

Second Reading

The Hon. MICHAEL VEITCH (Parliamentary Secretary) [3.20 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time

The Jury Amendment Bill 2010 will implement a number of outstanding recommendations of the New South Wales Law Reform Commission's 2007 report entitled "Jury Selection". The Law Reform Commission's report arose out of a reference given to the commission in August 2006 by the previous Attorney General to inquire into the operation and effectiveness of the system of selecting jurors under the Jury Act 1977 and related matters.

The Government already has enacted legislation to implement a number of the recommendations in the Law Reform Commission's report. In 2007, amendments were passed to enable the court to allow up to 15 jurors to be sworn in for trials expected to last for longer than three months. Amendments also were passed in 2008 to allow judges to discharge individual jurors for good cause due to a mistake in empanelment or a change in eligibility status after empanelment. The bill before the House represents further significant changes to the scheme regulating the participation of jurors in the justice system. However, before addressing the provisions of the bill, it is useful to provide an overview of the current scheme.

Members will be aware that juries in New South Wales comprise New South Wales citizens who have been chosen randomly from the electoral roll. In practice, the sheriff sends out a notice of inclusion to advise those people whose names have been selected and included on the jury roll. Approximately 200,000 people are sent a notice of inclusion each year and may subsequently be summoned for jury service. In 2009, of those sent a notice of inclusion, 114,790 people were summoned and required to attend for jury service. Of them 52,766 attended and 9,039 were selected to serve on juries. Around 50 per cent of people summoned seek and receive approval to be excused from jury duty.

Under the existing legislation, three schedules to the Act provide bases for not serving on a jury: some people are disqualified, some are ineligible, and some have a right to claim exemption. Disqualification essentially arises from past criminal conduct. Those who are ineligible cannot serve if they are summoned. This group includes the Governor, the Ombudsman, judicial officers and police officers, and those who cannot read or write English sufficiently, or are too sick, infirm or disabled, to discharge the duties of a juror. In the final group are those who can serve, but have a right to claim exemption. This group includes medical practitioners and emergency service workers, those with full-time carer responsibilities, and vowed clergy.

This bill provides for a number of substantive changes to the Jury Act, with an overriding focus on broadening the pool of eligible jurors to ensure the burden of jury duty is widely distributed and that juries remain representative of society. It is also the case that in rural and regional areas, it is often difficult to find sufficient eligible jurors who do not know anyone involved in the case. The reforms in this bill will ease the pressure. The general approach is to remove a right to be exempt and replace this with a need to show good cause why a person should be exempt.

I will now address the particular areas of reform covered by the proposed legislation. Firstly, the bill provides for a number of reforms in relation to criminal histories and the disqualification of potential jurors on this basis. The proposed new scheme is comparable to that of other jurisdictions and provides a reasonable compromise between preserving the integrity of the justice system and the principle that people who have paid the penalty for offending should be restored to their full rights as citizens, including the right to sit on a jury. Currently, the Jury Act provides that a person is disqualified from serving on a jury if at any time within the last 10 years in New South Wales or elsewhere, they have served any part of a sentence of imprisonment. This uniform 10-year exclusion after any term of imprisonment will be replaced with a graduated scheme: life exclusion for serious offences, 10 years after terms of imprisonment exceeding three months, and seven years after terms of less than three months.

The offences for which a person will be excluded from jury service for life are: firstly, any offence for which life imprisonment is the maximum available penalty; secondly, any offence constituting a terrorist act within the meaning of the Terrorism (Police Powers) Act 2002; thirdly, any public justice offence under part 7 of the Crimes Act 1900, New South Wales, for example, an offence of intimidating victims or witnesses or concealing serious indictable offences; and, fourthly, a sexual offence as defined in section 7 of the Criminal Records Act 1991. This is consistent with the Law Reform Commission's recommendations. A sentence of imprisonment includes being subject to a suspended sentence of imprisonment or being on probation or parole. However, it does not include a sentence of imprisonment that has been quashed or converted to a non-custodial sentence on appeal, a sentence of imprisonment in respect of a conviction that has been quashed or annulled, or for which a pardon has been granted, or a sentence of imprisonment for failure to pay a fine. I seek leave to have the remainder of the speech incorporated in *Hansard*.

Leave granted.

Juveniles are currently excluded if at any time within the last 3 years in New South Wales or elsewhere they have been found guilty of an offence and detained in a detention centre or other institution for juvenile offenders.

We propose to retain this three year exclusion, but to clarify certain matters in relation to it.

The Jury Act currently provides that a person is ineligible for jury service where they are bound by certain orders pursuant to a criminal charge or conviction.

The bill updates the legislation by providing for a comprehensive list of orders.

Additionally, the bill sets out other circumstances where a person is excluded from jury service.

These include:

where they are awaiting trial or sentencing;

are subject to a preventative detention order under the *Terrorism (Police Powers) Act 2002* or a control order or interim control order under Division 104 of the *Criminal Code Act 1995* of the commonwealth; or

or are a registrable person within the meaning of the Child Protection (Offenders Registration) Act 2000.

In addition to these changes, and to maintain public confidence in the jury system, the bill provides that the Sheriff has a statutory right to information regarding a person's criminal record in order to determine whether potential jurors should be excluded from jury service on the basis of their criminal history.

This information will be provided by the New South Wales Police Force based upon the National Criminal History Record Check, undertaken via the National Names Index.

Other Exclusions from Jury Service

Currently the Act provides that in addition to disqualification from jury service certain categories of people are ineligible. They cannot serve even if they want to.

The bill will consolidate this class, and simplify it, with those who are disqualified under the heading: "Persons excluded from jury duty".

The sub-categories in this schedule will more accurately reflect the range of people who should be excluded from jury duty for legitimate reasons, and include persons holding particular office such as judicial officers, Crown Prosecutors, and the Director of Public Prosecutions.

These office holders will be excluded from jury service for a period of three years after ceasing to hold office.

People employed in certain occupations in the public sector will similarly be excluded from jury duty for three years after ceasing their employment or period of engagement.

For example, employees of the Office of the Director of Public Prosecutions, the NSW Police Force, the Police Integrity Commission and the Independent Commission Against Corruption.

And, people who may have access to information about inmates and other detainees as a result of holding a position with certain government agencies or related bodies are excluded from jury service during the period of their service.

These include employees of the Department of Justice and Attorney General, the Probation and Parole Service and Justice Health.

I will make specific mention of the change in eligibility for former police officers. Almost all other jurisdictions in Australia confine the ineligibility to serving officers. The commission recommended this be the case in New South Wales as well, and this was supported by a number of submissions.

So, in line with the provisions for retired judicial officers, Ministers, and senior public lawyers, under this bill a person will be eligible to serve on a jury three years after leaving the Police Force.

The Government takes the view that there is no justification in a modern workforce, where someone may serve as a police officer for a few years and then take up another career, for a lifetime exclusion.

Every retired officer will be able to apply for excusal for good cause, and we will ensure appropriate consultation is undertaken when the guidelines are developed.

Exemption for "Good Cause"

At present, the Jury Act also provides that a person may be excused from attendance for jury service by the Sheriff for "good cause" at any time after they have been sent a notice of inclusion but before being summonsed.

They may be excused because of any matter of special importance, or any matter of special urgency, such as urgent medical treatment.

Applications based upon "good cause" are assessed on an individual basis.

The concept of "good cause" is not defined in the Act, although the Sheriff has developed guidelines to assist staff in applying the relevant provisions of the Act.

Random selection is one of the chief means of ensuring a jury is representative of the community.

The Law Reform Commission recommended shifting to a general exemption model based upon "good cause" to create a more level playing field.

The commission's recommendations provide that sickness, infirmity or disability should no longer be a ground of exclusion, but should be considered as a ground of excusal for good cause.

Similarly, they recommended that no person should be entitled to be exempted from jury service as of right because of personal characteristics or situations or because of their occupation, profession or calling but should be able to apply to be excused for good cause.

The commission also recommended the preparation of guidelines to assist the Sheriff's exercise of discretion in excusing jurors for good cause.

Under the model proposed in the commission's report, all individuals, regardless of their background or profession, would enjoy the same rights and obligations in relation to jury service.

The statutory categories for exemption in schedules 2 and 3 of the Jury Act would be removed, and individuals would apply for exemption on the basis of criteria set out in published guidelines.

The Government supports the intent of the recommendations of the Law Reform Commission's report.

However, the Government is of the view that the existing provisions that allow people falling within certain professional and other employment categories to claim an exemption as of right should be retained on the basis of the importance of the services they provide to the community.

These groups include medical practitioners, members of the clergy and emergency service providers.

Certain other groups of people have nevertheless been removed from schedules to the Act, and will now have to apply to the Sheriff for an exemption for "good cause".

For example, the Act presently provides a right for anyone "employed or engaged in the public sector in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration" to be excused.

There is no good reason to prevent administrative and clerical staff employed in prosecution or defence agencies such as the Director of Public Prosecutions and the Legal Aid Commission, who are not directly involved in matters before the courts, from undertaking jury service.

Similarly, pregnant women or people over 70 years may currently claim an exemption as of right.

It is a fact that many people attempt to get excused from jury service. Providing a right to exemption for all pregnant women, for example, means that a woman early in her pregnancy who is called for a one-day trial would have a right to exemption.

The Government is of the view that the proper approach should have regard to the circumstances, and so proposes to remove broad-based rights of exemption.

If anyone is not capable of serving, they will be able to apply for an exemption on the basis of "good cause" and the criteria that will be set out in published guidelines.

We will consult closely with key stakeholder groups when developing the guidelines to ensure that all those with genuine grounds not to serve are able to be excused.

I would also like to make clear that while we are removing the current right to exemption for a person "who resides with, and has full-time care of, a person who is sick, infirm or disabled" does not mean we will require such people to serve.

In line with removing other categories of exemption, we will deal with this in guidelines that allow different circumstances to be taken into account.

For example, it is possible that someone who lives with and has full-time care of an infirm person has ample capacity to make alternative arrangements for their care, and often does so.

If such a person is called for a short trial, and will be no more inconvenienced than any other member of the public, then they should be in the same position as everyone else.

The adoption of guidelines offers a more flexible approach and provides a more equitable means of dealing with applications for exemption.

The Government is concerned to ensure that all relevant circumstances are considered. To this end, the Attorney General has asked the Sheriff to consider the inclusion of a broad concept of "carer" in the guidelines. In developing this, he will consult with key stakeholder groups.

Deferral and Permanent Exemption from Jury Duty

The Law Reform Commission's report proposes that potential jurors, if otherwise eligible to be excused from jury service, should be allowed an opportunity to defer and to nominate dates within the coming 12 months when they will be available.

The implementation of this proposal in the suggested form poses practical difficulties in terms of management of the jury roll.

Nevertheless, the Government agrees in principle with this recommendation, and will provide for deferral to a later time during the period in which the person is on the roll.

The Law Reform Commission's report also proposed that the Sheriff be allowed to excuse people either permanently or for a limited period.

In order to ensure that the proposal does not have the effect of encouraging unwarranted applications for permanent excusal, the Government proposes that the Sheriff may exempt a person permanently from jury service where a person has a mental or physical impairment that results in jury service being incompatible with the person's good health or that otherwise renders the person unable to perform jury service.

Where the Sheriff refuses an application for permanent exemption, the bill provides for a right of appeal to the Local Court.

Where a person is otherwise incapacitated due to temporary illness or for other reasons, they will be able to apply for an exemption for "good cause" under the guidelines.

Employee Protection

I would now like to address the provisions of the bill that deal with employee protection.

The Law Reform Commission's report made a recommendation aimed at increasing the protection of employees who are summoned to serve on a jury.

The commission's report proposed that the employment protection provisions for jurors should apply to both full-time and permanent part-time employees.

The Government supports this approach, and is also of the view that the protection should extend to casual employees.

Casual workers represent 27 per cent of the workforce, and employers often have a pool of casual employees that they draw upon at any one time. It is therefore important that this group of employees is adequately protected.

In line with the Law Reform Commission's proposals, the legislation makes it an offence for an employer to require an employee to use annual or other leave entitlements in order to serve on a jury.

The proposed maximum penalty for breach of the provision is 20 penalty units (\$2,200).

In addition to these provisions, the bill adopts the commission's proposals regarding increased penalties for existing offences.

Section 69 of the Act provides that an employer shall not dismiss a person in his or her employment; injure the person in his or her employment; or alter his or her position to his or her prejudice by reason of the fact that the person is summoned to serve as a juror.

Breach of this provision currently incurs a penalty of \$2,200.

The penalty in section 69 of the Act was last amended in 1987 and is manifestly inadequate compared to equivalent offences in other Australian jurisdictions.

It is proposed to increase the maximum penalty to 50 penalty units, that is, \$6,000, and/or imprisonment for up to 12 months. In addition, an offence by a corporation will now incur a fine of up to 200 penalty units or \$22,000.

The proposed increase to 50 penalty units will bring New South Wales into line with the Australian Capital Territory and the Northern Territory, which are at the lower end of the scale of financial penalties in Australia.

The addition of a financial penalty for a corporation brings New South Wales into line with Victoria and Tasmania.

Procedural and Other Amendments

There are also a number of procedural and other amendments to the Jury Act arising out of the commission's report that are worth noting.

First, the commission's report proposed allowing jurors who seek to be excused from jury service in court on grounds which might cause them personal embarrassment, or which might relate to their personal health or circumstances, to reduce those grounds to a document to be handed up to the judge.

The bill adopts this proposal, which is also supported by the judiciary.

Secondly, the Law Reform Commission's report proposed that, pending the possible introduction of a Smart Electoral Roll, the Sheriff should have the authority and capacity to cross-check data relating to a potential juror's residential address with records held by other government agencies.

A system is currently in place whereby the Registry of Births, Deaths and Marriages regularly updates the Sheriff regarding the names of deceased persons.

The bill expands upon this, and provides that the Sheriff may request information from the Roads and Traffic Authority for the purposes of checking the details of a person whom the Sheriff proposes to summons for jury duty.

Appropriate privacy protocols will be followed in implementing any such scheme.

Amendments to the Jury Regulation—Juror Allowances

I now turn to the proposed amendments to the Jury Regulation 2004 and juror allowances.

In order to provide some context for the proposed changes, I will briefly outline the National Employment Standards, or NES, which were established under the Fair Work Act 2009 and commenced on 1 January this year.

The NES are designed to ensure that employees are protected by minimum conditions, and apply to all employees covered by the Federal industrial system regardless of industry, occupation or income.

The NES provide for Community Service Leave. Where an employee engages in an "eligible community service activity" they are entitled to be absent from their employment for a period while engaging in such an activity.

An "eligible community service activity" includes jury service that is required by or under a law of a State.

The NES also provide that employees undertaking jury service will be paid their base rate of pay by their employer, or the difference between their base pay and any jury allowances, for the first 10 days of jury service.

The scheme provided for in the Fair Work Act is also reflected in modern awards, and has been taken into account in determining the proposed new juror allowance arrangements.

Currently, the Jury Regulation 2004 provides that jurors are to be paid a daily allowance that increases depending on the length of time served on the jury. At present, different daily rates apply for days 2 to 5, days 6 to 10, and from day 11 onwards.

The proposed amendments provide for a simplified payment model.

Under the proposed reforms, employed and unemployed jurors will generally be eligible for a single daily rate for days 1 to 10.

That rate will be set initially at \$100 per day; the result will be that no juror will be worse off during the first 10 days of a trial.

From day 11 onwards, employed jurors who are no longer entitled to receive their full wage or salary payment by their employers will be paid at a substantially higher rate, which is more than double the rate for the first ten days of service.

Unemployed jurors will continue to be paid at the rate set for the first ten days of jury service. I would note there that social security entitlements are not adversely impacted by receipt of a juror allowance.

These changes represent a significant step in ensuring that employed jurors are not left out of pocket as a result of jury service, and will assist in encouraging participation in jury duty.

I note that the commission did recommend we move to a full 'income compensation model'. This would pay all jurors a base daily amount, supplemented by a capped measure of compensation for lost income.

This would have a cost to the jury system that is not sustainable, and in light of the National Employment Standards is unnecessary.

The proposal in the bill recognises that service can be more difficult for some due to the loss of income, and redresses that as far as possible while maintaining a reasonable cost to society.

Other Amendments to the Jury Regulation

The Law Reform Commission's report proposed that it should be possible to summons jurors to serve at any one of the courts within the permitted radius of their place of residence, subject to appropriate exemptions from service.

As currently framed the Jury Regulation provides that, in determining the electoral districts that are to comprise the jury districts constituted by the Act, the Sheriff must ensure that the address of each person whose name appears on an electoral roll is included in one, but not more than one, jury district.

It is proposed to amend this regulation so that jurors may be included on the jury roll for more than one jury district.

In practice this will mean that prospective jurors will be available to be added to jury rolls and to serve at any court convenient to their place of residence.

Parliamentary Privilege

Finally, while it is not a component of the bill, I also wish to take this opportunity to alert honourable members to the Government's response to the Law Reform Commission's recommendation that Parliament give consideration to the question of the extent and preservation of the statutory exclusion and common law immunity of members of Parliament in relation to jury service.

Currently, in New South Wales a person is statutorily ineligible to serve as a juror if he or she is a member of the Legislative Council or the Legislative Assembly.

Given recent developments in the United Kingdom, where the exemption from jury service for members of Parliament has been removed, the commission's report suggests that the ineligibility that currently applies to MPs might be repealed.

While the Government does not propose that serving Ministers should be required to undertake jury service, it is important that the question of MPs' general immunity from service be further examined.

The Government therefore proposes that the issues raised in the Law Reform Commission's report regarding the eligibility of MPs to serve on juries be referred to the Law and Justice Committee of the Legislative Council of the New South Wales Parliament.

Terms of reference for the referral have been developed in consultation with the Law Reform Commission.

The proposed reforms to the jury legislation have been the subject of wide consultation with professional and business bodies, community groups, members of the legal profession and the judiciary.

The new scheme will commence once the necessary administrative procedures are in place. It is anticipated that this will take approximately six months from the time the legislation is passed.

I will conclude with the words of Sir Gerard Brennan in *Brown v The Queen*, where he said:

Trial by jury is not only the historical mode of trial for criminal cases prosecuted on indictment; it is the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice. The verdict is the jury's alone, never the judge's. Authority to return a verdict and responsibility for the verdict returned belong to the impersonal representatives of the community. It is the fundamental institution in our traditional system of administering criminal justice.

While jury service is often difficult to fit in with the demands of modern life, we would all do well to remember that it is a right hard won that protects the liberty of every person.

I commend the bill to the House.