LAW REFORM COMMITTEE

Jury Service in Victoria

ISSUED FOR PUBLIC DISCUSSION AND COMMENT

ISSUES PAPER No 2

NOVEMBER 1995

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LAW REFORM COMMITTEE

PARLIAMENT OF VICTORIA

COMMENTS AND SUBMISSIONS INVITED

In presenting the issues raised in this Issues Paper the Committee assumes that the reader is familiar with the contents of and issues raised in Issues Paper No. 1 which was published in November 1994. The summary of the issues raised in Issues Paper No. 1 appears in Appendix III to this Issues Paper.

Issues Paper No. 1 can be accessed via the Internet on the Committee's home page at—

http://www.vicnet.net.au/vicnet/vicgov/parl/lawref/lawrefhome.html.

Issues Paper No. 2 will also be available soon on the Committee's home page.

It is important to note that the issues raised for specific consideration in this Issues Paper are not necessarily in order of importance or the order in which they should be dealt with by the Committee or persons making submissions. Nor does the paper's statement of issues purport to be exhaustive. Also some issues may be regarded as interconnected although the Committee's paper does not indicate that. The Committee will consider any suggestions that recommendations should be contingent on other recommendations being adopted.

The Committee would find it convenient to receive submissions by way of files on floppy disks or attached to email messages to its email address: lawrefvc@vicnet.net.au.

However a covering signed letter to authenticate the submission should be sent to the Committee.

JURY SERVICE – HAVE YOUR SAY

How to make comments and submissions

You are invited to make comments and submissions on issues relevant to the Review of Jury Service in Victoria, including but not limited to the issues raised in this Issues Paper.

Written comments and submissions should be sent to—

The Secretary
Law Reform Committee
Level 19, Nauru House
80 Collins Street
MELBOURNE 3000

Phone: (03) 9655 6957
Fax: (03) 9655 6075
Email: lawrefvc@vicnet.net.au

Closing date—Monday, 12 February 1996

Anyone can make a submission or comment. If you have served on a jury or have a particular interest in the area of jury service, the Committee would like to hear from you. It is not necessary to have legal or any other special qualifications. The Committee is keen to hear from all those who have something to say about jury service.

The Committee is interested in any comments on how the law is operating or how it might be improved. You may wish to address some or all of the issues raised in this Issues Paper.

Submissions on floppy disks or as files attached to email messages are welcome. A separate signed authentication should be forwarded to the Committee.

The Committee will also hold public hearings at which oral submissions and evidence can be given.

Confidentiality—All submissions are treated as public documents, unless confidentiality is requested.

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CHAIRMAN'S FOREWORD

Issues Paper No. 2 is intended to elicit the assistance of lawyers and others who may have factual, statistical, analytic, anecdotal, or other material to submit in response to its publication. The Committee's first and final report will be tabled in Parliament in the first half of 1996 after considering all further written and oral submissions.

The Committee's express terms of reference from the Attorney-General are directed principally towards improving the composition and selection processes of juries. It is also within the Committee's statutory terms of reference to inquire into and report on any matter arising out of tabled documents such as the annual reports of the judges of the Supreme Court and the County Court. It does not wish to limit the scope of the submissions which may be put to it on all or any of the issues raised in its issues papers or on any other matter relating to jury service because it recognises that many recommendations may be expressed to be contingent on the acceptance of other recommendations.

As a corollary, the Committee does not wish to insist on issues being dealt with in the order or the precise form in which they are presented in this paper. Indeed it would prefer that submissions not respond to single issues in isolation but rather that they should be related to important principles. For its part the Committee notes that the principles and values underlying its terms of reference are not stated and that it has proceeded on the view that the achieving of fair trials is fundamental and that in any contest between the overwhelming power of the state and the liberty, reputation or livelihood of the individual any departure from fairness ought to favour the individual.

There are also provisional judgments of a less fundamental character. The Committee has concentrated on criminal trials and treated questions relating to civil juries as consequential or subordinate. Nonetheless it invites submissions on matters particularly concerning civil juries, including submissions which do not share the Committee's assumptions. It also regards

the role of judiciary and practising lawyers in ensuring that trials are fair and procedurally rational and efficient as fundamental, with the corollary that Parliament should prefer to arm judges with the necessary powers rather than prescribe in detail how justice should be dispensed to accused persons.

The Committee has visited trial courts and taken evidence in Los Angeles, Chicago, South Bend (Indiana), New York, Washington D.C., Vancouver, Ottawa, Toronto, Montréal, London, Oxford, Coventry, Cambridge, Edinburgh, Dublin and Hong Kong, as well as conducting telephone conferences with witnesses in Sydney, South Africa and New Zealand. Amongst the provisional views which have been influenced or confirmed by such extensive processes of inquiry are a rejection of ethnic or comparable quotas on juries in favour of seeking to ensure that juries are impartial, adequately directed, and fully informed by relevant evidence about the social, psychological, or cultural circumstances of accused persons. The Committee also recognises the importance of good interpreting services for the accused in relation to any part of what is said in court which the accused or his counsel could not otherwise understand.

Victorian jurors are not badly treated, especially in financial terms, by the standards of many other common law jurisdictions. Their privacy is most strongly protected, possibly overprotected in the light of practice elsewhere. On the other hand less is done in Victoria to educate jurors and potential jurors about their role, rights, powers, immunities and functions than in some other places. The Committee is inclined to the view that more should be done to treat jurors like responsible adult citizens who are taking a major part in an important civic activity and that as little information should be withheld from them as is consistent with doing justice.

In a decade when the willingness of the parliament, the judiciary and the legal profession to innovate in procedures has greatly accelerated there is reason to think that the Committee's inquiry might provide the occasion for substantial improvements in trial by jury. If there are opportunities to be taken now the Committee hopes that the reader of this issues paper will help to make sure they are taken. It is well aware of the adage 'hard cases make bad law' but it is not convinced that attempts to improve the quality of trial processes for the benefit of accused persons who are atypical, or for the benefit of a community that suffers if juries can be too easily persuaded that there is reasonable doubt when there is not, should be glibly dismissed with any such substitute for clear and cogent argument.

The submissions to the Committee will be received and kept in confidence if requested. The Committee would be particularly pleased to receive individual submissions on all or just some issues from judges or practitioners with individual views or experience, in addition to any corporate submissions.

The Hon. James Guest, MLC
Chairman
November 1995

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1. GENERAL PRINCIPLES

The Importance of Trial by Jury

1.1 Jury trials in Victoria, indeed, in Australia and all or most other common law jurisdictions, constitute a small fraction of all criminal proceedings—even of completed trials or hearings.[2] In Victoria the figure is about one half of one per cent. Nevertheless, the Committee believes trial by jury to be a very important institution, particularly for the administration of criminal justice. The most authoritative statement of its essential features in Australia in recent years is that contained in the judgment of Deane J. in the High Court decision in *Kingswell v. The Queen*.[3] After stating that the 'rationale and the essential function' of trial by jury is 'the protection of the citizen against those who customarily exercise the authority of government: legislators ... administrators ... judges', His Honour continued:

> Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well–known tendency of jurors to identify and side with a fellow–citizen who is, in their view, being denied a "fair go" tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases.[4]

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2 This will be elaborated length in Chapter 2; see below paras. 2.1-2.4.

3 (1985) 159 C.L.R. 264. Deane J. dissented from the majority but not on points material for present purposes. Brennan J. at 296 concurred with the views in this passage.

4 id., 300-301.

1.2 Deane J.'s opinion concerning the importance of trial by jury and its continuing relevance in a modern society was repeatedly confirmed to the Committee during its recent overseas investigations.[5] The opinions of judges and criminal lawyers throughout the United States, Canada, the United Kingdom and the Republic of Ireland—wherever there were common law jurisdictions, proof beyond reasonable doubt, adversary systems, and cross-examination—were in favour of the jury system, for all its imperfections, as a means of dispensing justice to those accused of serious crimes. Accordingly, the Committee accepts as its starting point the fundamental proposition that the institution of trial by jury is an important safeguard of the liberties of all people, and that it should be one of the aims of the Committee's recommendations to strengthen the institution in the sense of seeking to ensure the continued existence of jury trial as an effective means of protecting the liberties of the subject against the State.

1.3 The Committee is also mindful of Blackstone's warning in his *Commentaries* :

> inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.[6]

This process of erosion may serve to explain the actual or effective abolition of juries in civil cases in some jurisdictions in recent years,[7] and the total abolition of the jury system in Singapore in 1969 after it was found to be inefficacious,[8] and in the Republic of South Africa in 1969 at the end of a twenty year period in which very few accused persons had exercised a right to choose a jury trial instead of being tried by a judge sitting alone.[9]

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5 See, Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Report on Overseas Investigations* (forthcoming).

6 Sir William Blackstone, *Commentaries on the Laws of England*, (1769), Book IV, p. 344 quoted by Deane J. in *Kingswell*, ibid. 296.

7 e.g. in South Australia, *Juries Act 1927*, s. 5; in Québec, *Juries Act* SQ 1976 c. 9, s. 56; in New South Wales, The Courts Legislation (Civil Procedure) Amendment Bill 1994 (lapsed).

8 See M. Cheang, 'Jury trial: the Singapore experience', (1973) 11 West. Aust. L. Rev. 120, 121.

9 Evidence of Mr Noel Wood, solicitor, Cape Town, South Africa, *Hansard*, 22 May 1995.

- Issue 1.1 Should any proposal for reform of the jury system seek to strengthen the institution in the sense of seeking to ensure the continued existence of jury trial as an effective means of protecting the liberties of the subject against the State?

Fairness and the Jury System

1.4 It was noted in *Issues Paper No. 1*[10] that in a number of recent decisions the High Court has affirmed the right to a fair trial as being 'a fundamental element of our criminal justice system'.[11] But what is meant by the expression 'a fair trial'? Gaudron J. has observed that: 'A trial is not necessarily unfair because it is less than perfect,[12] but it is unfair if it involves a risk of the accused being improperly convicted'.[13] What constitutes 'an improper conviction'? Appeal courts in considering the closely related issue of whether proceedings at trial have resulted in a miscarriage of justice, often ask the question whether, by reason of the unfairness, the accused may 'have lost a chance which was fairly open to him of being acquitted'.[14]

1.5 Notions of 'fairness' are inevitably dependent to a great extent upon contemporary community attitudes. As Deane J. has observed:

> While the law's insistence that there be no conviction without a fair trial according to law has been long established, the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances.[15]

One of the traditionally applauded strengths of the jury system is the innate ability of twelve members of the community, selected substantially at random, to apply a popular or ordinary person's standard rather than a professional standard to issues such as what is, or is not, fair in a particular

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10 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Issues Paper No 1*, The Committee, Melbourne, November 1994, para. 1.2.1.

11 *Jago v. District Court (NSW)* (1989) 168 C.L.R. 23, 29 per Mason C.J. See also: *Wilde v. The Queen* (1988) 164 C.L.R. 365, 375 per Deane J.; *Jago* at 56 per Deane J., 72 per Toohey J., 75 per Gaudron J..; *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 303 per Mason C.J. & McHugh J.; *R. v. Glennon* (1992) 173 C.L.R. 592, 623 per Deane, Gaudron, McHugh JJ.

12 See *Jago* at 49 per Brennan J.

13 *Dietrich* at 365, citing *McDermott v. The King* (1948) 76 C.L.R. 501, 511-515 per Dixon J.; *Driscoll v. The Queen* (1977) 137 C.L.R. 517, 541 per Gibbs J.

14 e.g., *Mraz v. The Queen* (1955) 93 C.L.R. 493, 514 per Fullagar J.

15 *Dietrich* at 328, see also 364 per Gaudron J.

case.[16] As Learned Hand J. has noted: 'this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions'.[17]

1.6 A general community perception that accused persons will be tried fairly is essential if public confidence in the system of justice is to be maintained. In his now famous aphorism Lord Hewart C.J. opined that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[18] It is the Committee's preliminary view that this principle extends to include the accused person's perception that, regardless of the outcome, he or she has been fairly judged according to law. Clearly some qualification would have to be put on the validity of an accused person's subjective perception that a trial process is not fair. 'Reasonableness' might require too high a standard, 'not deluded' too low. 'Reasonable for a person of the accused's relevant social, psychological and ethnic background' might be appropriate.

- Issue 1.2 Should the proposition that the right to a fair trial, which is entrenched in the common law, include the perception of an accused person that he or she is being tried fairly? What qualifications should be put on the validity of an accused person's perception?

The Role of the Judiciary in Ensuring that the Trial Process is Fair

1.7 The inherent powers of a court to prevent injustice are not confined within narrow categories. Rather, a judge who presides over a criminal trial 'has all the powers necessary or expedient to prevent unfairness in the trial'.[19] Brennan J. observed in *Jago v. District Court (NSW)*:[20]

> Unfairness occasioned by circumstances outside the court's control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a judge to avoid unfairness to either party but particularly to

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16 See, Lord Devlin, *The Judge*, Oxford University Press, Oxford, 1979, 176; and see the discussion below at paras. 2.21, 2.25.

17 *United States ex. rel. McCann v. Adams*, 126 F. 2d 774, 775 (1942).

18 *R v. Sussex Justices, ex. p. McCarthy* [1924] 1 K.B. 256, 259.

19 *Dietrich* at 364 per Gaudron J. citing: *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, 1301-1302, 1347; *Barton v. The Queen* (1980) 147 C.L.R. 75, 96, 107; *Jago* at 75.

20 (1989) 168 C.L.R. 23.

> the accused is burdensome ... The responsibility is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.[21]

His Honour later expressed the opinion that 'by a flexible use of the power to control procedure and by the giving of forthright directions to a jury, a judge can eliminate or virtually eliminate unfairness'.[22]

1.8 The powers of judges to control procedure within their courts is illustrated by the recent decision of the Victorian Court of Criminal Appeal in *R v. Searle*.[23] The trial judge of his own motion had stood aside a person whom he and the parties considered should not in the interests of justice become a member of the jury. The person had been seated in the jury box but had not been sworn. On appeal the Court of Criminal Appeal held that:

> a trial judge in the exercise of the inherent power that he possesses to ensure that a fair and just trial is conducted, may of his own motion stand aside a person whose name is called from the panel of jurors so as to prevent that person becoming a member of the jury to try an accused.[24]

This power may be exercised at any time before the juror is sworn. It must be exercised judicially and then only upon proper material being before the presiding judge; whether by his or her own observations or otherwise.[25]

1.9 Apart from the common law tradition, the right to a fair trial is further protected by international conventions. Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party,[26] contains a guarantee that 'everyone shall be entitled to a fair and public hearing by a **competent**, independent and **impartial** tribunal established by law' (emphasis added). Although the provisions of the ICCPR are not part of Australian domestic law, they 'may be used by the courts as a

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21 id., 47.

22 id., 49.

23 [1993] 2 V.R. 367.

24 [1993] 2 V.R. 367, 374 per Marks & McDonald JJ.; see also 380 per Hampel J. dissenting for other reasons.

25 id., 375-376.

26 Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980.

legitimate guide in developing the common law'.[27] If it is legitimate for the courts to take cognisance of international conventions in developing the common law then, *a fortiori*, a law reform body should do likewise in considering the need to reform the statute book.

1.10 A potential source of unfairness in a case might be the empanelling of a juror who is incapable of arriving at an informed and impartial judgment when deciding the outcome. This may be because the juror lacks the ability to comprehend the evidence or legal principles to be applied, or because he or she is unable or unwilling to put aside any preconceived notions or biases. It may be unreasonable to require the whole jury to understand all the evidence and legal principles in a case. A jury biased against the accused is the major vice. While the Committee notes that it is not just the accused's interest which needs to be considered, it would accept the convention that any imperfections in the system should operate in favour of an acquittal.

1.11 In the absence of real evidence, as is usually the case in Australia, the judgment by the accused, the prosecution, and the trial judge as to whether in a specific case the empanelling of a particular juror is likely to create a source of unfairness to the accused, must inevitably be intuitive or based on very crude generalisations. Some evidence about actual jury behaviour from other jurisdictions, anecdotal evidence, and a general knowledge of human nature all suggest that twelve people chosen as a truly random cross–section of the community, or chosen as they actually are, will often contain one or more people whose abilities to understand, analyse and weigh the evidence are less than the complexity of the case requires, some who are persuasive of others, and some who look to others to guide them. None of these facts or probabilities necessarily suggests that a major effort to overcome them is necessary for justice in the general run of criminal cases, in the absence of widespread dissatisfaction with the system or its outcomes. On the other hand, it is arguably unacceptable that a jury might, when chosen purely at random, or from a restricted sample of the community, contain practically no one who can truly comprehend the evidence, the judge's explanation of the law, or the critical arguments for each side, **at least where one or more of the parties reasonably insists that a competent jury is necessary for the purposes of a fair trial**.

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27 *Minister for Immigration v. Teoh* (1995) 69 A.L.J.R. 423. See also, *Mabo v. Queensland [No 2]* (1992) 175 C.L.R. 1, 41-43; *Dietrich* (1992) 67 A.L.J.R. 1, 15 per Brennan J.

1.12 In Victoria, the tribunal established by law to decide issues of fact in the trial of indictable offences is the jury. In the case of the more serious indictable offences which cannot be tried summarily, it is the only tribunal established by law to decide issues of fact impinging upon the determination of guilt. The ICCPR's reference to a **competent** and **impartial** tribunal raises two issues. First, the controversial and difficult question of whether a criminal case can be too complicated for any jury which is randomly selected from the general population to understand.[28] Secondly, the question of how best to ensure the impartiality of juries.

1.13 In responding to the perceived problem of juror incompetence in complex civil litigation, a number of courts in the United States have held that the due process clause of the Fifth Amendment to the United States Constitution requires that 'trial by jury may be refused in a case of such complexity that the jury cannot likely achieve a reasonable understanding of the relevant evidence and applicable legal rules'.[29] This is the case despite the guarantee contained in the Seventh Amendment of a right to trial by jury in civil cases involving more than twenty dollars. This reasoning has not been applied to override the accused's right to trial by jury under the Sixth Amendment.

1.14 Rather than abandoning altogether the right to trial by jury, in an appropriate case it may be preferable for the presiding judge to take a more active role in the jury selection and empanelment procedures in order to achieve a jury which is apparently competent to try the issues in the case fairly.

1.15 There is no code or comprehensive and authoritative statement applicable to Victoria as to how impartiality of juries is to be achieved, but the Victorian legal system can be said to rely implicitly on—

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28 See generally, Mark T. Cowie, 'Juries and Complex Litigation' in Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Report on Research Projects*,(forthcoming).

29 J.S. Campbell, 'The current understanding of the Seventh Amendment: jury trials in modern complex litigation', Centre for Judicial Studies, Boston, 1987. See e.g. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 631 F. 2d 1069 (3rd Cir. 1980); *Cotten v. Witcon Chem. Corp.*, 651 F. 2nd 274, 276 (5th Cir. 1981); contra, *In re U.S. Financial Securities Litigation*, 609 F. 2nd 411 (9th Cir. 1979).

a) the random selection of potential jurors from those enrolled to vote, although in practice this does not occur;

b) the rarely used machinery of challenge for cause;[30]

c) the power of the trial judge to make procedural rulings and orders and to give express directions to the jury; and

d) a presumption that jurors, acting in conformity with the instructions given to them by the trial judge, will be faithful to their oaths and render a true verdict in accordance with the evidence.[31]

1.16 In a recent lengthy and complex trial in England where there had been a great deal of pre–trial publicity, a questionnaire, which was designed to test potential jurors' availability and to determine whether there was any possibility of undue prejudice, was administered by court officials on the directions of the trial judge to potential jurors before the empanelling process commenced.[32] For administrative practicality the questionnaire was divided into two parts. The first part was designed to identify those with good reason to be excused from a lengthy trial. The second part contained questions designed to show whether any potential juror had been, or may have been, 'infected with bias as a result of pre–trial publicity'.[33] The second part of the questionnaire was only given to those potential jurors who had not been excused on the grounds of hardship. In settling the content of the questionnaire Phillips J. had regard to the submissions of counsel. In ruling on the use that could be made of the answers to the questionnaire, His Lordship said:

> The answers ... will be of assistance to me in deciding whether there are jurors who ought not to sit on this case and will provide assistance to Counsel in considering whether to challenge for cause.[34]

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30 See *Murphy v. The Queen* (1989) 167 C.L.R. 94, 99. Peremptory challenges are widely understood to be an attempt to bias the jury more than to eliminate bias.

31 See, *R. v. Glennon* (1992) 173 C.L.R. 592, 603 per Mason C.J. & Toohey J.

32 *R. v. Maxwell* (the trial is proceeding). See Hedley Goldberg, 'A random choice of jury?', *The Times,* 13 June 1995.

33 *R. v. Maxwell*, unreported ruling of Phillips J., 27 April 1995, 18. Copy provided to the Committee at a meeting with officers of the Serious Fraud Office, London, 3 July 1995.

34 ibid.

It should be noted that the right of peremptory challenge was abolished in England in 1988[35] and that challenge for cause is virtually unknown in practice. Clearly, the judge's concluding words could be applied to the exercise of peremptory challenges.

1.17 His Lordship also ruled that after a juror had been selected by ballot and before that juror was sworn:

> it will be open to me to ask any questions that I may consider appropriate in considering whether to exercise my powers to excuse or discharge the juror, and it will be open to Counsel, where appropriate, to challenge the juror for cause.[36]

Similar procedures are regularly adopted in the United States and are not uncommon in Canada.[37]

1.18 The issues raised are closely related to questions about challenge for cause and the use of questionnaires and other means for learning about potential jurors. These topics are returned to in Chapter 3.[38] The part that the parties and their counsel might play is also important. The Committee is inclined to the view that the sources of possible bias should not be regarded as a closed category. Where, as in Canada, application for a voir dire may be made to the court with a view to challenge for cause being allowed it is obviously open to counsel to argue that any number of ethnic, religious, media publicity or other factors should be treated as grounds for particular apprehension of bias.

- Issue 1.3 Should judges be encouraged to take an active role to ensure, so far as is practicable, that the jury empanelled for a trial is one likely to be able to weigh the evidence competently and deliver a fair verdict? Should such intervention depend always or normally on the request of a party?

Jury Representativeness

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35 *Criminal Justice Act 1988* (UK), c. 33, s. 118.

36 *R. v. Maxwell* at 19.

37 See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Report on Overseas Investigations*, (forthcoming).

38 See below paras. 3.20-3.23.

1.19 It may be very important to confidence in the administration of justice that a jury be broadly representative of the community it serves. The significance of this principle was emphasised by Deane J. in *Kingswell* where His Honour said:

> The institution of trial by jury also serves the function of protecting the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of a jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case ... and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.[39]

1.20 In addition to the considerations expounded by Deane J., community involvement in the jury process has been said to achieve an important educative process. A historian of trial by jury observed in 1878 that the jury system is 'one of the great instruments for the education of the people'.[40] In the world of electronic media that may be regarded as an overstatement. However, taken together these are reasons for the Committee to incline to the view that in general Victorian juries should be broadly representative of the whole community, and that citizens should be actively encouraged to participate in the system. The question of exceptions to this general proposition is taken up in Chapter 3.

1.21 The importance of representativeness in comparison with competence (either collectively or individually) and impartiality may require serious qualification. This is so because of the difficulty and expense of achieving anything which may be fairly regarded as representativeness, if random selection from a basically inclusive original pool is not regarded as sufficient. If it is, it may reasonably be argued that actual juries are not likely to be representative in any but an artificial sense. The issue of representativeness clearly raises questions about relative importance. The Committee is inclined

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39 *Kingswell v. The Queen* (1985) 159 C.L.R. 264, 301-302.

40 W.M.A. Forsyth, *History of Trial by Jury*, 2nd edn., rev. J.A. Morgan, Burt Franklin, New York, 1971 (1878), 355-356. See also, Sir William Holdsworth, *A History of English Law*, vol. 1, eds A.L. Goodhart & H.G. Hanbury, Methuen & Co, London, 1938, 348-349 citing De Torqueville, *Democratie en Amerique*, vol II., 190.

to the view that impartiality is always, and competence may be, more important than a representativeness which cannot now be said to exist in any strict sense. The issue also raises questions about the exemptions and exclusions which are granted, a topic raised at length in Issues Paper No. 1 and again in Chapter 3.[41]

1.22 What should count as 'representativeness' is however difficult to define. In the United States the requirement is that juries be 'selected at random from a fair cross–section of the community in the district or division wherein the court convenes'[42]. This does not mean that the composition of each jury must mirror that of the community; rather, there must be substantial compliance with the requirement.[43] This will generally be achieved in practice if the jury selection process does not systematically exclude any distinctive or 'cognizable' groups present in that community[44]. A similar position has been reached in Canada. In 1991 the Supreme Court of Canada held that generally a person is to be tried by a jury that is drawn from the community where the alleged offence occurred and which is representative of that community.[45] The Court has recognised that community 'representativeness' cannot be defined so as to require that juries be a microcosm of the communities they serve, since to do so would be an 'impossible achievement'.[46] It is 'impossible' because the community can be divided up into many groups based on factors such as gender, race, class and education. [47] Thus, the Canadian courts seek to ensure the representativeness of juries by requiring a process of random selection from a source which is broadly representative of the relevant community. In New Zealand recently, similar problems have been raised for discussion and like solutions proposed.[48]

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41 See below paras. 3.7-3.8.

42 See e.g. *The Jury Selection and Service Act*, 28 U.S.C., s. 1861. The ideal of the cross-sectional jury has been applied to state courts by the United States Supreme Court decision in *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

43 See, *Savage v. United States*, 547 F. 2nd 212 (1976); *United States v. Miller*, 771 F. 2nd 1219 (1985).

44 See e.g., United States v. Test, 550 F. 2nd 577 (1976).

45 *R. v. Sherratt*, [1991] 1 S.C.R. 509; D. Pomerant, Department of Justice, Canada, Working Document, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases*, April 1994, vi.

46 *R. v. Biddle* (1995) 96 C.C.C. 3d 321 per McLachlin& L'Heureux–Dube JJ.

47 ibid.

48 Law Commission, *Juries: Issues Paper*, October 1995, paras. 16–25.

- Issue 1.4 Should Victorian juries be broadly representative of the whole community? What is the relative importance of 'representativeness'?

- Issue 1.5 Should citizens who are entitled to serve on juries be actively enabled and encouraged to do so?

- Issue 1.6 Are there any other principles of general application which the Committee should apply in determining the direction of jury reform in Victoria?

2. THE AVAILABILITY OF JURY TRIAL

Introduction

2.1 Any reform of the jury system in Victoria must take account of the relative infrequency of jury trials as compared with other forms of trial. Generally speaking, trial by jury is the exception rather than the rule in both the civil justice system—where about 1.4 per cent of all cases disposed of in 1994 were tried before juries—and the criminal justice system—where less than half of one per cent of all charges heard were determined by juries.

2.2 In 1994 in the civil jurisdiction a total of 13,364 cases were disposed of in Victorian courts; 808 in the Supreme Court, 3,747 in the County Court, and 8,809 in the Magistrates' Court. Of these 3,322 cases were disposed of at a final hearing by Supreme and County Court judges (868) and magistrates (2,454).[49] Of the cases disposed of at a final hearing, only 186 were tried before juries in the Supreme Court (18) and the County Court (168). Of course there are no juries in the Magistrates' Court. Accordingly, the number of civil jury trials represents only 1.4 per cent of all civil cases disposed of in the year, or 5.6 per cent of cases disposed of at a final hearing. The figure of 186 is 21.4 per cent of civil cases tried in the Supreme and County Courts. Cases brought before tribunals such as the Small Claims Tribunal or the Residential Tenancies Tribunal are not included in these statistics.

2.3 In 1994 in Victoria 305,705 offences were disposed of by magistrates sitting without a jury.[50] This compares with 5,410 offences which were dealt

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49 See, Supreme Court of Victoria, *Annual Report 1994*, Appendix II, pp. 32-41, 44; County Court of Victoria, *Melbourne Civil Jurisdiction Statistics for January to December* (unpublished); Victoria, Department of Justice, Caseflow Analysis Section, Courts and Tribunal Services Division, *Monthly Civil Returns for the Circuit Courts*, (unpublished); Victoria, Department of Justice, Caseflow Analysis Section, Courts and Tribunal Services Division, *Civil Hearing Information in the Magistrates' Court* (unpublished).

50 Victoria, Department of Justice, Caseflow Analysis Section, Courts and Tribunals Services Division, *Sentencing Statistics Magistrates' Court Victoria 1994*, Melbourne, 1995,

with in the County Court and the Supreme Court. Of these latter offences, 1,328 were ruled upon by juries, while 4,082 were disposed of by judges either on a plea of guilty (3,909), or by the entry of a *nolle prosequi* or leading of no evidence by the Crown (111), or by a directed acquittal (43), or on some other unspecified basis (19).[51] Consequently, offences tried by juries represented less than half of one percent of all offences disposed of in the year.

2.4 Another measure of the relative infrequency of criminal jury trials in Victoria can be derived by comparing the Victorian statistics with those in other states. In 1992 in Victoria there were 10.13 jury trials per 100,000 persons in the population. This compares with: New South Wales 22.22, South Australia 25.16 and Queensland 34.89.[52] This extreme variation possibly could be explained by relatively fewer serious crimes being committed in Victoria compared with the other states[53]; or it could be because Victoria has structural differences which have the deliberate effect of reducing the right to trial by jury. It has been observed that:

> The two most obvious ways of having fewer jury trials are first, the transfer of cases from the higher courts to the summary courts and, secondly, the replacement of trials with guilty pleas.[54]

2.5 This observation has prompted the Committee to consider whether there are some offences categorised as summary offences which ought to be indictable offences, and whether there are indictable offences at present triable summarily which should be triable only in the higher criminal courts. Another way to pose the question is to put less weight on the categorisation of offences as indictable or summary, and to ask simply whether trial by jury or the right to trial by jury ought to extend to more offences.

Table CR 4.4, p. 4.77.

51 Victoria, Department of Justice, Caseflow Analysis Section, Courts and Tribunals Services Division, *Sentencing Statistics Higher Criminal Courts Victoria 1994*, Melbourne, 1995, Table 2, p. 85.

52 See J. Willis, 'Reflections on achieving fewer jury trials', (1995) 4 *J.J.A.* 220, 222-223.

53 In the financial year 1992-93 the rate per 100,000 of the population for the total number of offences involving murder, rape, serious assaults, armed robbery and robbery reported to police in Victoria, New South Wales, South Australia and Queensland were: Vic 187.00, NSW 271.78, SA 327.60, Qld 323.21. Thus, Victoria's major crime rate using this measure was 68.8% that of NSW, 57.1% that of SA, and 57.9% that of Qld. See, Mark T. Cowie, *A Description of Selected Major Violent Crime in Australia 1983-84 to 1992-93*, unpublished, Task Force Victor, 1994.

54 id., 221.

Summary Offences

2.6 Summary offences are generally less serious than indictable offences and are statutory in nature. They are heard by a magistrate sitting alone. Where an Act describes an offence or a prescribed penalty as summary, or is silent as to the procedure for its enforcement, then the offence is prosecuted as a summary offence.[55] Where the provision creating the offence describes it as indictable, or where the offence is punishable by three years imprisonment or more,[56] or where all offences contained in the Act are deemed to be indictable offences—as is the case with offences under the *Crimes Act 1958*[57] and the *Wrongs Act 1958*.[58]—then the offence must be prosecuted in the Supreme or County court; unless it is an indictable offence which is triable summarily in the Magistrates' Court.[59]

2.7 Parliament determines whether statutory offences should be prima facie triable by jury or summarily by classifying them as indictable or summary. In Victoria the usual mode of prosecution in the higher criminal courts, where, at present, all trials are jury trials, is not by indictment, but by presentment made by or in the name of the Director of Public Prosecutions.[60] No distinction between prosecution on indictment or by presentment need be made for present purposes.

2.8 In relation to offences under federal law, section 80 of the Commonwealth Constitution guarantees trial by jury for indictable offences, but does not compel trial by indictment, even for serious crimes. The effect of this is that:

> If legislation creating the offence permits the prosecution to be instituted by summons issued upon information 'without indictment', or changes an indictable offence into a summary one, a defendant cannot insist on a jury trial on indictment. [61]

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55 *Interpretation of Legislation Act 1984* (Vic), s. 52. See also, *Sentencing Act 1991* (Vic), s. 112(2).

56 *Sentencing Act*, s. 112(1).

57 *Crimes Act 1958* (Vic), s. 2B.

58 *Wrongs Act 1958* (Vic), s. 2A. Crimes under this Act include, publishing any libel with intent to extort money, and publishing a false defamatory libel.

59 *Crimes Act*, ss. 351–354. As to indictable offences which may be tried summarily see *Magistrates' Court Act 1989* (Vic), s 53 and the discussion below at paras. 2.13–2.25.

60 *Crimes Act*, ss. 351, 352.

61 R.G. Fox, *Victorian Criminal Procedure – State and Federal Law*, Monash Law Book Co–

2.9 The Committee is inclined to the view that where a person's reputation, livelihood, or other major interest is at risk, there ought to be a judicial discretion to allow trial by jury on application by the accused: for example, in cases such as a school teacher charged with a minor summary offence the conviction for which might lead to dismissal; or a minister of religion charged with a minor offence of a sexual nature, such as offensive behaviour, or soliciting for prostitution; or a long time public servant charged with a summary offence a conviction for which could lead to the loss of a substantial superannuation entitlement. The Committee doubts that any significant cost or inconvenience would result from making this concession to the circumstances of individuals.

2.10 The Committee is also inclined to the view that section 360A of the *Crimes Act 1958* which empowers a court to order the Legal Aid Commission to provide assistance to an indigent accused if the court is satisfied that 'it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial', should be applied to a jury trial of a 'summary' offence as discussed in paragraph 2.9 above.[62]

2.11 Some guidance may be found in *Kingswell v R*.[63] In his dissenting judgment in that case Deane J. attacked the basis for the classification of summary offences in the context of a decision which required the scope of section 80 of the Constitution to be delineated. While His Honour's opinions were *obiter* in the light of the majority decision as to the meaning and effect of section 80, the Committee respectfully notes his view on policy that it was inappropriate for the Parliament to decide that there should be no jury trial for offences where the maximum term of imprisonment was over twelve months. This conclusion relied on the presumed existence of limits beyond which a charge cannot properly be seen as fit to be dealt with as a summary offence. In His Honour's view these limits are determinable by the courts rather than legislation. His Honour concluded in relation to federal law that serious offences as a matter of principle are to be tried on indictment:

> A particular alleged offence will, for the purposes of characterizing a particular trial as a "trial on indictment", be a "serious offence" if it is not one which could appropriately be dealt with summarily by justices or magistrates in that conviction

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Operative, Clayton, Vic, 1995, 8.

62 See also below para. 2.21.

63 (1985) 159 C.L.R. 264.

> will expose the accused to grave punishment. It is unnecessary, for the purposes of the present case, to seek to identify more precisely the boundary between offences which are not and offences which are capable of being so properly dealt with. I have, however, indicated the tentative view that that boundary will ordinarily be identified by reference to whether the offence is punishable, when prosecuted in the manner in which it is being prosecuted, by a maximum term of imprisonment of more than one year. [64]

2.12 In Victoria there are a number of summary offences for which the maximum penalty exceeds twelve months. These are listed in Appendix IV to this Issues Paper.

- Issue 2.1 Should legislation be introduced to extend the right to trial by jury to any, and which, summary offences?
- Issue 2.2 Should the right to trial by jury depend upon the maximum penalty applicable to the summary offence and, if so, at what level of maximum penalty should that right become available?
- Issue 2.3 Should the right to trial by jury depend upon other criteria such as whether the accused's reputation, livelihood, or other major interest is at risk?
- Issue 2.4 Should the right to trial by jury be determined by the Court according to some such broad criterion as 'the interests of justice'?

Indictable Offences Triable Summarily

2.13 Indictable offences involve serious crimes which are ordinarily tried by a judge and jury in either the Supreme Court or the County Court. Indictable offences may be defined by common law or by statute. There are four main sources of indictable offences:

a. Most of the offences listed in the *Crimes Act 1958* are indictable.[65]

b. The residual common law offences are all indictable.[66]

c. State offences are presumed to be indictable where they carry a maximum penalty of three years imprisonment or more.[67]

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64 (1985) 159 C.L.R. 264, 317–319 per Deane J.

65 *Crimes Act*, s. 2B.

66 R.G. Fox, op.cit., 7–8.

67 *Sentencing Act*, s. 112.

d. Indictable offences can be created by statutes other than the *Crimes Act 1958*.

2.14 A large number of indictable offences can be heard summarily; that is, in the Magistrates' Court without a jury. Many of these are listed in Schedule 4 to the *Magistrates Court Act 1989* which is extracted in Appendix V to this Issues Paper. In addition to the Schedule 4 offences, all offences punishable by a maximum of ten years imprisonment or less were made triable summarily by an amendment to the *Magistrates' Court Act 1958* which became operative in 1992.[68] Most of these offences are shown in the tables which follow Schedule 4 in Appendix V.

2.15 In general, where an indictable offence is heard summarily the maximum penalty that can be imposed for any single offence is two years, or five years for multiple offences.[69] An exception is provided for offences against the *Drugs, Poisons and Controlled Substances Act 1981*, where the maximum penalty for a single offence on summary trial is three years imprisonment.

2.16 As originally enacted, Schedule 4 to the *Magistrates' Court Act 1989* listed **all** the indictable offences which in 1989 were considered to be appropriate for disposition by a magistrate without a jury trial. By a 'side wind' the *Sentencing Act 1991* amended the *Magistrates' Court Act 1989* by inserting section 53(1A)[70], with the result that a large and potentially uncertain number of quite serious offences became triable in the Magistrates' Court. The section is not merely a catch–all provision intended to eliminate the necessity to periodically amend Schedule 4 to the Act; rather, it has significantly expanded the jurisdiction of the Magistrates' Court to hear indictable offences.

2.17 Under section 53 of the *Magistrates' Court Act 1989*, as it was prior to 22 April 1992, if an accused person was before the Magistrates' Court charged with any indictable offence referred to in Schedule 4 to the Act, the court had a discretion to hear and determine the charge summarily if it was of the opinion that the charge was appropriate to be determined summarily, and the accused consented to a summary hearing. The police informant or the accused

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68 id., s. 119(6).

69 id., ss. 113, 16(5).

70 See Appendix V below.

could apply for a summary hearing, or the court could offer a summary hearing without any application being made.[71] In practice the application for a summary hearing was invariably made on the application of the prosecutor with the accused's consent, and magistrates would rarely refuse such an application. In 1992 the scope of section 53 was extensively widened by including within its ambit not only the indictable offences listed in Schedule 4, but all indictable offences punishable by terms of imprisonment of up to and including ten years. The extent of this amendment can be seen by the tables included in Appendix V to this Issues Paper.

2.18 Under the scheme of the legislation as it stood before the 1992 amendments, for an indictable offence to be triable summarily a decision had to be made whether or not it should be included in Schedule 4 to the Act. Under the present legislation, any new indictable offence which carries a maximum penalty of ten years or less—for example, the recently created offence of stalking[72]—is automatically triable summarily with the accused's consent. Furthermore, where the maximum penalty for an existing indictable offence is reduced to the ten year or less level, this will have the automatic consequence that the offence becomes triable in the Magistrates' Court. Recent changes to the penalties for offences in this category include: child destruction (20 years reduced to 10 years), using a firearm to resist arrest (14 years reduced to 10 years), extortion with a threat to kill (15 years reduced to 7.5 years), infanticide (15 years reduced to 5 years) and inciting suicide (14 years reduced 5 years)—to name some of the more serious offences.[73]

2.19 It may not be appropriate for some of these offences to be heard in the Magistrates' Court. There is a community interest in having some cases tried in the higher courts where the full penalty range is available. By widening the jurisdiction of the Magistrates' Court to hear and determine indictable offences summarily, there may be a serious 'risk of magistrates' courts failing to identify those cases where committal for trial is essential'.[74] It is true that on an application for a summary hearing the prosecution and the accused must consent, and the magistrate must form the view that the case is one

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71 *Magistrates' Court Act*, s. 54.

72 See *Crimes Act*, s. 21A.

73 See the plethora of offences listed in items 11, 12, 13, 16, 20 & 21 of the explanatory note to Schedule 2 of the *Sentencing Act*.

74 D.A. Thomas, "Committals for Trial and Sentence–the Case for Simplification", [1972] *Crim. L. R.* 477, 479.

appropriate for disposition by a summary hearing. Nevertheless, the Committee notes that the 1992 amendment has effectively placed largely in the hands of the parties the decision as to whether an offence punishable by ten years imprisonment or less is appropriate to be determined at a summary hearing, subject only to a magisterial discretion to refuse the application.

2.20 In Canada the Crown has a discretion as to whether to prosecute 'hybrid offences' by indictment or summarily, however, the Crown's election does not require the accused's consent. In that country there have been moves to reclassify offences from the higher criminal courts, where jury trial is preserved, to courts exercising summary jurisdiction. Recent amendments to the Criminal Code have resulted in the reclassification of offences which carried a maximum term of imprisonment of five years. For these offences the Crown can now elect to proceed summarily and thereby remove an accused person's right to elect trial by jury.[75] The accused is compensated for the loss of the opportunity to be tried by a judge and jury by being subject to a maximum term of only six months imprisonment.[76] The Committee observed during its investigations in Canada that there was a trend to proceed summarily in a range of quite serious offences in order to save money and reduce delays in the superior courts. The overt intention and consequence of this reform is to save money for the State and to reduce sentences imposed on those convicted.

2.21 It would be idle to consider the right to jury trial without regard to Legal Aid policies. Referring to the variation in the relative frequency of jury trial between Australian States, one author has observed:

> There is doubtless a range of causes for these variations. One key factor is undoubtedly the number of indictable offences in a jurisdiction that can be heard summarily and the attitude of the charging authority, defendants and magistrates to using the summary jurisdiction for those offences. Another relevant consideration can be the attitude of the relevant legal aid authority to such cases. In some jurisdictions, it is a condition of aid that indictable offences which are normally heard summarily be heard summarily. In such instances, while the defendant retains the right to have a jury trial, the practical effect is that the great majority of indictable cases which can be heard summarily are in fact heard summarily.[77]

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75 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Report on Overseas Investigations*, (forthcoming).

76 Criminal Code (Can.), s. 722(1).

77 Willis, op. cit., 222.

In this context the Committee notes that the Legal Aid Commission of Victoria's *Handbook* contains the following guideline:

> In the absence of compelling reasons assistance will not be provided for the hearing of charges in the County or Supreme Courts where such charges could be and normally are heard and disposed of in the Magistrate' Court.[78]

This guideline would not prevent an application under section 360A of the *Crimes Act 1958* by an accused person who has refused to consent to summary jurisdiction under section 53 of the *Magistrates' Court Act. 1989* Section 360A empowers a court to order the Legal Aid Commission to provide assistance to an indigent accused if the court is satisfied that 'it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial'.

2.22 The Committee notes that pressure to conclude matters speedily may be felt by the prosecuting authorities. Also restrictions placed on the availability of Legal Aid funding for jury trials may place unfair pressure on accused persons to accede to prosecution applications for summary hearings. If this happens, it might be thought to place an unreasonable burden on the Magistracy to decide whether the interests of the accused, as well as the wider community interest, is best served by granting any particular application by the prosecution for a summary hearing. In relation to applications for summary hearing of indictable offences, Lord Parker C.J. has observed that: 'There is something more involved than convenience and expedition. Above all there is the proper administration of criminal justice to be considered'. [79] The burden on magistrates will be significantly increased, by reason of the 1992 amendment, if the number and range of serious offences coming before the Magistrates' Court is greatly expanded.

2.23 Unlike the situation in summary hearings where, since the High Court's decision in *Latoudis v. Casey*[80] if a charge is dismissed in the Magistrates' Court the accused is normally entitled to have an order for costs against the informant, costs are rarely awarded in the higher criminal courts.[81] As this inquiry is necessarily concerned with the fundamentals of

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78 6th edn (1993), Guideline 4.1, p. 2-18.

79 *R. v. Coe* [1968] 1 W.L.R. 1950, 1953.

80 (1991) 170 C.L.R. 534

81 See, *R. v. Whitworth* (1988) 164 C.L.R. 500.

fairness in our criminal justice system, the issue of costs in jury trials can no more be avoided than the issue of legal aid policies. It is, to say the least, anomalous that a community which makes much of the importance of the jury system should penalise an innocent person who seeks trial by jury rather than submit to summary jurisdiction. The trade–off of a lower maximum sentence is likely to be totally irrelevant to a person truly oppressed by the State into consenting to a prosecution application for a summary hearing.

2.24 Since some of the Committee's recommendations may be contingent on other recommendations being adopted, it is relevant to consider the following issues—

- Issue 2.5 Should legislation be introduced to reduce the number of indictable offences which are triable summarily?

- Issue 2.6 Should an accused's ability to elect to have an indictable offence tried summarily depend upon the maximum penalty applicable to the offence and, if so, at what level of maximum penalty should the ability to so elect cease to be available?

2.25 In England, where the practice of magistrates determining applications for summary hearing parallels that in Victoria, guidelines for the exercise of the discretion have been provided in the form of a Practice Note.[82] They are intended to provide guidance rather than direction so that magistrates must still give individual consideration to each case. The Practice Note is reproduced in Appendix VI to this Issues Paper.

- Issue 2.7 Should guidelines be provided for the exercise of a magistrate's discretion to grant or refuse an application for a summary hearing?

The Trial of Serious Criminal Offences by a Judge without a Jury

The experience of common law jurisdictions

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82 *Practice Note (Mode of Trial: Guidelines)* [1990] 1 W.L.R. 1439.

2.26 In recent years a number of Australian[83] and overseas common law jurisdictions[84] have enacted legislation which gives to persons charged with serious criminal offences the option of electing to be tried by a judge without a jury. By the expression 'serious criminal offences' is meant those offences which are usually tried on indictment or presentment, where the option of a summary trial before a magistrate is not available. Extracts of the relevant legislation appear in Appendices VII to XII. The Committee is interested in obtaining the views of members of the legal profession and the general public on the question of whether this option should be introduced in Victoria.

2.27 The option of trial by judge alone may appear attractive to an accused because of the repugnant nature of the offence itself or of the surrounding circumstances, where his or her background will necessarily be revealed and is likely to be unattractive to a jury, where a 'technical' defence or a complex explanation will be relied upon, or where there is a fear that pre-trial publicity may affect the ability of a jury to act impartially.[85] In New South Wales judge alone trials are very common in diminished responsibility cases.[86] It has been argued that judge alone trials are not suited to cases in which judgment is required on issues raising community values; such as, reasonableness, provocation, self–defence, dishonesty and indecency, or in cases which are wholly circumstantial or in which there are substantial issues of credit.[87] Although judges are used to applying community standards, 'one of the best reasons for having a jury to determine issues relating to community values is the acceptance by the community of a jury's verdict'.[88] It is also noteworthy that an expectation in South Australia and New South Wales that judge alone

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83 ACT, *Supreme Court Act 1933* , ss. 68A-68C, introduced in 1993; NSW, *Criminal Procedure Act 1986*, ss. 31-33, in operation in 1990; SA, *Juries Act 1927*, s. 7 introduced in 1984; WA, *The Criminal Code*, ss. 651A-651C, inserted by *Criminal Law Amendment Act 1994*, in operation 1995.

84 Canada, Criminal Code, ss. 471, 473, 536, 552-568; New Zealand, Crimes Act 1961, ss. 361A-361C, as inserted by Crimes Amendment (No 2) Act 1979, s. 2.

85 D.C. Heenan, 'Trial by judge alone', (1995) 4 *J.J.A.* 240, 243; J. Badgery–Parker, 'The criminal process in transition: balancing principle and pragmatism, Part II', (1994-1995) 4 *J.J.A.* 193, 195, 198.

86 ibid. See also, New South Wales, Director of Public Prosecutions, 'Guidelines as to consent to election to be tried by a judge alone,' 1 March 1995, paras. 8, 9, 10.

87 J. Badgery–Parker, op. cit., 199; id., para. 6.

88 ibid.

trials would become the norm in complex or protracted criminal cases has not been fulfilled.[89]

2.28 It has generally been the experience of those jurisdictions where the option is available, that judge alone trials are on average shorter and less expensive than jury trials.[90] However, save in some Canadian provinces, the number of judge alone trials is not sufficient to make any significant difference to the overall disposition rate of cases.[91]

The trial of serious criminal cases in civil law countries

2.29 In the absence of a common law tradition of trial by jury, a number of civil law countries have developed tribunals for determining guilt in serious criminal cases which contain an element of community participation. Denmark has a system similar to the common law model. In grave offences, such as homicide, rape, and robbery, three High Court judges sit with a jury of twelve. The jury deliberates alone, but may summon the presiding judge and have him or her answer any points which have arisen during their deliberations.[92] A more complicated model operates in Belgium where in serious cases a Court of Appeal judge sits with two judges from the middle ranked criminal court, and a jury of twelve lay persons. The jury deliberates alone on the question of guilt. However, if the accused is found guilty by the jury only by a simple majority, the judges deliberate among themselves on the same question. If a majority of them do not agree with the majority of jurors, the accused must be acquitted.[93]

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89 ibid.; Carolyn Harrison, 'Redefining justice?: Trial by judge alone', Department of Criminology, University of Melbourne, unpublished; Evidence of Ms Megan Latham, Director NSW Criminal Law Review Division, *Hansard*, 11 September 1995.

90 Heenan, op. cit., 43 referring to information provided by Badgery-Parker J.

91 ibid. For the Canadian experience, see Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Report on Overseas Investigations* (forthcoming).

92 United Kingdom, The Royal Commission on Criminal Justice, *Criminal Justice Systems in Other Jurisdictions*, N. Osner, A. Quinn, G. Crown eds, HMSO, London, 1993, 79.

93 id., 56.

2.30 In France grave offences are heard in the Assize Court where nine jurors deliberate with three judges on guilt and sentence. There must be a majority of eight if the accused is to be convicted.[94] In Italy in the most serious cases the Italian Court of Assizes has two judges who deliberate together with a panel of six lay assessors, recruited at random. All eight members of this panel have to decide points of fact and points of law. They each vote and decide by simple majority.[95] In Germany the Greater Criminal Court, which has jurisdiction in relatively serious criminal cases, sits with three professional judges and two lay judges. However, in the Higher Criminal Court, which hears the most serious crimes such as murder and bank robbery, guilt is determined by five professional judges.[96] In Sweden in the more serious criminal cases one legally qualified judge sits with three lay judges. During deliberations in private the legally qualified judge will explain the subject matter of the case and the applicable legal rules to the lay judges. During voting on the question of guilt or innocence the lay judges state their opinion last.[97]

2.31 Many civil law systems have no community participation in the guilt determining process in serious criminal cases. In Israel and the Netherlands there are no juries and no lay element in the criminal justice system. Serious cases are tried by a court consisting of three professional judges. Less serious cases are dealt with by a single judge.[98] Spain provides an interesting case study. Article 125 of the Spanish Constitution of 1978 specifically recognised the fundamental right of citizens to participate in the administration of justice as members of a jury. However, a jury system has never been introduced despite pressure from many quarters. The ostensible reason given by the government for this is that the implementation of a jury system would lead to greater delays in the administration of justice. However, 'the real reason, in the opinion of the majority of Spanish jurists, is that the government would lose control of the judiciary'.[99] The Committee's visit to Los Angeles County Superior Court judges produced an observation relevant to the last mentioned

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94 id., 88.

95 id., 140.

96 id., 98.

97 id., 188-189.

98 id., 125-126, 152.

99 id., 178.

point. One of the judges, who has been advising in Russia on the establishment of a jury system, found a great deal of support for it from Russian judges who believed it would protect them from outside pressure, especially from government.

2.32 Lest it be suggested that the experience of civil law jurisdictions is too far removed from that in Victoria to be worth considering, the Committee notes that Scotland and Hong Kong—where there are adversarial criminal trials, with cross–examination, presided over by a single judge—nonetheless exhibit great variation from the usual common law model.[100] The variations include numbers of jurors from seven in Hong Kong to fifteen in Scotland, and majority verdicts which can be five out of seven in Hong Kong to eight out of fifteen in Scotland.

- Issue 2.8 Should legislation be introduced to enable persons charged with serious criminal offences to elect to be tried by a judge sitting without a jury?[101]
- Issue 2.9 Should legislation be introduced to enable persons charged with serious criminal offences to elect to be tried by a judge or a panel of judges sitting with or without lay assessors?

2.33 Clearly there are many more possible permutations than have been expressly raised by the Committee. Consideration should be given, for example, to the part that the judge should play in determining the mode of trial in a criminal case and, for another example, to the possible role of the judge in initiating a move to add assessors (by whatever name) to the tribunal of fact. In civil proceedings Supreme and County Court judges have the power to 'call in the assistance of one or more specially qualified assessors and hear the proceeding wholly or partially with their assistance'.[102] The judge is not bound by the assessor's opinion or findings.[103] Other points arise in relation to the achieving of fair trials for each of a number of accused persons with very different views or interests in the mode of trial.[104]

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100 For Scotland see, Criminal Procedure (Scotland) Act 1975 (UK) as amended, ss. 85-100, 123-164. For Hong Kong see, P. Duff, M. Findlay, C. Howarth, C. Tsang-Fai, *Juries – A Hong Kong Perspective*, Hong Kong University Press, Hong Kong, 1992, 37-42.

101 The expression 'serious criminal offences' is defined in para. 2.26 above.

102 Supreme Court Act 1986 (Vic), s. 77; County Court Act 1958 (Vic), s. 48A.

103 ibid.

104 See below paras. 2.59-2.60.

2.34 The Committee is conscious that the jury trial and some of its concomitants such as cross–examination of witnesses have compelled the common law jurisdictions to stage once and for all hearings. Neither the holding of a fair trial nor the discovery of truth are particularly well served by excluding whatever is inconsistent with this procedural requirement. Trial by judge alone would clearly allow for flexible procedures which could save time and money actually devoted to the determination and proof of guilt or its absence. The possibility that issues in criminal cases might be divided between those to be determined by a judge and those to be determined by a jury is one that the Committee is also interested in. This may be only for the purpose of recommending that judges and parties have wider scope for devising a trial process suited to the particular case. Saving money without significantly changing the balance between the parties, or improving the quality of adjudication without greatly increasing cost, and the degrees of benefit in between, are worthwhile objectives.

- Issue 2.10 Would it be desirable for judges to have the power upon application by one or more of the parties or upon his or her own motion to order some issues to be determined by a judge and others to be determined by a jury in criminal trials? Should there be legislation to facilitate such orders being made?

2.35 Judge alone trial legislation in common law jurisdictions has a number of common features, but there are important differences. The provisions of the legislation in the various jurisdictions will be discussed below under the following headings:

- The categories of offences covered.
- The presence of safeguards designed to prevent 'judge shopping'.
- Whether the consent of the prosecution is required.
- Whether a judge is required to form any view concerning the appropriateness of the election.
- The presence of safeguards designed to ensure that the accused makes a free and informed choice.
- Whether any limitations are placed on the right to elect judge alone trial.
- Whether there is a right to re–elect after an initial election.
- The presence of procedural provisions relating to the conduct of judge alone trials.

Categories of offences covered

2.36 In most jurisdictions the right to elect judge alone trial is available for all indictable offences. However, the South Australian provisions exclude the trial of 'minor indictable offences [where the accused] has elected to be tried in the District Court'.[105] In general 'minor indictable offences' are those indictable offences which are tried in the Magistrates' Court unless the accused elects for trial in a superior court.[106] This provision appears to be intended to prevent an accused removing a case from trial before a magistrate to trial before a District Court judge sitting without a jury. The Canadian Criminal Code excludes treason, murder, piracy, sedition and similar offences, and bribery by the holder of a judicial office from the jurisdiction of a provincial court judge to try alone.[107] However, an accused charged with one of these offences may, with the consent of the Attorney General be tried without a jury by a judge of a superior court of criminal jurisdiction.[108] In practice this discretion is rarely exercised.[109]

2.37 The inappropriateness of allowing non–jury trials for charges of murder was a cause of concern to White J. in *R. v. Marshall*.[110] After convicting the accused of murder in a judge alone trial, His Honour presented a strong case for excluding this form of trial in cases involving charges of treason and murder. His Honour expressed a strongly held view that on a charge of murder 'the values are too important; and the burden on the trial judges is oppressive'.[111] His Honour said:

> In a murder case, community values are reflected in a special way on such subject matters as provocation, self-defence, intention and manslaughter; in the later case, the jury has a "constitutional right" to bring in a merciful verdict of manslaughter even where the elements of murder are proved. That merciful verdict belongs to the jury, quaere to the judge.[112] There are also great difficulties in putting to one side, in a case

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105 *Juries Act 1927* (SA), s. 7(2).

106 *Summary Procedure Act 1921* (SA), ss. 5, 103.

107 Criminal Code (Can.), ss. 469, 554.

108 id., s. 473.

109 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Report on Overseas Investigations* (forthcoming).

110 (1986) 43 S.A.S.R. 448.

111 id., 499.

112 As to a jury's power to bring in a verdict that is not open on the evidence, see the

> as serious as murder, the kind of prejudicial material which is often introduced into a voir dire hearing. It is true that magistrates in minor cases and judges in civil cases often hear evidence on the voir dire or de bene esse and put out of their minds the prejudicial matter discovered in the course of provisional hearings. Nevertheless, in murder trials, where the sentencing consequences of an often finely-balanced decision can be so extraordinarily different, it is most important that the case be decided only upon properly admissible evidence or upon evidence which has been independently adjudged more prejudicial than probative upon long-established and clearly-developed principles. The trial judge acts as a filter against this polluting evidence which is capable of influencing or inflaming a jury unfairly against the accused, and less capable, but still capable, of influencing a judge sitting alone in a murder trial, perhaps subconsciously and in spite of his training and rigorous efforts to exclude such evidence from his mind.[113]

- Issue 2.11 Should judge alone trial legislation extend to all serious criminal offences?[114]
- Issue 2.12 Should judge alone trial legislation exclude a right of election in cases where the accused is charged with an indictable offence triable summarily?

Safeguards to prevent 'judge shopping'

2.38 Every jurisdiction has enacted provisions designed to prevent 'judge shopping'. 'Judge shopping' is where an election to be tried by a judge without a jury depends on the accused knowing the identity of the trial judge, combined with the accused's perception of what that judge's likely reaction to the defence case will be.

2.39 Most jurisdictions have sought to avoid 'judge shopping' by providing a time for election at a stage where ordinarily the accused would not know the identity of the judge allocated to hear the trial. This is usually coupled with a power in the court to grant leave to elect out of time in special cases. However, one New South Wales judge has commented that in his State:

> the restriction upon the time for election is futile because such is the nature of the listing system that almost invariably the identity of the trial judge will be known to the accused long before the deadline fixed by the legislation. [115]

In an effort to prevent this problem occurring, the Western Australian legislation provides for an election before an indictment has been presented to

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discussion below at paras. 3.27–3.35.

113 *R. v. Marshall* at 499.

114 The expression 'serious criminal offences' is defined in para. 2.26 above.

115 J. Badgery–Parker, op. cit., 198.

a court, or at any stage 'before the identity of the trial judge is known to the accused person'.[116]

2.40 It was noted in Chapter 1 that public confidence in the judicial system depends not only on the impartial administration of justice, but also on a public perception of impartiality.[117] Thus, it is an accepted principle that justice should be dispensed according to law and should not depend upon the whim of individual judges. This is the rationale behind the establishment in Victoria of the Criminal Trial Listing Directorate as an independent body which is primarily responsible for the listing of all trials in the higher criminal courts.

2.41 However, not all jurisdictions are concerned to prevent 'judge shopping'. For example, in the Canadian provinces of Ontario and Québec an accused who has elected trial by jury after the preliminary inquiry can re–elect to be tried by judge alone right up to the day of trial. The Criminal Code provides for the re–election to be made fourteen days before the trial date, or thereafter with the consent of the prosecutor.[118]

2.42 The practice in Ontario is for the Crown to readily consent to a time expired re–election from jury trial to trial by judge alone in order to avoid delay and the greater expense associated with a jury trial.[119] The same practice is followed in Québec where the Committee was told by André Vincent, Chief Crown Prosecutor for Montréal:

> Generally speaking out of a sense of fairness [the Crown does not] insist on that prior notice and what frequently happens is that on the morning of the jury selection the defence counsel sees what judge is assigned to the case and then [makes the] decision there.[120]

The Committee also heard evidence from witnesses in Ottawa and Toronto that, although not actively encouraged, 'judge shopping' was widely

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116 *The Criminal Code* (WA), s. 651A(4).

117 See above para. 1.6.

118 Criminal Code (Can.), s. 561.

119 Ontario Court of Justice (General Division) meeting with the Victorian Law Reform Committee, Ottawa, 22 June 1995, Side 2, p. 2; Ontario Court of Justice (General Division) meeting with the Victorian Law Reform Committee, Toronto, 23 June 1995, Side 3, p. 8.

120 Meeting with the Law Reform Committee at Faculty of Law, McGill University, Montréal, 26 June 1995, Side 1, pp. 6, 8.

accepted. Mr John McMahon, the Executive Legal Officer to the Chief Justice of Ontario described the system as operating in the following manner:

> When [the accused's legal representatives] see who is on the bench they look at the nature of the case and if they see that Judge S is sitting and that he's got a wide reasonable doubt in relation to sexual assaults [they] think that they have a better shot at it then they will re–elect. If [the judge is one] who they think is a little narrower then they may elect to stay with the jury. [121]

2.43 In Ottawa the Committee was told that this negotiating process in regard to re–elections took place prior to the day of trial. A typical situation would be for an assistant crown attorney to ask: Are you going to re–elect for judge alone? And for defence counsel to respond: Depends on the judge. Avenues would then be investigated to ascertain whether a judge acceptable to the accused could be listed to hear the case.[122] In Montréal the Committee was told in effect that the administration of criminal justice would grind to a halt if this negotiating process did not occur:

> almost all the time the prosecution will accept a change of option because you have to understand that it would be impossible here in Montréal to have all trials for the entire year to be judged by judge and jury. This year just in Montréal we had over 20,000 cases of criminal affairs [sic], so if all these cases are received before a judge and jury it would be almost ten years before we will be able to proceed in all the cases.[123]

The result of this process is that in Montréal in an average year only about fifty to sixty cases proceed before a judge and jury, and of these from twelve to fifteen are cases of murder where jury trial is effectively mandatory.[124] This represents less than two jury trials per 100,000 in the population, which compares with Toronto 5.9 per 100,000, and Melbourne 44 per 100,000.

2.44 The trial by judge alone system as it operates in Canada has other consequences. It encourages judges to stream into two groups: those who sit on judge and jury trials, and those who only preside over judge alone trials.[125]

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121 Ontario Court of Justice (General Division), meeting with the Victorian Law Reform Committee, Toronto, 23 June 1995, Side 1, p. 8.

122 Ontario Court of Justice (General Division) meeting with the Victorian Law Reform Committee, Ottawa, 22 June 1995, Side 2, p. 2.

123 André Vincent, Chief Crown Prosecutor for Montréal, meeting with the Law Reform Committee at Faculty of Law, McGill University, Montréal, 26 June 1995, Side 1, p. 8.

124 id., 9.

125 Ontario Court of Justice (General Division), meeting with the Victorian Law Reform Committee, Toronto, 23 June 1995, Side 2, p. 2.

The first group develops some expertise in dealing with juries, which is limited by the infrequency of jury trials, whereas the second group of judges which may be compared with magistrates in Victoria in this respect, may become 'case hardened', in and expression used to the Committee in Canada. This was not said so as to denigrate the judges' ability to remain in touch with community standards but, rather as a reason for preferring jury trials in some cases in an accused person's interests. Whether such judges, or indeed magistrates, can be said to lose touch with the standards and attitudes which a representative jury might bring to its work is not a question with an answer which the Committee finds obvious and wholly convincing.

2.45 Another consequence of the system is that when an accused initially elects for a jury trial, pressure to re–elect is exerted from judges hearing pre–trial proceedings who are concerned to ensure that cases are tried quickly. In Toronto the Committee was told by a defence lawyer who practised extensively in the higher criminal courts that:

> there is real pressure to re-elect, and because of the system and the administration with the pre-trials, there is, I feel, a very close connection between the Crown Attorney's Office and the judiciary.[126]

This perception is heightened by the fact that regular meetings take place between the Crown Attorney's officers and the judiciary in which court scheduling and case management matters are discussed in the absence of defence attorneys.[127]

2.46 The Committee is not inclined to regard the avoidance by accused persons of one or two judges amongst a large number as a matter of concern as it would be if any party were able to ensure that a trial was conducted by a particular judge; unless with the consent of all parties.

- Issue 2.13 What, if any, safeguards against 'judge shopping' should judge alone trial legislation contain?
- Issue 2.14 Should the judge who hears and determines an application for a judge alone trial be excluded from presiding at the trial?

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126 Ms Louise Botham, Criminal Lawyers Association in Ontario, meeting with the Law Reform Committee, Toronto 23 June 1995, Side 1, p. 13.

127 ibid.

Prosecution consent to an election

2.47 The consent of the prosecution to an election by an accused to be tried by judge alone is required in New South Wales and Western Australia. In Canada the Attorney General's consent is required only for charges of murder, treason, piracy, sedition and the like. The other jurisdictions have no requirement for prosecution consent.

2.48 For some years after the New South Wales provision was introduced, the prosecution acquiesced in the accused's decision as a matter of course on the grounds that it was essentially his or her decision.[128] However, following what the prosecution perceived to be some 'unsatisfactory outcomes', in March 1995 the Director of Public Prosecutions for New South Wales issued 'Guidelines as to consent to election to be tried by a judge alone'.[129] Under these guidelines each case is to be considered on its merits. There is no presumption in favour of consent.[130] The principal consideration is stated to be 'the achieving of justice by the fairest and most expeditious means available'.[131]

2.49 In New South Wales, in the absence of any provision requiring a judge to form a view concerning the appropriateness of an election for judge alone trial, the position effectively has been reached whereby the Director of Public Prosecutions exercises his/her discretion to give or withhold consent in what he/she perceives to be the public interest.[132] Those responsible for defending accused persons may argue with some justification that this situation leaves the Director open to the criticism that his/her judgment may be influenced also by tactical considerations.[133]

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128 *R. v. Hughes* (unreported, NSW Supreme Court, 7 November 1994) was the first time the DPP refused to consent to non–jury trial, citing the public interest in the particular case. See, J. Badgery-Parker, op. cit., 219, note 83.

129 Evidence of Ms Megan Latham, Director NSW Criminal Law Review Division, *Hansard*, 11 September 1995, 291.

130 New South Wales, Director of Public Prosecutions, 'Guidelines as to consent to election to be tried by judge alone', 1 March 1995, para. 1.

131 id., para. 5.

132 Evidence of Ms Megan Latham, Director NSW Criminal Law Review Division, *Hansard*, 11 September 1995.

133 Evidence of Mr Martin Sides QC, Senior Public Defender NSW, *Hansard*, 11 September 1995.

2.50 In Victoria the Director of Public Prosecutions is responsible for the institution, preparation and conduct on behalf of the Crown, of proceedings in the Supreme Court and the County Court in respect of indictable offences.[134] In performing his or her functions the Director is required to have regard to considerations of justice and fairness, the need to conduct prosecutions in an effective, economic and efficient manner, and the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime.[135] This latter consideration not only does not require the Director to exercise a discretion in a particular manner simply in order to give effect to the views of the victims of a crime, but, in the Committee's view, was intended to ensure adequate communication with victims and not to affect fundamental questions of fairness to the accused.

2.51 Consistently with the provisions of the *Public Prosecutions Act 1994*, it seems appropriate for any legislation introducing trial by judge alone in Victoria to allow the Director of Public Prosecutions to make objection to any election to waive jury trial.

- Issue 2.15 Should the Director of Public Prosecutions have the right to express a view on an election or application by an accused person to be tried by judge alone?

Judicial consent to an election

2.52 New Zealand is the only jurisdiction which requires a judge to form a view concerning the appropriateness or otherwise of an accused's election to waive jury trial. Pursuant to section 362B(4) of the Crimes Act 1961 (NZ), the judge to whom a notice by an accused of his/her wish to be tried by judge alone is referred, is required to make an order granting the application unless the judge, 'having regard to the interests of justice, ... considers that the accused should be tried before a Judge with a jury'. However, this provision has been interpreted restrictively by the New Zealand courts where it has been held that 'the Court will generally assume that ... the accused is the best judge of the interests of justice so far as he is concerned'.[136]

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134 *Public Prosecutions Act 1994* (Vic), s. 22(1).

135 id., 24.

136 *R. v. Narain* [1988] 1 N.Z.L.R. 580, 589 per Heron J.

2.53 Arguably a different view would be taken of a similar provision in an Australian jurisdiction. In *Brown v. The Queen* Deane J. observed that the institution of trial by jury is 'for the benefit of the community as a whole as well as for the benefit of the particular accused'.[137] Heenan J. has written that in his view, 'trial by judge alone should take place only when the interests of the community, as well as those of the accused, require it'.[138]

2.54 A judge has a degree of control over procedures in his or her court, and has an overriding duty to ensure that an accused person receives a fair trial. Accordingly, it could be argued that a specific provision requiring a judge to form a view about the desirability of an accused's election to waive trial by a jury is unnecessary. However, as Badgery–Parker J. has observed, if a judge were to express the view that in his or her opinion the accused's election was inappropriate:

> there may be a risk that the accused person might wrongly understand it to be an intimation that the judge had formed a view of the case adverse to the accused and that although the judge was seeking to protect the accused from any adverse effects of such pre–judgment by the interposition of a jury, the accused may nevertheless believe that the trial would take place in the presence of a judge presumptively biased against her or him and that hence it would not be a fair trial.[139]

- Issue 2.16 Should judge alone trial legislation require a judge to decide whether any election to waive jury trial is in the interests of justice?

Safeguards designed to ensure that an accused makes a free and informed choice

2.55 Because trial by jury is such an important right, three jurisdictions have enacted provisions in their judge alone trial legislation which are designed to ensure, so far as is practicable, that an accused who waives that right is making a free and informed decision. Badgery–Parker J. has commented that:

> where trial without jury is forced upon an accused person against his or her will, rather than being the result of his or her exercise of free choice, the risk is that the trial will be perceived by him or her, and by others in the community, as being less fair[140].

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137 (1986) 160 C.L.R. 171, 201. See also id., 197 per Brennan J.

138 D.C. Heenan, op. cit., 244.

139 J. Badgery–Parker, loc. cit.

140 J. Badgery–Parker, op. cit., 195.

2.56 Under the Australian Capital Territory model, the accused must produce a certificate signed by a barrister or solicitor stating that the legal practitioner has advised the accused in relation to the election and 'the accused person has made the election freely'.[141] The New South Wales and South Australian models are similar but without the need of a certificate.[142]

- Issue 2.17 Should judge alone trial legislation aim to ensure that an accused person has made a free and informed decision to waive trial by jury?
- Issue 2.18 As a corollary, should there be legislation or other steps to ensure that an accused person who waives his or her existing rights to jury trial in favour of summary jurisdiction in the Magistrates' Court has made a free and informed decision?

Limitations on the right to elect trial by judge alone

2.57 All jurisdictions place some limitation on an accused person's right to elect trial by judge alone; for example, by ensuring that the procedure is not used to effect a *de facto* severance of counts in a presentment, or separate trials of multiple accused jointly presented.[143] Typical provisions provide that an election can only be made in respect of all charges by all accused in a pending trial. Some jurisdictions have enacted provisions designed to prevent a person charged with an indictable offence which is triable summarily, and who has refused to consent to summary jurisdiction, subsequently electing trial by judge alone.[144]

2.58 Special problems arise in cases where Commonwealth offences are to be tried with State offences. Section 80 of the Commonwealth Constitution provides: 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury'. In *Brown v. The Queen* the High Court held that this section precludes an accused person from electing to be tried by a judge alone for an offence against a law of the Commonwealth.[145] If in the

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141 *Supreme Court Act 1933* (ACT), s. 68B(1)(b).

142 *Criminal Procedure Act 1986* (NSW), s. 32(1)(b); *Juries Act 1927* (SA), s. 7(1)(b).

143 Regarding orders for separate trials, see *Crimes Act 1958* (Vic), s. 372(3). The principles to be applied in determining applications for separate trials are canvassed in *R. v. Beavn* (1952) 69 W.N. (N.S.W.) 140; *Brennan v. The Queen* (1936) 38 W.A.L.R. 76; *R. v. Teitler* [1959] V.R. 321.

144 See above para. 2.36.

145 (1989) 160 C.L.R. 171 per Brennan, Deane and Dawson JJ.; Gibbs C.J. and Wilson J.

interests of justice it is necessary that all charges, both Commonwealth and State, arising from a given set of facts be heard and determined together, then it would seem appropriate to exclude the right to elect judge alone trial in such cases. However, in such a case the 'interests of justice' cannot be understood as denying the right of the accused to a fair trial in the fullest sense.

2.59 Insistence on the right to a fair trial derives from a concern to treat each individual human being with fairness. In that context the Committee notes that one category of well known case is that of jointly accused persons who have very different requirements or at least views about what constitutes fairness to them. Great cost and inconvenience to witnesses may be perfectly good reasons for refusing separate trials but they may also make it difficult to treat all accused persons fairly. As Hunt J. has said:

> The interests of the administration of justice of having joint trials are as relevant as the interests of the parties; but the interests of the administration of justice should not be permitted to outweigh any positive injustice which a joint trial would cause to one or other of the accused.[146]

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dissenting.

146 *R. V. Farrell* (N.S.W. Supreme Court, Hunt J., 27 April 1990, unreported).

2.60 In logic it may be argued that a single trial could be conducted with different tribunals of fact for different accused. This apparently extreme circumstance has occurred in the trial in California of Erik and Lyle Menendez, two brothers charged with the murder of their parents.[147] Judge Weisberg with the consent of all parties ordered that the trial proceed before two juries, each sworn to determine the case against each accused. Both juries simultaneously heard evidence relevant to and admissible against both accused, while each jury separately heard evidence which was ruled admissible against only one accused.[148] If that is a manageable option then the concurrent trial by judge alone and by judge and jury would appear to be comparatively simple. Some might take the view that too few cases would be involved. Others may take the view that four co–conspirators all exercising peremptory challenges in a similar manner could create an unacceptable appearance, or the reality, of bias in a tribunal, where a co–accused of completely different background would wish to defend himself or herself by giving a complex account of difficult technical matters to a judge alone, or a jury not biased by the challenges of his or her co–accused.

- Issue 2.19 Should judge alone trial legislation place any and, if so, what limitations on an accused person's right to elect trial by judge alone?
- Issue 2.20 Should there be legislation to create more options for the mode of trial in case accused persons have different interests or preferences but separate trials are not desirable?

The right to re–elect trial by jury

2.61 The Australian Capital Territory legislation provides for an accused person who has made an election for judge alone trial to re–elect jury trial 'at any time before he or she is arraigned', but no further election is permitted.[149] New South Wales has a similar provision for re–election 'at any time before the date fixed for the person's trial', however, there is no express restriction

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147 See generally, C. Reed, 'Another trial, for all concerned', *The Sunday Age*, 4 April 1995, 4.

148 The first trial miscarried when neither jury could agree on a unanimous verdict. The re-trial will be conducted before a single jury. See, M. Fleeman, 'Judge prefers single Menendez jury', *Daily News of Los Angeles*, 30 June 1994, 3; A. Burke, '1 jury will hear Menendez case', *Daily News of Los Angeles*, 4 April 1995, 4.

149 *Supreme Court Act 1933*, ss. 68B(1),(2).

on further re–election.[150] In Canada, there is a right to re–elect from trial by judge alone back to jury trial, and from jury trial back to judge alone trial.[151]

- Issue 2.21 If introduced, should judge alone trial legislation place any, and if so, what limitations on an accused person's right to re–elect a different method of trial from that initially elected?

Procedural provisions relating to the conduct of judge alone trials

2.62 The legislation in most jurisdictions contains procedural provisions relating to the conduct of judge alone trials and related matters. Western Australian legislation expressly provides that a court hearing a judge alone trial 'can exercise any power that it could have exercised if the election had not been made'.[152] To similar effect is the South Australian provision which provides:

> Where a criminal inquest proceeds without a jury in pursuance of this section, the judge may make any decision that could have been made by a jury on the question of the guilt of the accused, and such a decision will, for all purposes, have the same effect as a verdict of a jury.[153]

In *R. v. Marshall* White J. being satisfied that the elements of murder had been proved, relied on this provision to determine whether he should exercise what he termed 'the jury's "constitutional right" to return a verdict of manslaughter'.[154]

2.63 Most jurisdictions have provisions giving findings and judgments made by a judge sitting alone the same effect in law as they would have if made by a jury.[155] They also provide that judgments must include the principles of law applied by the judge and the findings of fact on which the

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150 *Criminal Procedure Act 1986*, s. 32(5).

151 Criminal Code (Can.), s. 561.

152 *The Criminal Code* (WA), s. 651C(2).

153 *Juries Act 1927*, s. 7(4).

154 (1986) 43 S.A.S.R. 448, 496. As to a jury's 'right' or 'power' to return a merciful verdict of manslaughter, see below, paras. 3.27-3.35.

155 ACT, *Supreme Court Act*, s. 68C(1); NSW, *Criminal Procedure Act 1986*, s. 33(1); SA, *Juries Act*, s. 7(4); WA, *The Criminal Code*, s. 651C(1).

judge relied.[156] Additionally, many jurisdictions expressly enact a requirement that a judge sitting alone must take any warning he or she would be required to give to jury into account in considering his or her verdict.[157] Finally, the enactment of judge alone trial legislation may require the consequential amendment of relevant appeal provisions.

- Issue 2.22 Should judge alone trial legislation contain provisions specifically addressing such matters as: the court's powers; the principles of law, practice and procedure to be applied; the effect in law of findings, rulings and judgments; the content of judgments, requirements; regarding warnings ordinarily given to juries; and rights of appeal?

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156 ACT, *Supreme Court Act*, s. 68C(2); NSW, *Criminal Procedure Act 1986*, s. 33(2); WA, *The Criminal Code*, s. 651B(2).

157 ACT, *Supreme Court Act*, s. 68C(3); NSW, *Criminal Procedure Act 1986*, s. 33(3); WA, *The Criminal Code*, s. 651C(3).

3. JURY SELECTION, TRIAL MANAGEMENT AND OTHER ISSUES

Introduction

3.1 The Committee has formed preliminary views in relation to some of the issues raised in *Issues Paper No. 1*, and invites public comment on these views. Additionally, a number of issues that were not raised in *Issues Paper No. 1* have become relevant as a consequence of written submissions received by the Committee, and the evidence of Australian and overseas witnesses who have appeared before it. These issues are the subject of this chapter.

'One Trial or One Day' Systems of Jury Service

3.2 In the United States, the length of jury service is determined by the courts, provided that it is not greater than a statutory maximum of thirty days within any two year period.[158] A number of United States courts have experimented with a 'one trial or one day' system of jury service. This system requires jurors to appear only one day as part of a jury pool. Jurors who are empanelled for a trial on that day serve on that case, and are then discharged. Those who are not empanelled for a trial are dismissed at the end of the day. People who attend for jury service, whether empanelled or not, receive a certificate exempting them from further liability for periods varying from two to seven years, depending upon the size of the potential juror population.[159]

3.3 The 'one trial or one day' scheme is considered to be 'the single most effective way of reducing the burden of jury service' [160] and reflects a growing trend in the United States to reduce its length. In 1994 the system was used in

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158 Title 28 USCS, §1866(e).

159 New York, The Jury Project, Report to the Chief Judge of the State of New York, 31 March 1994, 23-24.

160 New York, op. cit., 23.

about thirty three per cent of jurisdictions in the United States.[161] The scheme makes it possible for people who cannot afford to be away from work for long periods, or who have other commitments which exclude them from performing lengthy jury service, to serve for just a few days. The United States experience has been that 'a short term of [jury] service results in fewer requests for postponement and makes it easier for courts to justify strict enforcement proceedings'.[162]

3.4 Evidence given to the Committee suggests that the introduction of a 'one trial or one day' pool system would increase the administrative workload of the Sheriff's Office.[163] Nevertheless, its potential to lessen the burden of jury service, which should lead to greater community involvement, makes it an attractive option for reform. The introduction of such a system would also make it harder to justify many of the current categories of exemption and the range of excuses from jury service. In the Committee's opinion the use of this system would increase the number and categories of people available for jury service, and thereby increase the representativeness of the jury system.

- Issue 3.1 Should Victoria introduce a system of 'one trial or one day' jury service?
- Issue 3.2 Should a 'one trial or one day' system incorporate a provision exempting a person who attends for jury service from further jury service for a specified, and what, period of time?

Jury List Preparation

3.5 The Committee is inclined to the view that the whole State of Victoria should be divided into jury districts based on the court towns in lieu of the current thirty two kilometre radius.[164] The effect of this will be to extend the jury franchise to everyone who is currently enrolled to vote for the Legislative Assembly. The initial boundaries will be determined by the Electoral Boundaries Commission of Victoria in consultation with the Supreme Court Sheriff and will be revised by the Commission as the need arises.

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161 The Citizens Economy and Efficiency Commission, *The Management of Juries within Los Angeles County*, December 1994, 27.

162 New York, op. cit., 24.

163 John Artup, Deputy Sheriff (Juries), *Hansard*, 16 January 1995.

164 See, *Issues Paper No. 1*, paras. 3.2.1-3.2.4, figs. 5, 6.

3.6 In consideration of the large travelling distances that may be involved by the introduction of whole State jury districts, there would be a statutory right to be excused for anyone who resides more than forty kilometres by the shortest practicable route from the Supreme or County Court at Melbourne, or fifty kilometres by the shortest practicable route from the Supreme or County Court in a provincial centre. Any individual hardship that travelling these distances would impose may, at the Sheriff's discretion, constitute a ground for special excuse.

- Issue 3.3 Should the whole State of Victoria be divided into jury districts so that everyone on the State electoral roll resides within a jury district?
- Issue 3.4 Should the division of the whole State into jury districts be accompanied by a right to be excused from jury service for those persons who reside more than 40 kilometres, or some other distance, from the nearest court at which they would be required to serve? Should this distance be 50 kilometres, or some other distance, for persons residing outside the Melbourne Jury District?

3.7 It is apparent to the Committee that the current extensive range of categories of disqualification, ineligibility and excusal as of right from liability for jury service has the effect of significantly reducing the representativeness of the jury system, and places an unjustifiably onerous burden on those who currently have no right of exemption. The Committee is inclined to the view that these categories should be repealed in favour of a system which renders all members of the Victorian community, who are enrolled to vote for the Legislative Assembly, liable regardless of their status or occupation, unless their exclusion is justified by some overriding principle. These overriding principles include—

a. the need to maintain the separation of powers between the executive, legislative and judicial branches of government;

b. the need to ensure, as best as can be, that an accused person receives, and is generally perceived by him or herself and the community to receive, a fair trial from an impartial tribunal;

c. the need to maintain public respect for the justice system;

d. the need to ensure that public health and safety are not adversely affected by jury service;

e. the need to provide for special cases where jury service on a particular occasion, or at any time, would entail undue hardship on the person or the public served by the person.

3.8 The Committee recognises that there is a justification for exempting the older members of our community for whom jury service would be too onerous. Nevertheless, it believes that the current exemption for persons aged over the age of sixty-five is no longer justified. The Committee's preliminary view is that persons aged seventy-five years and over should be automatically exempted from liability for jury service, and there should be a right to be excused for those persons aged seventy and over.

- Issue 3.5 Should the current extensive categories of disqualification, ineligibility and excusal as of right be repealed in favour of a system which renders all members of the Victorian community, who are enrolled to vote for the Legislative Assembly, liable regardless of their status or occupation, unless their exclusion is justified by some overriding principle such as those enumerated in paragraph 3.7?

- Issue 3.6 Should persons aged 75 years and over be automatically exempt from jury service, with a right to be excused for persons aged 70 to 74?

Jury List Vetting

3.9 In *Issues Paper No. 1* the Committee discussed the current practice regarding jury vetting.[165] In accordance with the Act, the sheriff must forward a copy of every jury panel to the Chief Commissioner of Police, who shall make such inquiries as he or she considers necessary, as to whether any person whose name appears on such panel is disqualified from jury service under the Act. The Chief Commissioner of Police must report the result of those inquiries to the sheriff.[166]

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165 Paras. 3.5.4, 3.5.5.

166 ibid., s. 21.

3.10 In addition to these statutory procedures, for many years the Chief Commissioner of Police has provided the Director of Public Prosecutions with a list of those persons in each panel who have non-disqualifying criminal convictions, which, in the Chief Commissioner's opinion, might make them unsuitable to serve as jurors in criminal trials. The solicitors who instruct prosecutors at trials routinely receive copies of these lists which assists the Crown in exercising its right of peremptory challenge. However, neither accused persons nor their legal representatives receive copies of these lists.

3.11 Judicial opinion varies as to the merits of this practice. According to O'Bryan and Marks JJ. in the Victorian Full Court decision in *R. v. Robinson* this long established practice is lawful and not unfair.[167] Indeed, they considered it to be desirable in order to avoid selecting jurors who 'although not unqualified from serving ... might be so affected by prejudice as not to be an indifferent juror'. In so holding they declined to follow Vincent J.'s decision in *In The Trial of D*.[168] In that case His Honour concluded that the obligation of the Crown to act fairly and to be seen to be acting fairly was inconsistent with the practice of jury vetting.[169] O'Bryan and Marks JJ. referred to the decision of Lowe J. in *R. v. Thomas*,[170] which gave implicit support for the lawfulness of the practice of jury vetting by the Crown.[171]

3.12 In his dissenting judgment in *R. v. Robinson* Nathan J. said that the practice should stop, because he regarded it as being 'incompatible with the fair and random operation of the jury system'. His Honour expressed the opinion that:

> If the legislature had intended to disqualify such a wide class of persons, it would have done so in explicit terms. To do so by way of the D.P.P.'s bureaucratic process, is not merely inconsistent with the Act, it intrudes upon the fundamental right and obligation of electors to become jurors. It is a process which vets prospective jurors, contrary to the principle of random selection. [172]

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167 [1989] V.R. 289.

168 [1988] V.R. 937.

169 id., 947.

170 [1958] V.R. 97, 98.

171 *R.. v. Robinson* [1989] V.R. 289,294.

172 *R.. v. Robinson* [1989] V.R. 289, 307.

3.13 The administration of juries is an integral part of the system of justice which is dispensed, and to a large extent controlled, by the courts. It is for this reason that a court officer, the Supreme Court Sheriff, has responsibility for the jury system. The Committee understands that facilities are available to the sheriff to carry out the checks which are currently conducted by the Chief Commissioner of Police. The Committee is inclined to the view that the sheriff is the appropriate officer to perform the jury vetting function. This is not to suggest that the Chief Commissioner has not performed that function faithfully and efficiently in the past.

3.14 The Committee is further inclined to the view that it is for the Parliament through legislation to define the categories of persons who are considered unsuitable for jury service by reason of past criminal behaviour. It may be that the present categories need to be re–examined and widened. It may also be necessary to include additional questions on the questionnaire which is sent to prospective jurors; questions designed to elicit information concerning whether the prospective juror would be likely to act impartially in trying a particular case or generally. This information would be available to the sheriff who could communicate any relevant answers to the trial judge. In any event, the Committee is of the view that the current practice should be discontinued.

- Issue 3.7 Should the jury vetting process which is currently conducted by the Chief Commissioner of Police be conducted by the Sheriff?
- Issue 3.8 Should jury vetting beyond what is necessary in order to ensure that persons disqualified from jury service do not serve on juries be discontinued?

Peremptory Challenges

3.15 The right of peremptory challenge has a major impact on the representativeness of the jury system. Its use tends to make juries less representative of the community. The right of peremptory challenge was abolished in England in 1988,[173] following a recommendation of the Roskill Fraud Trials Committee that they should be abolished in relation to fraud

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173 Criminal Justice Act 1988 (U.K.), c..33, s.118.

trials.[174] A more general move for their abolition appeared after what was thought to be their inappropriate use in the 'Cyprus Secrets' trial. In that trial the nine defendants in effect pooled their peremptory challenges after their legal representatives had discussed how they were to be used for the best. This tactic was said by the Government to be an inappropriate manipulation of the jury system, and to have led to unjustified acquittals.[175]

3.16 Recently there has been a discernible trend in Australian jurisdictions to limit the number of peremptory challenges. For example, in Victoria in 1993 the Government enacted the *Juries (Amendment) Act* which reduced the number of peremptory challenges in criminal inquests from eight, to a formula which gives an accused between six and four peremptory challenges depending upon the number of accused who are standing trial. In the same Act the Crown's right to stand aside jurors (which was unlimited until the pool was exhausted) was abolished. The Crown now has the same number of peremptory challenges as the accused.[176] Additional challenges are allowed if the Crown and accused so agree. At the time of introducing this amendment Mr S.J. Plowman, on behalf of the Attorney–General, said:

> The question of peremptory challenges does not simply reflect a desire to generate cost savings. Rather it goes to the fundamental notion of the jury as a body which represents and reflects the broad spectrum of community attitudes and perspectives. It has been suggested that the use of the challenges can, particularly in multi–header trials where a number of accused can aggregate their challenges, lead to distortions in the representative nature of the jury. [177]

3.17 In New South Wales three peremptory challenges are available to the prosecution and the defence, although they can agree on further challenges beyond this.[178] Prior to 1987 in cases of murder there were twenty peremptory challenges available to each side and eight in other cases. In Canada there are twenty challenges available to an accused who is charged with high treason or murder, twelve challenges where the offence is punishable by more than

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174 United Kingdom, Fraud Trials Committee, *Report* (Lord Roskill, Chairman), HMSO, London, 1986, 130-131.

175 Michael Hill QC meeting with the Victorian Law Reform Committee, London, 4 July 1995. See also, 33 *Halsbury Statutes of England*, 139–140.

176 *Juries (Amendment) Act 1993*, s. 6.

177 Victoria, Legislative Assembly 1993, *Debates*, vol. 7, 1157.

178 *Jury Act 1977*, s.42.

five years imprisonment and four challenges for other offences.[179] In the United States each side has between ten and twenty peremptory challenges depending on the nature of the offence.[180]

3.18 In light of the recent trend in Australian jurisdictions to reduce the number of peremptory challenges, and their abolition altogether in England, should consideration be given to abolishing these challenges in Victoria? The Committee notes that the Victorian Bar Council in its *Report on Criminal Trials* recommended that challenges, both peremptory and for cause, not be abolished.[181]

3.19 The advantage to an accused of the system of peremptory challenges is that it enables him or her to have some control over who sits on the jury.[182] This may be expected to encourage in the accused a perception that the jury will be fair and impartial. One disadvantage in allowing these challenges is that the accused can use them to obtain a favourable jury, rather than an impartial one. Furthermore, owing to the limited information concerning prospective jurors which is available to an accused, stereotypes based on appearance tend to be applied in deciding whether or not to challenge a prospective juror. These stereotypes can relate to gender, age, race, religion, or socio-economic factors.

- Issue 3.9 Should the peremptory right of challenge be abolished?

Challenges for Cause and the Use of Questionnaires

3.20 The Victorian *Juries Act 1967* preserves the right of the Crown and accused persons to challenge a juror for cause.[183] Such challenges are to be tried by the judge before whom the jury for the trial is being empanelled.[184] Unlike a peremptory challenge, to sustain a challenge for cause some substantial reason for excluding a person from the jury must be proved; for

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179 Criminal Code (Can.), s. 634.

180 CPLR §270.25(2).

181 Victorian Bar Council, Shorter Trials Committee, *Report on Criminal Trials*, Australian Institute of Judicial Administration, Canberra, 1985, 167.

182 *R. v. Searle* [1993] 2 V.R. 367,380.

183 *Juries Act 1967* (Vic), s. 39.

184 id., s. 38.

example, that the person is disqualified or has a presumed or actual bias towards or against the Crown or an accused.

3.21 In Victoria challenges for cause are extremely rare.[185] Part of the reason for this is that no information concerning prospective jurors is available to the parties prior to the commencement of the empanelling process, and even then the information consists only of the potential juror's name and occupation. Age and sex will usually be apparent along with anything else that can be discerned from the juror's appearance. If the right of peremptory challenge is to become more useful, or if challenges for cause are to become more common, then greater information concerning prospective jurors needs to be made available to the Crown and the accused. This could be achieved either by requiring potential jurors to complete a pre–trial questionnaire, as occurred in the *Maxwell* trial in London[186] or through the conduct of a voir dire process, as occurs in the United States.

3.22 In the United States extensive questioning of jurors is permitted in order to assist with in the making of challenges for cause and peremptory challenges. In Los Angeles County, for example, the legislation governing the voir dire process in a criminal case allows the judge and then the parties to question the prospective jurors. This process occurs in the presence of the other jurors and is conducted in the following manner:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper.[187]

Judges in the United States must try to balance two competing interests; the accused's right to a public trial by an impartial jury, and a potential juror's right to privacy.[188]

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185 Evidence of James Bowen, *Hansard*, 1 May 1995.

186 See above paras. 1.16-1.17.

187 *Trial Jury Selection and Management Act* §223.

188 American Bar Association Standard 7(c) provides that the court must ensure the prospective juror's privacy is reasonably protected.

3.23 In Canada the questioning of jurors is only allowed once the right to challenge for cause has been established. For an application to be granted 'an air of reality' to the challenge must be shown. Once this test is satisfied it is relatively easy to obtain approval to conduct a voir dire, but tight controls on the questioning of jurors are applied. Prospective jurors cannot be asked questions which are degrading. They can also not be asked about their beliefs, likes or dislikes, race, national origin, politics, religion, membership of minority groups or moral positions. Generally the challenge is determined by the two jurors who were last sworn in.[189]

- Issue 3.10 Should an empanelling process based on a greater use of challenges for cause be introduced and, if so, how should such challenging process be conducted?
- Issue 3.11 Should there be greater use made of questionnaires directed to potential jurors which are designed—
    a. to assist judges determine those persons most likely to be able to weigh the evidence adequately and deliver a fair verdict;
    b. to assist the prosecution and defence in the exercise of their rights of challenge, whether peremptory or for cause;
    c. to assist those who administer the jury system to gain a better understanding of how the system is operating;
    d. for any other and what purpose?
- Issue 3.12 At what stage or stages in the selection or empanelment process should any such questionnaire be administered?

Instructions to Juror Pools and Jurors

3.24 In Victoria there is at present no consistent judicial approach to the information which should be given to potential jurors, before the empanelling process is commenced, concerning such matters as: the circumstances giving rise to the case, the issues in the case, the names of witnesses likely to be called by each party, the likely length of the case, or factors which may be likely to affect a person's ability to serve on the jury. For example, the pool of potential jurors may include persons who are victims of similar crimes, or the

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189 Criminal Code (Can.), s. 640.

family or friends of such victims, or people who, for whatever reason, feel they would not be able to act impartially as between the Crown and the accused. The Committee is not satisfied that at present there are sufficient practices in place which are designed to identify and exclude such persons from serving on a jury.[190]

3.25 A number of different sets of model jury instructions have been published in recent years; however, they relate to matters of law, rather than the machinery of empanelling jurors, and the task of introducing them to the trial process, and their role in it.[191]

- Issue 3.13 Should a standard set of introductory oral instructions be given to **potential jurors** by the trial judge prior to the commencement of the empanelling process and, if so, what matters should such instructions cover?
- Issue 3.14 Should a standard set of oral instructions be given to e**mpanelled jurors** by the trial judge prior to the commencement of the trial and, if so, what matters should such instructions cover?

Should Jurors be Kept in Ignorance?

3.26 In an increasingly well educated community it is likely that some jurors will be well informed about some matters traditionally kept from them. The likelihood will be increased if legislation is introduced to extend the number of people well informed about the law who sit on juries. It seems difficult to argue for denying the jury information that they might reasonably wish to have; at all events without an intelligible explanation—if only, for example, that it is the experience or traditional view of the Courts that certain types of evidence are unhelpful to doing justice. The Committee is inclined to the view that leaving to chance the possibility that a jury will have knowledge

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190 A document prepared by Judge P.R. Mullaly of the Victorian County Court, a copy of which is given to each newly appointed County Court judge, goes someway towards remedying this problem. See, P.R. Mullaly, 'Handling criminal juries—Part 2', paper presented to a seminar of Victorian County Court Judges, 1990.

191 See e.g., W.M.R. Kelly, *Collected Directions in Criminal Trials*, County Court of Victoria, Melbourne, 1995; J.L. Glissan & S.W. Tilmouth, *The Right Direction: A Casebook of General Jury Directions in Criminal Trials*, Butterworths, Sydney, 1990. Compare: Federal Judicial Center, *Pattern Jury Instructions*, Federal Judicial Center, Washington, DC, 1987; Young Lawyers Section of the Bar Association of the District of Columbia, *Criminal Jury Instructions—District of Columbia*, 4th edn by B.E. Bergman, Bar Association of the District of Columbia, Washington, DC, 1993.

significant to a case is not acceptable. If the jury is the guardian of people's liberties, should it be blindfolded?

Instructions Concerning 'Perverse Verdicts'

3.27 The question arises whether jurors ought to be instructed by the trial judge that they have the unreviewable power to acquit an accused person, or convict him or her of a lesser offence, even though the prosecution has proved his or her guilt beyond a reasonable doubt.[192] What form should such instructions including accompanying comment take? Many lawyers call such verdicts 'perverse', however, Lord Devlin has described this label as:

> an inappropriate, even an impertinent, word to use about an equal when all that you are saying is that you disagree with the conclusions which it is his [sic] job to reach and not yours.[193]

3.28 In the United States this process is termed 'jury nullification'. Juries most frequently exercise this power to acquit defendants charged with violating unpopular laws, or those whom the jury views sympathetically; for example, an accused found to have committed a 'mercy' killing.[194]

3.29 It was the judgment of Vaughan C.J. in 1670 in *Bushell's Case* that finally established the immunity of the jury from punishment for reaching a verdict with which the Bench did not agree.[195] In that case the jury which acquitted William Penn[196] and William Mead of unlawful assembly was punished by 'being locked up, without meat, drink, fire, and tobacco'. [197] Today the main argument in favour of such a power is that it is good policy to allow the rigidity of the law to be overridden in some cases by the

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192 See *Brown v. The Queen* (1913) 17 C.L.R. 570, 578-579; *Beavan v. The Queen* (1954) 92 C.L.R. 660, 662-663. Some have called it a 'constitutional right'; see e.g., *R. v. Maxwell* (1986) 43 S.A.S.R. 448, 496 per White J.; *R. v. Longley* [1962] V.R. 137, 140 per Sholl J.; *R. v. Ryan* [1966] V.R. 553, 566.

193 P. Devlin, *The Judge*, Oxford University Press, Oxford, 1979, 141.

194 The Chicago Jury Project discovered that in a significant number of cases the jury returns verdicts of not guilty, despite strong evidence to the contrary, because they feel the application of the law would lead to an unjust result in the particular case. See, H. Kalven & H. Zeisel, *The American Jury*. Little, Brown & Co, Boston, 1966.

195 (1670) Vaugh. 135.

196 Later founder of the American State which bears his name.

197 (1670) Vaugh. 135. See *Juries Act 1967* (Vic), s. 51 which provides to this day that jurors are to be allowed heating and refreshments.

community's representatives being permitted to temper the law with mercy and, on occasions, with anger.[198] Critics maintain that disregard for the law by acquitting defendants found guilty beyond a reasonable doubt sets a bad example, and breeds lawlessness in society generally.

3.30 The question whether the trial judge should direct the jury that they have this power is not easily resolved. In *R. v. Ryan* the trial judge directed the jury that they had the power to return a verdict of manslaughter even though satisfied that every element necessary to constitute the crime of murder had been established. In *R. v. Maxwell*[199] White J. while considering his verdict in a judge alone trial for murder, considered whether 'notwithstanding proof of the elements of murder, I should exercise the jury's "constitutional right" to return a verdict of manslaughter'. His Honour assumed that he had the power to do so by reason of section 7(4) of the *Juries Act 1927* (SA) which empowered a judge hearing such a case to 'make any decision that could have been made by a jury on the question of the guilt of the accused'.[200]

3.31 The law regarding the alternative verdict of manslaughter in murder trials is well settled. If manslaughter is not open on the evidence:

> the judge is under no duty to inform the jury that it is within their powers to find a verdict of manslaughter, unless the jury asks a question upon the subject. In that case it will usually be incumbent upon the judge to inform them that upon an indictment for murder it is within the province of a jury to find a verdict of manslaughter; but it is proper for him to add an expression of his opinion that on no view of the evidence which the jury might reasonably take are findings of fact open that fall short of murder but amount to manslaughter.[201]

Nonetheless, it remains the case that it is not **legally** open to a jury to return a verdict of manslaughter where they are satisfied that the accused's actions amount to murder.[202]

3.32 Lord Chief Justice Mansfield in 1782 while affirming that a jury has the power to form a verdict against the evidence, stressed that: 'It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though

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198 See e.g., *United States ex rel. McCann v. Adams*, 126 F. 2d 774 (1942), 775 per Learned Hand J. quoted above at para. 1.5.

199 (1986) 43 S.A.S.R. 448.

200 (1986) 43 S.A.S.R. 448, 496.

201 *Beavan v. The Queen* (1954) 92 C.L.R. 660, 662-663.

202 *Gammage v. The Queen* (1969) 122 C.L.R. 444.

they may have it in their power to do wrong, which is a matter entirely between God and their own consciences'.[203] The High Court in *Gammage v. The Queen*[204] approved this principle. Barwick C.J. asserted that jurors have no right to return a verdict of manslaughter when satisfied that murder has been established. However, he acknowledged that:

> persistence by them in returning another verdict must ultimately result in the acceptance of that verdict. In that sense, but in no other sense, it is both within their power and, if you will, their privilege to return a wrong verdict.[205]

3.33 Consequently, jurors can be false to their oath, but it will be assumed that they have been faithful to it. It would be contrary to law for the judge to tell them that they may return other than a true verdict.[206] Lord Devlin acknowledged the practicalities of the situation when he wrote:

> The claim of 'right' has been tacitly dropped. The practical point is that a jury has to be told of its rights but need not be reminded of its powers... The tacit compromise which the years have evolved is that the Bench no longer seeks ways of circumventing what the Bar does not press as a right. What this means is that to be acceptable to the judge **action under the power must spring from an unprompted jury**. (emphasis added)[207]

James Bowen, a retired Prosecutor for the Queen, drew the Committee's attention to the fact that this power is not pressed by the Bar as a right. In his view to do so would 'fly in the face of the oath that [the jurors] have taken to bring in a true verdict in accordance with the evidence'.[208] Consequently, the jury should not be encouraged to be perverse.

3.34 It is probable that jurors already exercise their power to return a perverse verdict on those occasions when they perceive the need to do so. Accordingly, it may be unnecessary to require judges to instruct them specifically on this issue. However, since some jurors could be expected to know of this power, while others will not, the failure to instruct them as to its existence may introduce an undesirable element of chance into the trial process. An example of this is said to have occurred in the 'South Australian

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203 *R. v. Shipley* (1784) 4 Doug. 171, 176. Cited in P. Devlin, *Trial by Jury* , Stevens & Sons Limited, London, 1966, 87–88.

204 (1969) 122 C.L.R. 451.

205 (1969) 122 C.L.R. 451.

206 *Gammage v. The Queen* (1969) 122 C.L.R. 463, per Windeyer J.

207 Devlin, op. cit., 125.

208 James Bowen, *Hansard*, , 6 March 1995, 200–201.

axe–murder case'. There the jurors were not aware of the power to return a 'merciful verdict of manslaughter' and reluctantly reached a verdict of guilty of murder. They then approached the media and voiced their concern.[209] On appeal a new trial was ordered and the second jury acquitted the accused. A similar case in Canberra was recently reported.

3.35 The Committee is inclined to the view that a jury ought to be properly instructed and informed before, during and at the end of evidence and addresses in a trial. It should be possible to inform a jury of its powers without encouraging it to use them without a great deal of careful and conscientious deliberation.

- Issue 3.15 Should jurors generally be informed that they have the power to return a verdict which is not consistent with their understanding of the law as it applies to their view of the evidence? If so, when and in what form should such information be given?
- Issue 3.16 Are there any other matters presently kept from the jury about which they ought to be informed?
- Issue 3.17 Is there sufficient flexibility for juries to enquire about relevant matters during the conduct of a trial?

- Issue 3.18 Are there any other matters which the Committee should consider, or recommendations it should make?

209 M. Findlay, P. Duff, *The Jury Under Attack*, Butterworths, Sydney, 1988, 130–131.

APPENDIX I FUNCTIONS OF THE COMMITTEE

PARLIAMENTARY COMMITTEES ACT 1968

4E. The functions of the Law Reform Committee are —

(a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;

(b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

APPENDIX II TERMS OF REFERENCE

Pursuant to section 4F(1)(a)(ii) of the *Parliamentary Committees Act 1968*, the Governor in Council refers the following matters to the Law Reform Committee:

1. to review and make recommendations on the criteria governing ineligibility for, and disqualification and excusal from, jury service under sections 4 and 5 of the *Juries Act 1967*;

2. to review and make recommendations in respect of the compilation of jury lists under Part II and the pre-selection of jurors under Part III of the *Juries Act 1967*;

3. to review and make recommendations in respect of the preparation of jury panels and the summoning of jurors under ss. 20, 20A, 21, 23, 24, 25, 26 and 27 of the *Juries Act 1967*.

Under section 4F (3) of the *Parliamentary Committees Act 1968*, the Governor in Council specifies 30 November 1995 as the date by which the Committee is required to make its final report to the Parliament on this matter.

Dated: 20 September 1994

Responsible Minister: JAN WADE, MP
Attorney-General

Victorian Government Gazette, G39, 29 September 1994, page 2343
Victorian Government Gazette, G5, 9 February 1995, page 311
Victorian Government Gazette, G13, 6 April 1995, page 822

APPENDIX III SUMMARY OF ISSUES RAISED IN ISSUES PAPER NO 1

Jury Representativeness

- Issue 1.2.1 Should the Committee for the purposes of its Inquiry accept as a general proposition that a jury should be **representative** of the **Victorian community**?
- Issue 1.2.2 Should **courts be given specific statutory powers** to discharge juries, and/or to stay proceedings, in circumstances where the jury is considered to be not sufficiently representative of the community?
- Issue 1.2.3 What, if any, qualifications or limitations should be placed upon the general proposition referred to in issue 1.2.1? Are there circumstances where, either by reason of the characteristics of the accused or the victim, or the nature of the offence, a jury which is deliberately designed not to be representative of the community, is justified?

Basic Qualification for Jury Service

- Issue 2.1 Should the **basic qualification** for jury service be altered?

Categories of Disqualification

- Issue 2.3.1 Should any of the categories of persons disqualified from serving as jurors be **abolished, limited or expanded**?
- Issue 2.3.2 Should any **new categories** of persons disqualified from serving as jurors be **added**?
- Issue 2.3.3 Should any of the categories of persons disqualified from serving as jurors be **redefined** as categories of persons ineligible to serve as jurors, or as persons entitled as of right to be excused from serving as jurors?

Categories of Ineligibility

- Issue 2.4.1 Should any of the categories of persons ineligible to serve as jurors by reason of their **current or previous occupation be abolished, limited or expanded**?
- Issue 2.4.2 Should any **new categories** of persons ineligible to serve as jurors by reason of their current or previous occupation be **added**?
- Issue 2.4.3 Should any of the categories of persons ineligible to serve as jurors by reason of their current or previous occupation be **redefined** as categories of persons entitled as of right to be excused from serving as jurors?
- Issue 2.4.4 Should any of the categories of persons ineligible to serve as jurors by reason of **perceived practical difficulties in their serving** be **abolished, limited or expanded**?
- Issue 2.4.5 Should any **new categories** of persons ineligible to serve as jurors by reason of perceived practical difficulties in their serving be **added**?
- Issue 2.4.6 Should any of the categories of persons ineligible to serve as jurors by reason of perceived practical difficulties in their serving be **redefined** as categories of a right to be excused from serving as jurors?

Categories of Entitlement to be Excused as of Right

- Issue 2.5.1 Should any of the categories of persons entitled as of right to be excused from serving as jurors be **abolished, limited or expanded**?
- Issue 2.5.2 Should any **new categories** of persons entitled as of right to be excused from serving as jurors be **added.** For example, should there be a category exempting those persons who have a conscientious objection to serving as jurors on **moral, ethical or religious grounds**?
- Issue 2.5.3 Should any of the categories of persons entitled as of right to be excused from serving as jurors be **redefined** as categories of persons ineligible to serve as jurors?
- Issue 2.5.4 Should any change be made to the system of granting **certificates of exemption** for up to ten years to persons on account of lengthy jury service?

Categories of Entitlement to be Excused for Good Reason

- Issue 2.6.1 Should the categories of entitlement to be excused from jury service for good reason be **limited or expanded, or further or better defined**?
- Issue 2.6.2 Should the **remuneration for jurors** and/or the **physical conditions of jury service** be improved to enable more persons to serve as jurors?
- Issue 2.6.3 Should any change be made to the current practice of **excusing** from jury service **those who have served on a jury in the preceding three or five years**? Should this practice be extended to include those who, being summoned for jury service, attend but never sit as jurors?
- Issue 2.6.4 Should **guidelines for the exercise of the discretion to excuse** a person from jury service for good reason be established? How should any such guidelines be established, and what should they provide?
- Issue 2.6.5 Should the **court** at which a person is required to serve, retain an **overriding discretion to excuse** any person from jury service where it appears just and reasonable so to do?

Civil Juries

- Issue 2.7.1 Should the category of **ineligibility** from serving as a civil juror be **abolished, limited or expanded**?
- Issue 2.7.2 Should any **new categories** of ineligibility or exemption from serving as a civil juror be **added**?

Commonwealth Exemptions

- Issue 2.8.1 Should the Committee recommend that the Victorian Attorney-General approach the Commonwealth Attorney-General to introduce legislation to **abolish, limit or expand any of the categories** of Commonwealth exemptions from State jury service?
- Issue 2.8.2 Should the Committee recommend that the Victorian Attorney-General approach the Commonwealth Attorney-General to introduce legislation to **add any new categories** of Commonwealth exemptions from State jury service?

Jury District Formation

- Issue 3.2.1 Should the **32 kilometre** radius which presently defines a jury district be **increased** so as to make eligible for jury service more Victorians? Should it be increased to a 40, 50 or 100 kilometre radius, or some other distance?
- Issue 3.2.2 What impact, if any, should an increase in the radius have on the **distance which entitles a person to be excused** as of right from jury service?
- Issue 3.2.3 Instead of relying on a distance radius, should the **whole State be divided into jury districts** in such a manner that every person enrolled for the Legislative Assembly, lives within a jury district? Should this be subject to the continuation of the present, or some other, basis for excusing those who live long distances from the nearest court town?
- Issue 3.2.4 If yes to issue 3.2.3, **what spatial unit or geographical area should be used** as a basis for defining the jury districts? Some possible alternatives are; in increasing order of size—

  census collection districts (CCD)
  postcode areas
  local government areas (LGA)
  State electoral subdivisions
  Legislative Assembly electoral districts
  Legislative Council electoral provinces
- Issue 3.2.5 As none of the spatial units or geographical areas listed above are immutable, **who should be responsible for recommending** to the Governor in Council what **new or changed jury districts** should be proclaimed? Should it be the Electoral Boundaries Commission, the State Electoral Commissioner, the Surveyor-General, or some other body or office?
- Issue 3.2.6 As the maps in figures 5 and 6 show, some jury districts overlap, even at a 32 kilometre radius. **How should overlapping jury districts be dealt with?** Should persons who live in more than one jury district be liable for jury service at each court town? If not, how should their liability be determined?

Jury List Compilation

- Issue 3.3.1 Is there any manner in which the process of jury list compilation can be **improved**?
- Issue 3.3.2 Should the **period for which jury lists are compiled** be reduced? How should the risk that some people

may be called upon to perform jury service unreasonably often be minimised?

Preselection of Jurors

- Issue 3.4.1 Is there any manner in which the process of pre-selection of jurors can be **improved**?
- Issue 3.4.2 Are there any improvements which could be made to the form of **questionnaire**?
- Issue 3.4.3 Should **questions** directed towards ascertaining the **impartiality of a prospective juror be included in the questionnaire**? If so, should these answers be provided to the Crown and the defence to assist with challenges?
- Issue 3.4.4 Is the quantum of **fines** for the offences of failing to return questionnaires, or for wilfully making untrue and misleading statements, **adequate**?
- Issue 3.4.5 Should a **method of enforcement of fines** involving the issue of infringement notices, coupled with enforcement provisions similar to the **PERIN procedure** set out in Schedule 7 to the Magistrates' Court Act 1989 be adopted under the Juries Act (see Appendix 5)?
- Issue 3.4.6 What **evidentiary provisions** should be enacted to assist in proving compliance with the Act?

Jury Panel Preparation

- Issue 3.5.1 Is there any manner in which the process of jury panel preparation can be **improved**?
- Issue 3.5.2 Is the **Chief Commissioner of Police** the most appropriate person to **inquire whether the name of any person who is disqualified** from serving as a juror is included in any **jury panel**? If some other person or body were given this task, what provisions would be necessary to facilitate the **sharing of information** while maintaining protection of **individual privacy**? Do any other considerations need addressing?

Summoning of Jurors

- Issue 3.6.1 Is there any manner in which the process of summoning jurors can be **improved**?
- Issue 3.6.2 What **period of time** should persons summonsed to attend **for jury service** who do not serve as jurors on a jury be required to remain available for selection?

APPENDIX IV VICTORIA
SUMMARY OFFENCES

SUMMARY OFFENCES WHICH CARRY A MAXIMUM PENALTY IN EXCESS OF TWELVE MONTH'S IMPRISONMENT

Summary Offences with a Maximum Penalty of 5 Years Imprisonment

Offence	Legislation
Penalties for breach of order where subsequent offence	Crimes (Family Violence) Act 1987, s.22

Summary Offences with a Maximum Penalty of 3 Years Imprisonment

Offence	Legislation
Offence against subdivisions 8A to 8E of the *Crimes Act 1958* (sexual offences) where offensive weapon carried	Crimes Act 1958, s.60A

Summary Offences with a Maximum Penalty of 2 Years Imprisonment

Offence	Legislation
Make or have custody/control of machine or material specifically designed to make a false document	Crimes Act, s.83A(5C)
Meat for human consumption, slaughter on other than licensed premises	Abattoir & Meat Inspection Act 1973 (AMIA), s.17
Sale for human consumption of mammals not listed	AMIA, s.17A
Fraud	Accident Compensation Act 1985 (ACA), s.248
Bribery	ACA, s.248AA
Concealment of will a misdemeanour	Administration & Probate Act 1958, s.66
Payments in consideration of adoption	Adoption Act 1984 (AA), s.119(f)
Restrictions on Advertising	AA, s.120AA
Restrictions on publication of identity of parties	AA, s.121(2)
Penalty for making unauthorised arrangement	AA, s.122(f)

Offence	Legislation
Presenting forged consent	AA, s.126
Failure to comply with condition of order relating to historic buildings	Casino Control Act 1991 (CCA), s.128F(4)
Forgery etc	CCA, s.153B
Restrictions on publication of proceedings	Children & Young Persons Act 1989 (CYPA), s.26(1)(c)
Extortion by & impersonation of court officials	CYPA, s.32
Prohibition against exhibition of unclassified films	Classification of Films & Publications Act 1990 (CFPA), s.22
Display, sale of objectionable films	CFPA, s.41
keeping together of classified & objectionable films	CFPA, s.42
Possession for sale public exhibit	CFPA, s.43
Making objectionable film	CFPA, s.44
Sale of objectionable publication	CFPA, s.48
Possession of objectionable publication	CFPA, s.49
Keeping of objectionable publication at premises	CFPA, s.50
Exhibition & display of objectionable publication	CFPA, s.51
Depositing objectionable publication in public place	CFPA, s.52
Producing objectionable publication	CFPA, s.53
Offences relating to prison security	Corrections Act 1986, s.32
Offence to give item to prisoner	Crimes Act 1958 (CA), s.58D
Make or have custody/control of machine or material specifically designed to make a false document	CA, s.83A(5C)
Penalties for breach of order if first offence	Crimes (Family Violence) Act 1987, s.22
Making statement that is false or misleading during examination	Crimes (Confiscation of Profits) Act 1986, (CCPA) s.18
Obstruction/hindrance of person executing search warrant	Crimes (Confiscation of Profits) Act 1986, (CCPA) s.40
Knowingly contravening order	CCPA, s.41(5D)
Failure to comply with production order	CCPA, s.41F
Monitoring order disclosed by person	CCPA, s.41O(2)(b)
Omit from statement a matter so that the report of a suspect transaction is misleading	CCPA, s.41P
Secrecy	CCPA, s.49B
Secrecy	Debits Tax Act 1990 (DTA), s.23
Offences relating to certificates of exemption	DTA, s.27
Offence	**Legislation**
Sells or purchases controlled substances offered for sale in street or from house to house	Drugs, Poisons & Controlled Substances Act 1981 (DPCSA), s.28
Sells volatile substance in certain circumstances	DPCSA, s.58
Person authorising performance report gives misleading information	Environmental Protection Act 1970 (EPA), s.26C(3)
False statement in published results	EPA, s.31C

Giving false/misleading information by environmental auditor to Authority	EPA, s.57AA
Disclosure of information an offence	EPA, s.60
Person who authorises performance report gives misleading information	EPA, s.26C(3)
Further penalty (subsequent offence)	Equipment (Public Safety) Act 1994, s.32(b)
Offence to obstruct actuary	Friendly Societies Act 1986 (FSA), s.59
Conceal etc. documents relating to friendly society's affairs	FSA, s.108
Forgery etc.	Gaming & Betting Act 1994, s.118
Gaming prohibited on unprotected device	Gaming Machine Control Act 1991 (GMCA), s.73
Offence against protection of sensitive areas of gaming equipment	GMCA, s.75
Damage or alter registered historic building or land	Historic Buildings Act 1981 (HBA), s.26(2)(e)
Fail to comply with permit	HBA, s.27(4A)
Failure to comply to order under s36	HBA, s.38
Breach interim preservation order	HBA, s.40(7)
Refuse inspection of books	Industrial & Provident Societies Act 1958, s.41A
Breach in research requirements	Infertility Treatment Act 1995 (ITA), s.22(3)
Transfer of gametes, zygotes or embryos used for research	ITA, s.40
Ban on procedures involving gametes produced by children	Infertility Treatment Act 1995 (ITA), s.41
Ban on procedures involving oocytes derived from a foetus	ITA, s.42
Ban on procedures involving gametes of people known to be dead	ITA, s.43
Offence	**Legislation**
Ban on use of zygotes, embryos removed from the body	ITA, s.44
Ban on mixing gametes, zygotes or embryos from more than one person	ITA, s.46
Ban on certain experimental procedures	ITA, s.48
Ban on sex selection	ITA, s.50
Storing gametes or zygotes	ITA, ss.52 & 52
Removal of zygotes, gametes from storage in breach of requirements	ITA, s.53
Ban on use of gametes, zygotes, embryos not stored at licensed centre	ITA, s.55
Importing prohibited	ITA, s.56
Surrogacy or advertising	ITA, ss.59 & 60

Offence of failing to comply with terms of licence / approval	ITA, s.110
Prohibition on use of listening device	Listening Devices Act 1969, s.4
Offences relating to ballot papers	Local Government Act 1989 (LGA), s.58
Bribery, threatening & undue influence	LGA, s.59
Offences relating to investigations	LGA, s.132
Giving to Local Government information person knows to be false/misleading	LGA, s.220H(5)
Penalty owner or occupier of betting house, 3rd or subsequent offence	Lotteries, Gaming & Betting Act 1966 (LGBA), s.18
Penalty betting in street etc. 3rd & subsequent offence	LGBA, s.23
Penalty for communicating racing information while race meeting being held where 3rd or subsequent offence	LGBA, s.42
Possession instruments of betting, 3rd /subsequent offence	LGBA, s.66B
Extortion by & impersonation of court officials	Magistrates' Court Act s.23
Fraud/forgery	Medical Practice Act 1994, s.63
Failure to comply with condition of order	Melbourne City Link Authority Act 1994, s.29(4)
Failure to comply with general power to obtain information & documents or giving officer false information	Office of Regulator–General Act 1994 (ORGA), s.27A

Offence	**Legislation**
Restriction on disclosure of confidential information	Office of Regulator–General Act 1994 (ORGA), s.27C
Disobey summons of office	ORGA, s.32
Disclosure of information an offence	ORGA, s 39A
Prohibition on discharge by jettisoning of harmful substances into state waters	Pollution of Waters by Oil & Noxious Substances Act 1986, s.23E
Offence to drive while disqualified, subsequent offence	Road Safety Act 1986 (RSA) , s.30
Dangerous Driving	RSA, s.64
Breach Confidentiality	Sports Drug Testing Act 1995, s.23
Assaults another by kicking or with a weapon	Summary Offences Act 1966, s.24(2)
Breach Secrecy	Debits Tax Act 1990, s.23

APPENDIX V VICTORIA INDICTABLE OFFENCES TRIABLE SUMMARILY

MAGISTRATES COURT ACT – SELECTED PROVISIONS

Indictable offences triable summarily

53 (1) If a defendant is charged before the Court with any offence referred to in Schedule 4 or with any other indictable offence to which this sub–section applies, the Court may hear and determine the charge summarily if–

(a) the Court is of the opinion that the charge is appropriate to be determined summarily; and

(b) the defendant consents to a summary hearing.

(1A) In addition to the offences referred to in Schedule 4, sub-section (1) applies to an indictable offence under an Act if the Act describes the offence as being level 5, 6, 7 or 8 or as being punishable by level 5, 6, 7 or 8 imprisonment or fine or both.

(1B) If an offence is described as being punishable in more than one way or in one of two or more ways, sub- section (1) does not apply to it if any one of those ways is not referred to in sub-section (1A).

(2) Sub–section (1) applies even though the proceeding may have been commenced more than 12 months after the date on which the offence is alleged to have been committed.

SCHEDULE 4

Indictable Offences Which May be Heard and Determined Summarily

(showing maximum penalty applicable to each offence)

1. Causing injury intentionally or recklessly Offences under section 18 of the Crimes Act 1958	5 years
2. Administering certain substances Offences under section 19 of the Crimes Act 1958	5 years
3. Threats to inflict serious injury Offences under section 21 of the Crimes Act 1958	3 years
4. Conduct endangering persons Offences under section 23 of the Crimes Act 1958	7´ years
5. Negligently causing serious injury Offences under section 24 of the Crimes Act 1958	5 years

6. Threatening injury to prevent arrest Offences under section 30 of the Crimes Act 1958	5 years
7. Assaults Offences under section 31 of the Crimes Act 1958	3 years
8. Indecent assault Offences under section 39 of the Crimes Act 1958	10 years
9. Indecent act with child under the age of 16 Offences under section 47(1) of the Crimes Act 1958	10 years
10. Sexual penetration of 16 or 17 year old child Offences under section 48(1) of the Crimes Act 1958	3 years
11. Indecent act with 16 year old child Offences under section 49(1) of the Crimes Act 1958	3 years
12. Sexual offences against people with impaired mental functioning Offences under section 51(2) of the Crimes Act 1958	3 years
13. Sexual offences against residents of residential facilities Offences under section 52(2) of the Crimes Act 1958	3 years
14. Occupier, etc. permitting unlawful sexual penetration Offences under section 54 of the Crimes Act 1958. – where the child under 13 years – where the child is aged between 13 – 15 years	 10 years 5 years
14A Procuring sexual penetration of child under the age of 16 Offences under section 58 of the Crimes Act 1958	5 years
14B. Bestiality Offences under section 59 of the Crimes Act 1958	5 years
15. Concealing birth of a child Offences under section 67 of the Crimes Act 1958	6 months
16. Theft Offences under section 74 of the Crimes Act 1958, if the amount or value of the property alleged to have been stolen does not in the judgment of the Court exceed $25,000 or if the property alleged to have been stolen is a motor vehicle.	10 years
17. Robbery Offences under section 75 of the Crimes Act 1958, if the amount or value of the property alleged to have been stolen does not in the judgment of the Court exceed $25,000.	12´ years
18. Burglary Offences under section 76 of the Crimes Act 1958, if the offence involves an intent to steal property the amount or value of which does not in the judgment of the Court exceed $25,000.	12´ years
19. Aggravated burglary Offences under section 77 of the Crimes Act 1958, if the offence involves an intent to steal property the amount or value of which does not in the judgment of the Court exceed $25,000.	15 years
20. Removal of articles from places open to the public Offences under section 78 of the Crimes Act 1958, if the amount or value of the article alleged to have been removed does not in the judgment of the Court exceed $25,000.	5 years

21. Obtaining property by deception Offences under section 81 of the Crimes Act 1958, if the amount or value of the property alleged to have been obtained does not in the judgment of the Court exceed $25,000.	10 years
22. Obtaining financial advantage by deception Offences under section 82 of the Crimes Act 1958, if the amount or value of the financial advantage alleged to have been obtained does not in the judgment of the Court exceed $25,000.	10 years
23. False accounting Offences under section 83 of the Crimes Act 1958, if the amount or value of the alleged gain or loss does not in the judgment of the Court exceed $25,000.	7´ years
24. Falsification of documents Offences under section 83 A of the Crimes Act 1958	2 years
25. False statement by company directors, etc. Offences under section 85 of the Crimes Act 1958	7´ years
26. Suppression, etc. of documents Offences under section 86 of the Crimes Act 1958, if the amount or value of the alleged gain or loss does not in the judgment of the Court exceed $25,000.	7´ years
27. Handling stolen goods Offences under section 88 of the Crimes Act 1958, if the amount or value of the stolen goods alleged to have been handled does not in the judgment of the Court exceed $25,000.	10 years
28. Going equipped for stealing, etc. Offences under section 91 of the Crimes Act 1958	3 years
29. Receipt or solicitation of secret commission by agent Offences under section 176 of the Crimes Act 1958, if the amount or value of the valuable consideration received, solicited, given or offered does not in the judgment of the Court exceed $25,000.	10 years
30. Giving or receiving false or misleading receipt or account Offences under section 178 of the Crimes Act 1958, if the amount or value of the valuable consideration received or given does not in the judgment of the Court exceed $25,000.	10 years
31. Gift or receipt of secret commission in return for advice given Offences under section 179 of the Crimes Act 1958, if the amount or value of the valuable consideration received or given does not in the judgment of the Court exceed $25,000.	10 years
32. Secret commission to trustee in return for substituted appointment Offences under section 180 of the Crimes Act 1958, if the amount or value of the valuable consideration received or given does not in the judgment of the Court exceed $25,000.	10 years
33. Aiding and abetting offences within or outside Victoria Offences under section 181 of the Crimes Act 1958, if the amount or value of the valuable consideration received or given does not in the judgment of the Court exceed $25,000.	10 years

34. Fraudulently inducing persons to invest money Offences under section 191 of the Crimes Act 1958.	10 years
35. Destroying or damaging property Offences under section 197(1) and 197(3) of the Crimes Act 1958, if the amount or value of the property alleged to be destroyed or damaged does not in the judgment of the Court exceed $25,000. Section 197(1) Section 197(3)	 7´ years 10 years
36. Threats to destroy or damage property Offences under section 198 of the Crimes Act 1958, if the amount or value of the property alleged to be threatened to be destroyed or damaged does not in the judgment of the Court exceed $25,000.	5 years
37. Possessing anything with intent to destroy or damage property Offences under section 199 of the Crimes Act 1958, if the amount or value of the property alleged to be intended to be destroyed or damaged does not in the judgment of the Court exceed $25,000.	3 years
38. Forcible entry Offences under section 207 of the Crimes Act 1958.	1 year
39. Obstructing engine, carriage, etc. on railway Offences under section 233 of the Crimes Act 1958.	2 years
40. False statements Offences under section 247 of the Crimes Act 1958.	2 years
41. Aiding a prisoner in escaping Offences under section 479B of the Crimes Act 1958.	5 years
42. Escape and related offences Offences under section 479C of the Crimes Act 1958.	5 years
43. Causing or inducing child to take part in prostitution Offences under section 5(1) of the Prostitution Control Act 1994.	7 years
44. Obtaining payment for sexual services provided by a child Offences under section 6(1) of the Prostitution Control Act 1994.	7 years
45. Agreement for provision of sexual services by a child Offences under section 7(1) of the Prostitution Control Act 1994.	7 years
46. Forcing person into or to remain in prostitution Offences under section 8(1) of the Prostitution Control Act 1994.	7 years
47. Forcing person to provide financial support out of prostitution Offences under section 9(1) of the Prostitution Control Act 1994.	7 years
48. Living on earnings of prostitute Offences under section 10(1) of the Prostitution Control Act 1994.	4 years
48A Allowing child to take part in prostitution Offences under section 11(1) of the Prostitution Control 1994.	4 years
48B Prostitution service providers to be licensed Offences under section 22(1) or (3) of the Prostitution Control Act 1994.	3 years

49. Drug offences Indictable offences under the Drugs, Poisons and Controlled Substances Act 1981 but the maximum penalties that the Court may impose are imprisonment for a period not exceeding 3 years or a fine of not more than 50 penalty units or both. – Manufacturing, s.56 – Trafficking, s.71 – Cultivation, s.72 if not trafficking – otherwise – Possession, s.73 if not trafficking – otherwise	5 years 25 years or 15 years 1 year 15 years 1 year 5 years
50. Contravention of restraining order Offences under section 20 of the Crimes (Confiscation of Profits) Act 1986.	5 years
51. Killing, taking, etc. whales Offences under section 76(1), 76(2), 76(2A) and 76(5) of the Wildlife Act 1975, but subject to section 85 of that Act.	$100,000
52. Election bribery Offences under sections 241, 242 and 243 of The Constitution Act Amendment Act 1958 but the maximum penalties that the Court may impose are imprisonment for a period not exceeding 12 months or a fine of not more than 20 penalty units or both.	
52AEquipment (Public Safety) Act 1994 Indictable offences under the Equipment (Public Safety) Act 1994 but subject to the following penalties which may be imposed by the Court: (a) For an offence against section 21 or 23 of that Act or an offence to which section 32 of that Act applies– (i) in the case of a body corporate, a penalty of not less than 50 penalty units and not more than 400 penalty units and, if the defendant has previously been convicted of an offence against the Equipment (Public Safety) Act 1994 (whether the same offence or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 50 penalty units and not more than 400 penalty units ; or	5 years

52AEquipment (Public Safety) Act 1994, contd. (ii) in any other case, a penalty of not less than 10 penalty units and not more than 200 penalty units or imprisonment for a period not exceeding 2 years or both and, if the defendant has previously been convicted of an offence against the Equipment (Public Safety) Act 1994 (whether the same or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 10 penalty units and not more than 200 penalty units or imprisonment for a period not exceeding 2 years or both; (b) For any other indictable offence under that Act-- (i) in the case of a body corporate, a penalty of not more than 400 penalty units and, if the defendant has previously been convicted of an offence against the Equipment (Public Safety) Act 1994 (whether the same offence or any other offence), the Court may, if it considers it appropriate to do so, an additional penalty of not less than 50 penalty units and not more than 400 penalty units; or (ii) in any other case, a penalty of not more than 100 penalty units and, if the defendant has previously been convicted of an offence against the Equipment (Public Safety) Act 1994 (whether the same or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 10 penalty units and not more than 200 penalty units or imprisonment for a period not exceeding 2 years or both.	
53. Occupational Health and Safety Act Indictable offences under the Occupational Health and Safety Act 1985 but subject to the following penalties which may be imposed by the Court- (a) For an offence against section 42, 44 or 54 of that Act -- (i) in the case of a body corporate, a penalty of not less than 50 penalty units and not more than 400 penalty units and, if the defendant has previously been convicted of an offence against the Occupational Health and Safety Act 1985 (whether the same offence or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 50 penalty units and not more than 400 penalty units; or (ii) in any other case, a penalty of not less than 10 penalty units and not more than 200 penalty units or imprisonment for a period not exceeding 2 years or both and, if the defendant has previously been convicted of an offence against the Occupational Health and Safety Act 1985 (whether the same or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 10 penalty units and not more than 200 penalty units or imprisonment for a period not exceeding 2 years or both;	5 years

(b) For any other indictable offence under that Act-- (i) in the case of a body corporate, a penalty of not more than 400 penalty units and, if the defendant has previously been convicted of an offence against the Occupational Health and Safety Act 1985 (whether the same or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 50 penalty units and not more than 400 penalty units; or (ii) in any other case, a penalty of not more than 100 penalty units and, if the defendant has previously been convicted of an offence against the Occupational Health and Safety Act 1985 (whether the same or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 10 penalty units and not more than 200 penalty units or imprisonment for a period not exceeding 2 years or both.	5 years
53A. Dangerous Goods Act Offences under section 20(1) of the Dangerous Goods Act 1985 but subject to the following penalties which may be imposed by the Court:- (a) In the case of a body corporate, a penalty of not less than 50 penalty units and not more than 400 penalty units and, if the defendant has previously been convicted of an offence against the Dangerous Goods Act 1985 (whether the same or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 50 penalty units and not more than 400 penalty units; (b) In any other case, a penalty of not less than 10 penalty units and not more than 200 penalty units or imprisonment for a period not exceeding 2 years or both and, if the defendant has previously been convicted of an offence against the Dangerous Goods Act 1985 (whether the same or any other offence), the Court may, if it considers it appropriate to do so, impose an additional penalty of not less than 10 penalty units and not more than 200 penalty units or imprisonment for a period not exceeding 2 years or both.	5 years
54. Road Safety Act Offences under section 61(3) of the Road Safety Act 1986.	2 years
55. Aggravated pollution Offences under section 59E of the Environment Protection Act 1970 but the maximum penalties that the Court may impose are imprisonment for a period not exceeding 2 years or a fine of not more than 400 penalty units or both.	7 years

56. Marine Act Indictable offences under the Marine Act 1988, but subject to section 110 of that Act. Acts tending to endanger vessel or crew, s.23 Distress signals when not in distress, s.25 Failure to assist person in distress, s.26 Prohibited discharge into State waters, s.36 Discharge of oil, s.37 Breach duty to report discharges Remove/damage lighthouse, s.91 Offer to accept bribes, s.93 Pilot endangers vessel, s.95 Operating unseaworthy vessel, s.98	 2 years 3 months 2 years 2 years 2 years 1 year 10 years 10 years 2 years 10 years
56APollution of Waters by Oil and Noxious Substances Act Indictable offences under the Pollution of Waters by Oil and Noxious Substances Act 1986, but subject to section 24C of that Act. Discharge oil/ oil residues/ substances/ disposal of garbage/sewage into State waters, ss. 8, 9, 18, 23B, 23G Breach of duty to report incidents, ss. 10, 19, 23D	 2 years 1 year
57. Incitement Offences under section 321G of the Crimes Act 1958 which are alleged to have been committed in relation to an indictable offence triable summarily by virtue of any item from 1 to 56.	
58. Attempts Offences under section 321M of the Crimes Act 1958 which are alleged to have been committed in relation to an indictable offence triable summarily by virtue of any item from 1 to 56.	
59. Accessories Offences under section 325 of the Crimes Act 1958 which are alleged to have been committed in relation to a serious indictable offence (within the meaning of that section) triable summarily by virtue of any item from 1 to 56.	
60. Concealing offences for benefit Offences under section 326(1) of the Crimes Act 1958 which are alleged to have been committed in relation to a serious indictable offence (within the meaning of that section) triable summarily by virtue of any item from 1 to 56.	1 year
61. Historic Shipwrecks Act 1981 Destroy a relic, s.19 Near historic shipwreck with explosives, salvage & recovery equipment, s. 19A Contravention of condition on permit, s.21	 5 years 1 year 2 years
Indictable offences under the Historic Shipwrecks Act 1981. Hinder/obstruct or assault/threaten inspector, s.28 Impersonate inspector, s. 28B	 2 years 12 months

INDICTABLE OFFENCES TRIABLE SUMMARILY PURSUANT TO SECTION 53(1A)

Offences with a Maximum Penalty of 10 Years Imprisonment

Offence	Legislation
Child destruction	Crimes Act 1958 (CA), s.10
Causing serious injury recklessly	CA, s.17
Stalking	CA, s.21A
Setting trap to cause serious injury	CA, s.26
Using firearms to resist arrest	CA, s.29
Assault with intent to rape	CA, s.40
Sexual penetration of child aged between 10 & 16	CA, s.46
Administering drugs	CA, s.53
Abduction or detention	CA, s.55
Trading with pirates	CA, s.70C
Theft	CA, s.74
Obtaining property by deception	CA, s.81
Obtaining financial advantage by deception	CA, s.82
Handling stolen goods	CA, s.88
Receipt or solicitation of secret commission by an agent	CA, s.176
Giving or receiving false or misleading receipt or account	CA, s.178
Gift/receipt of secret commission in return for advice given	CA, s.179
Secret commission to trustee in return for substituted appointment	CA, s.180
Aiding & abetting offences	CA, s.181
Liability of directors acting without authority	CA, s.182
Destroying or damaging property	CA, s.197
Endangering safe operation of an aircraft	CA, s.246A
Contamination of goods	CA, s.248
Offences connected with explosive substances	CA, s.317
Penalties for conspiracy	CA, s.321C
Penalties for attempt	CA, s.321P
Rescuing a prisoner from lawful custody	CA, s.479A
Indecent Assault	CA, s.39
Money Laundering	Crimes(Confiscation of Profits) Act 1986, s.41Q
Penalty for injuring works	Murray–Darling Basin Act 1993, s.30
Higher penalty for certain listed offences where land, works or meter seriously damaged/ person suffered substantial economic loss.	Water Act 1989, s.295
Breach of secrecy provision	Witness Protection Act 1991, s.10

Offences with a Maximum Penalty of 7´ Years Imprisonment

Offence	Legislation
Survivor of suicide pact who kills deceased party (manslaughter)	Crimes Act 1958 (CA), s.6B
Extortion with threat to kill	CA, s.27
Incest under s44(3) or s44(4)	CA, s.44
Abduction of child under 16 years	CA, s.56
Procuring sexual penetration by threats	CA, s.57(1)
Child stealing	CA, s.63
Abortion	CA, s.65
False accounting	CA, s.83
Suppression etc. of documents	CA, s.86
Destroying/damaging property intentionally	CA, s.197(1)
Rioters demolishing building	CA, s.206
Conveying water into mine, unlawfully & maliciously	CA, s.225
Removing etc. piles of sea banks	CA, s.228
Placing things on railways to obstruct/overturn engine etc.	CA, s.232
Altering signals/exhibiting false ones	CA, s.244
Setting fire etc. to aircraft	CA, s.246B
Penalties for attempt if level 6 offence	CA, s.321P
Possession/administration of exotic disease agents	Livestock Disease Control Act 1994, s.39

Offences with a Maximum Penalty of 5 Years Imprisonment

Offence	Legislation
Infanticide	Crimes Act 1958 (CA), s.6
Incites/aids/abets another person to commit suicide	CA, s.6B(2)
Threats to kill	CA, s.20
Extortion with threat to destroy property etc	CA, s.28
Sexual penetration by person providing medical therapeutic services to a person with impaired mental functioning	CA, s.51(1)
Sexual offence by worker at residential facility against resident	CA, s.52(1)
Procuring sexual penetration by fraudulent means	CA, s.57(2)
Child stealing	CA, s.63(2)
Bigamy	CA, s.64
Removal of articles from places open to the public	CA, s.78
Offence	**Legislation**
Threats to destroy or damage property	Crimes Act 1958 (CA), s.198
Rioters injuring or damaging property	CA, s.206(2)
Endangering safety of aircraft	CA, s.246C

Dangerous goods on aircraft	CA, s.246D
Threats to safety of aircraft	CA, s.246E
Unlawful oaths to commit treason, murder etc.	CA, s.316
Makes or knowingly has possession or control of explosive substances	CA, s.317(4)
Bomb Hoaxes	CA, s.317A
Penalties for conspiracy	CA, s.321C
Penalties for incitement	CA, s.321J
Penalties for attempt where level 6 offence	CA, s.321P
Accessories	CA, s.325

Offences with a Maximum Penalty of 3 Years Imprisonment

Offence	Legislation
Aids/abets/incites another person to commit or attempt suicide (pursuant to suicide pact)	Crimes Act 1958 (CA), s.6B(2)
Supplying or procuring anything to be employed in abortion	CA, s.66
Possessing anything with intent to destroy or damage property	CA, s.199
Removing buoy	CA, s.245
Unlawful oaths to commit indictable offence other than treason or murder	CA, s.316(2)
Penalties for attempt level 7 offence	CA, s.321P
Offence relating to entry or exit	Livestock Disease Control Act 1994 (LDCA), s.24
Offence relating to entry/exit points on infected land	LDCA, s.25
Activity in restricted area without a permit	LDCA, s.27
Entry or exit from restricted areas in contravention of notice	LDCA, s.28(3)

APPENDIX VI UNITED KINGDOM GUIDELINES FOR SUMMARY HEARING OF INDICTABLE OFFENCES

[QUEEN'S BENCH DIVISION]

PRACTICE NOTE (MODE OF TRIAL: GUIDELINES)

1990 Oct. 26 Lord Lane C.J. Alliott and Auld JJ.

Crime – Practice – Mode of trial – Offences triable either way – Guidance to magistrates' courts on selecting mode of trial

26 October. LORD LANE C.J., at the sitting of the court, handed down the following practice note.

The purpose of these guidelines is to help magistrates decide whether or not to commit "either way" offences for trial in the Crown Court. Their object is to provide guidance not direction. They are not intended to impinge upon a magistrate's duty to consider each case individually and on its own particular facts.

These guidelines apply to all defendants aged 17 and above.

General mode of trial considerations

Section 19 of the Magistrates' Courts Act 1980 requires magistrates to have regard to the following matters in deciding whether an offence is more suitable for summary trial or trial on indictment: (1) the nature of the case; (2) whether the circumstances make the offence one of a serious character; (3) whether the punishment which a magistrates' court would have power to inflict for it would be adequate; (4) any other circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other; (5) any representations made by the prosecution or the defence.

Certain general observations can be made: (a) the court should never make its decision on the grounds of convenience or expedition: (b) the court should assume for the purpose of deciding mode of trial that the prosecution version of the facts is correct; (c) the defendant's antecedents and personal mitigating circumstances are irrelevant for the purpose of deciding mode of trial; (d) the fact that the offences are alleged to be specimens is a relevant consideration; the fact that the defendant will be asking for other offences to be taken into consideration, if convicted, is not; (e) where cases involve complex questions of fact or difficult questions of law, the court should consider committal for trial; (f) where two or more defendants are jointly charged with an offence and the court decides that the offence is more suitable for summary trial, if one defendant elects trial on indictment, the court must proceed to deal with all the defendants as examining justices in respect of that offence. A juvenile jointly charged with someone aged 17 or over should only be committed for trial if it is necessary in the interests of justice; (g) in general, except where otherwise stated, either way offences should be tried summarily unless the court considers that the particular case has one or more of the features set out below *and* that its sentencing powers are insufficient.

Features relevant to individual offences

Where reference is made in these guidelines to property or damage of "high value" it means a figure equal to at least twice the amount of the limit imposed by statute on a magistrates' court when making a compensation order (currently £2,000).

Burglary

1. Dwelling house

(l) Entry in the daytime when the occupier (or another) is present.

(2) Entry at night of a house which is normally occupied, whether or not the occupier (or another) is present.

(3) The offence is alleged to be one of a series of similar offences.

(4) When soiling, ransacking, damage or vandalism occurs.

(5) The offence has professional hallmarks.

(6) The unrecovered property is of high value.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Note. Attention is drawn to paragraph 28(c) of Schedule 1 to the Magistrates' Courts Act l980, by which offences of burglary in a dwelling *cannot* be tried summarily if any person in the dwelling was subjected to violence or the threat of violence.

2. *Non-dwelling*

(1) Entry of a pharmacy or doctor's surgery.

(2) Fear is caused or violence is done to anyone lawfully on the premises (e.g. nightwatchman; security guard).

(3) The offence has Professional hallmarks.

(4) Vandalism on a substantial scale.

(5) The unrecovered property is of high value.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Theft and fraud

(l) Breach of trust by a person in a position of substantial authority, or in whom a high degree of trust is placed.

(2) Theft or fraud which has been committed or disguised in a sophisticated manner.

(3) Theft or fraud committed by an organised gang.

(4) The victim is particularly vulnerable to theft or fraud (e.g. the elderly or infirm).

(5) The unrecovered property is of high value.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Handling

(1) Dishonest handling of stolen property by a receiver who has commissioned the theft.

(2) The offence has professional hallmarks.

(3) The property is of high value.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Social security frauds

(1) Organised fraud on a large scale.

(2) The frauds are substantial and carried out over a long period of time.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case and that its sentencing powers are insufficient.

Violence (section 20 and section 27 of the Offences Against the Person Act 1861)

(1) The use of a weapon of a kind likely to cause serious injury.

(2) A weapon is used and serious injury is caused.

(3) More than minor injury is caused by kicking, head-butting or similar forms of assault.

(4) Serious violence is caused to those whose work has to be done in contact with the public (e.g. police officers, bus drivers, taxi drivers, publicans and shopkeepers).

(5) Violence to vulnerable people (e.g. the elderly and infirm).

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

The same considerations apply to cases of domestic violence.

Public Order Act offences

1. *Cases of violent disorder should generally be committed for trial.*

2. *Affray*

(1) Organised violence or use of weapons.

(2) Significant injury or substantial damage.

(3) The offence has clear racial motivation.

(4) An attack upon police officers, ambulancemen, firemen and the like.

In general, cases of affray should he tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Violence to and neglect of children

(l) Substantial injury.

(2) Repeated violence or serious neglect, even if the harm is slight.

(3) Sadistic violence (e.g. deliberate burning or scalding).

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Indecent assault

(1) Substantial disparity in age between victim and defendant, and the assault is more than trivial.

(2) Violence or threats of violence.

(3) Relationship of trust or responsibility between defendant and victim.

(4) Several similar offences, and the assaults are more than trivial.

(5) The victim is particularly vulnerable.

(6) Serious nature of the assault.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Unlawful sexual intercourse

(1) Wide disparity of age

(2) Breach of position of trust.

(3) The victim is particularly vulnerable.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Note. Unlawful sexual intercourse with a girl under 13 is triable only on indictment.

Drugs

l. Class A

(a) Supply: possession with intent to supply: these cases should be committed for trial.

(b) Possession: should be committed for trial unless the amount is small and consistent only with personal use.

2. Class B

(a) Supply; possession with intent to supply: should be committed for trial unless there is only small scale supply for no payment.

(b) Possession: should be committed for trial when the quantity is substantial.

Reckless driving

(1) Alcohol or drugs contributing to recklessness.

(2) Grossly excessive speed.

(3) Racing.

(4) Prolonged course of reckless driving.

(5) Other related offences.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Criminal damage

(1) Deliberate fire-raising.

(2) Committed by a group .

(3) Damage of a high value.

(4) The offence has clear racial motivation.

In general, cases should be tried summarily unless the court considers that one or more of the above features is present in the case *and* that its sentencing powers are insufficient.

Note— Offences set out in Schedule 2 to the Magistrates' Courts Act 1980 (which includes offences of criminal damage contrary to section 1 of the Criminal Damage Act 1971 which do not amount to arson) *must* be tried summarily if the value of the property damaged or destroyed is £2,000 or less.

APPENDIX VII SUPREME COURT ACT 1933(ACT)

SUPREME COURT ACT 1993 (ACT)

Trial by jury in criminal proceedings

68ACriminal proceedings shall be tried by a jury, except as otherwise provided by this Part.

Trial by judge alone in criminal proceedings

68 (1) An accused person in criminal proceedings shall be tried by a Judge alone if—

(a) the accused person elects in writing to undergo such a trial;

(b) the accused person produces a certificate signed by a barrister or solicitor stating that—

(i) he or she has advised the accused in relation to the election; and

(ii) the accused person has made the election freely;

(c) the election is made before the Court first allocates a date for the person's trial; and

(d) where there is more than 1 accused person in the proceedings—

(i) each other accused person also elects to be tried by the Judge alone; and

(ii) each accused person's election is made in respect of all offences with which he or she is charged.

(2) An accused person who elects to be tried by a Judge alone may, at any time before he or she is arraigned, elect to be tried by a jury.

(3) If an accused person makes and then withdraws an election, he or she shall not make another election.

Verdict of judge in criminal proceedings

68C(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury as to the guilt of the accused person and any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) The judgement in criminal proceedings tried by a Judge alone shall include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) In criminal proceedings tried by a Judge alone, if a law of the Territory would otherwise require a warning to be given to a jury in such proceedings, the Judge shall take the warning into account in considering his or her verdict.

APPENDIX VIII CRIMINAL PROCEDURE ACT 1986 (NSW) DISTRICT COURT RULES

CRIMINAL PROCEDURE ACT 1986 (NSW)

Trial by jury in criminal proceedings

31 Criminal proceedings in the Supreme Court or the District Court are to be tried by a jury, except as otherwise provided by this Part.

Trial by judge in criminal proceedings

32 (1) An accused person in criminal proceedings in the Supreme Court or District Court must be tried by the Judge alone if:

(a) the person so elects in accordance with this section; and

(b) the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.

(2) An election may not be made unless:

(a) all other accused persons in the trial also elect to be tried by the Judge alone; and

(b) each election is made in respect of all offences with which the accused persons in the trial are charged.

(3) An election may be made only with the consent of the Director of Public Prosecutions.

(4) An election must be made before the date fixed for the person's trial in the Supreme Court or District Court.

(5) An accused person who elects to be tried by the Judge alone may, at any time before the date fixed for the person's trial, subsequently elect to be tried by a jury.

(6) Rules of court may be made with respect to elections under this section.

Verdict of single Judge

33 (1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

DISTRICT COURT RULES

PART 53

CRIMINAL PROCEDURE RULES

Elections under Criminal Procedure Act

10B(1) An election referred to in section 32(1) or (5) of the Criminal Procedure Act 1986 in respect of any proceeding—

(a) shall be in writing in or to the effect of the approved Form;

(b) in the case of an election referred to in section 32(1) shall be endorsed with the consent of the prosecutor given for the purposes of section 32(3) of that Act; and

(c) shall be lodged with the registrar before the day appointed for the hearing of the proceedings.

(2) Consent of the Director of Public Prosecutions may be endorsed under subrule (1)(b) by the Director or a person authorised by the Director to give such consents on the Director's behalf.

DISTRICT COURT FORMS

Form 146
Election under section 32 (1) of the Criminal Procedure Act 1986
(Pt 53 r 10B)

IN THE DISTRICT COURT **No. —/—/—**
OF NEW SOUTH WALES
(CRIMINAL JURISDICTION)

REGINA v _____

I, , of , being charged with [*short details of the charge, or all of the charges, in the proceedings*] elect to be tried by a Judge alone in respect of the alleged offence(s).

I have before making this election sought and received advice in relation to the election from barrister [*or Solicitor*].

The date fixed for my trial is 19

Dated:

Accused.

Witness to signature of accused:

The Director of Public Prosecutions consents to this election.

Dated:

[Signature and description]

[Form 146 instr GG 28.3.91 p 2552.]

Form 147
Election under section 32 (5) of the Criminal Procedure Act 1986
(Pt 53 r 10B)

IN THE DISTRICT COURT **No. —/—/—**
OF NEW SOUTH WALES
(CRIMINAL JURISDICTION)

REGINA v _____

I, , having previously elected to be tried by a Judge alone in respect of these proceedings, now elect to be tried by a jury.
The date fixed for my trial is 19
Dated:

Accused.

Witness to signature of accused:

[Form 147 instr GG 28.3.91 p 2552.]

APPENDIX IX JURIES ACT 1927 (SA) JURIES RULES 1974 (SA)

JURIES ACT 1927 (SA)

Criminal inquests to be tried by jury

6 A criminal inquest in the Supreme Court or the District Court will, subject to this Act, be tried by a jury of 12 persons qualified and liable to serve as jurors as provided by this Act.

Trial without a jury

7 (1) Subject to this section, where, in a criminal inquest before the Supreme Court or the District Court—

(a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and

(b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner,

the inquest will proceed without a jury.

(2) No election may be made under subsection(1) where the accused is charged with a minor indictable offence and has elected to be tried in the District Court.

(3) Where two or more persons are jointly charged, no election may be made under subsection(1) unless all of those persons concur in the election.

(4) Where a criminal inquest proceeds without a jury in pursuance of this section, the judge may make any decision that could have been made by a jury on the question of the guilt of the accused, and such a decision will, for all purposes, have the same effect as a verdict of a jury.

JURIES RULES 1974 (SA)

Election for trial by a judge alone under section 7(1)(a) of the Act

14 (1) An accused person may make any election in respect of a trial pursuant to Section 7(1)(a) of the Juries Act, 1927(hereafter called "the election") in the manner and at the time stipulated in subrule (2) hereof and not otherwise. The election shall apply to the trial of all charges in the Information in respect of which the trial is intended to be held and no such election shall be valid or effectual if it purports to be limited to certain only of the charges contained in such Information.

(2) Except in the case of an accused person committed for trial to a circuit sittings the election may be made—

(a) not later than the last day on which the Court Registry is open for business prior to the day of his first arraignment on the Information in respect of which the trial is intended to be held.

(b) at his first arraignment on the Information in respect of which the trial is intended to be held by orally informing the Judge in person or by his counsel of the election and contemporaneously therewith tendering to the Judge a certificate complying with Rule 16, or

(c) by serving on the Clerk of Arraigns within such time as the Court at his first arraignment on the Information in respect of which the trial is intended to be held may allow both a notice in writing signed by him that he makes the election and a certificate in accordance with Rule 15.

(3) In the case of an accused person committed for trial to a circuit sittings the election is to be made by serving on the Clerk of Arraigns within fourteen days after the accused person is committed for trial both a notice of election in writing signed by the accused person and a certificate complying with Rule 16.

(4) If the election is not made in accordance with subrule (2) or subrule (3) the accused person is precluded from making it subsequently notwithstanding that the Information is amended or that the trial proceeds upon an Information filed in substitution for an earlier Information or Informations on which the accused person has been arraigned, provided however, that if the amendments or the new Information alters the substance of the charge or charges upon which the accused person is to be tried, the accused person may make an election at any time before trial by serving a notice of election in writing signed by him and a certificate complying with Rule 16 or, at his first arraignment on the new or amended Information, by orally informing the Judge in person or by his counsel of the election and contemporaneously therewith tendering to the Judge a certificate complying with Rule 16.

15 Where two or more persons are jointly charged with an offence, they may concur, as required by Section 7(3), in making the election pursuant to Section 7(1), by jointly signifying their concurrence in the election or by each of them separately notifying his election in accordance with subrule (2) or subrule (3) of Rule 14 as the case may be.

16 A certificate for the purposes of Rules 14 and 15 shall be a certificate in writing signed by a legal practitioner who then holds a current practising certificate under the Legal Practitioners Act, 1981 stating that the signatory thereto is a legal practitioner who then holds a current practising certificate and that the practitioner has advised the accused on all matters relevant to the accused making the election. Such certificate shall clearly identify the charges in respect of which the advice has been given.

APPENDIX X THE CRIMINAL CODE (WA)

THE CRIMINAL CODE (WA)

Trial by jury

622 If the accused person pleads any plea or pleas other than the plea of guilty, or a plea to the jurisdiction of the court, he is by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and, subject to chapter LXIVA, those issues are triable accordingly.

CHAPTER LXIVA—TRIAL BY JUDGE ALONE

Trial by judge alone without a jury

651A (1) In this section "election" means an election under subsection (2).

(2) Subject to this section, where an accused person committed for trial before any court for an indictable offence elects to be tried by a judge alone, the trial is to proceed without a jury.

(3) An election is to be made in open court in accordance with rules of court.

(4) An election can be made—

(a) before an indictment has been presented to a court against the accused person; or

(b) at any stage after an indictment(including an *ex officio* indictment) has been presented to a court against the accused person but before the identity of the trial judge is known to the accused person.

(5) An election does not have effect unless the Crown consents to the trial proceeding without a jury.

(6) Where 2 or more accused persons are jointly charged, an election made by one accused person does not have effect unless each other accused person also makes an election.

(7) Where an accused person is charged with 2 or more offences, an election does not have effect unless it is made in respect of both or all of the offences.

(8) An accused person who elects to be tried by a judge alone cannot subsequently elect to be tried by a jury.

Judge's verdict and findings

651B (1) In a trial by a judge alone under this chapter the judge may make any findings or give any verdict that could have been made or given by the jury if the trial

had been held before a jury, and any finding by or verdict of the judge has, for all purposes, the same effect as a finding by or verdict of a jury.

(2) A judgment in any trial by a judge alone under this chapter is to include the principles of law applied by the judge and the findings of fact on which the judge relied, but the validity of the judgment is not affected by any failure of the judge to comply with this subsection.

Law, practice and procedure relating to jury trials to apply to trials without juries

651C (1) A court before which an accused person has elected to be tried by judge alone under this chapter can exercise any power that it could have exercised if the election had not been made. The powers conferred by section 611A can be exercised to the extent provided by rules of court.

(2) In a trial by a judge alone under this chapter the judge is to apply, so far as is practicable, the same principles of law, practice and procedure as would be applied in a trial before a jury.

(3) If any written or other law—

(a) requires a warning, information or instruction to be given to a jury in certain circumstances; or

(b) prohibits a warning from being given to a jury in certain circumstances,

the judge in a trial by judge alone under this chapter is to take the requirement or prohibition into account if those circumstances arise in the course of the trial.

(4) The provisions of this Code or any other written law relating to trials before a jury apply to a trial by a judge alone under this chapter with any modifications that are prescribed by rules of court and any other modifications that may be necessary.

(5) Without limiting subsection (4), a reference in this Code or any other written law to a person being tried or triable by or before a jury, or to the trial of a person taking place before a jury, is, unless the context otherwise requires, to be read as including a reference to a person being tried or triable by a judge alone, or to the trial of a person taking place before a judge alone, under this chapter.

APPENDIX XI CRIMES ACT 1961(NZ)

CRIMES ACT 1961 (NZ)

Trial before a judge with a jury general rule

361A Subject to sections 361B and 361C of this Act, every accused person shall be tried before a Judge with a jury.

Accused may apply for trial before a Judge without a jury

361B (1) Subject to the succeeding provisions of this section, where any accused person is committed to the Supreme Court for trial for any offence other than one referred to in subsection (5) of this section, he may, within 28 days after the date on which he is so committed, give written notice to the Registrar of the Supreme Court at the place to which he is so committed of his wish to be tried before a Judge of that Court without a jury.

(2) Where a Registrar receives such a notice under sub-section (1) of this section, he shall forthwith give a copy of the notice to the prosecutor.

(3) Where the accused, within the period prescribed by subsection (1) of this section, gives notice in accordance with that subsection of his desire to be tried before a Judge without a jury, the Registrar shall refer the matter to a Judge of the Court (who may or may not be the Judge before whom the trial is to be held).

(4) The Judge to whom any matter is referred under subsection (3) of this section shall order that the accused be tried before a Judge without a jury unless, having regard to the interests of justice, the Judge considers that the accused should be tried before a Judge with a jury, in which case he shall order accordingly.

(5) No one shall be entitled to apply to be tried by a Judge without a jury if he is charged with an offence for which the maximum penalty is imprisonment for life or imprisonment for a term of 14 years or more.

(6) Where 2 or more persons are to be tried together, they shall be tried before a Judge with a jury unless each of them applies to be tried by a Judge without a jury.

(7) Any notice purporting to be given under this section on behalf of the accused by his counsel or solicitor shall, unless the contrary is proved, be deemed to be given with the authority of the accused.

(8) Notwithstanding anything in subsection (1) of this section, an accused person may give notice under that subsection during or at the end of the preliminary hearing before the Magistrate's Court.

Judge may order trial without a jury in certain cases

361C (1) Without limiting anything in section 361B of this Act but subject to the succeeding provisions of this section, where any person is committed for trial for any offence other than one referred to in section 361B (5) of this Act, he may, at any time

before he is given in charge to the jury, with leave of the Judge apply to the Judge for an order that he be tried before the Judge without a jury.

(2) The Judge shall not grant leave under subsection (1) of this section unless he is satisfied—

(a) That the accused was not given notice, in accordance with section 168B of the Summary Proceedings Act 1957, of his right to apply under section 361B of this Act to be tried before a Judge without a jury; or

(b) That there were good and sufficient reasons why the accused did not exercise that right in accordance with the said section 361B; or

(c) That it is in the interests of justice that leave be granted.

(3) No such leave shall be granted in any case where a Judge has, pursuant to section 361B (4) of this Act, ordered that the accused shall be tried before a Judge with a jury.

(4) Where 2 or more persons are to be tried together, no leave shall be granted under subsection (1) of this section unless each of them seeks such leave.

(5) Where the Judge grants leave, he shall order that the accused be tried before the Judge without a jury unless, having regard to the interests of justice, the Judge considers that the accused should be tried before the Judge with a jury, in which case he shall order accordingly.

APPENDIX XII CRIMINAL CODE (CANADA)

CRIMINAL CODE (CANADA)

Definitions

2 In this Act—

"justice" means a justice of the peace or a provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction;

Court of criminal jurisdiction

469 Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

(a) an offence under any of the following sections:

(i) section 47 (treason)
(ii) section 49 (alarming Her Majesty),
(iii) section 51 (intimidating Parliament or a legislature),
(iv) section 53 (inciting to mutiny),
(v) section 61 (seditious offences),
(vi) section 74 (piracy),
(vii) section 75 (piratical acts), or
(viii) section 235 (murder);

(b) the offence of being an accessory after the fact to high treason or treason or murder;

(c) an offence under section 119 (bribery) by the holder of a judicial office;

(d) the offence of attempting to commit any offence mentioned in subparagraphs (a)(i) to (vii); or

(e) the offence of conspiring to commit any offence mentioned in paragraph (a). R.S., c.C-34, s.427; 1972, c.13, s.33; 1974-75-76, c.93, s.37, c.105, s.29; R.S.C. 1985, c.27 (1st Supp.), s.62.

Trial by jury compulsory

471 Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury. R.S., c.C-34, s.429.

Trial without jury

473 (1) Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

(1.1) Where the consent of the accused and the Attorney General is given in accordance with subsection (1), the judge of the superior court of criminal jurisdiction may order that any offence be tried by that judge in conjunction with the offence listed in section 469.

(2) Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1), that consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal. R.S., c.C-34, s.430; R.S.C. 1985, c.27 (1st Supp.), s.63; 1994, c.44, s.30.

Remand by justice to provincial court judge in certain cases

536 (1) Where an accused is before a justice other than a provincial court judge charged with an offence over which a provincial court judge has absolute jurisdiction under section 553, the justice shall remand the accused to appear before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed.

(2) Where an accused is before a justice charged with an offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, the justice shall, after the information has been read to the accused, put the accused to his election in the following words:

> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to have a preliminary inquiry and to be tried by a judge without a jury; or you may elect to have a preliminary inquiry and to be tried by a court composed of a judge and jury. If you do not elect now, you shall be deemed to have elected to have a preliminary inquiry and to be tried by a court composed of a judge and jury. How do you elect to be tried?

(3) Where an accused elects to be tried by a provincial court judge, the justice shall endorse on the information a record of the election and shall

(a) where the justice is not a provincial court judge, remand the accused to appear and plead to the charge before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed; or

(b) where the justice is a provincial court judge, call on the accused to plead to the charge and if the accused does not plead guilty, proceed with the trial or fix a time for the trial.

(4) Where an accused elects to have a preliminary inquiry and to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to his election, the justice shall hold a preliminary inquiry into the charge and if the accused is ordered to stand trial, the justice shall endorse on the information and, where the accused is in custody, on the warrant of committal, a statement showing the nature of the election of the accused or that the accused did not elect, as the case may be.

(5) Where a justice before whom a preliminary inquiry is being or is to be held has not commenced to take evidence, any justice having jurisdiction in the province where the offence with which the accused is charged is alleged to have been

committed has jurisdiction for the purposes of subsection (4). R.S., c.C-34, s.464; R.S.C. 1985, c.27 (1st Supp.), s.96.

PART XIX

INDICTABLE OFFENCES — TRIAL WITHOUT JURY

INTERPRETATION

Definitions

552 In this Part,

"**judge**" means,

(a) in the Province of Ontario, a judge of the superior court of criminal jurisdiction of the Province,

(b) in the Province of Quebec, a judge of the Court of Quebec,

(c) in the Province of Nova Scotia, a judge of the superior court of criminal jurisdiction of the Province,

(d) in the Province of New Brunswick, a judge of the Court of Queen's Bench,

(e) in the Province of British Columbia, the Chief Justice or a puisne judge of the Supreme Court,

(f) in the Provinces of Prince Edward Island and Newfoundland, a judge of the Supreme Court,

(g) in the Province of Manitoba, the Chief Justice or a puisne judge of the Court of Queen's Bench,

(h) in the Provinces of Saskatchewan and Alberta, a judge of the superior court of criminal jurisdiction of the province, and

(i) in the Yukon Territory and the Northwest Territories, a judge of the Supreme Court. R.S., c.C-34, s.482; 1972, c.13, s.39, c.17, s.2; 1974-75-76, c.48, s.25, c.93, s.61; 1978-79, c.11, s.10; R.S.C. 1985, c.11 (1st Supp.), s.2, c.27 (1st Supp.), s.103(1); c.27 (2nd Supp.), s.10; c.40 (4th Supp.), s.2; 1990, c.16, s.6; 1990, c.17, s.13; 1992, c.51, s.38.

JURISDICTION OF PROVINCIAL COURT JUDGES

Absolute Jurisdiction

553 The jurisdiction of a provincial court judge to try an accused is absolute and does not depend on the consent of the accused where the accused is charged in an information

(a) with

(i) theft, other than theft of cattle,
(ii) obtaining money or property by false pretences,
(iii) unlawfully having in his possession any property or thing or any proceeds of any property or thing knowing that all or a part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment or an act or

omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

(iv) having, by deceit, falsehood or other fraudulent means, defrauded the public or any person, whether ascertained or not, of any property, money or valuable security, or

(v) mischief under subsection 430(4),

where the subject-matter of the offence is not a testamentary instrument and the alleged value of the subject-matter of the offence does not exceed five thousand dollars;

(b) with counselling or with a conspiracy or attempt to commit or with being an accessory after the fact to the commission of

(i) any offence referred to in paragraph (a) in respect of the subject-matter and value thereof referred to in that paragraph, or

(ii) any offence referred to in paragraph (c); or

(c) with an offence under

(i) section 201 (keeping gaming or betting house),

(ii) section 202 (betting, pool-selling, book-making, etc.),

(iii) section 203 (placing bets),

(iv) section 206 (lotteries and games of chance),

(v) section 209 (cheating at play),

(vi) section 210 (keeping common bawdy-house),

(vii) subsection 259(4) (driving while disqualified), or

(viii) section 393 (fraud in relation to fares). R.S., c.C-34, s.483; 1972, c.13, s.40; 1974-75-76, c.93, s.62; R.S.C. 1985, c.27 (1st Supp.), s.104; 1992, c.1, s.58; 1994, c.44, s.57.

Provincial Court Judge's Jurisdiction with Consent

Trial by provincial court judge with consent

554 (1) Where an accused is charged in an information with an indictable offence other than an offence that is mentioned in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, a provincial court judge may try the accused if the accused elects to be tried by a provincial court judge. R.S., c.C-34, s.484.

Provincial court judge may decide to hold preliminary inquiry

555 (1) Where in any proceedings under this Part an accused is before a provincial court judge and it appears to the provincial court judge that for any reason the charge should be prosecuted by indictment, he may, at any time before the accused has entered upon his defence, decide not to adjudicate and shall thereupon inform the accused of his decision and continue the proceedings as a preliminary inquiry.

(2) Where an accused is before a provincial court judge charged with an offence mentioned in paragraph 553(a) or subparagraph 553(b)(i), and, at any time before the provincial court judge makes an adjudication, the evidence establishes that the subject-matter of the offence is a testamentary instrument or that its value exceeds five thousand dollars, the provincial court judge shall put the accused to his or her election in accordance with subsection 536(2).

(3) Where an accused is put to his election pursuant to subsection (2), the following provisions apply, namely,

(a) if the accused elects to be tried by a judge without a jury or a court composed of a judge and jury or does not elect when put to his election, the provincial court judge shall continue the proceedings as a preliminary inquiry under Part XVIII and, if he orders the accused to stand trial, the provincial court judge shall comply with subsection 536(4); and

(b) if the accused elects to be tried by a provincial court judge, the provincial court judge shall endorse on the information a record of the election and continue with the trial. R.S., c.C-34, s.485; 1972, c.13, s.41; R.S.C. 1985, c.27 (1st Supp.), s.106; 1994, c.44, s.58.

Corporation

556 (1) An accused corporation shall appear by counsel or agent.

(2) Where an accused corporation does not appear pursuant to a summons and service of the summons on the corporation is proved, the provincial court judge

(a) may, if the charge is one over which he has absolute jurisdiction, proceed with the trial of the charge in the absence of the accused corporation; and

(b) shall, if the charge is not one over which he has absolute jurisdiction, hold a preliminary inquiry in accordance with Part XVIII in the absence of the accused corporation.

(3) Where an accused corporation appears but does not elect when put to an election under subsection 536(2), the provincial court judge shall hold a preliminary inquiry in accordance with Part XVIII. R.S., c.C-34, s.486; R.S.C. 1985, c.27 (1st Supp.), s.107.

JURISDICTION OF JUDGES

Judge's Jurisdiction with Consent

Trial by judge without a jury

558 Where an accused who is charged with an indictable offence, other than an offence listed in section 469, elects under section 536 or re-elects under section 561 to be tried by a judge without a jury, the accused shall, subject to this Part, be tried by a judge without a jury. R.S., c.C-34, s.488; R.S.C. 1985, c.27 (1st Supp.), s.108.

Election

Duty of judge

560 (1) Where an accused elects, under section 536 to be tried by a judge without a jury, a judge having jurisdiction shall,

(a) on receiving a written notice from the sheriff or other person having custody of the accused stating that the accused is in custody and setting out the nature of the charge against him, or

(b) on being notified by the clerk of the court that the accused is not in custody and of the nature of the charge against him,

fix a time and place for the trial of the accused.

(2) The sheriff or other person having custody of the accused shall give the notice mentioned in paragraph (1)(a) within twenty-four hours after the accused is ordered to stand trial, if the accused is in custody pursuant to that order or if, at the time of the order, he is in custody for any other reason.

(3) Where, pursuant to subsection (1), a time and place is fixed for the trial of an accused who is in custody, the accused

(a) shall be notified forthwith by the sheriff or other person having custody of the accused of the time and place so fixed, and

(b) shall be produced at the time and place so fixed.

(4) Where an accused is not in custody, the duty of ascertaining from the clerk of the court the time and place fixed for the trial, pursuant to subsection (1), is on the accused, and he shall attend for his trial at the time and place so fixed. R.S., c.C-34, s.490; R.S.C. 1985, c.27 (1st Supp.), ss. 101(3), 109(1).

(5) [Repealed. R.S.C. 1985, c.27 (1st Supp.), s.109(2).]

Right to re-elect

561 (1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect

(a) at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge;

(b) at any time before the completion of the preliminary inquiry or before the fifteenth day following the completion of the preliminary inquiry, as of right, another mode of trial other than by a provincial court judge; and

(c) on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor.

(2) An accused who elects to be tried by a provincial court judge may, not later than fourteen days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so thereafter with the written consent of the prosecutor.

(3) Where an accused wishes to re-elect under subsection (1) before the completion of the preliminary inquiry, the accused shall give notice in writing that he wishes to re-elect, together with the written consent of the prosecutor, where such consent is required, to the justice presiding at the preliminary inquiry who shall on receipt of the notice,

(a) in the case of a re-election under paragraph (1) (b), put the accused to his re-election in the manner set out in subsection (7); or

(b) where the accused wishes to re-elect under paragraph (1)(a) and the justice is not a provincial court judge, notify a provincial court judge or clerk of the court of the accused's intention to re-elect and send to the provincial court judge or clerk the information and any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, or any evidence taken before a coroner, that is in the possession of the justice.

(4) Where an accused wishes to re-elect under subsection (2), the accused shall give notice in writing that he wishes to re-elect together with the written consent of the prosecutor, where such consent is required, to the provincial court judge before whom the accused appeared and pleaded or to a clerk of the court.

(5) Where an accused wishes to re-elect under subsection (1) after the completion of the preliminary inquiry, the accused shall give notice in writing that he wishes to re-elect, together with the written consent of the prosecutor, where that consent is required, to a judge or clerk of the court of his original election who shall, on receipt of the notice, notify the judge or provincial court judge or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or provincial court judge or clerk the information, the evidence, the exhibits and the statement, if any, of the accused taken down in writing under section 541 and any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, or any evidence taken before a coroner, that is in the possession of the first-mentioned judge or clerk.

(6) Where a provincial court judge or judge or clerk of the court is notified under paragraph (3)(b) or subsection (4) or (5) that the accused wishes to re-elect, the provincial court judge or judge shall forthwith appoint a time and place for the accused to re-elect and shall cause notice thereof to be given to the accused and the prosecutor.

(7) The accused shall attend or, if he is in custody, shall be produced at the time and place appointed under subsection (6) and shall, after

(a) the charge on which he has been ordered to stand trial or the indictment, where an indictment has been preferred pursuant to section 556, 574 or 577 or is filed with the court before which the indictment is to be preferred pursuant to section 577, or

(b) in the case of a re-election under subsection (1) before the completion of the preliminary inquiry or under subsection (2); the information

has been read to the accused, be put to his re-election in the following words or in words to the like effect:

> You have given notice of your wish to re-elect the mode of your trial. You now have the option to do so. How do you wish to re-elect? R.S., c.C-34, s.491; R.S.C. 1985, c.27 (1st Supp.), s.110.

Proceedings following re-election

562 (1) Where the accused re-elects under paragraph 561(1)(a) before the completion of the preliminary inquiry or under subsection 561(1) after the completion of the preliminary inquiry, the provincial court judge or judge, as the case may be, shall proceed with the trial or appoint a time and place for the trial.

(2) Where the accused re-elects under paragraph 561(1)(b) before the completion of the preliminary inquiry or under subsection 561(2), the justice shall proceed with the preliminary inquiry. R.S., c.C-34, s.492; R.S.C. 1985, c.27 (1st Supp.), s.110.

Proceedings on re-election to be tried by provincial court judge without jury

563 Where an accused re-elects under section 561 to be tried by a provincial court judge,

(a) the accused shall be tried on the information that was before the justice at the preliminary inquiry, subject to any amendments thereto that may be allowed by the provincial court judge by whom the accused is tried; and

(b) the provincial court judge before whom the re-election is made shall endorse on the information a record of the re-election. R.S., c.C-34, s.493; R.S.C. 1985, c.27 (1st Supp.), s.110.

Election deemed to have been made

565 (1) Where an accused is ordered to stand trial for an offence that, under this Part, may be tried by a judge without a jury, the accused shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury if

(a) the accused was ordered to stand trial by a provincial court judge who, pursuant to subsection 555(1), continued the proceedings before him as a preliminary inquiry;

(b) the justice, provincial court judge or judge, as the case may be, declined pursuant to section 567 to record the election or re-election of the accused; or

(c) the accused does not elect when put to an election under section 536.

(2) Where an accused is to be tried after an indictment has been preferred against the accused pursuant to a consent or order given under section 577, the accused shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury and may, with the written consent of the prosecutor, re-elect to be tried by a judge without a jury.

(3) Where an accused wishes to re-elect under subsection (2), the accused shall give notice in writing that he wishes to re-elect, together with the written consent of the prosecutor, to a judge or clerk of the court where the indictment has been filed or preferred who shall, on receipt of the notice, notify a judge having jurisdiction or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or clerk the indictment and any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, any summons or warrant issued under section 578, or any evidence taken before a coroner, that is in the possession of the first-mentioned judge or clerk.

(4) Subsections 561(6) and (7) apply to a re-election made under subsection (3). R.S., c.C-34, s.495; R.S.C. 1985, c.27 (1st Supp.), s.111.

GENERAL

Mode of trial where two or more accused.

567 Notwithstanding any other provision of this Part, where two or more persons are charged with the same offence, unless all of them elect or re-elect or are deemed to have elected, as the case may be, the same mode of trial, the justice, provincial court judge or judge

(a) may decline to record any election, re-election or deemed election for trial by a provincial court judge or a judge without a jury; and

(b) if he declines to do so, shall hold a preliminary inquiry unless a preliminary inquiry has been held prior to the election, re-election or deemed election. R.S., c.C-34, s.497; R.S.C. 1985, c.27 (1st Supp.), s.111.

Attorney General may require trial by jury.

568 The Attorney General may, notwithstanding that an accused elects under section 536 or re-elects under section 561 to be tried by a judge or provincial court judge, as the case may be, require the accused to be tried by a court composed of a judge and jury, unless the alleged offence is one that is punishable with imprisonment for five years or less, and where the Attorney General so requires, a judge or provincial court judge has no jurisdiction to try the accused under this Part and a preliminary inquiry shall be held before a justice unless a preliminary inquiry has been held prior to the requirement by the Attorney General that the accused be tried by a court composed of a judge and jury. R.S., c.C-34, s.498; R.S.C. 1985, c.27 (1st Supp.), s.111.

LIST OF CASES

Savage v United States, 547 F. 2nd 212 (1976)

Taylor v Louisiana, 419 U.S. 522 (1975)

United States ex rel. McCann v Adams, 126 F. 2d 774 (1942)
United States v Miller, 771 F. 2nd 1219 (1985)
United States v Test, 550 F. 2nd 577 (1976)

Wilde v The Queen (1988) 164 C.L.R. 365

Zenith Radio Corp. v Matsushita Elec. Indus. Co., 631 F. 2d 1069 (3rd Cir. 1980)