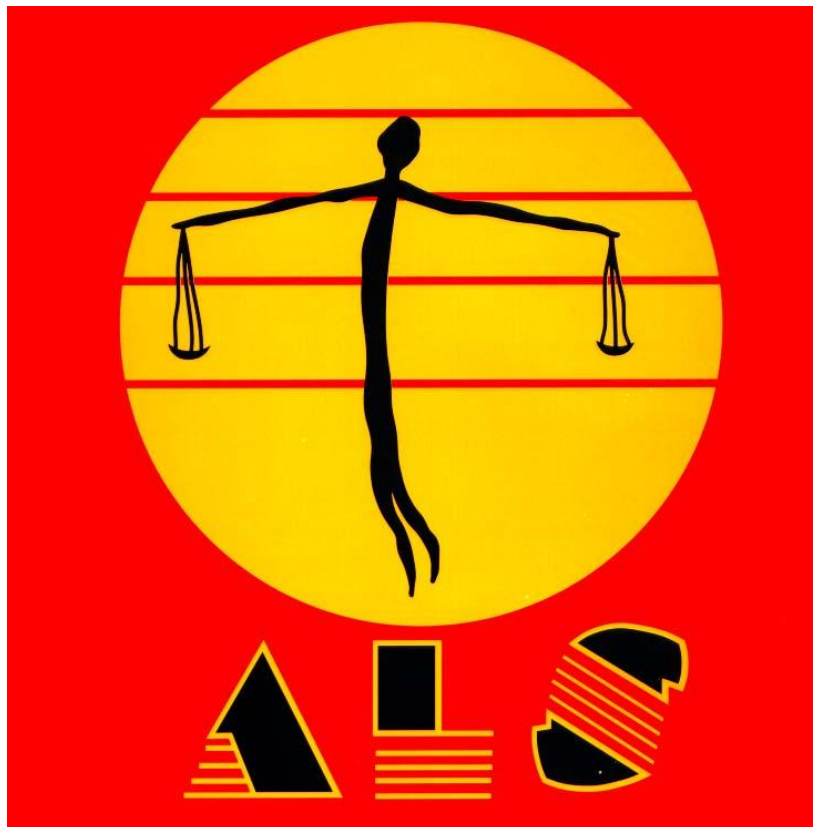


ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)

**Response to Selection, Eligibility and Exemption of
Jurors Discussion Paper**

(Project 99)

February 2010



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1. Introduction and scope of the submission

The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) prepared this submission for the Law Reform Commission of Western Australia in regards to the “Selection, Eligibility and Exemption of Jurors Discussion Paper: Project No 99”. ALSWA makes submissions in relation Chapter 2 – Juror Selection Process and Chapter 4 – Eligibility for Jury Service. ALSWA was granted an extension for this submission.

2. About ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law as well as human rights law and policy. Its services are available throughout Western Australia (WA) via 17 regional and remote offices and one head office in Perth.

ALSWA is a representative body with 16 executive officers¹ elected by Aboriginal peoples from their local regions to speak on law and justice issues.

ALSWA is a legal service provider solely for Aboriginal peoples living in WA and makes submissions on that basis.

Submissions are prepared by ALSWA in consultation with the Chief Executive Officer, Director of Legal Services, Executive Officer, Lawyers and Court Officers. All Court Officers are Aboriginal people and represent Aboriginal people in the Magistrates Courts and the Children’s Court under section 48 of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*. Each regional office has a Court Officer who provides an understanding of local issues. In more remote areas, Court Officers are often the only local permanent legal service dealing with all aspects of the legal system.

3. Chapter Two – Juror Selection Process

3.1. Peremptory Challenges (Proposal 3 & Invitation to Submit A):

ALSWA supports the retention of five peremptory challenges for all accused regardless of whether one or more accused are standing trial.

ALSWA is of the view that it is important for all accused, including Aboriginal accused, to have confidence that their trial will be conducted impartially and free from any bias. The right of peremptory challenge enables a juror to participate in removing any perceived bias (to a limited extent) without the need to embarrass the prospective juror.

The importance of excluding potential jurors who have been unsuccessfully challenged for cause (as outlined on page 33 of the discussion paper) cannot be underestimated.

¹ There are two Executive Officers for each of the former 8 ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by Aboriginal peoples every three years.

ALSWA is also of the view that there is insufficient justification for abolishing the right to peremptory challenge and is of the experience that the full number of peremptory challenges are rarely utilised.

ALSWA accepts that the State should have the same total number of challenges as available to accused (including in joint trials).

3.2. Power to Discharge Whole Jury (Invitation to Submit B):

ALSWA is also unconvinced that such a provision is necessary for Western Australia given the right of equal peremptory challenges between the accused and the State and the current power to discharge an entire jury if it is in the interests of justice to do so.

3.3. Jury Vetting (Proposal 4):

ALSWA supports the proposed amendments for the reasons outlined by the Commission.

3.4. Information about Prospective Jurors (Proposal 5 & Invitation to Submit C):

ALSWA supports proposal 5 and can see no legitimate reason for the disclosure of a potential jurors full address details.

ALSWA is strongly of the view that a prospective juror's occupation details be retained. Occupation details are critical for assessing potential bias that might arise.

ALSWA is of the view that a prospective juror's full name be retained on the jury list to ensure that any familial or cultural bias, including Aboriginal family feuding, can be readily identified. This is particularly important in regional areas where the jury pool is limited. Any concerns regarding juror security should be alleviated by the removal of their full address details.

4. Chapter Four – Eligibility for Jury Service

4.1. Eligibility of Judicial Officers (Proposal 13)

Although ALSWA supports increasing the number of persons eligible for jury service, ALSWA does not support proposal 13. ALSWA is of the view that former judicial officers should permanently remain ineligible for jury service.

A former judicial officer would inevitably bring to their consideration of evidence and any deliberations as a juror all manner of preconceived attitudes about the law and / or the criminal justice system.

ALSWA is concerned that former judicial officers could assert an inappropriate level of authority during deliberations. Although this may be entirely unintended, ALSWA has concerns that lay jurors may unduly or inappropriately influenced by the presence of a former judicial officer on the jury.

Further, it is fundamental in a jury trial that the presiding judicial officer determines the law and the jury determines the facts. The involvement of former judicial officers in a jury fundamentally undermines this important distinction.

4.2. Eligibility of Supreme Court Masters and the like (Proposals 14, 15, Invitation to Submit E)

See 4.1 above.

4.3. Eligibility of Justices of the Peace (Proposals 16):

ALSWA does not support proposal 16.

ALSWA is of the view that all Justices of the Peace, regardless of whether they have exercised the jurisdiction of the Magistrate's Court, should be permanently ineligible.

Justices of the Peace work closely with Police, especially in regional areas. In this role, Justices of the Peace routinely authorise the issuing of warrants, witness police documentation, act as responsible adults in interviews with juveniles and act as interview friends for vulnerable accused. A Justice of the Peace may have performed these functions without having ever exercised the jurisdiction of the Magistrate's Court.

ALSWA is concerned that this close association with the police could influence the manner in which a Justice of the Peace (or former Justice of the Peace) discharges their duties as a juror.

ALSWA has strong concerns that Justices of the Peace in Western Australia have been under trained and are often influenced by the authority of the Police. The tragic death of Mr Ward and finding made by the State Coroner at the inquest into his death highlight these problems.

4.4. Eligibility of Lawyers (Proposals 17 & Invitation to Submit F):

ALSWA is of the view that lawyers should permanently remain ineligible for jury service for the reasons outlined above in respect of judicial officers (see 4.1 above).

4.5. Eligibility of Registrars (Proposals 18 & 19):

See 4.1 above.

4.6. Eligibility of Judge's Staff (Proposals 20 & 21):

ALSWA is of the view that the staff of Judges in the Supreme and District Courts should be permanently ineligible for jury service. ALSWA the rationale behind the current exclusion, that being, that these officers who are personal staff of the judge, are so intimately involved in the criminal trial process as to call into question the independence or impartiality of the jury should they be permitted to serve.

ALSWA is of the view that staff of the Judges in the Family Court be ineligible for jury service during the term of employment and for a period of 5 years thereafter. Whilst ostensibly these officers may be removed from the criminal justice system, ALSWA is the view that issues of a criminal nature (such as allegation of sexual offending) routinely arise in Family Court proceedings. However, concerns about impartiality and independence of the jury can be ameliorated with the five year prohibition.

4.7. Eligibility of Sheriff's Officers & Bailiffs (Proposals 22 & 23):

ALSWA supports the retention of the current law that these officers remain ineligible for jury service during their term of employment and for a period of 5 years thereafter.

These officers play an important role in the administration of justice and have frequent contact and familiarity with lawyers, police, prosecutors and judicial staff which may undermine the perception of impartiality. As noted above such concerns can be ameliorated with a five year prohibition.

4.8. Eligibility of Members of Parliament (Proposal 24):

ALSWA does not support proposal 24. ALSWA is of the view that members of Parliament should be permanently ineligible for jury service. Members of Parliament are so intimately involved in the law making process and debates about law and order that no reasonable accused would be satisfied that they had a fair trial should a current or former parliamentarian be a member of the jury.

4.9. Eligibility of Officers of Parliament (Proposal 25):

ALSWA supports proposal 25.

4.10. Eligibility of Police (Proposal 26):

ALSWA is of the view that police officers should permanently remain ineligible for jury service.

Police have the unique knowledge of the reporting, investigation and prosecution of criminal matters. As a matter of human nature and/or common sense it would be impossible for a current or former police officer to separate that knowledge from their deliberations as a juror in order to consider the evidence in an impartial and balanced manner.

Further, it is widely accepted in the psychological literature that police adopt a police culture or "code" and robustly act in accordance with that code. ALSWA has strong concerns that a police officer would not be able to adequately question the credibility, reliability or honesty of a fellow officer.

Further, ALSWA has concerns that police officers may have strong negative preconceived views of accused persons, including Aboriginal accused persons. The recent media comments about criminal activity within Aboriginal

communities, attributed to the secretary of the WA Police Union, Mr Russell Armstrong, are testament to this.

ALSWA has strong concerns that police officers could assert an inappropriate level of authority during deliberations as a result of their occupation.

ALSWA is firmly of the view that accused persons would not perceive that they had received a fair trial if a current or former police officer were a member of the jury. This could not always be rectified by the right to peremptory challenge. ALSWA is of the expectation that any current officer would be peremptorily challenged at trial. An accused is not entitled to information regarding the former occupations of prospective jurors hence an accused could not exercise a peremptory challenge in the case of a former police officer if they perceived an unfairness to arise.

4.11. Eligibility of CCC Officers (Proposal 27):

ALSWA supports Proposal 27, save for ALSWA is of the view that the Commissioner of CCC and the Parliamentary Inspector should be permanent ineligible for jury service for the reasons outlined in respect of judicial officers and lawyers above.

4.12. Eligibility of Review Board Members (Proposal 28):

ALSWA is the view that members of review boards should be permanently ineligible for jury service. As part of their role, the members of review boards are exposed to detailed information regarding offenders and prisoner management to such an extent that they could not ever be seen to be removed from the administration of the criminal justice system. Importantly, in carrying out their duties members of review boards are required to focus on the risk to the public in releasing offenders. Such a focus may improperly affect the manner in which these officers carry out the role of juror and cannot be ameliorated with the passage of time.

4.13. Eligibility of DOTAG and DCS Staff (Proposal 29):

ALSWA supports proposal 29 save for ALSWA is of the view that those officers of the Department of Corrective Services involved in the management and supervision of offenders should be permanently ineligible for jury service.

ALSWA is of the view that such officers would be incapable of bringing an impartial mind to the function of juror given their constant contact with offenders. ALSWA has concerns that such officers may have strong negative preconceived views of accused persons or types of offenders. Further, ALSWA is concerned that as DCS staff member would be aware that protected and privileged information may exist (such as criminal histories) that would not ordinarily be available to a juror thus undermining the principle that a juror should not speculate about unknown facts.

4.14. Eligibility of Ombudsman (Proposal 30):

ALSWA supports proposal 30.

4.15. Eligibility of DCP Staff (Proposal 31):

ALSWA does not support proposal 31. ALSWA is of the view that any 'authorised' staff of DCP (ie. those involved in the investigation into whether a child may be in need of protection) should be permanently ineligible for jury service. Such staff routinely investigate allegations of criminal offending against children, such as sexual offending.

ALSWA has strong concerns that within their role these officers may have formed very strong preconceived views about sexual offending and offending against children. ALSWA also notes that DCP utilise a far lower standard of proof in their investigations than that required by the criminal law and must at all times act in the best interests of the child.

Given these differences ALSWA has grave concerns that the experience of the DCP staff member may inappropriately influence the jury. Further, ALSWA is of the strong view that no accused charged with a sexual offence would perceive that they had received a fair trial should an authorised DCP staff member be on the jury.