsatisfactory. The Court went on to add at page 79 (a passage to which our attention has been drawn):

*'One can see that there may be circumstances in which it could be argued that despite the provisions of section 18 of the Juries Act 1974 the verdict was unsafe or unsatisfactory because of some deficiency in a member of the jury or for some other reason, but on the facts of this particular case, where there is only one juror involved, where that juror could well have been discharged had the facts of his deafness become known and the trial proceeded; having regard to the fact that majority verdicts are possible in circumstances these days, and there being no evidence whatsoever of miscarriage of justice by reason of the verdicts, it is not possible to say that verdicts in the case of each of these appellants were either unsafe or unsatisfactory.'*²⁴

Language competence and educational standard

3.20 In *United States of America v Jorge E Marin*²⁵ (a 1993 case), the United States Court of Appeals for the Seventh Circuit affirmed the convictions of the appellant and held that the trial judge properly permitted the government to base a peremptory challenge on a witness's lack of education, and that that reason was not necessarily a racially motivated one. The court accepted that the prosecutor *"had no interest in the race of prospective jurors but that he did have an interest in selecting educated jurors to try this complicated drug conspiracy case."*²⁶

²⁴ (1987) 84 Cr App Rep 1, at 4.

²⁵ 7 F 3d 679.

²⁶ 7 F 3d 679, at 686.

3.21 In *United States of America v Mike Moeller and Peter Thomas McRae, and Billie B. Quicksall*,²⁷ the prosecution claimed at trial that the length and complexity of the case required jurors with at least a high school education. One panel member with no formal education seemed to be having difficulty with the questions and was unable to fill out the juror questionnaire. The Circuit Judge ruled that:

*"in this case, ... the complex nature of the conspiracy, and the number of interconnected offences alleged, adequately support the district court's determination that the prosecution articulated adequate race-neutral reasons for the peremptory strikes."*²⁸

3.22 Likewise, in *United States of America v Jesus Carrasco Sandoval*,²⁹ the United States District Court for the Northern District of Illinois noted that *"the government sought to obtain a well-educated jury because the case is complex. ... Courts have also recognised that the education of a panel member may be considered in complex conspiracy cases."*

3.23 In *Delvin Darnell James v the State of Texas* (an unpublished appeal case), the Court of Appeals of Texas appeared to have accepted the prosecution's explanation that its challenge to two jurors was based on their education level. The Court noted:

*"The State explained it struck [potential juror] 24 because he had no high school education. The State further explained it also struck [potential juror] 18 for the same reason. The juror information card for [potential juror] 18 revealed that he had not completed high school. The rationale given was that the case involved a shooting and medical records would be introduced (presumably, the State was concerned about the jurors being able to read and understand the medical records). Such an explanation is race neutral."*³⁰

3.24 In the Canadian case of *R v Saraga*,³¹ the Quebec Superior Court granted an application made by the accused pursuant to section 555(2) of the Criminal Code for an order that the jury at his trial be composed of jurors speaking the English language. The application was to be determined on the basis that an accused who spoke English or French had the right to be tried by a jury skilled in whichever of the two official languages he habitually spoke. While the accused's first language was French and he still spoke excellent French, his recent day-to-day life had been conducted exclusively in English. In the circumstances, the court was satisfied that it was in the interest of justice that the trial be conducted in English.

²⁷ 80 F 3d 1053.

²⁸ 80 F 3d 1053, at 1060.

²⁹ 1997 US Dist LEXIS 16253.

³⁰ Decided by the Court of Appeals of Texas, Sixth District, Texarkana on 8 November 2005.

³¹ 1998 W C B LEXIS 6963.

3.25 In the Canadian case of *R v Fatt*,³² the Crown brought a motion for a change of venue of the trial on the ground that the community size and the close personal relationships in the community between the defendant, the victim, and the Crown witnesses would make it impossible to select a jury from 159 voters listed in the community of approximately 300 people. The defendant asked the Court to declare that he had a right to a jury of six persons and asked that the Crown's motion for a change of venue be dismissed. The Crown's motion was rejected. In doing so, the court observed that a jury should be selected from the community of the defendant. There could be a good case made for classifying all Canadians as peers and members of the same community, though in the Northwest Territories that was more difficult. The court commented that that would imply a degree of integration with all the advantages that uniformity brings, but one could forcefully argue that that had not been the way, either in the Northwest Territories or in Canada itself. In the Northwest Territories, where the majority of the people were of native or aboriginal ancestry, a recent amendment to the Jury Act would allow for jurors who speak only one of the aboriginal languages to qualify as jurors. This was to benefit and preserve cultural pluralism in the North. Further, the Court said that section 27 of the Canadian Charter of Rights and Freedom:

" ... provided that the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. This was a mandate for the preservation of the pluralistic society, especially, it would seem, in the North with its vast distances and vast differences. It would direct the court not to utilise the judicial system as if it were a tool for integration but rather to recognise the distinct culture and community of such groups as the unique Chipewyan group of the Dene. ...

Community then, from these authorities, and from the realities imposed by size and logistical considerations ... should mean a reasonably distinguishable group by language and culture. It should occupy ... a unique geographic area. If those conditions are met, then it seems that those people living in that area should qualify as community. ... Put simply, it seems that when a relatively homogeneous group, culturally and traditionally, live in a distinct geographic area (indeed, as the Dene or the Inuit do), if the jury is to fill its purported role, it will do this only if the jurors reflect the values and cultural mores of that community."³³

3.26 The court added that the accused had "evidenced a legitimate concern and [had] waived his rights under the Charter to a 12-member jury." The court ruled that "a 6 or 12-member jury should be available at the option of the accused. ... Here the venue will be changed to Fort Resolution (another

³² [1986] NWTR 388.

³³ [1986] NWTR 388, paras 33 - 36.

village) because of the bias of the witnesses³⁴ and granted the cross-motion for the six-member jury.

3.27 In a 1997 North-West Territories Court of Appeal case, *R v Kaunak*,³⁵ the accused was acquitted on a charge of sexual assault. The Crown appealed and sought an additional order excluding monolingual Inuktitut speakers from the jury at a new trial. The accused had been tried by a jury, the members of which spoke two different languages. The Crown sought to adduce fresh evidence on appeal that the translation given to the jury of the trial judge's instructions was wrong. The Court of Appeal ruled that the fresh evidence should be admitted and, as a result, a new trial was required as the Inuktitut-speaking jurors had not been properly instructed. While it was proposed that all jurors should be English-speaking at the retrial, the Court of Appeal was not satisfied that the affidavit evidence led to the conclusion that concepts such as reasonable doubt, contained in any jury charge, were not capable of being translated into Inuktitut. The dissenting judge said that "... Absent Charter considerations, the court should defer to the legislative choice set out in the Jury Act so that no order should be made that the accused be tried by an English-speaking jury."³⁶

3.28 In *United States of America v Martin Henderson*,³⁷ the defendant was convicted following a jury trial and appealed on the grounds that the District Court erred in denying his motions challenging the array of petit jurors, because the Clerk of Court and Jury Commissioner, who were jointly responsible for the selection of qualified petit jurors, attached significant consideration in making that selection to each prospective juror's formal education. The contested issue was:

*"Whether the clerk and the jury commissioner may consider intelligence level as indicated by a formal eighth grade education as a factor in the selection of the names of persons to be placed in the box from which the names of jurors are publicly drawn."*³⁸

3.29 The Circuit Judge explained the process of selection of jurors as follows:

"The manner of the selection of the persons whose names were placed in the box from which the panel was drawn for the trial of the defendant was stipulated. The clerk of the court and the jury commissioner annually send a questionnaire to each of approximately 800 prospective jurors. Prospective jurors are required to answer the questionnaire in their own handwriting. It asks, among other things, the person's occupation, length of time of present employment or business, and ability to read,

³⁴ [1986] NWTR 388, paras 45 - 48.

³⁵ 36 WCB (2d) 237.

³⁶ 1997 WCB LEXIS 5526.

³⁷ 298 F 2d 522.

³⁸ 298 F 2d 522, at 523.

write and understand English. It requires that the number of years of primary, high school and college education be indicated by the circling of appropriate figures on the form. ... In determining whether to place the name of the person in the jury box the decision is made on the basis of the information disclosed by the questionnaire. Spelling, grammar, penmanship, failure to answer any question, and the nature and length of employment are all considered. A person may be accepted if the nature and length of employment indicate responsibility, ability and experience, regardless of the amount of formal education. The questionnaire is the sole basis for estimating the intelligence of the prospective juror and significant consideration is given to the amount of formal education for the purpose of obtaining more intelligent jurors. In connection with the selection of persons with less than an eighth grade education, if relatively few names are needed to fill the box, the clerk and commissioner become more selective and are more likely to select those who have had more formal education. At the time of defendant's trial there were some jurors whose names were in the box and some on the jury panel who had less than an eighth grade education.

The defendant contends that in the selection of prospective jurors for the Eastern District of Wisconsin, which embraces the metropolitan Milwaukee area, whether such persons have completed eight grades of formal education may not be considered. He argues that in the enactment of 28 USCA section 1861, Congress has imposed a 'literacy' standard which precludes inquiry into the intelligence of prospective jurors and that the use of the intelligence criteria here employed by the clerk and commissioner in the selection process destroys the uniformity intended by Congress, violates the statute, and results in an exclusion of an important segment of the community, precluded by the Sixth Amendment to the United States Constitution, and which voids defendant's conviction."³⁹

3.30 In addressing the issue raised by the defendant, the court said:

"The government disputes that intelligence may play no part in jury selection and points to the fact that until September 1, 1948 qualifications and exemptions of federal jurors were dependent upon the laws of the state where the federal district court sat and that nineteen states imposed qualifications of 'intelligence, fair education'. In 1948, 28 USCA, sections 1861 and 1864 were enacted. Except for disqualification for certain criminal convictions, section 1861 made every citizen meeting the age and residence requirements competent for jury duty provided that he was able to read, write, speak and 'understand the

³⁹

298 F 2d 522, at 523 - 524.

*English language', that he was not incapable to render efficient jury service because of mental or physical infirmities, and that he was not incompetent under state law. In 1957 Congress removed the provision requiring competency under state law from section 1861 as a part of civil rights legislation designed to attain objectives not inconsistent with recognition that a reasonable level of intelligence is appropriate, if not a requisite, to the rendition of efficient service as a juror. And, that the goal of 'efficient' service is an express objective of the statute is evidenced by its provision requiring rejection of persons incapable by reason of mental or physical infirmities of rendering 'efficient jury service'. Recognition that the statute envisions 'efficient' service requires rejection of a conclusion that an intelligence level equated with mere literacy was intended to be imposed as a maximum standard to be employed by the clerk and the commissioner in the selection of persons pursuant to section 1864 whose names are to be placed in the box from which jurors are drawn. And this view of the statute not only is in accord with its express provisions but is in harmony with the observation in Brown v Allen, 344 US 443, 474, ... that no due process infirmity invalidates a jury source which 'reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty'. And as was pointed out in United States v Dennis, 2 Cir, ... the theory that a jury must be a 'cross-section' of the community 'must be taken with some reserves' and the statute 'presupposes some winnowing of those called'. The 'cross-section' contemplated is not an absolute. Frequently such complete representation would be impossible. ... But it does mean that prospective jurors shall be selected by court officials without the use of irrational or self-imposed standards.'*⁴⁰

3.31 In giving its ruling, the court said:

"The record before us discloses that the criteria here employed by the clerk and the commissioner in selecting persons whose names were placed in the box are not in themselves unreasonable or violative of the letter or spirit of the statute. Their use did not constitute or result in arbitrary exclusion. Lack of a formal eighth grade education did serve to require closer scrutiny of the nature of the person's employment to ascertain if it indicated such responsibility, ability or experience as evidenced a similar degree of intelligence. And, it was only where relatively few names were needed that persons who had more formal education were likely to be preferred for selection. Sole reliance on a questionnaire is not the most ideal method for the selection of prospective jurors. But the criteria here employed in the selection were not only practical, under the

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298 F 2d 522, at 524 - 525.

circumstances, but did serve to confirm the required ability to read, write, speak and understand the English language and indicate the existence of an intelligence level which certainly is not unreasonable as a requirement for the selection of efficient jurors. ... The facts here present no arbitrary exclusion of the nature condemned in Smith v Texas, 311 US 128, ... cited and relied upon by the defendant. Nor do the criteria employed have the effect of excluding an important segment of the community here involved. The record shows that in such urban areas 82% of the adult population has at least an eighth grade education and 79% of male labourers meet this standard. ... Defendant has no constitutional or statutory right that 'ignorance' be represented in the jury box. We are of the opinion that the District Court did not err in its rulings rejecting the challenge to the array."⁴¹

3.32 In *Robert K Mason, aka Anthony Bernard Smith v Commonwealth of Virginia*,⁴² a jury was empanelled without objection. While the jury was deliberating, defence counsel made a motion for a mistrial because he had received information that one of the jurors purportedly had "*great difficulty understanding English.*" The trial judge interrupted the jury's deliberations and summoned the jurors to the courtroom, where he examined the challenged juror to determine her level of proficiency in the English language. The juror understood all the trial judge's questions. The Supreme Court of Virginia considered in the appeal whether the trial court should have removed the juror, who had been empanelled and sworn without objection. The Supreme Court referred to *Weeks v Commonwealth* which pointed out that:

"[the appellate court] must give deference to the trial court's decision whether to exclude or retain a prospective juror because the trial court 'sees and hears the juror'; ... the trial court's decision will be disturbed only upon a showing of manifest error."⁴³

3.33 The Supreme Court of Virginia affirmed the decision of the trial court and said that:

"the trial court properly denied Mason's motion for a mistrial because the record fails to demonstrate that the challenged juror had a disability which was "such as to probably cause injustice" in Mason's criminal trial. ... The trial court made a factual finding that the challenged juror had a sufficient level of understanding of the English language which permitted her to participate fully in the jury deliberations. According the trial court the deference to which it is entitled, we perceive of no

⁴¹ 298 F 2d 522, at 525 - 526.

⁴² 498 SE 2d 921.

⁴³ 450 SE 2d 379, at 389.

reason to disturb the trial court's finding, which is supported by the record."⁴⁴

Disability

Deafness

3.34 In the English case of *Chapman and Lauday*,⁴⁵ the defendants were convicted by unanimous verdicts of burglary and going equipped for burglary. After the trial it transpired that one of the jurors, though duly qualified, was deaf and did not hear half of the evidence or all of the judge's summing-up, because of his disability. The juror did not disclose his deafness to anyone during the trial, and it only came to light afterwards. The defendants appealed against conviction and contended that because of the juror's disability their trial was a nullity. The Court dismissed the appeal and said:

*"... where there is only one juror involved, where that juror could well have been discharged had the facts of his deafness become known, and the trial proceeded; having regarded to the fact that majority verdicts are possible in circumstances these days, and there being no evidence whatsoever of miscarriage of justice by reason of the verdicts, it is not possible to say that verdicts in the case of each of these appellants were either unsafe or unsatisfactory."*⁴⁶

3.35 *Chapman and Lauday* was followed in *R v Barry Bliss*⁴⁷ where it was held that, pursuant to section 18(1) of the Juries Act 1974, the verdict of a jury should not be stayed or reversed by reason only that a disqualified juror was party to it. A deficiency in a member of a jury would only afford grounds for quashing a conviction if it constituted either a material irregularity in the course of the trial or rendered the verdict unsafe and unsatisfactory. The Court of Appeal said that:

*"... the principle ... is that this Court will not interfere with the verdict of a jury unless there is either evidence pointing directly to the fact or evidence from which a proper inference may be drawn that the defendant may have been prejudiced or may not in fact have received a fair trial."*⁴⁸

3.36 The English case of *Re Osman*⁴⁹ concerned an application by a Mr Touron Osman who had received a summons for jury service at the Central Criminal Court. Mr Osman informed the court that he was profoundly

⁴⁴ 498 SE 2d 921, at 924.

⁴⁵ (1976) 63 Cr App R 75.

⁴⁶ (1976) 63 Cr App R 75, at 79.

⁴⁷ [1986] Crim LR 467

⁴⁸ (1987) 84 Cr App R 1, at 5.

⁴⁹ [1996] 1 Cr App R 126.

deaf and thus required the services of an interpreter. The Recorder of London, Sir Lawrence Verney, pursuant to section 9B of the Juries Act, considered whether the summons should be discharged. Section 9B of the Juries Act 1974 provides that:

"(1) Where it appears to the appropriate officer, in the case of a person attending in pursuance of a summons under this Act, that on account of physical disability there is doubt as to his capacity to act effectively as a juror, the person may be brought before the judge.

(2) The judge shall determine whether or not the person should act as a juror; but he shall affirm the summons unless he is of the opinion that the person will not, on account of his disability, be capable of acting effectively as a juror, in which case he shall discharge the summons.

(3) In this section 'the judge' means any judge of the High Court or any Circuit judge or Recorder."

3.37 In his decision to discharge Mr Osman's jury summons, Sir Lawrence Verney addressed the issue of severe deafness:

"The disability here is one of severe deafness. Mr Osman ... concedes that in court it would not be possible for him without help to be sure of hearing the questions of counsel, or the answers of witnesses, or the speeches of counsel, or the summing-up, What he says that he needs, and I accept that he does, is the service of a communicator or interpreter in British Sign Language. It is possible given notice to obtain those services as we have this morning. It is not easy, but the problem which arises therefrom is a problem which a court could face. What the court cannot allow is for this juror to have an interpreter retire with him to the jury room to interpret the deliberations. ...

[Mr Osman] would not on account of his disability be able to follow the whole of the evidence and in those circumstances he cannot be capable of acting effectively as a juror. However willing he is to participate, his participation through no fault of his own would be incomplete and it is not fair to the defendant to have a jury in that situation. The interests of the defendant if they clash with those of a potential juror should in my opinion prevail.⁵⁰

3.38 Sir Lawrence Verney also made the following observations as to whether a deaf juror would be able to act effectively:

⁵⁰ Re Osman, [1996] 1 Cr App R 126, at 128 - 129.

"I am sure that many people understand what is required in acting effectively as a juror and that may be why there has been little authority upon that subject. The only reference which I have found which is useful is Guildford Crown Court, ex p. Siderfin (1990) Cr App R 192, [1990] 2 Q B 683 where it is said that the duties [of a juror] include a willingness to enter into discussions with other members of the jury and to perform the duties of a juror in conjunction with them. I have no doubt as to the willingness of Mr Osman.

There are two aspects: the duties in court and the duties in retirement. In court, fairness to the defendant requires that every juror should have a similar opportunity to listen to the evidence and to assess the reliability of a witness. ... For even one [juror] to have an interpreter is likely to leave the defendant with a fear that the juror, while perhaps helped to understand what has been said, must inevitably have lost any nuances available to his colleagues from the manner and tone of voice in which answers are given. Where assessment of the credibility of a witness is important, as so often it is, that juror may not be capable of acting as effectively as the others.

More difficult – and I think insoluble – is the problem in the jury room on retirement. In court there is a reasonable prospect of ensuring that only one person speaks at a time, although that is not always achieved. In retirement all jurors may make a contribution – or so it is to be hoped – and they may try to do so simultaneously. How is the juror who requires an interpreter to make an equal contribution? It would seem that this can only be achieved by the presence in the jury room of the same interpreter.

It has long been held that it is an incurable irregularity for an independent person to retire with the jury even though he may take no part in the discussion. An interpreter would be bound to take a part even though not expressing any personal opinion.⁵¹

3.39 However, in *People v Guzman*⁵² the Court of Appeals of New York held that a hearing-impaired person was not disqualified from jury duty. As reported, the juror in question:

"[S]peaks English, reads English, but he cannot hear. Although he is able to read lips, he was assisted during jury selection by a court-appointed sign language interpreter. He explained that, through lip-reading, 'I can see everything about the person, I can feel the tone, I can see the tone, the inflection of the person,

⁵¹ *Re Osman*, [1996] 1 Cr App R 126, at 127 - 128.
⁵² 76 NY 2d 1.

*but I can never get full verbatim. That is why I prefer to use the interpreter."*⁵³

3.40 The prospective juror and the interpreter in *People v Guzman* communicated using sign language that transmitted the speaker's words literally, without any intervening translation. The interpreter assured the court that she was familiar with, and would abide by, the code of ethics for sign language interpreters and that she would limit her role to that of a "communications facilitator".

3.41 The findings of the trial court, as noted by the Court of Appeals were:

*"As with most juror qualification questions, the determination whether a hearing-impaired person can provide reasonable jury service in a given case must be left largely to the discretion of the trial court, which can question and observe the prospective juror and the interpreter during the voir dire. ... In addition, the [trial] court was satisfied that the interpreter was competent and could abide by ethical constraints and the court's instructions prohibiting participation in the jury's deliberations."*⁵⁴

3.42 The Court of Appeals' ruling on the defendant's contentions regarding the prospective juror's hearing impairment in *People v Guzman* was:

"Defendant contends, nonetheless, that the prospective juror was incapable of performing the duties of a juror in several respects. First, he challenges the juror's ability to perceive and understand the evidence on the ground that an interpreter might make mistakes in transmitting the testimony to the juror or might miss certain testimony if more than one person speaks at a time. Given the trial court's findings concerning the abilities of this juror and the interpreter, however, it seems unlikely that mistakes or omissions would occur with significantly greater frequency than they do with hearing jurors, who may be distracted or inattentive at times. Furthermore, material discrepancies between oral testimony and the signed transmission could be detected with the juror's lip reading ability or would surface during deliberations and could be resolved by having the testimony read back.

Defendant also contends that, even with a signer, the juror could not adequately evaluate oral testimony because he would miss vocal inflections, which provide important clues about a witness's credibility. We disagree. For one thing, as the trial court noted, a qualified signer is able to convey much about the speaker's delivery, including the speed, pauses, modulations and other variations. Furthermore, the juror testified that he was

⁵³ 76 NY 2d 1, at 3.

⁵⁴ *People v Guzman*, 76 NY 2d 1, at 5.

able to use visual clues to determine the tone and inflection of the speaker. More importantly, however, there is no reason to suppose that perception of vocal inflections is a necessary part or a superior method of assessing credibility. Each juror is expected to bring to the courtroom his or her own method of sorting fact from fiction -- the same method the juror relies on in conducting everyday affairs. ...⁵⁵

Blindness

3.43 In *Edwin R Lewinson v Robert J Crews*⁵⁶ (a New York Case in 1967), a totally blind man was considered as not having the qualifications required of jurors under section 596 of the Judiciary Law because he was not "in the possession of his natural faculties". The court considered that its interpretation of the statute was supported by an examination of the practical duties and responsibilities which would fall upon a juror:

"He is frequently required to evaluate physical evidence. There are still photographs and moving pictures, and there are mechanical objects which demonstrate working parts. Sometimes enlarged fingerprints are the subject of comparison and examination; so, too, are diagrams and enlargements of handwriting exhibits when the genuineness of documents is being questioned. Occasionally, demonstrations are made with diagrams upon a blackboard. These are but a few of the many materials, objects and methods of presentation brought to the courtroom concerning which sight is indispensable to a full understanding.

Sight is also a factor in testing the credibility of a witness. The veracity of a witness is determined in the main by what he says. It may be discovered in the context of the questions and the answers and to some extent by the intonations of his voice. Another aid in this respect is the facial expression and body movement of a witness upon close and intense interrogation. Sight enforces the juror's judgment in this regard. Appellate courts recognize that a witness's physical presence provides assistance to the trier of the facts in evaluating his testimony, for although the appellate court has all the words of the trial before it in the printed record on appeal, it often bows to the determinations of fact made by the Judge or jury at the trial based on personal observations of the witnesses. There is sound reason for this rule of law for at the trial other aids beyond the cold record help to tell truth from falsehood.

⁵⁵ *People v Guzman*, 76 NY 2d 1, at 6.
⁵⁶ 282 NYS 2d 83.

A litigant who comes before the Bar of Justice, whether in a criminal case or in civil litigation, wishes to have the impact of his evidence fall with its full weight upon the jury, if there be a jury trial. If his evidence or exhibits are not understood or the force of his interrogation of witnesses is lost, he will not have been afforded his full rights. It is not an adequate protection to say that he may challenge the blind juror on the voir dire for if we hold blindness not to be a disqualification under the statute, a challenge for cause will not be available thereafter on that account. A peremptory challenge would be still available but these are limited in number and they are an important right possessed by a litigant; he should not be made to resort to such challenges in order to preserve his right to fair trial.

In requiring 'natural faculties' as a qualification for service on a jury, the Legislature may have considered not only the function of a juror, but also the effect his disability would have on the orderly and practical operation of the court's processes. While this factor alone would not support the construction we make, it is a pertinent consideration.¹⁵⁷

3.44 However, Hopkins J expressed the following dissenting view:

"The qualifications of a juror are defined in the statute. ... A citizen is guaranteed certain privileges and immunities. Traditionally, the right and duty to serve as a juror has been accounted to be a privilege of citizenship. Correlatively, all persons, whether citizens or aliens, are entitled to a trial by jury composed of citizens representing a broad spectrum of the community. A statute, which, either by definition or by administrative enforcement, prevents jury service by a large segment of the population violates the constitutional guarantees.

The blind is a large segment of our population. A statute which by its definition of qualifications of jurors denies to the blind the right of jury service should do so in unmistakable terms; and the discrimination must be based on rational grounds. But our statute does not single out blindness as a ground of disqualification, as it does felons or the non-propertied. ...

The right of jury service, then, unless limited by a clear direction, reposes in all citizens; the litigants may, of course, exercise their power of selection at the voir dire. A litigant might well favour the acceptance of a blind juror to serve in his case, despite the physical handicap. ...

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282 NYS 2d 83, at 85 - 86.

The ability of the blind to serve in the seat of judgment is reflected by the career of many non-sighted persons. Blindness does not disable one to be a lawyer or a Judge; it is contradictory to use the defect as a reason of rejection as a juror, especially since the juror does not act alone but in conjunction with 11 other persons to reach a joint determination. ...

True, the blind juror cannot see the witness or real evidence. But an appraisal of testimony does not depend on the mere visual presentation; the voice of the witness and the inherent probability of the truth of the testimony are as cogent signs of the credibility of the evidence. In the use of these tests a blind person is no more handicapped than the sighted. ... [T]he selection of jurors depends largely on the judgment of the suitors at the time of the trial. ... Any predilection or bias on the part of a prospective juror which would militate against a fair verdict is thus left to exposure at the voir dire. ... The community has increasingly recognized the potential reservoir of talent and intelligence which the blind possess in common with other members of the group through the expansion of schools and auxiliary services: jury service, it seems to me, is not beyond their capabilities."⁵⁸

3.45 In *Commonwealth v Susi*,⁵⁹ the Supreme Court of Massachusetts held that "a mere description of the physical evidence would not have conveyed adequately the subtleties which would be apparent on a visual comparison".⁶⁰ The predominant issue at the trial was identification of the defendant. The trial judge refused to excuse a blind prospective juror for cause, thereby requiring the defendant to exhaust his peremptory challenges. The jury subsequently found the defendant guilty and the defendant appealed against conviction on the ground that the trial judge erred in denying his challenge for cause of a juror who was blind. The Supreme Judicial Court of Massachusetts ruled that the defendant had suffered a prejudicial diminution of peremptory challenges which warranted reversal and a new trial. The Supreme Court said:

"We believe that, in the circumstances of this case, the trial judge abused her discretion in denying the defendant's challenge for cause of a blind juror. The issue of identification was the predominant issue at trial. The jury were asked to view and to compare a drawing and photographic evidence, to compare the physical appearances of witnesses, and to compare the appearance of the defendant with his appearance in photographs and with a composite drawing. A mere

⁵⁸ 282 NYS 2d 83, at 86 - 89.

⁵⁹ *Commonwealth v Susi* 394 Mass 784

⁶⁰ *Commonwealth v Susi* 394 Mass 784, at 788.

*description of the physical evidence would not have conveyed subtleties which would be apparent on a visual comparison.*⁶¹

3.46 In *Jones v New York City Transit Authority*,⁶² a personal injury action involving substantial amounts of physical evidence, a blind person was considered to be properly excluded from jury service through the use of a challenge for cause based solely on his blindness. David B Saxe J in his judgment highlighted the significance of whether a person's impairment would preclude him from serving as a reasonable juror in a particular case. He said:

*"... when considering the competence of a blind person, the court must determine whether the person's impairment would preclude him from serving as a reasonable juror in that particular case. Physical handicaps, such as blindness, must be treated like any other disability when determining whether a prospective juror should be held incompetent to serve on a jury and thus removed for cause. It is therefore important to look at the duties and responsibilities of the jury and determine whether a blind individual is incapable of performing these duties."*⁶³

3.47 In the New York case of *People v Caldwell*⁶⁴ the court ruled that a vision-impaired juror was able to participate because the case primarily involved a determination on the issue of credibility based on conflicting accounts from witnesses. The court followed the decision in *People v Guzman* and said:

"No question exists about [the juror's] mental ability to understand the evidence or about her verbal communication skill. The sole question is whether her inability to observe the witnesses' facial expressions prevented her from fairly evaluating the testimony.

*As the Court of Appeals noted in Guzman, each juror brings to the deliberation process his or her own background and experience. Thus, the court in Guzman held that a hearing-impaired juror should not be disqualified because that individual could not determine credibility based on the witness' tone and delivery. ... Similarly, it would have been inappropriate to disqualify [the juror] simply because she could not see the witnesses' facial expressions or their body language. ... [T]he question is whether the court could accommodate the juror by verbally describing the evidence or by any other means, and whether the evidence is so crucial that the juror's inability to see it denied the defendant a fair trial."*⁶⁵

⁶¹ *Commonwealth v Susi* 394 Mass 784, at 788.

⁶² 483 NYS 2d 623.

⁶³ 483 NYS 2d 623, at 626.

⁶⁴ *People v Caldwell* 603 NYS 2d, at 713.

⁶⁵ *People v Caldwell* 603 NYS 2d 713, at 715 - 716.

3.48 The decision in *Jones v New York City Transit Authority*⁶⁶ was distinguished from *People v Caldwell*.⁶⁷ In *People v Caldwell*, Rosalyn H Richter J remarked:

"In Jones, the court concluded that the prospective juror who was blind should not be permitted to serve because there would be a significant amount of physical evidence. Here, however, the case primarily involved credibility determinations based on conflicting accounts from witnesses, whose testimony Ms B [the juror with visual impairment] was able to hear at trial. The jury also had to listen to a number of tape recordings, all of which Ms B could evaluate in the same manner as the other jurors. There were only a limited number, all of which the court read into the record."⁶⁸

3.49 In the 1993 case of *Donald Galloway v The Superior Court of the District of Columbia*, the plaintiff, who was blind, attempted to register for jury service. However, he was informed that he was barred from serving by the official policy of the defendant court, which excluded all blind persons. The plaintiff brought a lawsuit against the court and the district, alleging that the policy violated section 504 of the Rehabilitation Act⁶⁹ and the Americans with Disabilities Act. The District Court for the District of Columbia, hearing the plaintiff's motion, said:

"...plaintiff has offered uncontradicted testimony that blind individuals, like sighted jurors, weigh the content of the testimony given and examine speech patterns, intonation, and syntax in assessing credibility. Thus, the 'nervous tic or darting glance, the uneasy shifting or revealing gesture is almost always accompanied by auditory correlates, [including inter alia,] clearing the throat, pausing to swallow, voice quavering or inaudibility due to stress or looking downward,' ... and permits a blind juror to make credibility assessments just as the juror's sighted counterparts do."⁷⁰

3.50 However, in *Walter Lavan Trammel v The State*⁷¹ in 1995 Justice Hunstein made the following observations:

"The prosecutor testified that she struck juror no 5 because he was visually impaired to the point of requiring a cane to make his way and she was concerned that he would be unable to see, adequately, the diagrams to be used by State's witnesses to

⁶⁶ 483 NYS 2d 623.

⁶⁷ *People v Caldwell* 603 NYS 2d, at 713.

⁶⁸ 603 NYS 2d, at 715.

⁶⁹ Section 504 of the Rehabilitation Act provides that:

"No otherwise qualified individual with handicaps in the United States, ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."

⁷⁰ *Donald Galloway v The Superior Court of the District of Columbia* 816 F Supp 12, at 16 - 17.

⁷¹ 265 Ga 156.

point out the locations and movements of the victim and the defendant, all of which the prosecutor considered very important to the State's case. ... The trial court, having the opportunity to observe juror no 5, could reasonably conclude as it did that the explanation offered by the State for striking him was race-neutral and without discriminatory intent."⁷²

3.51 It is clear from the case law that the basis for exempting persons who are blind or deaf from jury service is that they are thought unable to witness the demeanour of a person giving evidence. "Demeanour" denotes the outward manifestations of a witness, including appearance, conduct and tone and inflection in speech, which may assist the trier of fact generally in interpreting the witness's oral evidence and also in determining the credibility of the evidence given by that witness. "Demeanour" was given its importance in common law by the appellate courts' reluctance to overturn the trial judge's decision where that decision was based on the judge's opinion of a witness's demeanour.⁷³

3.52 The significance of observing the demeanour of a witness was highlighted in the Scottish case of *Watt v Thomas*,⁷⁴ in which Lord Thankerton referred to the following opinion of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd*:

*"Witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page."*⁷⁵

3.53 In *Murray v Fraser*,⁷⁶ Lord Scott Dickson, the Lord Justice Clerk, referred to Lord Halsbury's observations in *Kilpatrick v Dunlop*:

*"I am unable to determine one thing or the other, namely, whether the appellant or respondent was worthy of credit. It is a question of credit, where each gives a perfectly coherent account of what he has done and said, and contradicts the other. Under these circumstances it is impossible that the Court of Appeal should take upon itself to say, by simply reading printed and written evidence, which is right, when it has not had that decisive test of hearing the verbal evidence and seeing the witnesses, which the judge had who had to determine the question of fact, and to determine which story to believe."*⁷⁷

3.54 In referring to the same observations made by Lord Halsbury in *Kilpatrick v Dunlop*, Lord Thankerton said:

⁷² 265 Ga 156, at 157.

⁷³ *The "El Uruguayo"* [1928] 31 LIL Rep 89.

⁷⁴ *Watt v Thomas* [1947] AC 484, at 487 - 8.

⁷⁵ 1919 SC (HL) 35, at 36 - 37.

⁷⁶ 1916 SC 623

⁷⁷ Quoted in *Murray v Fraser* 1916 SC 623, footnote at 632.

"In other words, whereas you might formerly find in the judge's notes some indication of the impression made on his mind by the witnesses, no trace of any such impression is to be found in the cold, mechanical, record of the evidence."⁷⁸

Ineligibility and excusals

3.55 As we have discussed in the previous chapters, all people are liable for jury service unless disqualified, ineligible or exempt as of right under statutory provisions. However, there are cases in which particular jurors have sought to be excused from service, and cases in which defendants have appealed against conviction on the ground that a particular juror was ineligible for jury service.

3.56 In *R v Crown Court at Guildford ex parte Siderfin*,⁷⁹ the applicant belonged to the Plymouth Brethren, a religious sect which had conscientious objections to jury service. She was summoned to appear before the Crown Court and wrote objecting to jury service on religious grounds. The chief clerk decided not to excuse her from jury service pursuant to section 9(2) of the Juries Act 1974.⁸⁰ On appeal, a judge in chambers, after refusing her an adjournment for legal representation, found that she had not established sufficient grounds to be excused from jury service. She applied for judicial review of the judge's decision. In the judgment granting her application for judicial review, Watkins LJ said:

"We repeat that the existence of a serious conscientious objection arising out of a religious belief, on its own, would be unlikely to amount to a 'good reason' for being excused jury service. In other words, it would not outweigh the necessity to insist upon the observance of the public duty or obligation to perform jury service. It may, in our view, do so if the applicant's religious beliefs, for example, would be likely to prevent her from performing her duty as a juror in a proper way. Adherence to some kind of religious belief simply cannot be regarded as an unchallengeable right to excusal from jury service as automatically amounting to 'good reason.' ... In the present case, ... the judge did not ... appreciate that if the applicant served on a jury she would, according to her, perform her duties in isolation from the other jurors. She would, she informs us in her affidavit, have reached a verdict without reference to any other juror, and moreover announced it separately. In other words, she would not participate at all in the usual discussion

⁷⁸ [1974] AC 484, at 489.

⁷⁹ (1990) 90 Cr App R 192.

⁸⁰ Section 9(2) of the Juries Act 1974 provides that:

"If any person summoned under this Act shows to the satisfaction of the appropriate officer that there is good reason why he should be excused from attending in pursuance of the summons, the appropriate officer may excuse him from so attending and shall do so if the reason shown is that the person is entitled under subsection (1) to excusal."

between jurors which is an integral part of the jury system. There is, as has been recently emphasised in Watson and Others (1988) Cr App R 1, 8, [1988] QB 690, 700 in the judgment of a five judge Court given by Lord Lane, C.J:

*'a duty on each jury member not only as an individual but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be "discussion, argument and give and take within the scope of your oath."'*⁸¹

3.57 It was also said *per curiam* that:

*"We feel it right to repeat in conclusion that membership of a religious sect or movement cannot be regarded as a passport to excusal from jury service. Excusal is a personal matter. Every application must, as we have said, be determined on its own facts and strictly according to law."*⁸²

3.58 In *R v Gray*, an application was made by counsel for one of the accused that a juror should be "excused" after the commencement of a trial for rape on the ground that one of the jurors was known to the step-father of the prosecutor. Counsel argued that that juror should be excused from further attendance under section 55a of the Juries Act, 1927-1976,⁸³ and that the trial should continue with eleven jurors. The juror concerned stated that, although he knew the prosecutor's step-father, he did not know the prosecutor, and he denied that his impartiality as a juror would be in any way affected. Jacobs J denied the application and said:

"I am unable to construe s55a as conferring a power to discharge a juror or to require that he be excused. The power is to excuse a juror from further attendance in cases of special urgency or importance The power to excuse is not a power to discharge, neither in my judgment is the power to order that a juror be excused a power which the judge can exercise of his own motion, without application by the juror and contrary to the wishes of the juror. In any event, in view of the juror's categorical assertion that he was aware of his duty and responsibility, and that his impartiality was not affected by the matter to which attention had been drawn, I was not satisfied that 'any matter of ... importance' had arisen to justify me in

⁸¹ (1990) 90 Cr App R 192, at 198 - 199.

⁸² (1990) 90 Cr App R 192, at 199.

⁸³ Section 55a of the Juries Act, 1927 - 1976 provides:

"During any inquest civil or criminal, except for murder or treason, if the presiding judge is satisfied that by reason of any matter of special urgency or importance any juror should be excused from further attendance, the judge may order that that juror be excused from attendance during that inquest, and during such further period (if any) as the judge specifies."

requiring the juror to be excused, if indeed I had such power. I appreciated that justice must appear to be done, but there was no reason to apprehend that it would not be.

In the course of submissions, counsel for one of the accused suggested that I should invite the juror to seek to be excused, in terms which gave him little or no option to refuse, but it seemed to me that to adopt such a course would not only be a grave and unfair imputation against the juror, but would have one of two other consequences. If the juror refused I would have been left with no alternative but to discharge the jury, a course which all counsel wished to avoid. If, however, the juror, in response to pressure from me, had sought to be excused notwithstanding his assertions of impartiality, it could scarcely have failed to undermine the confidence that ought to exist between the Court and the jury, or the balance of the jury as the case may be. I doubt very much that I would in any circumstances have put the jury, or the jury concerned, in such a dilemma. It seems to me that the only real choice or discretion that I had was either to discharge the jury, whatever the consequences, and irrespective of the wishes of counsel, if I had any reason to apprehend a mistrial or a miscarriage of justice, or else, if I had no such apprehension (and I had none) to direct the trial to continue.⁸⁴

3.59 In *R v Abdroikov and others*,⁸⁵ the defendants all appealed against their convictions, submitting that their trials had offended against the principle of fairness in that they had not been free from actual or apparent bias. The Court of Appeal dismissed the appeals and the defendants appealed to the House of Lords. Lord Bingham of Cornhill allowed the appeal of the third appellant and remitted the case to the Court of Appeal with an invitation to quash the convictions and rule on any application which might be made for a retrial. In his judgment, Lord Bingham said:

"It is in my opinion clear that justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor. ... The third appellant was entitled to be tried by a tribunal that was and appeared to be impartial, and in my opinion he was not. The consequence is that his convictions must be quashed. This is a most unfortunate outcome, since the third appellant was accused of very grave crimes, of which he may have been guilty. But even a guilty defendant is entitled to be tried by an impartial tribunal and the consequence is inescapable. ...⁸⁶

⁸⁴ *R v Gray*, 17 SASR 534, at 538 - 539.

⁸⁵ [2008] 1 All ER 315.

⁸⁶ [2008] 1 All ER 315 at para 27.

3.60 In *R v Khan and others*,⁸⁷ appeals against conviction and applications for permission to appeal against conviction in five cases were heard together. The defendants contended that a member of each of their respective juries had, by reason of his or her occupation, an appearance of bias. The relevant jurors with whom the defendants took issue were serving police officers, an employee of the Crown Prosecution Service (in a case which was being prosecuted by the Department of Trade and Industry) and two jurors who were prison officers in prisons in which the defendants had been prisoners. All the appeals against conviction were either dismissed or refused by the Court of Appeal who said that "*knowledge of a defendant's bad character will not automatically result in the juror ceasing to qualify as 'independent and impartial.'*"⁸⁸ However, the court pointed out that some precautionary measures should be taken:

*"It is undesirable that the apprehension of the jury bias should lead to appeals such as those with which this court has been concerned. It is particularly undesirable if such appeals lead to the quashing of convictions so that re-trials have to take place. In order to avoid this it is desirable that any risk of jury bias, or of unfairness as a result of partiality to witnesses should be identified before the trial begins. If such a risk may arise, the juror should be stood down."*⁸⁹

3.61 In the Scottish case of *Hamilton v HM Advocate*,⁹⁰ a juror was excused from service on the last day of a trial because of a threat made to him. He communicated the fact that he had been threatened to another juror when entering the court. The trial judge refused to excuse the latter juror. The defendant was convicted and appealed on the ground *inter alia* that this decision by the trial judge was erroneous in law. The High Court refused this ground of appeal and held that the trial judge had not erred in law, and had cured the problem by an adequate direction in his charge to the jury. This direction was to the effect that the jury should put out of their minds any information which they had as to the fact of, and circumstances surrounding, the discharge of the former juror and that they would be breaking their judicial oath if they allowed themselves to be influenced by any extraneous considerations.

⁸⁷ [2008] 3 All ER 502.

⁸⁸ [2008] 3 All ER 502, at para 120.

⁸⁹ [2008] 3 All ER 502, at para 131.

⁹⁰ 1986 SLT 663.

Chapter 4

Issues for consideration and reforms in other jurisdictions

Introduction

4.1 We examine in this chapter each of the criteria currently applied for qualification as a juror and the issues which those criteria raise. We also refer to proposals for reform which have been made in a number of other jurisdictions. It may be useful at the outset, however, to set out what are generally perceived to be the functions of the jury.

4.2 The jury's primary function is to determine the relevant facts of the case from the evidence presented and to apply the law to reach a verdict. The jury acts as a fact-finder and it is for the jury to decide which witnesses to believe and which to reject, either in whole or in part. In addition to this primary function, the New Zealand Law Commission identified a number of others which the jury serves:

"The core value underlying all the various functions of the jury is their democratic nature. They allow members of the community to participate in the criminal justice system and to bring a diverse range of perspectives, personal experiences and knowledge to bear in individual criminal cases. ...

... The jury, because of its nature, acts as the community conscience in deciding criminal cases. However, this function is dependent on juries representing all members of the community, and deliberating in an impartial and democratic manner.

The jury is also regarded as a safeguard against arbitrary or oppressive government. However, it rarely operates actively in this sense. It plays an important role in legitimising and maintaining public confidence in the criminal justice system. In order to maximise that confidence, juries should appear to be, and in fact be, impartial and representative of the community. The jury also has a role in educating people about the workings of the criminal justice system."¹

4.3 In *Juries: A Hong Kong Perspective*, the authors considered the role of jurors as finders of fact and commented:

¹ The New Zealand Law Commission, *Juries in Criminal Trials: Part One* (1998, Preliminary Paper No 32), at 2 - 3.

"It is argued that because the jury is comprised of ordinary citizens, it is able to assess more accurately than the judge what actually happened in the incident with which the trial is concerned. In fulfilling their task, jurors are seen as being able to utilize their collective common sense, apply their own knowledge of the world and draw upon their own everyday experiences. Collectively, or even singly, jurors will have a wider experience of the world than the judge, and it is also likely that the jury will be more familiar with the social world from which most defendants and witnesses will come. Also, it is argued that there is less danger of the jury becoming case-hardened, and thus cynical about the tales told by the defendant and disposed automatically to believe the police. On this basis, it is alleged, the jury can better weigh up the facts presented to them, decide which witnesses to believe and which to doubt, determine whether certain events were possible or probable, and assess the credibility of the defendant's story."²

The authors remarked, however, that a number of criticisms could be levelled at this "rather rosy" picture of the jury. These included the fact that the rules of evidence would often prevent the jury from hearing all the available evidence; that the jury might not fully understand the evidence, particularly technical evidence; and that the jury's view of the evidence could be significantly influenced by the judge.

***"Trial by one's peers"* and the representativeness of the jury**

4.4 The democratic and social functions of the jury to which the New Zealand Law Commission referred are reflected in the somewhat ambiguous concept of *"trial by one's peers."* That concept dates back to the Magna Carta in England in 1215. Chapter 39 of the Magna Carta provides that:

"No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land."³

4.5 At the time of the Magna Carta, however, this provision had nothing to do with trial by jury in the sense that it is understood today. Instead, as pointed out by the New South Wales Law Reform Commission, *"trial by one's peers"*:

"... benefited only direct tenants of the King, such as barons, who were entitled to be tried by their feudal peers rather than by the King's justices. The procedure was expanded after Pope

² Peter Duff, Mark Findlay, Carla Howarth, Chan Tsang-fai (eds), *Juries: A Hong Kong Perspective* (Hong Kong University Press, 1992), Chapter 1, at 3.

³ JC Holt, *Magna Carta*, (Cambridge University Press 1992), 2nd ed, reprinted 1994, at 461.

*Innocent III forbade trial by ordeal, also in 1215. English judges began to rely instead on informed neighbours of an accused person; people who would be expected to know the facts. Gradually, however, the jury developed into a body of free and propertied men who were required to find the facts by weighing only the evidence presented to them. Knowledge of the facts or of a party became a ground for excluding a person from a particular jury.*⁴

4.6 The term "peers" was used in the Magna Carta in the general sense of social equals. In the context of the modern jury trial, the term has been taken to mean a representative cross-section of the community. Trial by one's peers does not equate to trial by one's own ethnic group. In the Queensland case of *R v Walker*,⁵ the applicant complained that the panel of prospective jurors for his trial contained no members of his own Nunukel people. In dismissing his complaint, the Queensland Court of Criminal Appeal said:

"There is nothing at all in the record to suggest that the jury before whom the applicant's trial in the District Court proceeded was not formed from a panel selected and summoned in the manner provided by the provisions of the Jury Act. The fact, if it be so, that the panel included no Nunukel people may have been attributable to chance, or to the limits, prescribed under s.11 of the Jury District of Brisbane. However that may be, it does not follow that the appellant did not receive trial by a jury of his 'peers' or equals; and, even if it did, it would not signify. The provisions of the Jury Act regulating the composition of juries were complied with at his trial and, if in conflict with ch. 39 of Magna Carta, the provisions of ch. 39 are to that extent impliedly repealed.

*The appellant's complaint that he was not tried by a jury of Nunukel people is therefore not one that is admitted under the law of Queensland, which does not recognise the possibility of a jury drawn exclusively from a particular ethnic or other distinctive group in the community.*⁶

4.7 It has long been recognised that the jury should be representative of the community as a whole, rather than a particular group. But that does not mean that each jury must be a statistical cross-section of the community from which it comes, as the New Zealand Law Commission pointed out:

⁴ New South Wales Law Reform Commission, *Conscientious Objection to Jury Service* (1984, Community Law Reform Program – Sixth Report), at para 2.2.

⁵ [1988] 2 Qd R 79.

⁶ Cited above, at 85 - 86.

"Peers' on a jury in a criminal trial are the 12 people drawn randomly from the population living in the court's jury district. It is statistically possible to have any number of random samples, none of which is representative of the population from which they are drawn. A random sample of names from a jury list is not necessarily a representative sample of the jury district population (or of the general population). In other words, we cannot always expect 'individual juries' to reflect the distribution of different groups in the jury district population. In practice, the random selection process is also compromised by various factors including the completeness and accuracy of electoral rolls (and therefore jury lists) the ability to excuse people from jury service, and the use of peremptory challenges."

4.8 The importance of representativeness is explained by Professor Michael McConville in the preface to *Juries: A Hong Kong Perspective*:

*"For many jurisdictions, the jury is a core political institution symbolizing the commitment of the state to democratic, representative and participatory forms of government. The jury constitutes a force for laws which are understandable to ordinary people and in keeping with their sentiments about fairness and justice. And in a real sense, whilst applicable to only a small minority of cases, jury trial acts as some restraint upon both the cult of professionalism and the centrifugal tendencies of the strong state. Through the general verdict, the jury has the power and the right to judge not only the facts but also the law and the use to which it is put in specific cases."*⁸

4.9 The importance of a representative jury was recognised by the United Kingdom Departmental Committee on Jury Service in its 1965 report, when it said:

*"A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues that face them the corporate good sense of that community. This cannot be in the keeping of the few, but is something to which all men and women of good will must contribute."*⁹

4.10 One argument advanced in favour of a representative jury is that it helps ensure impartiality: the biases of the individual are cancelled out within the group.¹⁰ The significance of a representative jury is further explained in *Juries: A Hong Kong Perspective*:

⁷ The New Zealand Law Commission (1998), above, at chapter 6, para 259.

⁸ Duff, Findlay, Howarth & Chan (1992), above, at xi.

⁹ *Report of the Departmental Committee on Jury Service* (1965, Cmnd 2627m), at para 53.

¹⁰ See *Taylor v Louisiana* 419 US 522 (1975) and *R v Sherratt* (1991) 63 CCC (3d) 193, referred to in New Zealand Law Commission (1998), above, at para 271.

*"Ultimately perhaps, the independence of the jury and its representativeness are subsidiary to the notions of impartiality and community participation. ... the representativeness of the jury guarantees that it is genuinely the community view that is put forward and so furthers impartiality in that any individual prejudices are submerged in the group. Any biases present in particular sectors of the community are negated."*¹¹

4.11 A similar view was expressed by the Victorian Law Reform Committee in its 1997 report on *Jury Service in Victoria*:

*"It is submitted that the concept of forming an impartial jury can co-exist with the concept of a representative jury. In fact they are mutually supportive if we view the impartial jury not as one in which there is no prejudice but as one where the balance of prejudices in the community are reflected in the composition of the jury. Deliberations are considered impartial then, when group differences are not eliminated but are invited and represented."*¹²

The representativeness of the jury in Hong Kong

4.12 The number of people who qualify for jury service in Hong Kong is relatively small as a proportion of the overall population. According to the records kept by the Registrar of the High Court, the number of jurors as at December 2008 was 616,617 out of a population of around 6.9 million. This is a significant improvement on the position in 1995, when it was said there were only 20,000 persons qualifying for jury service out of a population of around 6 million.¹³ One change was the extension of the jury list in 1997 to include those proficient in the Chinese language, where hitherto there had been a requirement for proficiency in the English language. Section 4(1)(c) of the Jury Ordinance (Cap 3) now provides that a person qualifies for jury service if he *"has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings."* Article 9 of the Basic Law provides that both Chinese and English are official languages of the Hong Kong Special Administrative Region and, as such, proficiency in either language satisfies the language requirements for jury service.

4.13 Earlier criticisms of the Hong Kong jury list as consisting of *"a cultural, social and political elite"*¹⁴ may no longer be justified, but some concerns as to the representativeness of the Hong Kong jury may remain

¹¹ Duff, Findlay, Howarth & Chan (1992), above, at 7.

¹² Victorian Law Reform Committee, *Jury Service in Victoria* (1997, Final Report, Vol 3)), at para 3.19.

¹³ Quoted in Victorian Law Reform Committee, *Jury Service in Victoria* (1997, Final Report, Vol 2), at para 3.12.

¹⁴ *Report of the Select Committee on the Problems Involved in the Prosecution and Trial of Complex Commercial Crimes*, Legislative Council of Hong Kong, quoted in Victorian Law Reform Committee (1997, Vol 2), above, at para 3.12.

valid. Commenting on the jury system in Hong Kong in 1992, Professor McConville said:

*"For those Chinese who appear on the jury list, there is a clear bias in favour of the well-educated, middle class, professional or business people. The system is also noteworthy for its composition (seven jurors, with nine possible in complex fraud cases) which may be significantly affected by peremptory challenges (each defendant having five such challenges), extensive provisions for exemption and disqualification ..."*¹⁵

4.14 The authors of the 1992 study of the jury system in Hong Kong were in no doubt as to the desirability of a representative jury:

*"In most other common law jurisdictions, the state has been forced to expand the jury franchise as a result of contemporary ideological pressures which render increasingly attractive notions such as democracy, representativeness and community participation in official decision making. ... On a practical level, the ability of the jury to fulfil its task is increasingly perceived to be dependent upon its representing a true cross-section of the community. For example, in comparison to a judge, or a jury drawn from the upper echelons of society, a representative jury is perceived to have wide experience of the world and to possess sound common sense. This gives it the ability to assess the reliability of witnesses and to determine the likelihood of various events having taken place. On the more political level, a jury which represents society as a whole, rather than the social elite, is perceived to be more likely to be independent of the state and impartial in its judgement upon the accused..."*¹⁶

Age requirements

Lower age limit

4.15 There are two broad strands of opinion in relation to the appropriate lower age limit for jury service. On the one hand, there are those who argue that the responsibilities of jury service require a level of maturity and experience which precludes those of young age. Lord Roskill, in the 1986 Fraud Trials Committee Report, said that some witnesses had suggested that the lower age limit of 18 was too low and should be raised to 21, or perhaps 25. It was argued that *"few 18 year olds can be expected to have sufficient maturity and experience of life to make a proper judgment on the issues which they are required to determine."*¹⁷

¹⁵ Duff, Findlay, Howarth & Chan (1992), above, at Preface.

¹⁶ Cited above, at 58 - 59.

¹⁷ Fraud Trials Committee Report (1986), above, at Chapter 7, para 7.7.

4.16 On the other hand, there are others who argue that the age for jury service should be the same as, for instance, that at which persons are considered mature enough to exercise their electoral rights and vote. The New Zealand Law Commission proposed in their preliminary paper on *Juries in Criminal Trials* that the minimum age limit should be lowered to 18, the same age at which people in New Zealand would qualify to vote, and referred to arguments from the 1976 report of the UK Committee on the Age of Majority:

*"By 18 most young people are ready for these responsibilities and rights and would greatly profit by them, as would the teaching authorities, the business community, and the administration of justice, and the community as a whole."*¹⁸

4.17 A further argument advanced by the New Zealand Law Commission for lowering the age was to enhance the jury's representativeness:

*"Lowering the age qualification would benefit representation of the community on juries. The age of defendants who can potentially be tried by jury is 14 years and older. A significant proportion of the population who could be described as a defendant's 'peers' in terms of age would be eligible for jury service if the minimum age qualification were lowered to 18 years."*¹⁹

It is worth noting that the Juries Amendment Act 2000 subsequently reduced the minimum age for jury service in New Zealand from 20 to 18 years.

Upper age limit

Australia

4.18 In New South Wales persons who are aged 70 or over are eligible but excused as of right from jury service.²⁰

4.19 In Victoria, there is no upper age limit for service as a juror. However, the Juries Commissioner of Victoria may permanently excuse a person from jury service by reason of the person's advanced age, upon the person's application or another person's on his behalf.²¹

4.20 The issue of the upper age limit of a juror was studied by the Victorian Law Reform Committee, which issued a paper for public discussion and comment in November 1994. Among the submissions received was one from the Council on the Ageing in Victoria, which argued that there should be

¹⁸ New Zealand Law Commission (1998), above, at para 331.

¹⁹ Same as above, at para 333.

²⁰ Jury Act 1977, Schedule 3.

²¹ Juries Act 2000, section 9.

no automatic exclusion of those over an upper age limit. The Council pointed out, first, that people's abilities related in only a minor way to their age. Secondly, juries should reflect the community of which they formed part and older people should be included in the same proportion as they occurred in the population. The Council pointed out thirdly that the older age range was likely to cover a greater proportion of retired people who might have more time available, and who had retired from occupations which had earlier exempted them from jury service.

4.21 In the light of these discussions, the Victorian Law Reform Committee formed the following view:

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

The committee recognises that such a system will increase the administrative burden of operating the jury system. However, the system is technically feasible.²²

The Committee accordingly recommended that there should be no upper age limit for jury service, but that persons aged 70 years and over should be entitled to elect not to be eligible for selection for jury service.²³

England and Wales

4.22 In England and Wales, section 1(a) of the Juries Act 1974 provides that the upper age limit for jurors is 70 years, and section 19 of the Criminal Justice Act 1988 provides that jurors over 65 years of age can be excused as of right.

Ireland

4.23 Prior to 2008, the Juries Act 1976 provided that every citizen aged 18 years or upwards and under the age of 70 years was qualified and liable to serve as a juror. Persons excusable from jury service as of right

²² Victorian Law Reform Committee (1996, Vol 1), above, at paras 3.167 - 3.168.

²³ Cited above, at para 3.168, Recommendation 40.

included those aged 65 years or upwards and under the age of 70 years. The Civil Law (Miscellaneous Provisions) Act 2008 abolished the references to 70 years. Those over 65 may now continue to serve on juries if they wish but they may be excused if they so choose

New Zealand

4.24 The New Zealand Law Commission considered whether the existing maximum age qualification should be removed and observed that:

*"Juries should be as representative of the community as possible. There seems to be no reason in principle why people aged 65 and older should not be qualified for jury service. Such people should decide for themselves whether or not they want to serve on a jury."*²⁴

4.25 The Juries Amendment Act 2000 subsequently reduced the minimum age for jury service in New Zealand from 20 to 18 years and removed the maximum age limit of 65 years. Registrars were given the power to excuse persons of 65 or over.

Residency requirements

4.26 In most common law jurisdictions, a prospective juror must be enrolled as an elector (eg New South Wales, Victoria, New Zealand, Ireland), or a resident or citizen of the jurisdiction in question (eg Alberta, USA). In the United Kingdom, a prospective juror must be registered on the parliamentary or local government electoral roll and have been ordinarily resident in the UK, the Channel Islands or the Isle of Man, for any period of at least five years since attaining the age of 13.

4.27 As with the application of other qualifying criteria which restrict the entry of a person's name to the jury list, the imposition of a residency requirement reduces the representativeness of the jury pool. The Victorian Law Reform Committee pointed out:

*"The requirement of citizenship not only reduces the representativeness of the jury system, it has been argued that it encroaches upon the accused person's right to have a trial by his or her peers."*²⁵

While recognising the considerable practical and administrative difficulties entailed in such a change, the Victorian Law Reform Committee nevertheless concluded that:

²⁴ The New Zealand Law Commission (1998), above, at para 337.

²⁵ Victorian Law Reform Committee (1996, Vol 1), above, at para 3.7.

"... the basic qualification for jury service should include non-citizen permanent residents. However, because of the current administrative difficulties in establishing an accurate database of citizens and non-citizen permanent residents, the committee accepts that for the time being the qualification should remain unchanged."²⁶

4.28 The importance of juries representing the local community's values was emphasised by the New Zealand Law Commission in its 1998 discussion paper on juries:

"The use of local jury districts, centred upon a jury court, has parallels with the boundaries of electoral districts and the election of constituency members of Parliament to represent local interests. A similar principle is in operation: people have a strong interest in the administration of criminal justice in their own local community, and their interests and sense of community values should be represented on local juries."²⁷

Good character

Criminal records

Australia: New South Wales

4.29 In its 2007 report on jury selection, the New South Wales Law Reform Commission made the following observations on the rationale for disqualifying persons from jury service on the grounds of their criminality:

"There are two principal reasons for excluding people who have been defendants in the criminal justice system. The first is the possibility that their past criminal behaviour, and its consequences as a result of their involvement in the justice system, may impact upon their ability to be impartial, or make them amenable to improper influence from criminal associates. The second concerns the importance of preserving the public confidence in the jury system, which might potentially be threatened if it became publicly known that people with the requisite criminal records, or facing trial, had been allowed to serve on a jury."²⁸

4.30 The Commission recommended that people who were currently serving a sentence of imprisonment should be excluded from jury service; and imprisonment for the purposes of this exclusion should include sentences served by way of periodic detention and home detention and suspended

²⁶ Cited above, at para 3.11.

²⁷ The New Zealand Law Commission (1998), above, at Chapter 6, para 268.

²⁸ The New South Wales Law Reform Commission, *Jury Selection*, Report 117 (September 2007), at para 3.3.

sentences. A recommendation was also made to exclude a person from jury service for life if he had been sentenced to imprisonment for a crime or offence for which life imprisonment was the maximum available penalty. The Commission recommended that a person should be excluded from jury service for 10 years from the date of expiry of any sentence or sentences of imprisonment aggregating three years or longer. It also recommended that a person should be excluded from jury service for two years from the date of expiry of any sentence or sentences of imprisonment aggregating less than three years in respect of a summary offence, and aggregating less than six months in respect of any indictable offence.

New Zealand

4.31 In New Zealand, section 7 of the Juries Act 1981 provides that no one may serve on a jury who has:

- "(a) at any time, been sentenced to imprisonment for life or for a term of three years or more, or to preventive detention;
- (b) at any time in the preceding five years been sentenced to a term of imprisonment of three months or more, or to corrective training."

4.32 The New Zealand Law Commission commented in its discussion paper on *Juries in Criminal Trials* that any disqualification diminishes the representative nature of juries. The Commission pointed out that before the enactment of the Juries Act 1981, the corresponding provision (section 5(d)) in the Juries Act 1908 disqualified anyone of "*bad fame or repute*" as well as people who had previous criminal convictions, and that this was reinforced by section 3 of the 1908 Act, which provided that only those people of "*good fame and character*" qualified as jurors. The Commission observed, however, that:

" ... The inclusion of the 'bad fame or repute' disqualification in the same provision disqualifying people with previous convictions suggests a common rationale for both – a rationale which may still underlie the disqualification based on previous imprisonment for an offence. The rationale may be characterised in terms of impartiality: that there is a risk of bias if a person who has been convicted and imprisoned for a criminal offence is permitted to serve on a jury. ...

How do we know that a person who has been convicted and imprisoned for a criminal offence will be biased? The answer is that we do not, any more than we know that such person will not be biased. It is impossible to predict accurately the attitudes of an individual based on their personal characteristics and history."²⁹

²⁹ Cited above, at paras 339 - 340.

4.33 The New Zealand Law Commission considered that excluding those who had served their sentence went against the idea of rehabilitation, by denying them an opportunity to participate in an important civic and community duty. It also diminished the representative nature of the jury.³⁰ The Commission went on:

"A primary justification for retaining the present disqualification would be to preserve the integrity of the jury system, rather than attempting to exclude arbitrarily jurors assumed to be biased because of their criminal history. The integrity or legitimacy of the jury system may be compromised if juries include people who have themselves been convicted and punished for criminal offences. If a jury acquits a defendant, and one or more people on the jury had previously been sentenced to imprisonment for serious crimes, then public confidence in the integrity of that verdict could be undermined.

*It has been suggested by the New South Wales Law Reform Commission in *The Jury in a Criminal Trial* (1986) that people who have been charged with criminal offences, but who have not yet had those charges finalised, should also be disqualified from jury service. The presumption of innocence suggests that a person should not be disqualified because of what an accusation of criminal offending may say about his or her character. The New South Wales suggestion was that disqualification should arise because of the 'currency of their association with the criminal justice process'. That association may be a biasing factor. However, we disagree with this approach. A person who has not been convicted should not be disqualified. Being the spouse, a sibling, parent or offspring of a convicted or accused person may be an equally biasing factor. Considerations such as that suggest that drawing the line at any point other than the presumption of innocence would be a difficult exercise, and devoid of principle. If a person summoned for jury service is in custody awaiting trial or sentence, then prison authorities could apply to the Registrar for that person to be excused within the terms of s.15(1) of the Juries Act.³¹*

4.34 In their report on *Juries in Criminal Trials*, the New Zealand Law Commission concluded that the current provisions excluding persons with certain convictions from jury service should be retained. Their views were set out as follows:

"It is not possible to predict whether an individual with a conviction will in fact be biased against the justice system. One who regrets conduct which resulted in conviction may feel strongly against criminal behaviour. Moreover, a person who

³⁰ Cited above, at para 341.

³¹ Cited above, at paras 342 - 343.

has served a sentence may be said to have paid the debt to society and be entitled not to be punished further. Recent work in the area of restorative justice stresses that crime is a violation of relationships among the offender, the victim and the community, and that there exists a need for the restoration of those relationships and the reintegration of offenders into society. Legal barriers to social and civic participation, such as disqualification from jury service, not only serve as a constant reminder to offenders that they are not permitted to truly re-integrate, but may help to persuade them that any efforts to do so are wasted.

Nevertheless, on balance, the Commission is of the view that 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.³²

Undischarged bankrupts

Australia: Victoria

4.35 A person who is an undischarged bankrupt is disqualified from jury service in Victoria.³³ Following their review of the jury system, the Victorian Law Reform Committee concluded that undischarged bankrupts should be eligible for jury service. The Committee's views were set out as follows:

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

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

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

However, as several submissions to the committee argued, not all bankrupts should be disqualified from jury service because

³²

New Zealand Law Commission, *Juries in Criminal Trials* (2001, Report 69), at paras 180 - 182.

³³

Juries Act 2000, Schedule 1.

some are rendered bankrupt through factors beyond their control.

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

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

All categories of disqualification, other than that of being an undischarged bankrupt, exclude persons who have committed fairly serious criminal offences. The committee is of the view that in contemporary Australia it is inappropriate to associate undischarged bankrupts with criminals in regard to jury service disqualification.³⁴

Education requirements

4.36 In response to their consultation about jury service in Victoria, the Victorian Law Reform Committee received submissions suggesting that jurors should have to satisfy a minimum literacy requirement. The Victorian Law Reform Committee did not agree with these submissions and said:

"The committee believes that the introduction of a literacy requirement as part of the basic qualification for jury service is unnecessary because under the Juries Act 1967 a person who is unable to read or write, or has an inadequate knowledge of the English language is already ineligible for jury service. If a higher level of knowledge of the English language were required this would cause juries to be less representative of the community as a whole. This requirement would operate to exclude certain groups within the community. Persons from non-English speaking backgrounds and groups who have been identified as having literacy difficulties would be particularly affected by such a requirement.

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

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Victorian Law Reform Committee (1996, Vol 1), above, at paras 3.18 - 3.21.

*administered to the jury panel partly in order to ascertain literacy levels.*³⁵

4.37 The idea of a literacy requirement for jurors was also discussed in England by Lord Roskill in the 1986 Fraud Trials Committee Report, where he referred to the earlier views of the Morris Committee:

"The Morris Committee considered whether their recommendation that inclusion on the electoral register should be the basic qualification for jury service (in place of the householder qualification) ought to be coupled with a recommendation that some sort of educational, intelligence or literacy test should be introduced. The Committee rejected various proposals along these lines as being either inappropriate or unacceptable. However, they concluded by saying that:

*'It is ... self-evident that a juror will not be able to understand what is going on in court unless he has a good command of the English language. He may have to study documents, and perhaps to take notes. We therefore recommend that no one should be qualified to serve on a jury who cannot read, write, speak and understand English without difficulty.'*³⁶

4.38 Lord Roskill added:

*"It seems to us that in any fraud trial, whether it is an ordinary case or a complex case, it is imperative as a matter of principle that the members of the jury should be able to read and write English without difficulty. The reason is that in fraud cases, so much depends upon documents and tables or figures and jurors will not be able to understand them adequately and make notes unless they have a basic grounding in the English language."*³⁷

4.39 In Hong Kong, prospective jurors must have completed education to Form 7 level, but this is an administrative standard applied by the Commissioner of Registrations, rather than one mandated by legislation. The result is that Hong Kong jurors may not be a representative cross-section of Hong Kong society. Most other common law jurisdictions impose no education attainment, other than requiring jurors to be able to understand and speak English.

4.40 According to information provided by the Census and Statistics Department, the population in Hong Kong was about 6.9 million in March 2009, of whom approximately 4.7 million were aged between 21 and 65. Yet

³⁵ Victorian Law Reform Committee, *Jury Service in Victoria* (1996, Final Report, Vol 1), at paras 3.12 - 3.13.

³⁶ Fraud Trials Committee Report (1986, HMSO), at Chapter 7, para 7.9.

³⁷ Cited above, at para 7.11.

as at December 2008 only 616,617 names appeared on the list of jurors and the number of jurors "ready for selection" was 371,638.³⁸

Disability

4.41 In Hong Kong, a person suffering from blindness, deafness or any other disability "*preventing [him] from serving as a juror*" is excluded from jury service by virtue of section 4(1)(a) of the Jury Ordinance (Cap 3). The inference is that the legislation assumes that blindness or deafness automatically prevents a person from being capable of jury service. Such an approach may be thought too sweeping, as some visually or hearing impaired persons may still be able to perform the tasks of a juror, depending on the nature of their sensory impairment, and on the technological and other means available to assist them with such tasks.

4.42 In a discussion paper on blind or deaf jurors issued in February 2004, the New South Wales Law Reform Commission said:

"It is a fundamental principle of Australian mores that no group of its citizens should be excluded from the duties or rights attaching to citizenship except for compelling and acceptable reasons. Exclusion of any citizen from jury service should occur only in circumstances where that person is not capable of fulfilling the task. This consideration militates against the current practice that maintains a blanket exclusion on blind or deaf people serving on juries. The apparently positive experience of some United States jurisdictions in utilising blind or deaf jurors supports this view – even allowing for the differing legal, social and economic conditions that exist in the United States, especially by reason of explicit constitutional norms and the pervasive use of juries in criminal and civil proceedings. On the other hand, there is much to commend the view that jurors need to have available all their faculties of communication for the purpose of evaluating evidence which is often a difficult task. It is reasonable to argue that, although blind or deaf persons may not, in the particular case, have greater difficulty in doing this than other jurors, the risk that the quality of justice might be adversely affected justifies retention of the present exclusion. In the case of deaf persons, the requirement of a signer, not only in court but also in the jury room, supports this conclusion."³⁹

³⁸ Figures provided by the Registrar of the High Court. The number of jurors "ready for selection" is the number of jurors on the list less those persons: (a) who have served as jurors at any time within the preceding period of two years, or (b) are not able to attend jury service as they are not currently living in Hong Kong, or (c) are unable to attend on medical or other grounds.

³⁹ New South Wales Law Reform Commission, *Blind or deaf jurors* (2004, Discussion paper), at para 6.1.

4.43 The New South Wales Law Reform Commission added:

"The deaf or blind juror will, like most others, have found ways of encountering, and coping with, everyday life, including the attempt to assess the truthfulness of what people say to them. A person who is deaf, for example, might use visual clues to determine a speaker's tone and inflection. It is also very likely that he or she will have developed increased sensitivity in other faculties as a means of compensating for the loss of hearing. ... Blind people may well have greater listening skills and the ability to recall information than the sighted, and can achieve a high level of auditory and tactile perception. Of course, this will not always be the case."⁴⁰

4.44 The question raised by the New South Wales Law Reform Commission in its discussion paper was whether, if appropriate provisions could be made, blind or deaf jurors who were able to discharge a juror's duties in the circumstances of the particular case should be liable for jury service.

4.45 On the one hand, arguments could be raised that any automatic exclusion of persons with visual or hearing impairment from jury service may affect the representativeness of a jury. In addition, it could be said that complex rules and procedures have the potential to:

"affect adversely any juror, perhaps a sighted and hearing one even more than a juror who is blind or deaf and who may have become habituated to developing compensating strategies such as a keener memory or lessened likelihood of becoming distracted."⁴¹

On the other hand, it can be argued that, in the interest of due and proper administration of justice, persons who are severely disabled by sight or hearing should be exempted from jury service. Bearing in mind that a juror's task is difficult in many cases even for jurors without disabilities, the additional difficulties posed by sight or hearing impairment create risks for the adequacy of the jury's deliberations.

4.46 The New South Wales Law Reform Commission considered that the right of an accused to a fair trial clearly took precedence over any entitlement of a deaf or blind person to serve as a juror. The Commission went on:

"[T]he issue is whether that entitlement is compatible with the notion of a fair trial or whether there is a point at which they become mutually exclusive. Many of the submissions we received take the view that, despite the desirability on equity or citizenship grounds of having blind or deaf people serving on

⁴⁰ Cited above, at para 3.10.

⁴¹ Cited above, at para 2.18.

juries, it is clear that they would experience practical difficulties in so doing."⁴²

4.47 Opinion was divided on whether blind or deaf people should be given the choice of whether to serve on a jury, with some disabilities groups in New South Wales arguing that they should have an obligation to serve as jurors and that the justice system had a responsibility to facilitate that.⁴³ However, Professor McCallum expressed the following concern:

*"The disabilities of hearing and/or visual impairment are overwhelmingly disabilities which manifest themselves amongst elderly Australians. ... Given that blindness and deafness are aging diseases and that the majority of blind or deaf persons on the electoral rolls are citizens of senior years ... blind or deaf persons should have the right to be exempted from jury service. Many older Australians who suffer the onset of blindness or deafness have difficulties in adjusting to these conditions, and having regard to these circumstances, it would be inappropriate not to allow such persons a right of exemption from jury service."*⁴⁴

4.48 The New South Wales Law Reform Commission agreed with Professor McCallum's view that people who are blind or deaf should have an unqualified right to be exempt from jury service, and proposed in their report to amend Schedule 3 of the Jury Act 1977 to allow a person who is blind or deaf to claim exemption from jury service.

4.49 The Victorian Law Reform Committee also examined the issue of disability in their study on jury service and recommended in their Final Report that:

*"The current specific categories of ineligibility from jury service relating to persons with mental, intellectual and physical disabilities should be repealed in favour of a general category which renders ineligible a person who has a physical, intellectual or mental disability that makes the person incapable of effectively performing the functions of a juror."*⁴⁵ [emphasis added]

4.50 Referring to this recommendation, the New South Wales Law Reform Commission observed:

⁴² Cited above, at para 2.16.

⁴³ New South Wales Law Reform Commission, *Blind or deaf jurors*, Report 114 (September 2006), at paras 4.5-4.6.

⁴⁴ New South Wales Law Reform Commission, *Blind or deaf jurors*, Report 114 (September 2006), at para 4.6.

⁴⁵ Victorian Law Reform Committee, *Jury Service in Victoria* (1996, Vol 1), above, at para 3.140, Recommendation 33.

*"Although this formulation has not been adopted in the current version of the Victorian statute, it would seem to encapsulate the essential nature of this reason for jurors to be excused, in that it places the focus on whether they could effectively or perhaps more correctly, 'sufficiently' perform the required functions."*⁴⁶

4.51 In its issues paper⁴⁷ on jury service, the New South Wales Law Reform Commission considered whether disability which impacts upon a person's ability to discharge the duties of a juror should continue to be a ground of ineligibility and whether such disability should be more precisely defined. The Commission noted that in New South Wales and some other jurisdictions, a person was ineligible to serve as a juror if he or she was unable, because of sickness or infirmity, to discharge the duties of a juror. Elsewhere, sickness or infirmity was an express ground that could qualify as a "good cause" for which the person might be excused from attendance for jury service.⁴⁸

4.52 The Commission considered that sickness, infirmity or disability should not attract automatic ineligibility. The preferable course was to treat each case separately, as a potential ground for excuse for good cause, reserving to the authority that administers the Act the capacity to grant either permanent excusal, or an excusal for a particular trial.

4.53 In assessing the credibility of the evidence led, a juror will take account of numerous factors, including the witness's demeanour. The significance of demeanour has been discussed in a number of cases.⁴⁹ In *"El Uruguayo"*,⁵⁰ Lord Justice Scrutton expressed his view on the significance of seeing a witness giving evidence:

*"My view has always been, and is still, that very great importance should be attached to the view of the Judge who has seen the witnesses. Other Judges do not take such a strong view of the importance of seeing a man giving evidence. I have always taken it, and will continue to take the view that it takes a strong case to induce one to interfere with the judgment of a Judge who has seen a witness and has believed him."*⁵¹

⁴⁶ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (September 2007), at para 5.17.

⁴⁷ New South Wales Law Reform Commission, *Jury Service*, IP 28 (November 2006).

⁴⁸ New South Wales Law Reform Commission, *Jury Service*, IP 28 (November 2006), at para 7.14.

⁴⁹ *The "El Uruguayo"* [1928] 31 LIL Rep 89; *Yuill v Yuill* [1945] 1 All ER 183; *R v Ng Wing Ming* [1994] 2 HKC 464; *R v Cheong Luen Shing* [1994] 3 HKC 451.

⁵⁰ [1928] 31 LIL Rep 89.

⁵¹ Cited above, at 90.

4.54 In the 1974 case of *Commonwealth v Brown*,⁵² the defendant contended that the hearing difficulties of a juror, discovered only after the jury's verdict, had denied him a fair, impartial, and competent jury, resulting in less than the unanimous verdict guaranteed by the US Constitution. On appeal, the Superior Court of Pennsylvania said:

"Fundamental to the right of an 'impartial' jury is the necessity that participating jurors be competent and qualified. By statute, Pennsylvania requires that only 'sober, intelligent and judicious persons,' ... and persons 'able to understand the English language,' ... be eligible as jurors. Implicit in these requirements is that a juror should be free from such physical infirmities as will interfere with or preclude the proper discharge of his duties."⁵³

4.55 The court went on:

"The appellant is entitled to a jury verdict arrived at by each and all of the jurors upon the evidence introduced. ... The presence of a juror with a physical impairment of such magnitude as to interfere with the juror's ability to hear and understand the presented testimony and evidence precludes a verdict by all jurors. Such a disability would render the juror incompetent to serve and would deny appellant's right to an impartial jury and a fair hearing. While a juror is not disqualified per se because of his deafness, ... where the deafness is of such degree as to indicate that the juror may have not heard material testimony, the juror must be disqualified, rendering any verdict he gave as meaningless.

In the instant appeal, we find that the record indicates that the juror in question had a hearing impairment so great as to deny appellant a fair, impartial trial and a unanimous verdict. We recognize that it is quite difficult to determine the amount of prejudice suffered by the appellant because of the juror's hearing difficulties. However, the record substantiates that the juror had difficulty in hearing. He admitted inability to hear questions and his responses were inconclusive as to whether he had heard all the testimony. Thus, we are confronted with a situation where, in order to insure fairness and to alleviate any possibility of prejudice caused by the deaf juror, we must assume prejudice for the sake of insured fairness. ... We, therefore, reverse the judgment of sentence of the lower court and remand for a new trial."⁵⁴

⁵² 332 A.2d 828.

⁵³ Cited above, at 831.

⁵⁴ Cited above, at 831 - 832.

4.56 As pointed out by Lawton LJ in the English case of *R v Mason*, trial judges have a right to intervene to ensure that a competent jury is empanelled. That is part of their duty to see that there is a fair trial. Lawton LJ said that this form of judicial intervention was most commonly used:

*"... when a judge notices that a member of the panel is infirm or has difficulty in reading or hearing; and nowadays jurors for whom taking part in a long trial would be unusually burdensome are often excluded from the jury by the judge."*⁵⁵

4.57 With the removal in England by section 118 of the Criminal Justice Act 1988 of the defendant's right to challenge jurors without cause, the Attorney General issued new guidelines on the exercise by the Crown in England and Wales of its right to "stand by" jurors. The part relevant to jurors with disabilities read:

"4. Primary responsibility for ensuring that an individual does not serve on a jury if he is not competent to discharge properly the duties of a juror rests with the appropriate court officer and, ultimately, the trial judge. Current legislation provides, in ss. 9 and 10 of the Juries Act 1974, fairly wide discretions to excuse or discharge jurors either at the person's own request, where he offers 'good reason why he should be excused', or where the judge determines that 'on account of physical disability or insufficient understanding of English there is doubt as to his capacity to act effectively as a juror'.

*5. The circumstances in which it would be proper for the Crown to exercise its right to stand by a member of a jury panel are: (a) where a jury check authorised in accordance with the Attorney-General's guidelines on jury checks reveals information justifying exercise of the right to stand by in accordance with para. 9 of the guidelines and the Attorney-General personally authorises the exercise of the right to stand by; or (b) where a person is about to be sworn as a juror who is manifestly unsuitable and the defence agree that, accordingly, the exercise by the prosecution of the right to stand by would be appropriate. An example of the sort of exceptional circumstances which might justify stand-by is where it becomes apparent that, despite the provisions mentioned in para 4 above, a juror selected for service to try a complex case is in fact illiterate."*⁵⁶

4.58 The issue of disability was discussed by the Court of Appeal in England in *Chapman and Lauday*,⁵⁷ in relation to section 18(1)(d) of the Juries Act 1974.⁵⁸ In dismissing the defendant's appeal, the Court said:

⁵⁵ *R v Mason* [1981] QB 881, at 887.

⁵⁶ Quoted in Peter Murphy, *Blackstone's Criminal Practice* (1991, Blackstone Press Limited), at Appendix 4.

⁵⁷ (1976) 63 Cr App R 75, where after a verdict had been returned it was found that one of the jurors was exceedingly deaf and had only heard at best about half of the proceedings.

⁵⁸ Section 18(1)(a) Juries Act 1974 states:

"This Court is a creature of statute. Its powers are contained in the Criminal Appeal Act 1968. That Act provides in section 2(1): 'Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or ..., and in any other case shall dismiss the appeal ... '. One can see that there may be circumstances in which it could be argued that despite the provisions of section 18 of the Juries Act 1974 the verdict was unsafe or unsatisfactory because of some deficiency in a member of the jury or for some other reason, but on the facts of this particular case, where there is only one juror involved, where that juror could well have been discharged had the facts of his deafness become known, and the trial proceeded; having regard to the fact that majority verdicts are possible in circumstances these days, and there being no evidence whatsoever of miscarriage of justice by reason of the verdicts, it is not possible to say that verdicts in the case of each of these appellants were either unsafe or unsatisfactory.

The substance of the grounds raised in this case was related to a degree of deafness suffered by a juror as a matter which would pose considerable questions for the administration of the criminal law in jury trials, if that was held to be a valid ground, on everyday verdicts of the jury. No doubt that it is the reason why section 18 found its way on to the statute book. We think that section provides a complete answer to the appeal of the appellant in this case. The appeal must be dismissed.⁵⁹

4.59 It should be noted that in Hong Kong a similar provision to section 18(1) of the Juries Act 1974 is to be found in section 6 of the Jury Ordinance (Cap 3). That section provides:

"If any person is summoned as a juror who is not qualified or liable to serve as a juror, or is exempt from service, such want of qualification or exemption shall be a good cause of challenge and the person so summoned shall be discharged on such challenge or on his own application, if the court is satisfied of the fact and so directs; but no such want of qualification or exemption, if not submitted to the court before such person is sworn, shall afterwards be accepted as a ground for impeaching any verdict given by the jury on which such person has served."

⁵⁹ "No judgment **after verdict** [emphasis added] in any trial by jury in any court shall be stayed or reversed by reason that any juror was unfit to serve."

Chapman and Lauday, above, (1976) 63 Cr App R 75, at 79.

4.60 The judgment of *Chapman and Lauday* was followed in *Barry and Bliss*.⁶⁰ The Court of Appeal dismissed the appeal and said:

"It appears to us that the principle ... is that this Court will not interfere with the verdict of a jury unless there is either evidence pointing directly to the fact or evidence from which a proper inference may be drawn that the defendant may have been prejudiced or may not in fact have received a fair trial. ... In all the circumstances of this case, bearing in mind not least the strength of the case mounted by the prosecution against the appellant, the fact that the jury in rejecting the appellant's own account of affairs were unanimous, and that it was a verdict arrived at after due and no doubt careful deliberation, we do not feel that there is really a shred of evidence pointing to any form of risk or injustice or failure to receive a fair trial."⁶¹

The issue of bias

4.61 A recent article in *The Independent* newspaper in the United Kingdom argued that police jurors are a threat to fair trials:

"Police officers should not be allowed to sit on juries because of the danger they pose to the fairness of trials, senior members of the judiciary say.

The criticism by four senior Crown Court judges sitting in England and Wales follows a shake-up of the criminal justice system five years ago in which reforms were introduced to stop the middle classes evading jury service. Before the change, police officers, judges, defence lawyers and prosecutors were exempt from serving on juries. ...

The judges gave their views in interviews with Robert Julian, a former New York State Supreme Court Justice, who concluded that while there was support for the 'random jury selection' there was 'concern among many judges about the service of jurors such as police officers and judges.' ...

Judge Julian ... said that while many of the judges interviewed said the presence of a juror with expertise in the subject-matter of the trial was 'the luck of the draw', many were also not happy with the blanket approach to jury service.

⁶⁰ [1986] Crim L.R 467.
⁶¹ (1987) 84 Cr App R 1, at 6 - 7.

Last year, the House of Lords ruled that the 'possibility of bias, possibly unconscious, which flowed from the presence on the jury of persons professionally committed to one side of the adversarial trial process' could form the basis for quashing a conviction.

And this year the Court of Appeal said that one way around concerns about bias was to get jurors to declare their profession earlier in the pre-trial process. ...⁶²

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Editorial by Robert Verkaik, Law Editor, in *The Independent*, 17 September 2008.

Chapter 5

Recommendations for reform

Introduction

5.1 As we have seen in previous chapters in this report, the jury plays a key role in Hong Kong's criminal justice system and allows members of the community to participate in, and contribute to, the operation of that system. We think it is important that the jury system should remain comprehensible and accountable to the community it exists to serve. This chapter reviews the existing qualifications for jury service and considers whether those qualifications should be amended. In our consultation paper, we also looked at the exemptions from jury service for certain categories of persons provided under section 5 of the Jury Ordinance. In this chapter, we review the relevant findings of our consultation exercise and set out our recommendations for reform.

5.2 In reaching our conclusions and making our recommendations, we have taken into account a number of specific considerations:

- The jury pool should be as widely representative of the community as is compatible with ensuring the accused's right to a fair trial. In that regard, are the present limitations in respect of age too restrictive? And would it be appropriate to relax the existing blanket exclusion of the blind and the deaf?
- The law should be stated clearly and unambiguously, so that it is accessible and comprehensible to all. That cannot be said to be the case with, for example, the current law's undefined references to "*residence*" and "*good character*."
- The criteria for jury service should reflect contemporary conditions. Is it still appropriate, for instance, to exclude those over 65 years of age from jury service?

5.3 The sub-committee received 68 written responses to the consultation paper from both individuals and a range of organisations. All the feedback received has been given careful consideration and many of the suggestions have been incorporated in the formulation of this report. A list of the persons and organisations that sent submissions to us can be found in Annex 1 to this report.

Qualifications for jury service

5.4 The criteria for service as a juror are set out in section 4 of the Jury Ordinance (Cap 3). A person is liable to serve as a juror if he satisfies all the requirements that are stipulated in the statutory provisions. These criteria have been discussed earlier in this report and are examined more closely in this chapter, taking into consideration the responses to the consultation paper.

"A person who has reached 21 years of age, but not 65 years of age"

Lower age limit

5.5 The arguments in favour of retaining the existing lower age limit of 21 include the following:

- The duties and responsibilities of jury service require a level of maturity and experience which could not reasonably be expected from a younger person. The jury's primary function is to determine the guilt or innocence of the defendant, a decision of the utmost gravity which may in serious cases result in the defendant's loss of liberty. In reaching that decision, the jury will be required to assess the credibility of the evidence led. The ability to judge a witness's veracity, to evaluate the evidence and adequately to understand human nature are skills less likely to be found in a person younger than 21.
- While the legal age of majority is for most purposes set at 18, the particular requirements of jury service justify a higher age. The determination of a person's guilt or innocence is an issue of a greater magnitude than other functions which a person is legally competent to perform at 18.
- The right to stand as a candidate in elections in Hong Kong has been maintained at 21, notwithstanding the reduction of the legal age of majority for most other purposes (including the right to vote) to 18. Jury service is a civic duty of similar importance to which the age of 21 should also apply.
- Unlike most other decisions which a person can legally make at 18, the jury's findings of fact cannot readily be overturned, and the defendant and the victim have little recourse if those findings are wrong. This justifies a requirement that jurors satisfy a higher minimum age.

5.6 There have been no suggestions that the minimum age for jury service should be raised above 21. Those respondents to our consultation paper who were in favour of a change in the existing lower age for jury service argued that it should be reduced to 18 to match the legal age of majority.

Other arguments for a reduction in the existing lower age limit to 18 included the following:

- It is a basic tenet of the jury system that it should provide a jury which is representative of the community. The existing lower age of 21 excludes from jury service a significant section of the community. It also dilutes the principle of "*trial by one's peers*" by denying to defendants aged between 18 and 21 the opportunity of a jury which includes jurors from a similar age group.
- The legal age of majority for most purposes is 18, based on the belief that persons of that age are sufficiently mature to, for instance, enter into enforceable contracts or make a will. Jury service does not require a higher level of maturity or impose greater responsibilities than these other activities for which the age of 18 is thought appropriate.
- A reduction in the minimum age for jury service would widen the jury pool and would therefore reduce the burden of jury service on others in the community.

5.7 As we pointed out in our consultation paper, the trend in other common law jurisdictions has been to reduce the minimum age limit for jury service to (or to maintain it at) 18 years. We note also, however, that Hong Kong has historically moved more cautiously in relation to the age of capacity than some other jurisdictions. The age of majority for most purposes was lowered from 21 to 18 in Hong Kong in 1990, with the enactment of the Age of Majority (Related Provisions) Ordinance (Cap 410), some 20 years after similar changes were made in the United Kingdom. It was not until 1994 that the Electoral Provisions (Miscellaneous Provisions) Ordinance reduced the voting age in Hong Kong from 21 to 18, a change which had been adopted in the main common law jurisdictions in the 1970s.

5.8 While the pace of change in Hong Kong has differed from that in other jurisdictions, so too has the extent of that change. The reforms introduced by the Age of Majority (Related Provisions) Ordinance (Cap 410) did not bring changes to all aspects of capacity relating to age. The minimum age at which a child could marry without parental consent remained unchanged at 21, as it remains today, reflecting strongly held views by some in the community. Similarly, although the voting age has been reduced to 18, section 37 of the Legislative Council Ordinance (Cap 542) restricts candidates for election to those aged 21 or above. We explained in the consultation paper that, while the trend in other jurisdictions should not be disregarded, we believed that adopting a cautious approach to reform of the minimum age for jury service in Hong Kong would be in line with the approach which Hong Kong had followed generally in relation to age of capacity. Our provisional view was therefore that, unless there was a clear consensus among those responding to our consultation paper that the minimum age limit for jury service should be reduced, the *status quo* should be maintained.

5.9 The views expressed to us have not led us to alter our provisional view. While some argued in favour of reducing the minimum age for jury service, the majority of respondents agreed that the current minimum age limit should be retained. In the circumstances, we confirm our provisional view that the existing minimum age for jury service should be maintained at 21.

Upper age limit

5.10 The existing upper age limit for jury service is 65. The consultation paper set out the following arguments in favour of retaining that upper age limit:

- Jury service is an important civic duty which can be onerous. It would be unreasonable to impose this burden on elderly persons who are likely to be less resilient and more prone to ill-health than younger persons.
- The risk of dementia increases with age and the early stages of this may be difficult to detect, but it would be sufficient to impair the individual's ability to function properly as a juror.

5.11 There has been no suggestion to lower the upper age limit below 65. As we discussed in our consultation paper, arguments to raise the upper age limit include:

- Raising the upper age limit would enhance the jury's representativeness of the community. Those over 65 represent a significant proportion of the community and should not be excluded from contributing their experience to the jury system.
- Raising the upper age limit would widen the jury pool and lessen the burden on others. In particular, many of those over 65 are likely to be retired and jury service may prove less burdensome for them than for those still in employment.
- Life expectancy has steadily increased over the years. An upper age limit of 65 may previously have been appropriate but it no longer reflects the demographics of the population.

5.12 Having considered these arguments we concluded in the consultation paper that the upper age limit for jury service should be raised from 65 to 70. Such a change would make the jury pool more representative of the community and would reflect the fact that life expectancy has increased.¹ The public response to our provisional proposal has confirmed our view, with only a small minority opposed to raising the upper age limit.

¹ As at June 2009, there were 272,600 persons in Hong Kong aged 65 - 70. Of those, 26,800 had attained Form 7 education or above (Source: General Household Survey by the Census & Statistics Department, Q2 2009).

5.13 We explained in the consultation paper that there were two alternatives to simply raising the upper age limit for jury service and applying it to all persons within that age bracket. The first would be to provide that persons between 65 and the new upper age limit must "opt in" to be eligible for jury service. The second would be to take the opposite approach, and include all persons below the new upper age limit on the jury list but to allow those over 65 to "opt out" if they choose. The advantage of the latter approach is that, by placing the onus on the individual to take himself out of the system, rather than to opt into it, the jury pool is less likely to be diminished. We expressed our view in the consultation paper that that was the better option, and proposed that those aged between 65 and 70 should be entitled as of right to exemption from jury service should they apply for it.

5.14 An alternative which we considered in the consultation paper would be to remove the upper age limit for jurors altogether, reflecting increased life expectancy and the fact that people are living longer in good health. We noted that the Victorian Law Reform Committee had concluded that there should be no upper age limit for jury service, but that persons aged 70 years and over should be entitled to elect not to be eligible for selection for jury service. Likewise, we observed that New Zealand had removed the maximum age limit of 65 years in the Juries Amendment Act 2000. Court registrars are empowered to excuse persons over 65 years of age from jury service on the basis of age upon application. We invited views on whether a similar approach should be followed in Hong Kong and a minority of those who favoured a change in the existing law argued that there should be no upper age limit as it was unnecessary and undesirable.

5.15 Taking into consideration the strong support for raising the upper age limit, and our earlier expressed view that change should be cautious, we have concluded that we should maintain our original recommendation of raising the upper age limit to 70, with persons over 65 having an automatic right to "opt out" of liability for jury service if they so choose.

Recommendation 1

We recommend that the existing requirement for jury service that an individual has attained 21 years of age should be retained, but the upper age limit for jury service should be raised from 65 to 70. We also recommend that an individual who has attained 65 years of age should be entitled as of right to exemption from jury service upon his application.

"A person who ... is a resident of Hong Kong"

5.16 The Jury Ordinance (Cap 3) does not specify what constitutes "resident" for the purposes of jury service. The Ordinance does not, for instance, specify a minimum length of residence or stay in Hong Kong for a person to be qualified to serve as a juror, nor does it tie residence for jury purposes to the possession of a permanent or other form of identity card.

5.17 We pointed out in our consultation paper that we considered it important that the jury list should be representative of the community as a whole. That approach, as we have seen in preceding chapters of this report, is in line with the jurisprudence on jury composition in other jurisdictions. In defining what constitutes the community in Hong Kong for these purposes, we think it reasonable to exclude those who are merely transients, or those whose time in Hong Kong has been so short as to preclude them from acquiring some understanding of local norms, values and culture.

5.18 The system currently adopted in Hong Kong is that the name of any person applying for an identity card will, if the person satisfies the criteria for jury service, be passed by the Commissioner of Registration to the Registrar of the High Court for inclusion into the jury list. It is therefore possible that a newcomer to Hong Kong will find himself called for jury service within a relatively short time of arrival. We think it important that a juror should have some understanding of what behaviour the general public would regard as, for instance, decent/indecent or reasonable/not reasonable. We have reservations as to whether a newcomer would be able to apply the "reasonable man" test in the context of the local standards and culture. We therefore prefer that a person should have resided in Hong Kong long enough to acquire sufficient knowledge of local culture and social values so that he may properly assess the witnesses' evidence. We noted in our consultation paper that this is also in line with the approach in other common law jurisdictions, such as Alberta in Canada, England and Wales, Ireland, and California in the United States, which have in their legislation clearly provided that a person would be qualified or liable to serve if he is a resident, a citizen, or has been ordinarily resident in the jurisdiction. England and Wales has, in particular, provided that to be eligible as a juror the person has to have 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 13.²

5.19 At the same time, we think it important that the mix of peoples which make up Hong Kong's community should be represented in the jury pool. Figures from the Census and Statistics Department reveal that in 2006, 95% of Hong Kong's then 6.8 million population was Chinese by ethnic background. Other significant, though far smaller, ethnic groups included 112,453 Filipinos, 87,840 Indonesians, 20,444 Indians and 15,950 Nepalese.³ All contribute to what constitutes the community of Hong Kong.

² Section 1(1)(b), Juries Act 1974.

³ Census and Statistics Department, Table 139, *Population by Ethnicity, 2001 and 2006*, at http://www.censtatd.gov.hk/hong_kong_statistics/statistical_tables/index.jsp?TableID=139.

5.20 Having taken these considerations into account, we proposed in our consultation paper that, though arbitrary, a minimum period of actual residence in Hong Kong should be required before a person is eligible for jury service. That period of residence should not be so long as to exclude all but permanent residents, but should be sufficient to ensure that the juror has a reasonable connection to Hong Kong. We have concluded in our consultation paper that the appropriate minimum period of residence should be three years. We pointed out that, while it was desirable that potential jurors should have an understanding of local culture and norms, it was also important that the test of residence for jury purposes should be simple and easily applied. We therefore recommended that a person should be presumed, unless the contrary was proved, to be a resident of Hong Kong for the purposes of section 4 of the Jury Ordinance (Cap 3) if his Hong Kong identity card had been issued to him three years or more before the issue to him of the notice of jury service.

5.21 There was general acceptance among respondents that, while there was bound to be an element of arbitrariness in whatever period was chosen, three years was in all the circumstances a reasonable period. Concerns were expressed, however, that the effect of our original proposal might be to preclude from jury service long-term residents who had been absent from Hong Kong for part of the three years immediately preceding service of the notice of jury service, even though that was not the sub-committee's intention. There was also some doubt as to what was needed to rebut the proposed presumption.

5.22 Having discussed this aspect of our proposals further, we have concluded that a simpler test of residence for the purposes of section 4 of the Jury Ordinance should be adopted, tied to the possession of an identity card for three years and residence in Hong Kong at the time that a notice of jury service is issued to the individual. Under this formulation, there is no need for a presumption, with the attendant uncertainties as to its method of rebuttal, and long-term residents remain eligible for jury service notwithstanding absences from Hong Kong within the three years preceding issue of the notice of jury service. By focusing on the date of issue of an identity card and residence at the time the notice of jury service is issued, we believe the task of determining residential eligibility for jury service will be made simpler. At the same time, we do not think our revised proposal will preclude from jury service on residence grounds any persons who might be thought suitable for jury service, as it would be difficult to identify persons who might fall into that category who would not have held an identity card for three years.

Recommendation 2

We recommend that, to be eligible to serve as a juror, a person must have been issued with a Hong Kong identity card three years or more prior to his being issued with a notice of jury service and be resident in Hong Kong at the time the notice is issued.

"The person is of good character"

5.23 The Jury Ordinance (Cap 3) is silent as to what is meant by "good character." We believe that some guidance should be provided in the legislation. In our consultation paper, we considered three possible classes of person who might be considered not of "good character": undischarged bankrupts; those with previous convictions; and those charged with an offence and not yet tried.

Undischarged bankrupts

5.24 We suggested in our consultation paper that an undischarged bankrupt should not be automatically excluded from jury service. Bankruptcy does not necessarily imply a lack of integrity, but may be the result of misfortune or poor financial or investment judgement. We said that it would in our view be wrong automatically to characterise all undischarged bankrupts as not of "good character." We pointed out that this was in line with the view of the Victorian Law Reform Committee, who said that, "*in contemporary Australia it is inappropriate to associate undischarged bankrupts with criminals in regard to jury service disqualifications,*"⁴ and suggested that undischarged bankrupts should be eligible for jury service.

5.25 The contrary view was expressed by the Victorian Government, which in rejecting the Victorian Law Reform Committee's recommendation stated:

*"Whilst many people find themselves declared bankrupt through no immediate fault of their own (such as the person whose spouse incurred debts in his or her name without that person's knowledge) there are many others who are in the position by virtue of deliberate and wilful misuse of position, or other questionable behaviour. It would seem not desirable to have such persons eligible for jury service."*⁵

⁴ Victorian Law Reform Committee, *Jury Service in Victoria* Final Report, 1 (1996), para 3.21.

⁵ The Victorian Government responses to the recommendations of the Law Reform Committee Final Report Volume one – *Jury Service in Victoria*. (Response to Recommendation 5).

5.26 The Victorian Government's stance was reflected in the Juries Act 2000, which retains the disqualification of undischarged bankrupts from jury service.⁶

5.27 Only two respondents to our consultation paper thought that an undischarged bankrupt should not be eligible for jury service. Taking into consideration the overall responses, we stand by our original position and maintain our view on this issue.

Previous criminal convictions

5.28 The essential consideration in determining what amounts to "good character" for the purposes of section 4(1)(b) of the Jury Ordinance is in our view whether or not the individual's inclusion on a jury would impair its integrity. The function of the jury is to determine the guilt or innocence of the defendant, based on its assessment of the evidence led. It is, in our view, essential to public confidence in the administration of justice that there should be no grounds for questioning the integrity of the jury system. We explained in the consultation paper that for that reason, we preferred to err on the side of caution when deciding whether or not a criminal conviction should bar the individual from subsequent jury service.

5.29 One option which we considered in our consultation paper would be to adopt provisions similar to those governing candidates for election to the Legislative Council, which disqualify persons who have within the preceding five years been convicted and sentenced to imprisonment for a term exceeding three months.⁷ The argument in favour of this option is that the standard set for the nomination and election of legislators is equally appropriate for the selection of jurors, who fulfil a key role in the administration of justice. Other alternatives we considered would be for the length of the "quarantine period" to relate to the length of the term of imprisonment to which the individual had been sentenced, or to the nature of the offence for which he had been convicted.

5.30 As we pointed out in our consultation paper, the difficulty with adopting a period of exclusion from jury service which relates to the sentence imposed or the nature of the offence itself is to determine where the line should be drawn. Is the line properly to be drawn at imprisonment for one month, three months or six months? Are the appropriate offences those of dishonesty, or some other category? If exclusion is to be based on sentence or the nature of the offence, we think it inevitable that, no matter where the line is drawn, there will be cases where a juror's previous conviction calls in question the impartiality of the jury. We said in our consultation paper that our inclination was to err on the side of caution when deciding whether or not a criminal conviction should bar the individual from subsequent jury service and

⁶ Schedule 1 of the Juries Act 2000.

⁷ Section 39(1)(e) of the Legislative Council Ordinance (Cap 542) disqualifies a person from being nominated as a candidate, and from being elected, if he has been convicted within the preceding five years "in Hong Kong or any other place of an offence for which [he] has been sentenced to imprisonment ... for a term exceeding 3 months without the option of a fine".

we therefore recommended that a person with a criminal conviction record, regardless of its nature, should be excluded from jury service. We considered that this recommendation would safeguard the integrity of the jury system.

5.31 It would, however, be against the spirit of the Rehabilitation of Offenders Ordinance (Cap 297) if a person whose criminal conviction was regarded as "*spent*" under the Ordinance were to be excluded from jury service. We therefore considered it appropriate to follow section 2 of the Rehabilitation of Offenders Ordinance (Cap 297), under which a person's conviction would be regarded as spent if he was not sentenced to imprisonment exceeding three months or to a fine exceeding \$10,000 and a period of three years had elapsed without the person being again convicted in Hong Kong of an offence. We pointed out in the consultation paper that the Rehabilitation of Offenders Ordinance would only apply to one conviction, and the first conviction would reappear in the person's criminal conviction record upon his second conviction.

5.32 The responses to our provisional recommendation that a person with a criminal conviction record, regardless of its nature, should be excluded from jury service were mixed. Some argued that those with "*spent*" convictions under the Rehabilitation of Offenders Ordinance should also be excluded from jury service, on the basis that such convictions could relate to acts of dishonesty or corruption which raised doubts about the person's integrity. It was pointed out that such offences did not always attract a sentence of imprisonment. Others argued that convictions for minor or regulatory offences (such as, for instance, careless driving, or jaywalking), or where there had been a long lapse of time since the conviction, should not permanently exclude a person from jury service.

5.33 In light of the comments we have received, we have revisited the issue and revised our conclusion. In doing so, we have sought to balance the need to safeguard the integrity of the jury system and the need for easy application. We have also considered the resources implications on administration in ascertaining the up-to-date criminal records. We recommend that a person, otherwise fully eligible, should be barred for life from jury service if he has (in Hong Kong or any other place) been convicted of an offence for which he has been sentenced to imprisonment, whether suspended or not, for a term exceeding three months without the option of a fine. If his sentence of imprisonment was for three months or less, he should be qualified to serve as a juror if the conviction took place more than five years before he is summonsed to serve as a juror. For these purposes, we should also accord to the spirit of the Rehabilitation of Offenders Ordinance to disregard any conviction treated as spent under that Ordinance.

Charged with an indictable offence and not yet tried

5.34 We pointed out in our consultation paper that, while due regard must be accorded to the principle of presumed innocence, there would be cases where the nature of the alleged offence and the evidence known to exist would demand exclusion of persons awaiting trial for an indictable

offence. It would be impossible to examine each case separately. We appreciated that it would be wrong automatically to classify persons falling within this category as anti-social but there was an inherent risk that they might be perceived as sympathetic to the defendant, which might undermine public confidence in the administration of justice.

5.35 We noted that persons falling within this category are excluded from jury service in Victoria. We agreed with that approach and recommended that persons awaiting trial for an indictable offence should be excluded from jury service.

5.36 Only one respondent disagreed with our recommendation, arguing that the civic rights and duties of persons charged but not yet tried should be respected and that the principle of presumed innocence should allow them to remain eligible for jury service. We note this view but our concern is the risk that such persons may be perceived to have a bias against the prosecution. We therefore stand by our original recommendation.

Charged with any offence and remanded in custody

5.37 We think that persons charged with an offence and remanded in custody should be excluded from jury service for the same reasons as we have advanced in respect of persons awaiting trial for an indictable offence, with the additional practical reason that jury service by a person in custody would present considerable logistical difficulties. We remain of the view set out in our consultation paper that such persons should be excluded from jury service.

5.38 In conclusion, we think it essential in order to safeguard public confidence in the administration of justice that any person who has been convicted and sentenced to imprisonment for more than three months within the last five years, other than a spent conviction, or who has been charged with an indictable offence and has not yet been tried, or charged with any offence and remanded in custody, should not be included in the jury list or jury panel. Relating to this issue, we note the safeguards that are provided in section 6 of the Jury Ordinance (Cap 3) where want of qualification of a juror is a ground of challenge but is not a ground for impeaching the verdict given by a jury on which such a person has served. We consider it important that section 6 should be retained.

Recommendation 3

We recommend that section 4(1)(b) of the Jury Ordinance (Cap 3) should be replaced by a provision to the effect that a person is not eligible to serve as a juror if he:

- (a) has been convicted at any time in Hong Kong or elsewhere of a criminal offence for which he has been sentenced to imprisonment (whether suspended or not) exceeding three months, without the option of a fine;
 - (b) has been convicted within the previous five years of a criminal offence for which he has been sentenced to imprisonment (whether suspended or not) for three months or less;
 - (c) is awaiting trial for an indictable offence; or
 - (d) is remanded in custody pending trial for any offence,
- provided that a spent conviction under the Rehabilitation of Offenders Ordinance (Cap 297) should not be regarded as a criminal conviction for the purposes of (b).

"The person has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings"

5.39 Section 4(1)(c) of the Jury Ordinance (Cap 3) refers to "*sufficient knowledge of the language.*" Rather than require a specific language qualification to qualify for inclusion on the jury list, the practice has been for many years that persons who have attained an educational level of at least Form 7 (or its equivalent) will, in the absence of any evidence to the contrary, be treated as having satisfied the language requirement. Originally, jury trials were conducted only in English and the restriction of the jury pool to those with a particular level of education was seen as a means of ensuring that jurors had a sufficient knowledge of English. In its pre-1997 version, the relevant part of section 4 of the Jury Ordinance read:

"Every person ... who has a knowledge of the English language sufficient to enable him to understand the evidence of witnesses, the address of counsel and the Judge's summing up, shall be qualified and liable to serve as a juror"

Section 4 was amended in 1997 to its present form, reflecting the fact that jury trials are now conducted in either Chinese or English and both are official languages under Article 9 of the Basic Law.⁸ The previous practice of requiring a general educational level of Form 7, rather than a specific language qualification, continues to be applied, however.

⁸ Article 9 of the Basic Law provides:
"In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region."

The existing education system in publicly funded schools

5.40 To understand the current practice, it may be helpful to outline the relevant aspects of the existing secondary education system in publicly funded schools in Hong Kong. Under the present system, all students sit the Hong Kong Certificate of Education Examination (HKCEE) at the end of the year known as “Form Five”. Students who are successful in the HKCEE may proceed to the two-year sixth-form courses leading to the Hong Kong Advanced Level Examination (HKALE), which they sit at the end of the second year (called “Form 7”).

5.41 The HKCEE and the HKALE may be taken in either English or Chinese. The same standards are applied in marking and grading and the language medium is not recorded on the results notices or certificates. HKALE results are graded from A to F, with A the highest and F the lowest grade. Results below grade F are designated as unclassified (shown as “UNCL” on the certificate). Every student who starts the Form 7 year will receive a certificate at the end of the year which indicates the grades he has achieved in each subject sat in the public examination.

5.42 There are no compulsory subjects which a student must study at HKALE level, though most will take Chinese Language & Culture and Use of English. There is no separate university entrance examination, but the eight local universities funded by the Universities Grants Committee generally require a pass in Chinese Language & Culture and Use of English in the HKALE. It is therefore possible that a student who did not wish to enter university could leave Form 7 without having passed an examination in either English or Chinese language.

The education system in non-publicly funded schools

5.43 The education system described above basically applies to all publicly funded schools in Hong Kong, though Direct Subsidy Scheme schools have more flexibility in the curriculum and some may offer a small number of alternative programmes in parallel with the local curriculum. There is also, however, a wide range of private schools in Hong Kong and these may offer a curriculum which is completely different from the local version. They may, for instance, adopt curricula current in other countries, with course and examination requirements quite distinct from those applicable to local publicly funded schools. Where a private school offers the local curriculum, however, the local system described above will apply.

Current procedure for compiling the provisional list of jurors

5.44 As explained above, those who have attained an educational level of at least Form 7 (or its equivalent) will (in the absence of any evidence to the contrary) be treated as having satisfied the language requirement for the purposes of compiling the provisional list of jurors. The application of this “Form 7” standard is not a statutory requirement but an administrative arrangement which has been in place for many years. Potential jurors who

satisfy the “Form 7” standard are identified by the Commissioner of Registration as follows:

- (i) In filling out the application form for a Hong Kong identity card, applicants are required to tick either “*Sec. and below*” or “*Matric. and above*” in the box marked “*Education Level*” in the form. Neither the form nor its associated guidance notes offer any explanation as to what is meant by these terms, and applicants are not asked to provide proof of the claimed education level. Those who have entered “*Matric. and above*” are marked as potential jurors and their details are passed to the Registrar for inclusion in the list; those who have marked “*Sec. and below*” are not. One consequence of that is that a student who has achieved high grades in HKCEE English or Chinese but leaves school at the end of Form 6 will be excluded from jury service while, on the other hand, a student who has qualified for a mathematics place at university with only limited linguistic skills will be included.
- (ii) In addition, the Commissioner writes annually to the eight local universities and, since October 2006, the three other local tertiary education institutions (the Hong Kong Academy of Performing Arts, the Hong Kong Institute of Education and the Open University of Hong Kong) for lists of their graduates. If not already included, graduates on the lists provided will be added by the Commissioner to the pool of potential jurors.

5.45 We noted in chapter 1 that section 4A(1)(a) of the Jury Ordinance empowers the Registrar of the High Court or the Commissioner of Registration to require any person to supply them with the name and identity card number of any person who has “*obtained a grade of pass*” in “*an English language examination or a Chinese language examination or part of such examination as may be so specified*”.⁹ Section 4A(4)(a) defines an English language examination to mean “*an examination of English language or an examination conducted in the English language*”. Section 4A(4)(b) provides a similar definition in respect of a Chinese language examination. The effect appears to be that any person who has passed an examination in *any* subject (not just language), conducted in either English or Chinese, at *any* level could be treated as a potential juror. As we have noted, however, in practice the Registrar includes on the provisional list of jurors only those who have “attained” (ie at least started) Form 7 or its equivalent.

⁹ In addition, under section 4A(1)(b), the Registrar or the Commissioner may require any person to provide such information as they consider necessary to enable them to determine whether any person has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the relevant proceedings.

The new education system

5.46 We note that a new academic structure in publicly funded schools was implemented in September 2009. Under the new system, three years in lower secondary school (the current Form One to Form Three) will be followed by a further three years in senior secondary school (currently Form Four to Form Six, to be described under the new scheme as Secondary Four to Secondary Six). The current two public examinations, the HKCEE and the HKALE, will be replaced by a single public examination which will lead to the Hong Kong Diploma of Secondary Education (HKDSE) and be taken at the end of Secondary Six (what is now Form Six). The new qualification will provide students with a common qualification giving access to study in the eight Hong Kong universities funded by the Universities Grants Committee.

5.47 The new senior secondary curriculum and assessment is designed so that standards at the higher levels will be comparable to the existing HKALE and the standards achieved by students awarded good grades will be internationally recognised in the same way as those under the existing arrangements.

5.48 There will be no university entrance examination apart from the HKDSE examination. Currently, local students applying for entry to undergraduate programmes at any of the eight UGC-funded universities are generally required to obtain an HKALE pass in Advanced Supplementary Level Use of English and Chinese Language & Culture. Under the new system, most universities announced in July 2006 that they would require four core subjects (Chinese Language, English Language, Mathematics and Liberal Studies) and one elective subject which may be specified or unspecified. Individual programmes may have other additional requirements. Admission will be based on merit and the student's capacity to participate fully in the particular programme for which he seeks enrolment.

5.49 A student's performance in the new HKDSE examination will be graded from Level 1 to Level 5, with Level 1 being the lowest. Every student entering Secondary Six will receive a diploma, regardless of his exam performance. The diploma will record the grade achieved in each subject, including "UNCL" where the student does not sit the exam or fails to achieve Level 1 standard.

Our recommendations:

(a) The existing education system

5.50 We begin by stating that we do not think it desirable that the existing educational standards required for jury service should be lowered. We realise that there is something of a mismatch between the reference in section 4(1)(c) of the Jury Ordinance to "*sufficient knowledge of the language*" and the longstanding administrative practice of requiring attainment of a general educational level (Form 7), rather than a specific language qualification. We explained earlier that the application of the Form 7

requirement was originally intended as a means of ensuring an adequate level of English language competence, but it would also have resulted in a jury pool whose members could be expected to have a higher level of comprehension than if no such general educational level were applied. The view of members of the Hong Kong judiciary who have conducted jury trials both in Hong Kong and overseas is that jurors here appear to have a higher level of understanding of the issues before them and that this is highly beneficial to the administration of criminal justice.

5.51 The increasing complexity of the directions which the trial judge is required to give to the jury (quite apart from the complexity of the evidence itself) make it more important than ever that jurors should have the requisite powers of comprehension. A recent study of juries in England found that, while between 49% and 69% of jurors thought they were able to understand the judge's oral directions, in fact only 31% fully understood the directions in terms used by the judge.¹⁰ We noted in our consultation paper that removing or lowering the education requirement would have the advantage of widening the jury pool and would include more members of the community in the administration of justice.¹¹ We considered but rejected this option, instead recommending the retention of the existing requirement that only those who have attained an educational standard of Form 7 or its equivalent should be included in the jury list. The majority of those who commented on this aspect of our proposals (including the Law Society and the Masters of the High Court and District Court) agreed that the existing educational standard should be retained.

5.52 We consider that what is at present an administrative practice should be given a statutory basis and that a requirement for attainment of Form 7 or an equivalent general educational standard replace the existing reference in section 4(1)(c) to knowledge of the language in which the proceedings are to be conducted. Section 4(2) would continue to allow the court or the coroner to discharge any person summoned to serve as a juror who had satisfied the general educational requirement but "*who is unable to satisfy the court or the coroner that the person's knowledge of the language in which the proceedings are to be conducted is sufficient to enable the person to understand the proceedings.*"

¹⁰ "Are Juries Fair?", Cheryl Thomas, UK Ministry of Justice Research Series 1/10, February 2010, at pages 36 to 37 (see <http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf>).

¹¹ As at March 2009, out of a total population of 6,899,700, there were 4,722,300 persons aged 21 to 65, amounting to 68.4% of the total population. Of those with higher educational attainment, 5.1% of the total population had attained the level of sixth form education, 7.2% of the total population had attained post-secondary (non-degree) level and 15.0% of the total population had attained post-secondary (degree) level. "Attained" in this context means the highest level of education attained by an individual in an educational institution *regardless of whether he completed the course*. Source: Quarterly Report of the General Household Survey, January – March 2009, compiled by the Census & Statistics Department.

(b) The new education system

5.53 The introduction of the new academic structure means that the Form 7 syllabus will no longer be offered from 2012. We therefore recommended in our consultation paper that, while the existing administrative practice of requiring a potential juror to have attained an education standard of Form 7 or its equivalent should be stipulated in the legislation, this should be supplemented in 2012 by an alternative requirement that a potential juror have completed Secondary Six and achieved Level 3 in both English and Chinese languages in the HKDSE¹² or the equivalent.

5.54 We have been advised by the Education Bureau that there is no direct correspondence between grades in the old system and levels in the new system, as the two systems are different.¹³ In developing the level descriptors, however, levels 4 and 5 made reference to grades A to D of the HKALE.

5.55 We have reconsidered this aspect of our recommendations and concluded that it would be inconsistent to propose that once the new academic structure is in place jurors be required to have passed a language exam to a prescribed level, while no similar requirement is proposed under the old academic structure. We have accordingly revised our original recommendation and now propose that under the new academic structure persons should be included in the jury pool if they have completed Secondary Six, or an equivalent level of education. Just as with the Form 7 requirement under the existing education system, there should be no requirement for a specific language examination qualification.

(c) Alternative educational qualifications in Hong Kong

5.56 As we explained at paragraph 5.43, private schools in Hong Kong may offer a curriculum which differs from that provided in publicly funded schools. Curricula provided at international schools in Hong Kong include American, Australian, British, Canadian, French and German. All of these are taught to the requisite level for college/university entrance in the respective countries. The International Baccalaureate (IB) is also available and, as at November 2009, 12 schools in Hong Kong offered one or more of the IB programmes.¹⁴ The IB diploma is a two year educational programme for students aged 16 to 19, taught in English, French or Spanish. Diploma students must complete assessments in six subjects and satisfy three “core requirements”: an “extended essay”; the “theory of knowledge” course; and the “creativity, action, service” component. The six subjects must include a second language, and three or four of the subjects must be taken at “Higher

¹² The Heads of Universities Committee issued a press release on 18 May 2005, stating: “We expect that the language standards of university entrants will be comparable to the current entrance requirements, which is likely to be Level 3 in the proposed 5 Level system of the new Hong Kong Diploma of Secondary Education.”

¹³ Email of 13 November 2009 from the Education Bureau to the Secretary of the Law Reform Commission.

¹⁴ See <http://en.wikipedia.org/wiki/Category:International_Baccalaureate_schools_in_Hong_Kong>

level”, with the rest at “Standard level”.¹⁵ Rather than attempt the full diploma qualification, it is possible for students to register for one or more individual IB subjects without having to satisfy the core requirements. IB certificates are issued to indicate completion of diploma courses and exams for non-diploma students.¹⁶

5.57 A person who has successfully completed one of the international secondary curricula offered in Hong Kong could reasonably be supposed to have comprehension and linguistic abilities equivalent to a student taking the local curriculum. Given the growing number of international schools in Hong Kong, and the increasing availability of the IB, we think it sensible to provide recognition of appropriate international educational standards in the revised legislative framework for jury qualification. It would be impractical to seek to set out in legislative form an exhaustive list of those standards and in our view this should be left to the Registrar of the High Court to determine on a case by case basis.

(d) Alternative educational qualifications overseas

5.58 The question of whether persons who have been schooled overseas are qualified for inclusion on the jury list may be difficult to determine. Where the curriculum is one offered in schools in Hong Kong (such as the American, Australian or UK curriculum), an overseas student’s qualification should obviously be recognised. Where, however, the curriculum is unknown in Hong Kong, it may be more difficult to determine whether or not it provides an equivalent standard to Form 7 or Secondary 6. In our view, the determination in each case should be left to the Registrar of the High Court

(e) The application of the scheme

5.59 To implement the proposals set out above, our intention is that section 4 of the Jury Ordinance (Cap 3) should be amended to replace subsection (1)(c)’s reference to language with a requirement that the prospective juror have attained a specified level of education. We envisage that the legislation would provide that the education standard would be satisfied by a person who had completed: (a) Form 7; (b) Secondary Six; (c) the IB Diploma; or (d) such other secondary education as the Registrar of the High Court considers equivalent.

5.60 We explained at paragraph 5.44 above that the current application form for a Hong Kong identity card requires the applicant to indicate his educational level: either “secondary and below” or “matriculated and above”. Those who have ticked the “matriculated or above” box are added to the provisional list of jurors. While we are anxious not to add needless complexity to the system, if the existing administrative criteria for determining eligibility for jury service are put on a statutory footing along the lines proposed in the preceding paragraph, we think it will be necessary to

¹⁵ See <<http://www.ibo.org/diploma/index.cfm>>

¹⁶ See <http://en.wikipedia.org/wiki/International_Baccalaureate_Diploma_Programme>

reflect that fact in the identity card application process by requiring applicants to indicate which secondary education standard they have satisfied.

5.61 There is one further practical point. We noted at paragraph 5.44 that it is the Commissioner of Registration's practice to write annually to the eight local universities and, since October 2006, the three other local tertiary education institutions (the Hong Kong Academy of Performing Arts, the Hong Kong Institute of Education and the Open University of Hong Kong) for lists of their graduates. If not already included, graduates on the lists provided will be added by the Commissioner to the pool of potential jurors. The reason for seeking a list of graduates (rather than entrants) is because section 5(1)(i) of the Jury Ordinance (Cap 3) currently provides that "*full time students of any school, college, university, polytechnic, technical institute, industrial training centre or other educational (including vocational education) institution*" shall be exempt from service as jurors. Except for those who have decided to continue on to post-graduate study, most students will no longer be exempt from service as jurors upon graduation. This explains why the Commissioner's annual request to the universities and the tertiary education institutions is for lists of their graduates rather than lists of persons admitted to their normal full-time courses leading to a degree. We recommend later in this chapter, however, that the existing exemption from jury service for full-time students should be abolished. If that proposal is implemented, it would make more sense in future for the Commissioner to request lists of persons admitted as students to the universities and other tertiary education institutions, and we so recommend.

Recommendation 4

We recommend that:

- (1) Section 4(1)(c) of the Jury Ordinance (Cap 3) and the existing administrative practice of requiring a potential juror to have attained an education standard of Form 7 (being the minimum entrance requirement for entry to a university in Hong Kong), or an equivalent standard, should be replaced with a statutory requirement that the prospective juror have completed: (a) Form 7; (b) Secondary Six; (c) the IB Diploma; or (d) such other secondary education as the Registrar of the High Court considers equivalent.**
- (2) If our proposal is adopted to abolish the existing exemption from jury service for full-time students, the Commissioner of Registration should in future consider requesting annually from Hong Kong's universities and tertiary education institutions lists of persons admitted as students, rather than lists of graduates.**

5.62 We note that it is not uncommon for prospective jurors to claim excusal on the grounds of their inadequacy in English, and we have concerns that such claims could be subject to abuse. We therefore propose that the court should make clear to a prospective juror who claims inadequacy in English that he will nevertheless remain liable for future service as a juror in trials conducted in Chinese. We suggest that the juror should be advised along the following lines:

"You are here because you are qualified on paper to serve as a juror. If you claim inadequacy in English to serve in this trial, a note will be sent about you to the Registrar to ensure that your name will be put forward in future for service as a juror in a trial conducted in Chinese."

We recommend that the Judiciary should consider adopting an internal guideline in these terms.

5.63 We have also considered whether guidelines should be provided for the exercise of the Registrar's discretion to excuse a person from jury service. Section 28(2) of the Jury Ordinance (Cap 3) confers power on the Registrar to excuse a person from serving as a juror for *"good reason."* In our view, discretion should be left to the Registrar as to whether to excuse a person in order to preserve flexibility and we do not consider it necessary to establish guidelines.

"The person is of sound mind and not afflicted by blindness, deafness or other disability preventing the person from serving as a juror"

"... of sound mind ... "

5.64 We do not think it appropriate for persons with mental impairment or mental handicap to serve on a jury for the obvious reason that they would have difficulty properly performing their functions as jurors. There was no contrary view expressed in the responses to our consultation paper.

5.65 We understand that there is no way of knowing whether a juror is of unsound mind as there is no source of information for this unless the person summoned for jury service claims exemption on this ground and provides supporting documentation. However, during the empanelling process, both the Registrar and the trial judge would have the discretion to exclude those enlisted jurors whom they perceive to be mentally unsound. The established practice is for the trial judge in the empanelling procedure to invite the prosecution or defence to ask any juror to stand down if the juror's unsoundness of mind becomes apparent on his taking the oath or affirmation. We think this is an effective way to exclude the mentally impaired from jury service.

"... not afflicted by blindness, deafness ..."

5.66 We pointed out in the consultation paper that it could be argued that the underlying principle that a jury should be representative of the community which it serves would suggest that those suffering from disabilities should be included in the jury pool if that were viable from a practical point of view. There is force in this argument, but at the same time it would not be right to include in the jury pool persons who, by reason of their disability, were unable to participate fully in the jury's work. Among other tasks, jurors must assess the credibility of the witnesses who testify before them and in doing so they will need to consider the demeanour of each witness. Moreover, the jury will have to examine and consider all exhibits produced at the trial, including maps, diagrams, sketches and physical objects, etc, apart from documents. At the close of the defence case, the jury retires to consider its verdict and it is essential that all jurors are capable of taking full part in the deliberations on the evidence, which may include visual or audio elements. The significance of this issue has also been highlighted in cases which we have discussed in Chapters 3 and 4 of this report.

5.67 In the end, enhancing the representativeness of the jury pool must give way to ensuring that a defendant receives a fair trial before a jury comprised of persons who can fully discharge their functions as jurors. We therefore took the provisional view in our consultation paper that the existing provisions should be retained which exclude blind and deaf persons from jury service.

5.68 In its 2006 report on blind and deaf jurors, the New South Wales Law Reform Commission recommended that blindness or deafness should not automatically preclude a person from jury service:

"At the heart of this reference is the question whether blind or deaf people can perform the functions of a juror. The Commission finds that, so long as all appropriate and reasonable adjustments are made available, neither blindness nor deafness is inherently inimical to jury service. It may be that, in individual cases, it is inappropriate to empanel a blind or deaf juror. A blanket prohibition however, as currently exists, is excessive and unnecessary. It mandates the exclusion of a class of citizens from participating in one of the rights and responsibilities of citizenship purely on the basis of a disability, and precludes any enquiry as to the actual ability of a member of that class to effectively perform in that role. This, in the Commission's view, is unacceptable. While the Commission understands that practical difficulties may at times hamper implementation (eg unavailability of interpreters), this is a separate matter that does not have any bearing on the principles at stake."¹⁷

¹⁷

Blind or Deaf Jurors, New South Wales Law Reform Commission, report no 114 (2006), at para 4.1.

5.69 A number of those who responded to the consultation paper expressed concern that the existing wording of section 4(1)(a) of the Jury Ordinance (Cap 3) appeared to automatically disqualify blind and deaf persons, regardless of their degree of disability. It was pointed out that vision and hearing impairment covered a range of different degrees of sensory disability and, particularly with the increasing availability of auxiliary aids, it might no longer be appropriate to apply a blanket exclusion from jury service.

5.70 We share the view that, in principle, jury service should be inclusive, so that citizens with disabilities, who are otherwise qualified, should be allowed to serve as jurors. However, as there are different kinds and various degrees of disabilities, in practical terms, the establishment may not at the moment be able to accommodate and assist all who may require assistance. Nevertheless, we believe improvements should be made in order to give effect to this important objective and we propose in Recommendation 5 that the wording of section 4(1)(a) of the Jury Ordinance should be revised to make clear that blindness or deafness should only exclude a person from jury service where it prevents him from fulfilling his duty as a juror.

"... other disability preventing the person from serving as a juror ..."

5.71 As we pointed out in our consultation paper, the key consideration here is that the disability must be of such a nature or degree that it would mean that the person could not fulfil his functions as a juror. While the nature of some disabilities may render jury service impossible, others may not. Once more, we would stress the desirability of enhancing the representativeness of the jury pool. If the inclusion of disabled persons in that pool does not adversely impact on the accused's right to a fair trial, then there are strong grounds for such inclusion. We do not think it would be helpful to attempt to provide an exhaustive list of disabilities in section 4 of the Jury Ordinance (Cap 3). We therefore proposed in the consultation paper that the present approach should be maintained, which is to leave a broad discretion to the Registrar to discharge any person summoned as a juror if that person has applied for exemption on the ground of disability.

5.72 Turning to consideration of specific disabilities, while it would not be practicable to require a person who is severely physically handicapped, such as someone suffering from paralysis, to take up juror duty, we do not think that those with less severe mobility impairment should be excluded from the jury list. What prevents persons confined to wheelchairs from undertaking jury service is not an inability to fulfil the functions of a juror but the physical limitations of the court premises for jury hearings (ie the High Court Building and coroners' courts). Accordingly, we suggested in our consultation paper (and we maintain our view) that the Registrar of the High Court should consider appropriate modifications to those parts of the High Court Building and coroners' courts which are used by jurors to render them accessible to persons in wheelchairs. We received general support for this recommendation among those who responded to the consultation paper.

5.73 We suggested in our consultation paper that speech impairment should not present a problem provided a potential juror with that impairment could communicate his views and questions clearly. In some circumstances, impairment in reading and writing (such as dyslexia) may prevent a person serving as a juror; in others, it may not.

5.74 We have considered once more section 4(1)(a) of the Jury Ordinance (Cap 3) which provides that a person is liable to serve as a juror if he is "*of sound mind and not afflicted by blindness, deafness or other disability preventing the person from serving as a juror*". Taking account of the responses made to our consultation paper, and bearing in mind the general desirability of an inclusive jury pool, we consider that the existing provision should be amended to make clear that disability, of whatever kind, should only preclude a person from jury service if it would prevent him from fulfilling the obligations of a juror. It should therefore only exclude those whose disability would prevent them from serving as jurors, rather than exclude generally anyone who is deaf, blind or suffering from other disabilities. We have revised our recommendation accordingly. Clearly, if persons who are blind or deaf are to serve as jurors there will need to be special facilities provided. It should in our view be a matter for the Administration to decide the proper allocation of resources, taking account of the number of persons involved, and it is not our intention that there should be an obligation to provide facilities in every court and jury room, regardless of cost and likely usage.

Recommendation 5

We recommend that:

- (1) Section 4(1)(a) of the Jury Ordinance (Cap 3) concerning disabilities in relation to jury service should be amended to make clear that blindness or deafness should only exclude a person from jury service where it prevents him from fulfilling his duty as a juror. We therefore recommend that section 4(1)(a) should be amended to read:**

"(a) the person is of sound mind and not afflicted by:

- (i) blindness, or***
- (ii) deafness, or***
- (iii) other disability***

preventing the person from serving as a juror; and".

- (2) The Registrar of the High Court should consider making such changes to the physical configuration of the High Court Building and coroners' courts as would facilitate jury service by those confined to wheelchairs.**

Form of notice of jury service

5.75 We suggested in our consultation paper that the notice of jury service should be amended so as to include a list of exemptions and a list of disqualifications in line with our recommendations. The intention was that if the person served with the notice considered that he fell within one of the exempt or disqualified categories of persons, he should tick the appropriate box and return the notice to the Registrar of the High Court, along with supporting documentation, for the Registrar to verify the truthfulness of the proposed ground for exemption. We have reconsidered this aspect of our proposals and do not now think that a list of the categories of persons exempt from jury service should be included on the form. Instead, we propose that the form should set out the principal justifications for excusal from, or deferral of, jury service (as set out at Recommendation 7 below) and provide information on how to apply for excusal or deferral.

5.76 We have also revised Recommendation 6 to require a person served with a notice of jury service to confirm that he has no previous convictions, is not awaiting trial for an indictable offence and is not remanded in custody pending trial for any offence.

Recommendation 6

We recommend that the form of notice of jury service should be amended to include:

- (a) the principal justifications for excusal from, or deferral of, jury service; and**
- (b) a box to be marked by the person served with the notice confirming that he has no criminal conviction (and a spent conviction under the Rehabilitation of Offenders Ordinance (Cap 297) is not regarded as a criminal conviction for these purposes), is not awaiting trial for an indictable offence, and is not remanded in custody pending trial for any offence.**

The completed form should be returned to the Registrar of the High Court for verification.

Exemptions from jury service under section 5 of the Jury Ordinance

5.77 The existing list of persons exempted from jury service can be found in Annex 2 to this report. We suggested in our consultation paper that the justifications for the various exemptions under section 5 of the Jury Ordinance might be categorised as follows:

- (a) Where substantial inconvenience to the public may result. This might apply to doctors and other professionals whose services are needed for the welfare and health of the public without the interruptions which jury service would cause.
- (b) Where undue hardship or extreme inconvenience may be caused to the person. This might apply to full time students of any school, or post-secondary or tertiary education institution including any technical institute, industrial training centre or other vocational training institution.
- (c) Where the person is involved in the administration of justice, so that unfairness may result or may be perceived to result because:
 - (i) he can deduce that the accused has a criminal record;
 - (ii) he is biased either against the prosecution or defence;
 - (iii) he is by reason of his status or position likely to unduly influence his fellow jurymen; and
 - (iv) he may not comply with the judge's direction as to the law because of his own knowledge or understanding of it and may influence his fellow jurymen to do the same.
- (d) Those for whom jury service is incompatible with their tenets or beliefs.
- (e) Those who are conferred consular privileges and immunities such as consuls, vice-consuls, and officers of equivalent status of governments of foreign states, and the spouses and dependent children of such persons.
- (f) Those officers whose relationship with the Government of the Hong Kong Special Administrative Region are governed by the national laws listed in Annex III of the Basic Law and promulgated in the Promulgation of National Laws (no 2) 1997, namely, officers employed on full pay in the naval, military or air services as members of the Hong Kong Garrison; and their spouses.

5.78 We noted the view of Lord Justice Auld in his 2001 *Review of Criminal Courts of England and Wales* ("the Auld report") that there should be no categories of person who are exempt as of right from jury service. Instead, persons previously granted automatic exemption should be dealt with (i) by way of a discretionary exemption (upon application to be decided by the court), or (ii) by way of postponement of the period that the applicant is required to serve. We also note that these recommendations on jury service were subsequently adopted and enacted in the Criminal Justice Act 2003 in England and Wales.

5.79 We acknowledge the force of the arguments put forward in support of the Auld report's recommendation to abolish automatic exemptions from jury service, and accept as persuasive the fact that the legal position in England and Wales now reflects the Auld report's view. Nevertheless, as pointed out in our consultation paper, we consider that practical considerations outweigh the theoretical merits of the Auld report's approach. If the reality is that certain categories of persons would invariably be granted a discretionary exemption from jury service on application to the court, there would seem little point in making them nominally subject to jury service at all. The need to consider individual applications for exemption, even in straightforward cases where the granting of an exemption is not in doubt, would impose an additional burden on the court's time with little concomitant benefit. We therefore maintain our view that if certain categories of persons would invariably be entitled to exemption from jury service, they should be statutorily exempted. A member of an exempt category of persons should be given the right to apply to be included in the list of jurors if he so wishes, and it would be a matter for the trial judge to decide whether to include him in a particular trial. As explained in our consultation paper, we are reinforced in our conclusion by the fact that, in contrast to the approach in England and Wales, many common law jurisdictions retain automatic exemptions over some categories of persons.¹⁸

5.80 We noted in our consultation paper that the Jury Ordinance (Cap 3) uses the term "exemption", without differentiating between different types of exemption. We suggested that different terms should be adopted in different situations so that the reasons for the individual's exemption or exclusion might be more readily understood, and we proposed in the consultation paper that the following terminology should be used:

¹⁸ For example, California exempts public officers in the executive, legislative, or judicial branches of the government, who are actively engaged in the performance of official duties, and also persons actively engaged in professional occupations, such as doctors and firefighters. In Queensland, the Governor, members of Parliament, local government mayors, or other councillors, a person who is or has been a judge or magistrate, a lawyer actually engaged in legal work, a person who is or has been a police officer, a detention centre employee, or a corrective services officer, are not eligible for jury service. Similarly, in Ontario, every member of the Privy Council of Canada or the Executive Council of Ontario, every member of the Senate, the House of Commons of Canada or the Assembly, every judge and every justice of the peace, every barrister and solicitor and every student-at-law, every legally qualified medical practitioner and veterinary surgeon who is actively engaged in practice and every coroner, every person engaged in the enforcement of law, including sheriffs, wardens of any penitentiary, superintendents, jailers or keepers of prisons, correctional institutions or lockups, sheriff's officers, police officers, firefighters and officers of a court of justice, etc. are ineligible to serve as jurors.

- (i) *"ineligible for jury service"* when a person is not qualified to be a juror because of age, unsoundness of mind, or illiteracy, etc;
- (ii) *"exempt"* for those categories of persons whose services are much needed and in respect of whom there would be substantial inconvenience to the public if they were required to serve on a jury;
- (iii) *"excluded from jury service"* when a person is excluded on a point of principle; and
- (iv) *"excused"* when an eligible juror is excused from serving on a particular occasion upon application being made to the Registrar or the trial judge, but his service would be required for future cases.

5.81 Some respondents questioned the appropriateness of some of the categorisations of persons proposed in our consultation paper. For instance, the basis for "exemption" was said to be that these were persons *"whose services are much needed and in respect of whom there would be substantial inconvenience to the public if they were required to serve on a jury."* It was at least moot whether that was the appropriate categorisation (rather than, say, "exclusion" *"on a point of principle"*) for members of the Legislative and Executive Councils, even though there might be no dispute that they should not be liable for jury service. Some thought that the term "exemption" in some cases seemed to be more a matter of privilege or, in the case of consular officials, immunity, rather than the importance of their functions to the community.

5.82 We have reconsidered our original recommendation in the light of the responses received and have concluded that no practical purpose would be served by seeking to classify the various categories of persons excluded from the jury pool. The practical consequences are the same regardless of the classification under which a particular category is placed: the members of that category are not entitled to, or liable for, jury service. The disadvantage of creating these additional classifications is that it would become necessary to distinguish one category from another, a process which is not without difficulty and potential controversy. In the circumstances, we have decided not to pursue our original recommendation. Instead, we propose to maintain the existing terminology used in the Jury Ordinance and to use the term "exempt" from jury service to apply to any category of persons who, though qualified to serve, will not be included in the jury list.

5.83 In our consultation paper, we also suggested that the guiding principles for the consideration of applications for exemption, exclusion, or excusal from, or deferral of, jury service should be spelt out in the Jury Ordinance to assist the Registrar or the trial judge in determining whether or not to grant an exemption, exclusion, deferral or excusal. The justifications for exemption, exclusion, deferral or excusal should include:

- (i) where substantial inconvenience to the public may result;
- (ii) where undue hardship or extreme inconvenience may be caused to the person;
- (iii) where the person is involved in the administration of justice so that bias may result or may be perceived to result; and
- (iv) where jury service is incompatible with the person's tenets or beliefs.

5.84 It was pointed out to us that the categories of persons who are currently exempt from jury service are set out in section 5 of the Jury Ordinance. It is our intention that the categories of persons who will be exempt from jury service under our proposals should continue to be statutorily defined. It will be a question of fact in each case whether or not an individual falls within one of these categories. There is therefore no question of the Registrar or the trial judge being required (or, indeed, entitled) to consider whether or not a particular exemption is "*justified*" on the grounds set out in the preceding paragraph. That will already have been decided by the legislature: the role of the Registrar or the trial judge in respect of exemptions will be solely to satisfy himself that the particular individual falls within the category claimed. If he is so satisfied, then the individual must be exempt. It is only when he exercises his discretion in respect of applications for excusal and deferral that the Registrar or the trial judge will need to consider the justifications set out above.

5.85 One respondent suggested that the Registrar or trial judge should be allowed a wider discretion to excuse persons from jury service on the basis of the merits of individual cases. We agree with this suggestion, and we have reflected this in Recommendation 7(e).

5.86 We originally recommended that one of the justifications for excusal from jury service should be "*that undue hardship or extreme inconvenience may be caused to the person*". It has been suggested to us (a) that "extreme" inconvenience is too high a threshold and (b) that the hardship or inconvenience should not be restricted to the person himself but should include, for instance, his employer.

5.87 The first point is more straightforward and one alternative would be to require "undue" inconvenience, in line with the "undue hardship" already proposed in Recommendation 7. That would make clear that the inconvenience must be significant and disproportionate to the benefit to the community of enforcing jury service, while leaving the trial judge or Registrar with a level of discretion.

5.88 On the second point, extending the hardship or inconvenience to other persons would clearly make sense where, for instance, the prospective juror was employed in a household to care for an elderly person. However, a

general extension to any employer would run the risk of inviting abuse: less public-spirited employers might routinely declare that any employee's absence for jury service would cause them undue hardship or inconvenience.

5.89 We have reviewed the legislation in a number of other jurisdictions and have found a variety of approaches adopted. We have concluded that a formulation which would meet the concerns raised and the difficulties referred to above would be to provide that the justifications for excusal or deferral should include the fact that "*undue hardship or undue inconvenience*" may be caused to the person "*or any person under his care or supervision.*" In addition, we think that guidelines should be drawn up for the determination of applications for excusal or deferral, including (as proposed by the Law Reform Commission of Western Australia) specific examples of applications that should ordinarily be granted and examples of applications that should ordinarily be rejected.¹⁹ Taking account of equivalent overseas provisions, acceptable grounds for excusal or deferral might include any or all of the following:

- state of health
- disability or incapacity
- extreme distance or excessive inconvenience of travel
- special circumstances arising out of the nature or special commitments of a person's occupation or business
- family commitments, or other personal circumstances
- a personal obligation to provide actual and necessary care to another, where no comparable substitute care is available or practical.

Recommendation 7

We recommend that the guiding principles for the consideration of applications for excusal from, or deferral of, jury service should be spelt out in the Jury Ordinance to assist the Registrar or the trial judge in determining whether or not to grant such applications. The justifications for excusal or deferral should include:

- (a) that substantial inconvenience to the public may result;**
- (b) that undue hardship or undue inconvenience may be caused to the person or any person under his care or supervision;**
- (c) that the person is involved in the administration of justice so that bias may result or may be perceived to result;**

¹⁹

See Law Reform Commission of Western Australia, Discussion Paper, *Selection, Eligibility and Exemption of Jurors* (September 2009).

(d) that jury service is incompatible with the person's tenets or beliefs; or

(e) that it is in the interests of justice to do so.

We also recommend that guidelines should be drawn up for the determination of applications for excusal or deferral, including specific examples of applications that should ordinarily be granted and examples of applications that should ordinarily be rejected.

Our proposed categories for exemption

5.90 As we explained above, section 5 of the Jury Ordinance (Cap 3) sets out the categories of persons who are currently exempt from jury service. We proposed in our consultation paper that, rather than use the single term "exempt" to cover all categories of persons who are not liable to jury service, different titles ("*exempt*", "*excluded*" and "*immune*") should be used for different categories of persons who are not required or entitled to serve on a jury. As explained at paragraph 5.82, on further reflection we have decided to maintain the existing terminology in the Jury Ordinance and to use the term "exempt" from jury service to apply to any category of persons who, though qualified to serve, will not be included in the jury list. In what follows, we accordingly use the term "exempt" throughout.

5.91 In our consultation paper, we reviewed the various categories of persons in section 5 of the Jury Ordinance who are currently exempt from jury service and presented our proposals in respect of each of them. We set out below the various section 5 categories and our final conclusions in the light of the responses to our consultation paper. In doing so, we adopt the numbering applied in section 5.

"(a) members of the Executive or Legislative Council"

5.92 The view we put forward in our consultation paper was that there should not be any change to their exemption from jury service. We argued that members of the Executive or Legislative Council were important elements in the governance of Hong Kong and that it would not be in the community's best interests if jury service were to prevent these persons fulfilling their constitutional role.²⁰ No respondent suggested that members of the Executive or Legislative Council should be liable for jury service and we maintain our view that Executive and Legislative Council members should be **exempt** from jury service.

²⁰ As at August 2009, there were 29 members of the Executive Council (15 Official members and 14 Non-official members) and 60 members of the Legislative Council (Source: HKSAR Government website).

"(ab) justices of the peace"

5.93 In our consultation paper, we said that while justices of the peace ("JPs") fulfil important public duties, such as visiting custodial institutions, taking and receiving declarations and performing other functions under the Oaths and Declarations Ordinance, we did not think that these were exercised so frequently as to justify a blanket exemption of this category from jury service.²¹ Where jury service in a particular instance would prevent a JP from fulfilling a commitment required of him, then the court would no doubt look sympathetically on his application to be excused from jury service.

5.94 Given the independent role that JPs play in visiting custodial institutions and the like, we did not think there could be reasonable grounds for any perception of bias if JPs were made liable for jury service. Accordingly, our provisional view was that JPs should not be exempt but should instead be able to apply to be *excused* from jury service in a particular case.

5.95 Only two respondents specifically opposed our view. One respondent (the Justices of the Peace Secretariat) argued that continued exclusion of JPs from the jury list was necessary to preserve JPs' perceived "independence":

"Given that the Subcommittee recommends that officers of the Correctional Services Department (CSD) be exempt/excluded from jury service (because they are closely related with the 'enforcement' of criminal law), it seems untenable not to accord the same treatment to JPs who act as a safeguard against abuse in the CSD's enforcement system."

5.96 This argument is singularly unconvincing. If the "independent" execution of a JP's duties requires that he be unconnected with the criminal justice system, then the JP Secretariat's argument raises a question mark about the appropriateness of ever appointing any solicitor or barrister as a JP, which is clearly absurd.

5.97 It was also suggested to us that JPs were already obliged to carry out substantive public duties and that it would be better to share out public duties among qualified members of the public, rather than overloading a particular sector. Again, we do not find this argument persuasive, nor do those members of the Commission who themselves serve as JPs. The duties cannot be said to be onerous and do not justify a blanket exclusion from jury service. With the exception of the JP Secretariat and a member of the public, all those who specifically commented on this aspect of the consultation paper (including the Law Society and the Legal Policy Division of the Department of Justice) supported our proposal. We accordingly maintain our view that JPs should **not** be automatically exempt from jury service.

²¹ As at August 2009, there were 1,416 JPs in Hong Kong (Source: email from the JP Secretariat of 26 August 2009).

- "(b) any public officer who is –**
(i) a judge, deputy judge, District Judge, deputy District Judge, Registrar, Senior Deputy Registrar, Deputy Registrar, Assistant Registrar, coroner or magistrate"

5.98 One of the factors for granting exemption from jury service is that the individual is involved in the administration of justice and that there may therefore be a perception of bias. There are particular issues where a judicial officer is concerned and in our consultation paper we agreed with the conclusion of the Parliamentary Law Reform Committee in Victoria in their final report on jury service in Victoria that persons who are judges or magistrates should not serve on juries.²² The Committee reached this view because, firstly, of the need to preserve the lay character of jury service; secondly, the likelihood that a judicial officer would have special knowledge which should not enter into a jury's deliberations; and, thirdly, the likelihood that a judicial officer would have undue influence on the jury's deliberations in the sense that the lay jurors could be expected to defer to that person's view of the case.²³ We explained in the consultation paper that there was in addition the concern that a judicial officer serving as a juror might be known to the judge presiding at the trial or the lawyers involved in the case, so that his serving as a juror might risk a perception of favour or prejudice to, or might embarrass, one party or the other. This is of particular relevance to Hong Kong, where the legal profession is of a relatively small size and lawyers are likely to know one another. For these reasons, it was our view that this category should be excluded from jury service for life.

5.99 There was no opposition expressed by respondents to the consultation paper to the idea that serving judges should not be included in the jury pool.²⁴ However, a number of respondents doubted that there was adequate justification for exempting "for life" persons in this category, particularly those who were at the rank of Registrar or below. It was pointed out that, unless they had also served as a judge, such persons would be free to return to private practice and could be excluded, if applicable, on that ground. The following points were also made to us:

- As the law currently stands in Hong Kong, judges are excluded from jury service only so long as they are in office. It is not proposed to exclude or exempt "for life" any other category associated with the administration of justice (for instance, the Commissioner of Police, the DPP, solicitors and barristers, etc). Such changes as are proposed to the list of exclusions have all been to remove existing restrictions. The sole exception relates to the proposal to extend the existing exclusion for judges while

²² *Inquiry into Jury Service in Victoria*, report of the Parliamentary Law Reform Committee of Victoria (December 1997).

²³ *Inquiry into Jury Service in Victoria*, cited above, Vol 1, at 50.

²⁴ As at October 2009, there were 172 judges, deputy judges, District Judges, Deputy District Judges, Registrars, Senior Deputy Registrars, Deputy Registrars, Assistant Registrars, coroners and magistrates (Source: Judiciary).

they are in office to a lifetime exclusion. That is at odds both with the rest of the proposals and with the trend of reform in other common law jurisdictions.

- As proposed, the lifetime exclusion would have the effect of, for instance, excluding from jury service for life someone who serves a single two and a half year contract as a magistrate, or a barrister who serves once as a temporary judicial officer.
- There has been no suggestion that the existing law has caused any difficulties in practice.

5.100 We have examined the approach adopted on this issue in a number of overseas jurisdictions and found a range of options. In Alberta, Ireland, New South Wales, Prince Edward Island, Queensland, Saskatchewan and Western Australia, judges are ineligible for jury service for life. At the other end of the scale, the Criminal Justice Act 2003 in England and Wales removed all exemptions for judges, who are now eligible for jury service (under the Juries Act 1974, a judge was ineligible for life). In the Australian Capital Territory, British Columbia, Manitoba, New Brunswick, Newfoundland & Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec, South Australia and Yukon only serving judges are excluded from jury service.

5.101 Another approach is to exclude judges while in office and for a period thereafter. In the Northern Territory, Tasmania and Victoria, a former judge or magistrate becomes eligible for jury service 10 years after his or her last judicial appointment. The Law Reform Commission of Western Australia has recently proposed that the existing permanent ineligibility of judges should be changed to a period of five years ineligibility from the date of termination of their last commission as a judicial officer, and this ineligibility should extend to those holding acting or auxiliary judicial commissions. The Commission took the view *“that no occupation should render a person permanently ineligible for jury service and this includes judicial officers.”*²⁵

5.102 Having considered the reservations expressed to us, we accept that a lifetime exclusion for judges is unnecessary and at odds with the overall thrust of our proposals. We maintain, however, that there are particular sensitivities where a former judge serves on a jury, particularly in a small jurisdiction such as Hong Kong. Their presence would affect the lay character of jury service; they would have special knowledge which should not enter into the jury’s deliberations; their presence would likely have undue influence on the jury’s deliberations; and, in view of the relatively small legal circle in Hong Kong, they might be known to the judge presiding at the trial or the lawyers involved in the case. We have considered the various approaches followed in other jurisdictions and have concluded that an appropriate balance would be struck by providing that all judges and judicial officers be excluded for a period of years after they leave office. We therefore recommend that all judges and

²⁵ Law Reform Commission of Western Australia, Discussion Paper, *Selection, Eligibility and Exemption of Jurors* (September 2009), at page 65.

judicial officers in office and within 10 years after the termination of their judicial office be **exempt** from jury service.

- "(b) any public officer who is -**
- (ii) a presiding officer, adjudicator or member of any tribunal established by law;**
 - (iii) an officer or member of the staff of any court or tribunal established by law, if his work is mainly concerned with the day to day administration of the court or tribunal"**

5.103 We expressed the view in our consultation paper that considerations similar to those in category (b)(i) above applied to these two categories. Jury service by such persons might lead to a perception of bias. We therefore considered that these categories should be excluded from jury service.²⁶

5.104 One respondent suggested that the exemption should be limited to full-time appointments and not part-time members. We have duly considered this point but we are concerned that such an approach would be administratively complicated. We therefore consider that our original recommendation with regards to these two categories should be maintained and that they should be **exempt** from jury service.

- "(b) any public officer who is -**
- (iv) a legal officer within the meaning of section 2 of the Legal Officers Ordinance (Cap 87);**
 - (v) serving in the Department of Justice, the Legal Aid Department, the Official Receiver's Office or the Intellectual Property Department"**

5.105 We expressed the view in our consultation paper that considerations similar to those in category (b)(i) above applied to these two categories.²⁷ Jury service by such persons might lead to a perception of bias. We therefore considered that these categories should be excluded from jury service.

²⁶ As at October 2009, there were 18 "presiding officers, adjudicators and members of any tribunal established by law" and 1,080 officers and members of staff whose work was mainly concerned with the day to day administration of a court or tribunal established by law (Source: Judiciary).

²⁷ A legal officer for these purposes means "an officer lawfully performing the functions of any of the officers designated in Schedule 1" to the Legal Officers Ordinance (Cap 87). That schedule refers to officers in the Department of Justice, the Lands Department, the Companies Registry and the Land Registry. As at August 2009, there were 301 legal officers in the Department of Justice, 14 legal officers in the Companies Registry, 36 legal officers in the Lands Department and 17 legal officers in the Land Registry. As at August 2009, there were 787 public officers (other than legal officers) serving in the Department of Justice, 515 in the Legal Aid Department and 260 in the Official Receiver's Office. (Sources: emails from the Companies Registry, Land Registry, Department of Justice, Official Receiver's Office and Legal Aid Department in August 2009, and from the Lands Department in September 2009).

5.106 One respondent thought that that would cast the exemption too widely and suggested that it should be limited to the Department of Justice and the Legal Aid Department. We disagree with this view. As we pointed out in the consultation paper, jury service by a member of these categories of persons may lead to a perception of bias. We maintain our view that these categories should be **exempt** from jury service.

- "(b) any public officer who is -**
(vi) a member of the Hong Kong Police Force, the Immigration Service, the Customs and Excise Service or the Fire Services Department, including a person holding any post specified in the Seventh Schedule to the Fire Services Ordinance (Cap 95);
(vii) an officer of the Correctional Services Department"

5.107 Members of the Hong Kong Police Force, the Immigration Service, and the Customs and Excise Service are generally perceived as part of the prosecution process, while officers of the Correctional Services Department are closely related with the enforcement of the criminal law.²⁸ We took the view in our consultation paper that these persons should be excluded from jury service to avoid a perception of bias. As regards *"a member of the Fire Services Department, including a person holding any post specified in the Seventh Schedule to the Fire Services Ordinance"*, we considered that their services were indispensable to the community and their existing exemption from jury service should therefore not be changed.²⁹

5.108 We received strong support for this recommendation and maintain our view that members of the Hong Kong Police Force, the Immigration Service, the Fire Services Department and the Customs and Excise Service and officers of the Correctional Services Department should be **exempt** from jury service.

- "(b) any public officer who is -**
(viii) a member of the Government Flying Service"

5.109 We noted in our consultation paper that the Government Flying Service provides a range of essential services to the community, including:

²⁸ There were 27,522 disciplined staff and 4,818 civilian staff in the Hong Kong Police Force as at September 2009. As at August 2009, there were 5,032 public officers in the Immigration Service, 4,346 members of the Customs & Excise Service (plus a further 5,398 carrying out duties in that department) and 6,417 public officers in the Correctional Services Department (Sources: emails from the Hong Kong Police Force of September 2009 and from the Customs & Excise Department, the Immigration Department, the Correctional Services Department of August 2009).

²⁹ As at September 2009, there were 9,319 members of the Fire Services Department (8,710 disciplined grades and 609 civilian grades) (Source: email from the Fire Services Department of 14 September 2009).

- support to the Hong Kong Police Force and other law enforcement agencies of Hong Kong in carrying out their law enforcement duties;
- search and rescue and casualty evacuation;
- fire fighting;
- medical services purposes.

Many of these are emergency services, provided by a limited workforce.³⁰ To reduce the Service's available manpower by imposing liability for jury service would impact on the Service's ability to meet its commitments. We therefore considered that this category of persons should continue to be exempt from jury service.

5.110 This view was supported by those responding to the consultation paper and we therefore maintain our view that members of the Government Flying Service should be **exempt** from jury service.

- "(b) any public officer who is -**
- (ix) the Commissioner, Deputy Commissioner or an officer of the Independent Commission Against Corruption;**
 - (x) carrying out duties in the Hong Kong Police Force, the Immigration Department, the Customs and Excise Department, the Fire Services Department, the Correctional Services Department, the Government Flying Service or the Independent Commission Against Corruption"**

5.111 Senior officers in the Police or ICAC and those carrying out duties for the Police, Immigration Department, Customs & Excise Department, Correctional Services Department, and the ICAC are persons closely related with the enforcement of the criminal law and generally perceived as part of the prosecution process. The view we expressed in the consultation paper was that these persons should be excluded from jury service to avoid a perception of bias.

5.112 We considered that those carrying out duties for the Fire Services Department and the Government Flying Service were providing indispensable services to the community and should be exempt from jury service.³¹

³⁰ As at August 2009, there were 222 public officers who were members of the Government Flying Service (Source: email from the Government Flying Service of 31 August 2009).

³¹ As at August 2009, there were 64 persons carrying out duties in the Government Flying Service, 9,319 such persons in the Fire Services Department, 6,564 in the Immigration Service, 5,398 in the Customs & Excise Department and 1,261 in the ICAC (Sources: emails from the Government Flying Service, the Immigration Department, the Customs & Excise Department and the ICAC of August 2009, and the Fire Services Department of September 2009).

5.113 There was strong support for our view and we therefore maintain our original recommendation that all those in these categories should be **exempt** from jury service.

**"(b) any public officer who is -
(xi) serving in a training or apprentice rank"**

5.114 We conceded in our consultation paper that it was possible that jury service might cause undue hardship to a trainee or apprentice but we did not think that that need necessarily always be the case. We did not therefore consider that there should be automatic exemption for persons in this category. We proposed instead that they should be able to apply to be *excused* from jury service on a particular occasion where the circumstances so warranted.

5.115 One respondent suggested that Student Air Traffic Controllers and Air Traffic Flight Services Officers III, being officers at training ranks, should be exempt from jury service as their training programmes (which incorporated both local and overseas training) might last for several years. We have given this issue due consideration but consider that there is insufficient justification for blanket exemption of public officers who are serving in a training or apprentice rank. If an Air Traffic Control trainee wishes to be excused for part or all of the period of his traineeship, the better course would be for him to make an application for excusal or deferral. The same reasoning applies to full-time students of tertiary education. We therefore suggest no change to our original recommendation regarding this category of persons, who should no longer be exempt from jury service.

**"(b) any public officer who is -
(xii) appointed as the principal probation officer, or as a probation officer, under the Probation of Offenders Ordinance (Cap 298);
(xiii) a social worker employed full-time in any reformatory school established under the Reformatory Schools Ordinance (Cap 225), any place of detention appointed under the Juvenile Offenders Ordinance (Cap 226), or any approved institution within the meaning of the Probation of Offenders Ordinance (Cap 298)"**

5.116 These are persons closely connected with the enforcement of the criminal law.³² We expressed the view in the consultation paper that these persons should be excluded from jury service to avoid a perception of bias. We received strong support for our recommendation to exclude these categories on the basis of perception of bias and we therefore recommend that they should be **exempt** from jury service.

³²

As at August 2009, there were 147 Probation Officers and 123 social work staff working in correctional homes (Source: email from the Social Welfare Department of 27 August 2009).

"(c) consuls, vice-consuls, and officers of equivalent status, of governments of foreign states and such salaried functionaries of such governments as are nationals of such governments and are not carrying on business in Hong Kong, and the spouses and dependent children of such persons"

5.117 These are persons who are conferred in Hong Kong the consular privileges and immunities accorded by customary international law and international agreements. We stated in our consultation paper that we did not consider there was a case for imposing jury service on such persons and we considered they should be **exempt** from jury service. We maintain that view.

"(d) barristers-at-law and solicitors in actual practice, and their clerks"

5.118 Considerations similar to those in category (b)(i) above apply. Jury service by a member of this category of persons may lead to a perception of bias.³³ We considered in the consultation paper that this category should be excluded from jury service. We did not think that the same considerations applied in respect of lawyers' clerks, however, and accordingly recommended that they should not be exempt or excluded from jury service.

5.119 We could not come to a conclusion, however, as to whether exemption should be granted (and, if so, the duration of the exemption) to "*barristers and solicitors **not** in actual practice or who may be engaged in other fields, such as law lecturers and professors*". We sought views in particular on this issue.

5.120 One respondent suggested that law lecturers or professors at universities who are not qualified barristers or solicitors should also be excluded in order to preserve the lay character of the jury; and to avoid special knowledge infusion and undue influence. Another respondent could see no reason why legal qualification should by itself be a ground for exclusion. There appeared no compelling reason to grant exemption to barristers and solicitors who were not in actual practice or who might be engaged in other fields, such as law lecturers and professors. We have considered these points and are not convinced that a case has been adequately made out for excluding barristers and solicitors who are not in practice. The principal reason for excluding practising barristers or solicitors is to avoid a perception of bias, but that does not apply with the same force to those not in practice.

³³ As at August 2009, there were 1,090 barristers and 6,394 solicitors with practising certificates. It is not possible to provide an accurate figure as to the number of clerks, but it would seem reasonable to assume that each set of barristers' chambers (of which there are 129) and each solicitors' firm (of which there are 726) would have at least one (Sources: websites of the Law Society and Bar Association).

5.121 We have considered again our proposal to discontinue the exemption from jury service currently granted to the clerks of solicitors and barristers in actual practice. The point was made to us on consultation that, by the nature of their work and their necessarily intimate involvement in the preparation and supervision of criminal cases, the participation of lawyers' clerks as jurors may result in actual or perceived bias. We accept the force of this argument, which we think applies equally to any employee of a solicitor or barrister. We note by way of analogy that any member of staff of the Judiciary, the Department of Justice, the Legal Aid Department, the Official Receiver's Office or the Intellectual Property Department is currently exempt from jury service. It seems to us that a similar approach should be taken in respect of employees of lawyers in private practice. We therefore recommend that solicitors and barristers in actual practice and their employees should be **exempt** from jury service on the grounds of perception of bias.

"(e) persons duly registered as or deemed to be medical practitioners under the Medical Registration Ordinance (Cap 161), persons duly registered as dentists under the Dentists Registration Ordinance (Cap 156) and persons duly registered under the Veterinary Surgeons Registration Ordinance (Cap 529)"

5.122 In our consultation paper we said that it was clear that persons in this category provided important services to the public and their involvement in jury service would inconvenience the community. At the same time, however, we noted that the numbers of such persons were significant and a blanket exemption would impinge on the degree to which the jury pool reflected the community at large. In addition, in contrast to the Government Flying Service, where the absence on jury service of a single member might impact on the Service's ability to provide emergency services, it could be expected that doctors, dentists and veterinary surgeons, who come from a larger pool, might be better placed to arrange their affairs to take account of jury service without adversely affecting the level of patient care.³⁴ Where that was not the case, application could be made to be excused in the particular circumstances. Taking these considerations into account, we were of the view that persons in this category should not be automatically exempt or excluded from jury service. Should they have particular difficulty on any particular occasion, they could apply for excusal or deferral.

5.123 We received a large number of responses from the medical profession, who were strongly opposed to our proposal to remove the existing exemption from jury service. The principal arguments put forward for retaining the exemption were:

³⁴ As at October 2009, there were 12,424 medical practitioners with full registration with the Medical Council of Hong Kong and 166 with limited registration. As at August 2009, there were 2,138 dentists registered to practise dentistry in Hong Kong and 517 registered veterinary surgeons (Sources: email from the Medical Council of Hong Kong of October 2009 and emails from the Dental Council of Hong Kong and the Veterinary Surgeons Board of Hong Kong of August 2009).

- there is a shortage of doctors in public service and there will continue to be a shortfall in the supply of such doctors for the foreseeable future;
- many private practitioners operate alone, with no replacement readily available, and jury service would require them to close their practices for the duration of that service;
- the medical service provided by a doctor cannot easily be replaced. Even if a replacement doctor is available, he would not enjoy the same trust and confidence of the patient, and would be unlikely to be able to provide the patient with the same quality of service since he would not be as familiar with the patient's medical history; and
- the medical services provided by a doctor may often be required as a matter of urgency. They provide life-saving and palliative services which are of great importance to the community.

5.124 Some or all of these reasons would be likely to apply to almost every medical practitioner. It is therefore likely that any application to the Registrar or the court by a medical practitioner for deferral or excusal would almost invariably be granted. Requiring doctors to apply on each occasion for deferral or excusal would therefore constitute an unnecessary burden for both the doctors themselves and the Registrar. In the light of these considerations, we have therefore revised our recommendation and recommend that medical practitioners under the Medical Registration Ordinance (Cap 161), persons duly registered as dentists under the Dentists Registration Ordinance (Cap 156) and persons duly registered under the Veterinary Surgeons Registration Ordinance (Cap 529) should remain **exempt** from jury service on the grounds of the inconvenience to the public which jury service would cause. In addition, we consider that practitioners of Chinese medicine duly registered as Chinese medicine practitioners under the Chinese Medicine Ordinance (Cap 549) should also be **exempt** for similar reasons.

5.125 One respondent suggested that registered and enrolled nurses should also be exempt, given the shortage of nursing staff and the vital role they play. We agree with this suggestion and recommend that persons duly registered as registered nurses under the Nurses Registration Ordinance (Cap 164) and persons duly enrolled as enrolled nurses under the Nurses Registration Ordinance (Cap 164) should be **exempt** from jury service.

"(f) editors of daily newspapers in Hong Kong and such members of their staffs in respect of whom the Registrar is satisfied that jury service would disrupt the publication of such newspapers"

5.126 We said in our consultation paper that we did not consider that persons in this category should be automatically exempt. Where the

circumstances justify excusal in a particular case, an application could be made for excusal from jury service.

5.127 There was general support for our recommendation, and we therefore confirm our original recommendation.

"(g) chemists and druggists actually carrying on business as such"

5.128 We said in our consultation paper that we did not consider that persons in this category should be automatically exempt. Where the circumstances justify excusal in a particular case, an application could be made for excusal from jury service. In the case of Government chemists, however, we thought that they should be excluded from jury service, because they were normally related with the enforcement of the criminal law and would generally be perceived as part of the prosecution process.

5.129 There was general support for our recommendation that chemists and druggists should not be automatically exempt from jury service. We also received general support for our proposal to exclude Government chemists from jury service. One respondent suggested that members of the Laboratory Specialist Services Officer Grade serving in the Forensic Science Division of the Government Laboratory should also be excluded as there might also be a perception of bias in respect of such persons because of their involvement in the collection and analysis of evidence in relation to criminal cases and investigations. We take the point and agree that these persons should be exempt or excluded. We therefore recommend that Government chemists and members of the Laboratory Specialist Services Officer Grade serving in the Forensic Science Division of the Government Laboratory should be **exempt**.

- "(h) clergymen, priests, and ministers of any Christian congregation or Jewish congregation functioning in Hong Kong;
(ha) imams of and persons holding similar positions in any Muslim congregation functioning in Hong Kong;
(hb) priests of and persons holding similar positions in any Hindu congregation functioning in Hong Kong"***

5.130 Our provisional view in the consultation paper was that persons in categories (h), (ha) and (hb) should not be automatically exempt or excluded, but should be able to apply for exemption or exclusion if they found jury service incompatible with their tenets or beliefs.

5.131 A range of views were expressed to us on this. One respondent argued that persons in these categories should be exempt from jury service because they would favour the defence, while another suggested they would favour the prosecution. We do not think there is any basis for supposing that persons in these categories would not exercise reasonable judgement when they serve as jurors and we maintain our view that they should not be exempt

or excluded. They would be able to apply for excusal or deferral if the circumstances so warranted.

"(j) full time students of any school, college, university, polytechnic, technical institute, industrial training centre or other educational (including vocational education) institution"

5.132 We proposed in our consultation paper that these persons should not be automatically exempt or excluded but should be able to apply for excusal or deferral if attending jury service on a particular occasion would cause extreme hardship or inconvenience to them.³⁵

5.133 We received both supporting and opposing views on this proposal. One respondent suggested there was no pressing need to require a person's service during the limited duration of his full-time studentship which required the devotion of all of his time and energy and so the automatic exemption should remain. We have given this response due consideration but remain of the view that full-time students should not automatically be exempt from jury service. A full-time student would be free to apply for and obtain excusal or deferral in appropriate circumstances.

"(j) officers employed on full pay in the naval, military or air services of the Hong Kong Garrison"

5.134 As we discussed in our consultation paper, officers employed on full pay in the naval, military or air services of the Hong Kong Garrison, together with the spouses of such officers, are persons who are conferred in Hong Kong the consular privileges and immunities accorded by customary international law and international agreements. Persons in this category should be **exempt** from jury service as their relationship with the Government of the Hong Kong Special Administrative Region is governed by the national laws which have been promulgated in the Promulgation of National Laws (No 2) 1997.

"(k) pilots licensed under the Pilotage Ordinance (Cap 84), and the master and members of the crew of any ship;

(l) pilots, navigators, wireless operators and other full-time members of the crews of passenger or mail or commercial aircraft"

5.135 We said in our consultation paper that we did not see the justification for exempting persons in categories (k) and (l) and we received general support for our proposal that they should be able to apply for excusal

³⁵ Some 225,400 students were in full-time education at Form 7 or above as at June 2009. Of those, 112,300 were aged 21 to 65 (the existing age range for jury service) (Source: the General Household Survey conducted by the Census & Statistics Department, Q2 2009).

from, or deferral of, jury service in a particular case if that service would cause them significant hardship or inconvenience.³⁶

***"(m) members of the Hong Kong Auxiliary Police Force and persons summoned to act or enrolled or appointed as special constables under any enactment:
Provided that any person claiming exemption under this paragraph may be required by the Registrar to produce a certificate from the Commissioner of Police in proof of such exemption"***

5.136 These are persons closely related with the enforcement of the criminal law and generally perceived as part of the prosecution process.³⁷ We expressed the view in the consultation paper that these persons should be excluded from jury service to avoid a perception of bias.

5.137 We received general support for our view that this category should be excluded. We note the view of one respondent that special constables, unless on active work, need not be exempted, but our view is that it would be difficult to determine "active work". We therefore maintain our original recommendation that this category should be **exempt** because of a possible perception of bias.

"(n) persons who are vowed and full-time members of any religious orders living in monasteries, convents or other such religious communities"

5.138 Our provisional view in the consultation paper was that persons in this category should not be automatically exempt, but should be able to apply for excusal or deferral if they found jury service incompatible with their tenets or beliefs.

5.139 Some respondents expressed concern that jury service might cause particular distress to those who have been consecrated to live a confined life in a monastery or convent. We do not think that is an adequate justification for a blanket exemption from jury service, however, and we maintain our original position on these categories of persons, who would be able to apply for excusal from, or deferral of, jury service in a particular case.

³⁶ As at 2 July 2009, there were 102 pilots licensed under the Pilotage Ordinance and 4,965 local seafarers (including masters and crew) registered in the Seafarers Register. As at 18 June 2009, there were around 3,900 cockpit crew members and 9,900 cabin crew members (Sources: letters from the Marine Department and the Civil Aviation Department).

³⁷ As at September 2009, there were 3,893 members of the Hong Kong Auxiliary Police Force (Source: email from the Hong Kong Police Force of 3 September 2009).

- "(o) the spouse of -**
- (i) the Chief Justice;**
 - (ia) a judge of the Court of Final Appeal;**
 - (ib) the Chief Judge;**
 - (ii) a Justice of Appeal;**
 - (iii) a judge of the Court of First Instance; and**
 - (iv) a coroner"**

5.140 We said in our consultation paper that we did not see the justification for exempting persons in this category, and proposed that the exemption currently applied to them should be removed.

5.141 One respondent argued in favour of retaining the existing exemption on the basis that there was a risk that judicial spouses might possess inside information. We do not consider this a persuasive ground for retaining the exemption. Furthermore, there seems little logic in restricting any such "spousal" exemption to those named: should it not equally apply to the spouses of magistrates and District Court judges, and of others involved in the criminal process (police and ICAC officers, for instance)? In all the circumstances, we maintain our position and think that the exemption from jury service currently granted to this category should be discontinued.

- "(p) spouses of members of the Hong Kong Garrison serving on full pay"**

5.142 As we discussed in our consultation paper, the Hong Kong Garrison's relationship with the Government of the Hong Kong Special Administrative Region is governed by the national laws which have been promulgated in the Promulgation of National Laws (No 2) 1997. Spouses of members of the Hong Kong Garrison should be **exempt** from jury service.

- "(r) the Legal Adviser of the Legislative Council Secretariat and any of his assistants who is in the full time employment of the Legislative Council Commission and is a barrister or a solicitor as defined in the Legal Practitioners Ordinance (Cap 159)"**

5.143 Our consultation paper said that considerations similar to those in category (b)(i) above applied also to this category.³⁸ Jury service by a member of this category of persons might lead to a perception of bias. We considered that this category should be excluded from jury service. No contrary view has been expressed to us and we confirm our original view that persons in this category should be **exempt** from jury service on the basis that there may be a perception of bias.

³⁸ As at August 2009, there were 11 full-time assistants to the Legal Adviser who were barristers or solicitors (Source: email from the Council Secretary (Administration) of the Legislative Council of 25 August 2009).

Additional categories

5.144 One respondent suggested that investigators of the Securities and Futures Commission and of the Ombudsman's Office should be exempted from jury service. We have given this issue due consideration and agree that these investigators should be **exempt** on the ground of perceived bias.

Recommendation 8

We recommend that:

- (1) The following categories of persons should be exempt from service as jurors:**
 - (a) members of the Executive or Legislative Council;**
 - (b) any public officer who is:**
 - (i) a member of staff within the Judiciary;**
 - (ii) a legal officer within the meaning of section 2 of the Legal Officers Ordinance (Cap 87);**
 - (iii) serving in the Department of Justice, the Legal Aid Department, the Official Receiver's Office or the Intellectual Property Department;**
 - (iv) a member of the Hong Kong Police Force, the Immigration Service, the Customs and Excise Service or the Fire Services Department including any post specified in the Seventh Schedule to the Fire Services Ordinance (Cap 95);**
 - (v) an officer of the Correctional Services Department;**
 - (vi) a member of the Government Flying Service;**
 - (vii) the Commissioner, Deputy Commissioner or an officer of the Independent Commission Against Corruption;**

- (viii) carrying out duties in the Hong Kong Police Force, the Immigration Department, the Customs and Excise Department, the Fire Services Department, the Correctional Services Department, the Government Flying Service or the Independent Commission Against Corruption;
- (ix) appointed as the principal probation officer, or as a probation officer, under the Probation of Offenders Ordinance (Cap 298);
- (x) a social worker employed full-time in any reformatory school established under the Reformatory Schools Ordinance (Cap 225), any place of detention appointed under the Juvenile Offenders Ordinance (Cap 226), or any approved institution within the meaning of the Probation of Offenders Ordinance (Cap 298);
- (c) consuls, vice-consuls, and officers of equivalent status, of governments of foreign states and such salaried functionaries of such governments as are nationals of such governments and are not carrying on business in Hong Kong, and the spouses and dependent children of such persons;
- (d) barristers-at-law and solicitors in actual practice, and their employees;
- (e) persons duly registered as or deemed to be medical practitioners under the Medical Registration Ordinance (Cap 161), persons duly registered as dentists under the Dentists Registration Ordinance (Cap 156), persons duly registered under the Veterinary Surgeons Registration Ordinance (Cap 529), and persons duly registered as Chinese medicine practitioners under the Chinese Medicine Ordinance (Cap 549);

- (f) persons duly registered as registered nurses under the Nurses Registration Ordinance (Cap 164) and persons duly enrolled as enrolled nurses under the Nurses Registration Ordinance (Cap 164);
 - (g) officers employed on full pay in the naval, military or air services of the Hong Kong Garrison, together with the spouses of such officers;
 - (h) officials or employees of the Central People's Government and their spouses and dependants;
 - (i) members of the Hong Kong Auxiliary Police Force and persons summoned to act or enrolled or appointed as special constables under any enactment, provided that any person claiming exemption under this paragraph may be required by the Registrar to produce a certificate from the Commissioner of Police in proof of such exemption;
 - (j) Government chemists and members of the Laboratory Specialist Services Officer Grade serving in the Forensic Science Division of the Government Laboratory;
 - (k) the Legal Adviser of the Legislative Council Secretariat and any of his assistants who is in the full time employment of the Legislative Council Commission and is a barrister or a solicitor as defined in the Legal Practitioners Ordinance (Cap 159);
 - (l) investigators appointed by the Securities and Futures Commission and the Ombudsman's office.
- (2) Any public officer who is serving as:
- (i) a judge, deputy judge, District Judge, deputy District Judge, Registrar, Senior Deputy Registrar, Deputy Registrar, Assistant Registrar, coroner or magistrate; or
 - (ii) a presiding officer, adjudicator or member of any tribunal established by law,

should be exempt from service as a juror and should continue to be exempt for 10 years after the termination of their judicial office.

- (3) The exemption from jury service currently granted to the following categories of persons should be discontinued:
- (a) any public officer who is serving in a training or apprentice rank;
 - (b) editors of daily newspapers in Hong Kong and such members of their staffs in respect of whom the Registrar is satisfied that jury service would disrupt the publication of such newspapers;
 - (c) registered pharmacists actually carrying on business as such;
 - (d) clergymen, priests, and ministers of any Christian congregation or Jewish congregation functioning in Hong Kong;
 - (e) imams of and persons holding similar positions in any Muslim congregation functioning in Hong Kong;
 - (f) priests of and persons holding similar positions in any Hindu congregation functioning in Hong Kong;
 - (g) full time students of any school, college, university, polytechnic, technical institute, industrial training centre or other educational (including vocational education) institution;
 - (h) pilots licensed under the Pilotage Ordinance (Cap 84), and the master and members of the crew of any ship;
 - (i) pilots, navigators, wireless operators and other full-time members of the crews of passenger or mail or commercial aircraft;
 - (j) persons who are vowed and full-time members of any religious orders living in monasteries, convents or other such religious communities;

- (k) the spouse of:**
 - (i) the Chief Justice;**
 - (ii) a judge of the Court of Final Appeal;**
 - (iii) the Chief Judge;**
 - (iv) a Justice of Appeal;**
 - (v) a judge of the Court of First Instance;
and**
 - (vi) a coroner;**
 - (l) justices of the peace.**
- (4) Subject to and without limiting the general applicability of Recommendation 7, the Registrar or the trial judge, as the case may be, may defer jury service required of the persons listed at Recommendation 8(3) who have been summoned, or excuse them from jury service upon their application, if satisfied with the merits of their applications.**

Other comments received during consultation

5.145 It was suggested to us during the consultation that the two year "exemption" period (as provided by section 17 of the Jury Ordinance) was too short a period for persons who had undertaken jury service. We think that this is an administrative matter which is best left to the discretion of the Registrar.

5.146 Two respondents raised the issue of jurors' allowances and observed that these were insufficient to compensate a juror for his loss of earnings. The concern was also raised that some employees were required to work in the office after the sitting in court had ended for the day while others were given "no pay leave" by their employers.

5.147 While these are legitimate concerns, they are matters outside our terms of reference and we think they should be seriously considered in an appropriate forum.

Chapter 6

Summary of recommendations

6.1 We recommend that the existing requirement for jury service that an individual has attained 21 years of age should be retained, but the upper age limit for jury service should be raised from 65 to 70. We also recommend that an individual who has attained 65 years of age should be entitled as of right to exemption from jury service upon his application (Recommendation 1, following para 5.15).

6.2 We recommend that, to be eligible to serve as a juror, a person must have been issued with a Hong Kong identity card three years or more prior to his being issued with a notice of jury service and be resident in Hong Kong at the time the notice is issued (Recommendation 2, following para 5.22).

6.3 We recommend that section 4(1)(b) of the Jury Ordinance (Cap 3) should be replaced by a provision to the effect that a person is not eligible to serve as a juror if he:

- (a) has been convicted at any time in Hong Kong or elsewhere of a criminal offence for which he has been sentenced to imprisonment (whether suspended or not) exceeding three months, without the option of a fine;
- (b) has been convicted within the previous five years of a criminal offence for which he has been sentenced to imprisonment (whether suspended or not) for three months or less;
- (c) is awaiting trial for an indictable offence; or
- (d) is remanded in custody pending trial for any offence,

provided that a spent conviction under the Rehabilitation of Offenders Ordinance (Cap 297) should not be regarded as a criminal conviction for the purposes of (a) and (b) (Recommendation 3, following para 5.38).

6.4 We recommend that:

- (1) Section 4(1)(c) of the Jury Ordinance (Cap 3) and the existing administrative practice of requiring a potential juror to have attained an education standard of Form 7 (being the minimum entrance requirement for entry to a university in Hong Kong) should be replaced with a statutory requirement that the prospective juror have attained an education level of: (a) Form 7;

(b) Secondary Six; (c) the IB Diploma; or (d) such other secondary education as the Registrar of the High Court considers equivalent.

- (2) If our proposal is adopted to abolish the existing exemption from jury service for full-time students, the Commissioner of Registration should in future consider requesting annually from Hong Kong's universities and tertiary education institutions lists of persons admitted as students, rather than lists of graduates (Recommendation 4, following para 5.61).

6.5 We recommend that:

- (1) Section 4(1)(a) of the Jury Ordinance (Cap 3) concerning disabilities in relation to jury service should be amended along the following lines:

"(a) the person is of sound mind and not afflicted by:

- (i) blindness, or*
- (ii) deafness, or*
- (iii) other disability*

preventing the person from serving as a juror; and".

- (2) The Registrar of the High Court should consider making such changes to the physical configuration of the High Court Building and coroners' courts as would facilitate jury service by those confined to wheelchairs (Recommendation 5, following para 5.74).

6.6 We recommend that the form of notice of jury service should be amended to include:

- (a) the principal justifications for excusal from, or deferral of, jury service; and
- (b) a box to be marked by the person served with the notice confirming that he has no criminal conviction (and a spent conviction under the Rehabilitation of Offenders Ordinance (Cap 297) is not regarded as a criminal conviction for these purposes), is not awaiting trial for an indictable offence, and is not remanded in custody pending trial for any offence.

The completed form should be returned to the Registrar of the High Court for verification. (Recommendation 6, following para 5.76).

6.7 We recommend that the guiding principles for the consideration of applications for excusal from, or deferral of, jury service should be spelt out in the Jury Ordinance to assist the Registrar or the trial judge in determining

whether or not to grant such applications. The justifications for excusal or deferral should include:

- (a) that substantial inconvenience to the public may result;
- (b) that undue hardship or undue inconvenience may be caused to the person or any person under his care or supervision;
- (c) that the person is involved in the administration of justice so that bias may result or may be perceived to result;
- (d) that jury service is incompatible with the person's tenets or beliefs; or
- (e) that it is in the interests of justice to do so.

We also recommend that guidelines should be drawn up for the determination of applications for excusal or deferral, including specific examples of applications that should ordinarily be granted and examples of applications that should ordinarily be rejected (Recommendation 7, following para 5.89).

6.8 We recommend that:

- (1) The following categories of persons should be exempt from service as jurors:
 - (a) members of the Executive or Legislative Council;
 - (b) any public officer who is:
 - (i) a member of staff within the Judiciary;
 - (ii) a legal officer within the meaning of section 2 of the Legal Officers Ordinance (Cap 87);
 - (iii) serving in the Department of Justice, the Legal Aid Department, the Official Receiver's Office or the Intellectual Property Department;
 - (iv) a member of the Hong Kong Police Force, the Immigration Service, the Customs and Excise Service or the Fire Services Department including any post specified in the Seventh Schedule to the Fire Services Ordinance (Cap 95);
 - (v) an officer of the Correctional Services Department;
 - (vi) a member of the Government Flying Service;

- (vii) the Commissioner, Deputy Commissioner or an officer of the Independent Commission Against Corruption;
 - (viii) carrying out duties in the Hong Kong Police Force, the Immigration Department, the Customs and Excise Department, the Fire Services Department, the Correctional Services Department, the Government Flying Service or the Independent Commission Against Corruption;
 - (ix) appointed as the principal probation officer, or as a probation officer, under the Probation of Offenders Ordinance (Cap 298);
 - (x) a social worker employed full-time in any reformatory school established under the Reformatory Schools Ordinance (Cap 225), any place of detention appointed under the Juvenile Offenders Ordinance (Cap 226), or any approved institution within the meaning of the Probation of Offenders Ordinance (Cap 298);
- (c) consuls, vice-consuls, and officers of equivalent status, of governments of foreign states and such salaried functionaries of such governments as are nationals of such governments and are not carrying on business in Hong Kong, and the spouses and dependent children of such persons;
 - (d) barristers-at-law and solicitors in actual practice, and their employees;
 - (e) persons duly registered as or deemed to be medical practitioners under the Medical Registration Ordinance (Cap 161), persons duly registered as dentists under the Dentists Registration Ordinance (Cap 156), persons duly registered under the Veterinary Surgeons Registration Ordinance (Cap 529), and persons duly registered as Chinese medicine practitioners under the Chinese Medicine Ordinance (Cap 549);
 - (f) persons duly registered as registered nurses under the Nurses Registration Ordinance (Cap 164) and persons duly enrolled as enrolled nurses under the Nurses Registration Ordinance (Cap 164);
 - (g) officers employed on full pay in the naval, military or air services of the Hong Kong Garrison, together with the spouses of such officers;

- (h) officials or employees of the Central People's Government and their spouses and dependants;
 - (i) members of the Hong Kong Auxiliary Police Force and persons summoned to act or enrolled or appointed as special constables under any enactment; provided that any person claiming exemption under this paragraph may be required by the Registrar to produce a certificate from the Commissioner of Police in proof of such exemption;
 - (j) Government chemists and members of the Laboratory Specialist Services Officer Grade serving in the Forensic Science Division of the Government Laboratory;
 - (k) the Legal Adviser of the Legislative Council Secretariat and any of his assistants who is in the full time employment of the Legislative Council Commission and is a barrister or a solicitor as defined in the Legal Practitioners Ordinance (Cap 159);
 - (l) investigators appointed by the Securities and Futures Commission and the Ombudsman's office.
- (2) Any public officer who is serving as:
- (i) a judge, deputy judge, District Judge, deputy District Judge, Registrar, Senior Deputy Registrar, Deputy Registrar, Assistant Registrar, coroner or magistrate; or
 - (ii) a presiding officer, adjudicator or member of any tribunal established by law,
- should be exempt from service as a juror and should continue to be exempt for 10 years after the termination of their judicial office.
- (3) The exemption from jury service currently granted to the following categories of persons should be discontinued:
- (a) any public officer who is serving in a training or apprentice rank;
 - (b) editors of daily newspapers in Hong Kong and such members of their staffs in respect of whom the Registrar is satisfied that jury service would disrupt the publication of such newspapers;
 - (c) registered pharmacists actually carrying on business as such;

- (d) clergymen, priests, and ministers of any Christian congregation or Jewish congregation functioning in Hong Kong;
 - (e) imams of and persons holding similar positions in any Muslim congregation functioning in Hong Kong;
 - (f) priests of and persons holding similar positions in any Hindu congregation functioning in Hong Kong;
 - (g) full time students of any school, college, university, polytechnic, technical institute, industrial training centre or other educational (including vocational education) institution;
 - (h) pilots licensed under the Pilotage Ordinance (Cap 84), and the master and members of the crew of any ship;
 - (i) pilots, navigators, wireless operators and other full-time members of the crews of passenger or mail or commercial aircraft;
 - (j) persons who are vowed and full-time members of any religious orders living in monasteries, convents or other such religious communities;
 - (k) the spouse of:
 - (i) the Chief Justice;
 - (ii) a judge of the Court of Final Appeal;
 - (iii) the Chief Judge;
 - (iv) a Justice of Appeal;
 - (v) a judge of the Court of First Instance; and
 - (vi) a coroner;
 - (l) justices of the peace.
- (4) Subject to and without limiting the general applicability of Recommendation 7, the Registrar or the trial judge, as the case may be, may defer jury service required of the persons listed at Recommendation 8(3) who have been summoned, or excuse them from jury service upon their application, if satisfied with the merits of their applications (Recommendation 8, following para 5.144).

**List of those who responded
to the consultation paper**

1. Airport Authority Hong Kong
2. Alliance to Uphold Quality of Medical Service
3. Association of Licentiates of Medical Council of Hong Kong
4. Cherry Au Yeung
5. Hon Madam Justice Beeson
6. Professor Johannes Chan, SC, Dean of the Faculty of Law,
University of Hong Kong
7. Dr Peter B K Chan
8. Vinson Cheng
9. Eric T M Cheung, Department of Professional Legal Education,
University of Hong Kong
10. Chief Secretary for Administration's Office, Administration Wing
11. Chinese Muslim Cultural & Fraternal Association
12. Brian Choa
13. Dr Henry Choy
14. Andrew Chuang
15. Civil Aviation Department
16. Correctional Services Department
17. Customs and Excise Department
18. Department of Health
19. Department of Justice, Legal Policy Division
20. Department of Justice, Prosecutions Division
21. Education Bureau
22. Elderly Commission
23. Equal Opportunities Commission
24. Evangelical Lutheran Church of Hong Kong
25. Federation of Medical Societies of Hong Kong
26. Fire Services Department
27. Government Chemist
28. Government Doctors' Association
29. Government Flying Service
30. Home Affairs Bureau
31. Home Affairs Department
32. Hong Kong Auxiliary Police Force

33. Hong Kong Bar Association
34. Hong Kong Dental Association
35. Hong Kong Doctors Union
36. Hong Kong Medical Association
37. Hong Kong Police Force
38. Hong Kong Society for the Blind
39. Hong Kong Society for the Deaf
40. Hong Kong St John Ambulance
41. Hospital Authority
42. Immigration Department
43. Independent Commission Against Corruption
44. Intellectual Property Department
45. Judiciary (Masters of the High Court and District Court)
46. Justices of the Peace Secretariat
47. Dr Kum Chi Chiu Leo
48. Dr Kwok Ka Ki
49. Dr Brendan Lai
50. Professor Lawrence Lai, Department of Real Estate and
Construction, University of Hong Kong
51. Lands Department
52. Law Society of Hong Kong
53. Legal Aid Department
54. Dr Li Siu-wah
55. Dr Li Sum Wo
56. Dr Man Chi Wai
57. Marine Department
58. Medical Council of Hong Kong
59. Dr Ming
60. Eusie Ng
61. Official Receiver's Office
62. Dr Que Tak-Lun
63. Social Welfare Department
64. Society for Community Organisation
65. Tsui Wai-leung
66. Dr Charles Wong Kee Cheung
67. C K Yeung
68. Dr Yuen Kai Tak

**Existing exemptions from jury service
under section 5 of the Jury Ordinance (Cap 3)**

5. Exemptions from service

- (1) The following persons shall be exempt from service as jurors -
- (a) members of the Executive or Legislative Council;
 - (ab) justices of the peace;
 - (b) any public officer who is -
 - (i) a judge, deputy judge, District Judge, deputy District Judge, Registrar, Senior Deputy Registrar, Deputy Registrar, Assistant Registrar, coroner or magistrate;
 - (ii) a presiding officer, adjudicator or member of any tribunal established by law;
 - (iii) an officer or member of the staff of any court or tribunal established by law, if his work is mainly concerned with the day to day administration of the court or tribunal;
 - (iv) a legal officer within the meaning of section 2 of the Legal Officers Ordinance (Cap 87);
 - (v) serving in the Department of Justice, the Legal Aid Department, the Official Receiver's Office or the Intellectual Property Department;
 - (vi) a member of the Hong Kong Police Force, the Immigration Service, the Customs and Excise Service or the Fire Services Department, including a person holding any post specified in the Seventh Schedule to the Fire Services Ordinance (Cap 95);
 - (vii) an officer of the Correctional Services Department;
 - (viii) a member of the Government Flying Service;
 - (ix) the Commissioner, Deputy Commissioner or an officer of the Independent Commission Against Corruption;
 - (x) carrying out duties in the Hong Kong Police Force, the Immigration Department, the Customs and Excise Department, the Fire Services Department, the Correctional Services Department, the Government Flying Service or the Independent Commission Against Corruption;
 - (xi) serving in a training or apprentice rank;
 - (xii) appointed as the principal probation officer, or as a probation officer, under the Probation of Offenders Ordinance (Cap 298); or
 - (xiii) a social worker employed full-time in any reformatory school established under the Reformatory Schools Ordinance (Cap 225), any place of detention appointed under the Juvenile Offenders Ordinance (Cap 226), or

- any approved institution within the meaning of the Probation of Offenders Ordinance (Cap 298);
- (c) consuls, vice-consuls, and officers of equivalent status, of governments of foreign states and such salaried functionaries of such governments as are nationals of such governments and are not carrying on business in Hong Kong, and the spouses and dependent children of such persons;
 - (d) barristers-at-law and solicitors in actual practice, and their clerks;
 - (e) persons duly registered as or deemed to be medical practitioners under the Medical Registration Ordinance (Cap. 161), persons duly registered as dentists under the Dentists Registration Ordinance (Cap. 156) and persons duly registered under the Veterinary Surgeons Registration Ordinance (Cap. 529);
 - (f) editors of daily newspapers in Hong Kong and such members of their staffs in respect of whom the Registrar is satisfied that jury service would disrupt the publication of such newspapers;
 - (g) chemists and druggists actually carrying on business as such;
 - (h) clergymen, priests, and ministers of any Christian congregation or Jewish congregation, functioning in Hong Kong;
 - (ha) imams of and persons holding similar positions in any Muslim congregation functioning in Hong Kong;
 - (hb) priests of and persons holding similar positions in any Hindu congregation functioning in Hong Kong;
 - (i) full time students of any school, college, university, polytechnic, technical institute, industrial training centre or other educational (including vocational education) institution;
 - (j) officers employed on full pay in the naval, military or air services of Her Majesty;
 - (k) pilots licensed under the Pilotage Ordinance (Cap 84), and the master and members of the crew of any ship;
 - (l) pilots, navigators, wireless operators and other full-time members of the crews of passenger or mail or commercial aircraft;
 - (m) members of the Hong Kong Auxiliary Police Force and persons summoned to act or enrolled or appointed as special constables under any enactment:
 Provided that any person claiming exemption under this paragraph may be required by the Registrar to produce a certificate from the Commissioner of Police in proof of such exemption;
 - (n) persons who are vowed and full-time members of any religious orders living in monasteries, convents or other such religious communities;
 - (o) the spouse of -
 - (i) the Chief Justice;
 - (ia) a judge of the Court of Final Appeal;

- (ib) the Chief Judge;
 - (ii) a Justice of Appeal;
 - (iii) a judge of the Court of First Instance; and
 - (iv) a coroner;
 - (p) spouses of members of the Armed Forces of Her Majesty serving on full pay;
 - (q) *(Repealed 25 of 1998 s 2)*
 - (r) the Legal Adviser of the Legislative Council Secretariat and any of his assistants who is in the full time employment of the Legislative Council Commission and is a barrister or a solicitor as defined in the Legal Practitioners Ordinance (Cap. 159).
- (2) In this section -
- (a) reference to Registrar includes reference to the Registrar of the District Court;
 - (aa) "Senior Deputy Registrar" (高級副司法常務官) means Senior Deputy Registrar of the High Court;
 - (b) "Deputy Registrar" (副司法常務官) means Deputy Registrar of the High Court or of the District Court;
 - (c) "Assistant Registrar" (助理司法常務官) means Assistant Registrar of the High Court or of the District Court.

Notice of jury service: Form 2 of the Schedule to the Jury Ordinance (Cap 3)

"JURY ORDINANCE

(Chapter 3)

NOTICE

Jury Service

1. Whereas it appears that you are a person –

- (a) qualified to serve as a juror under section 4; and
- (b) not exempt from service as a juror under section 5,

you are hereby notified that your name will be added to the list of jurors unless, within 14 days after the receipt of this notice, you notify me in writing that you claim exemption from jury service on either of the following grounds -

- (a) that you do not qualify to serve as a juror under section 4 of the Jury Ordinance;
- (b) that you are exempt from service as a juror under section 5 of the Jury Ordinance.

2. A copy of sections 4 and 5 of the Jury Ordinance is attached hereto for your information.

Dated this day of , 19 .

Registrar of the High Court.

High Court
38 Queensway
Hong Kong"