

JURY EXEMPTION REGULATIONS 2019

EXPLANATORY STATEMENT

Issued by authority of the Acting Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Jury Exemption Act 1965* (the Act) exempts certain Commonwealth employees from liability to serve as jurors in federal, state and territory courts. The Act provides the definition of Commonwealth employee and clarifies that a Commonwealth employee shall not be summoned to serve as a juror in a court in which, by reason of the Schedule to the Act and the Regulations, a person is exempt from serving as a juror.

Subsection 4(2) of the Act provides that the Governor-General may make regulations, for or in relation to exempting a Commonwealth employee, or a person included within a class of Commonwealth employees, from liability to serve as a juror in federal, state and territory courts.

The *Jury Exemption Regulations 1987* (the Principal Regulations) sets out categories of Commonwealth employees, or persons included within a class of Commonwealth employees, exempt from liability to serve as a juror in federal, state and territory courts. The Principal Regulations sunset on 1 April 2019.

The purpose of the proposed *Jury Exemption Regulations 2019* (proposed Regulations) is to remake the Principal Regulations with minor amendments to ensure the Regulations remain fit for purpose and meet the needs of the community.

The administration of justice requires that juries are independent, impartial and representative of the broader community. Certain Commonwealth employees carry out roles which make them unsuited to provide such independent and impartial service, primarily because their roles are closely involved in the development of legislation, investigation and prosecution of offenders, or administration of the courts.

In order to facilitate the public administration of government, some Commonwealth employees are not liable to serve as jurors. Jury service can be required with little notice and can last for undefined periods of time. In certain positions, the unplanned absence of particular individuals could significantly disrupt the effective administration of government, particularly in smaller agencies that require specialised knowledge, such as areas within Parliament.

The proposed Regulations would:

- update or remove the names of some departments and agencies, staffing positions and terminology to reflect current use and practice;

- narrow the scope of some categories of roles to ensure that people are not exempt from jury service where there is no valid justification for exemption;
- clarify that all persons who are exempt are Commonwealth employees as defined under the Act; and
- repeal the *Jury Exemption Regulations 1987*.

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Attorney-General's Department (the Department) conducted consultation as part of a review of the Principal Regulations. The Department wrote to Commonwealth agencies and bodies currently listed as exempt from jury service, inviting them to make a submission and to provide their views on whether any updates are required to the Principal Regulations.

As part of the review, the Department assessed whether the current categories of Commonwealth employees who are exempt from jury duty continue to reflect the Government's priorities and needs of the community. The consultation indicated strong support that certain Commonwealth employees be exempt from jury service on the basis of workload and responsibilities associated with certain positions, or where jury service might result in a conflict of interest. This consultation was incorporated into the proposed Regulations. The states and territories have been advised of the proposed remake of the Regulations.

REGULATION IMPACT STATEMENT

The Regulations have a minor regulatory impact on business, community organisations and individuals. The Office of Best Practice Regulation was consulted about the Regulations and advised that a Regulation Impact Statement was not required.

Details of the Regulation are set out in **Attachment A**.

A Statement of Compatibility with Human Rights is at **Attachment B**.

Details of the *Jury Exemption Regulations 2019*

Section 1 – Name

This section provides that the name of the Regulations is the *Jury Exemptions Regulations 2019*.

Section 2 – Commencement

This section provides that the Regulations commence on the date after the instrument is registered.

Section 3 – Authority

This section provides the Regulations are made under the *Jury Exemption Act 1965*.

Section 4 – Schedules

This section provides that the *Jury Exemption Regulations 1987* are repealed under Schedule 1 to the Regulations.

Section 5 – Definitions

This section provides the expression Commonwealth employee is defined in the *Jury Exemption Act 1965*.

Part 2 – Exemption of certain Commonwealth employees from jury service

Section 6 – Certain Commonwealth employees exempt from service as jurors in courts

This section provides that Commonwealth employees covered by sections 7, 8, 9 or 10 are exempt from liability to serve as a juror in the federal courts and courts of the States and the following Territories (whether exercising jurisdiction in the State or Territory concerned or outside it):

- the Australian Capital Territory
- the Northern Territory
- Norfolk Island
- The Territory of Christmas Island

Section 7 – Senior Commonwealth employees

This section provides that an Agency Head (as defined in the *Public Service Act 1999*), an SES employee, or acting SES employee, at the classification of Senior Executive Band 3 or an APS employee who is acting in an equivalent position, is exempt from liability to serve as a juror. It also provides that a Commonwealth employee, who is not employed under the *Public Service Act 1999*, who holds or performs the duties of an office or position that is comparable to that of an Agency Head or an SES Band 3 employee, is exempt from jury service.

To determine whether a person is equivalent to an Agency Head or SES Band 3 of the APS, it is intended that consideration be given to persons who would attend meetings, Senate Estimates and Ministerial and other discussions or situations requiring representation from an organisation or body at the equivalent decision-making level.

Section 8(a)

This section provides that Commonwealth employees whose duties involve the provision of legal services in a Department, the Office of Parliamentary Counsel or the Office of the Director of Public Prosecutions, are exempt from liability to serve as a juror.

Section 8(b)

This section provides that Commonwealth employees who are officers or employees of the High Court are exempt from liability to serve as a juror.

Section 8(c)

This section provides that Commonwealth employees who are officers of a federal court or APS employees whose services are made available for the purpose of the administrative affairs of a federal court, other than the High Court, whose duties relate directly and substantially to the administration of justice, are exempt from jury service.

The exemption applies to officers and employees who are Registrars of a federal court, other than the High Court, or who work in chambers and registries in federal courts, other than the High Court, assisting judges, processing cases and court documents or providing courtroom support. The exemption does not apply to employees working exclusively in providing corporate services to a federal court, other than a High Court, such as finance, human resources or information technology.

Section 8(d)

This section provides that an APS employee in the National Measurement Institute whose duties involve providing analytical or calibration services or advice, are exempt from liability to serve as jurors.

Section 8(e)

This section provides that a person is exempt from jury service if they are a person employed under section 24 of the *Australian Federal Police Act 1979*. This includes employees of the Australian Institute of Police Management.

Section 8(f)

This section provides that the Chief Executive Officer, examiners appointed under the *Australian Crime Commission Act 2002*, and staff of the Australian Crime Commission who are engaged under the *Public Service Act 1999*, are exempt from liability to serve as jurors.

Section 8(g)

This section provides that a member, the Registrar or a member of the staff of the Administrative Appeals Tribunal are exempt from liability to serve as jurors.

Section 8(h)

This section provides that a member, the Native Title Registrar or a Deputy Registrar of the National Native Title Tribunal, or a member of the staff assisting the Tribunal is exempt from liability to serve as jurors.

Section 8(i)

This section provides that a staff member, as defined in the *Australian Securities and Investments Commission Act 2001*, whose duties involve the provision of legal services or investigating matters is exempt from liability to serve as jurors.

Section 9

This section provides that employees of a Commonwealth body or part of a Commonwealth body, that is declared to be a national response agency under section 452 of the *Biosecurity Act 2015*, and is performing functions or exercising powers under Part 1 of Chapter 8 of the *Biosecurity Act 2015* in relation to a biosecurity emergency and during a biosecurity emergency period, is exempt from jury service.

Section 10(a)

This section provides the Official Secretary to the Governor-General is exempt from liability to serve as a juror.

Section 10(b)

This section provides an SES employee or acting SES employee, who is assisting a Royal Commission, is exempt from jury service.

Section 10(c)

This section provides a person performing the duties of Secretary to a committee of inquiry established under an Act is exempt from jury service.

Section 10(d)

This section provides a person holding or performing the duties of the following positions relating to a Minister are exempt from jury service:

- Chief of Staff
- Principal Adviser
- Senior Adviser
- Senior Media Adviser
- Adviser
- Media Adviser

Section 10(e)

This section provides the Registered Organisations Commissioner under the *Fair Work (Registered Organisations) Act 2009* is exempt from jury service.

Section 10(f)

This section provides a Deputy Australian Building and Construction Commissioner under the *Building and Construction Industry (Improving Productivity) Act 2016* is exempt from jury service.

Section 10(g)

This section provides the following people who hold or perform the duties of one of the following offices or positions in the Department of the Senate, are exempt from jury service:

- Clerk of the Senate
- Deputy Clerk of the Senate
- Usher of the Black Rod
- An SES employee (as defined in the *Parliamentary Service Act 1999*) or an acting SES employee (as defined in the Act) with a classification of Senior Executive Band 1
- Secretary to a committee established by the Senate, or jointly by the Senate and the House of Representatives (including a committee established by an Act)
- A Parliamentary Service employee (as defined in the Act) performing the duties of a Clerk at the Table in the Senate

Section 10(h)

This section provides the following people who hold or perform the duties of one of the following offices or positions in the Department of the House of Representatives, are exempt from jury service:

- Clerk of the House of Representatives
- Deputy Clerk of the House of Representatives
- Clerk Assistant (Procedure)
- Clerk Assistant (Committees)
- Clerk Assistant (Table)
- Serjeant-at-Arms
- Deputy Serjeant-at-Arms
- Director (Programming), Table Office
- Director (Legislation and Records), Table Office
- Secretary to a committee established by the House of Representatives, or jointly by the House of Representatives and the Senate (including a committee established by an Act)

Section 10(i)

This section provides the following people who hold or perform the duties of one of the following offices or positions in the Joint Department, as defined in the *Parliamentary Service Act 1999*, are exempt from jury service:

- Secretary
- Parliamentary Librarian
- Chief Information Officer
- First Assistant Secretary, Building and Security Division
- Chief Operating Officer
- Chief Finance Officer
- Assistant Secretary, Capital Works Branch
- Director, Legal Services

Section 10(j)

This section provides that the Parliamentary Budget Officer is exempt from jury service.

Section 10(k)

This section provides that an APS employee holding or performing the duties or position of parliamentary liaison officer in the Department administered by the Prime Minister is exempt from jury service.

Part 3 – Application, saving and transitional provisions

Division 1 – Provisions for this instrument as originally made

Section 11 – Application to liability to serve arising on or after commencement

This section provides that the *Jury Exemption Regulations 2019* applies to liability to serve as a juror that arises on or after the commencement of the instrument.

Schedule 1 – Repeals

Section 1 – The whole of the instrument

This section repeals the *Jury Exemption Regulations 1987*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Jury Exemption Regulations 2019

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulations

1. The purpose of the *Jury Exemption Regulations 2019* (the Regulations) is to:
 - update or remove the names of some departments and agencies, staffing positions and terminology to reflect current use and practice;
 - narrow the scope of some categories of roles to ensure that people are not exempted from jury service where there is no valid justification for exemption; and
 - repeal the *Jury Exemption Regulations 1987*.
2. The Regulations are proposed to be remade with the following amendments, inter alia:
 - clarify that persons who are exempt from jury service under the Regulations must be Commonwealth employees as defined under the *Jury Exemption Act 1965*;
 - narrow the scope of persons or officers of the federal courts, except the High Court, who are exempt from jury service to those whose duties relate directly and substantially to the administration of justice, to clarify the exemption does not apply to employees working exclusively in providing corporate services to a federal court, such as finance, human resources and information technology;
 - update the names of Departments, legislation and positions to reflect current use and practice, including:
 - the addition of Agency Heads and SES Band 3 and Commonwealth employees who perform duties equivalent to these positions;
 - the National Measurement Institute;
 - *Australian Securities and Investments Commission Act 2001*;
 - *Biosecurity Act 2015*;
 - a person holding or performing the duties relating to a Minister;
 - Registered Organisations Commissioner; and
 - include positions in the Joint Department (as defined in the *Parliamentary Service Act 1999*) and the Parliamentary Budget Officer as exempt from jury service.

Human rights implications

3. The legislative instrument engages the following human rights:
 - the right to non-discrimination: Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR), Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Articles 1, 2, 4 and 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women* and Articles 3, 4, 5 and 12 of the *Convention on the Rights of Persons with Disabilities*,
 - the right to a fair trial and fair hearing rights: Article 14 of the ICCPR, Article 40 of the *Convention on the Rights of the Child* and Article 13 of the CRPD,
 - minimum guarantees in criminal proceedings: Article 14(3), (5), (6) and (7) of the ICCPR, and
 - presumption of innocence: Article 14(2) of the ICCPR

The right to non-discrimination

4. The Instrument may engage the right to non-discrimination and limit this right on the basis that it excludes certain categories of Commonwealth employees, or persons included within a class of Commonwealth employees, from jury service. Discrimination on the ground of occupation may fall under the ‘other status’ category contained in Article 26 of the ICCPR. However, as discussed below, any limitation on the right would be justified in the circumstances.
5. The principle of legitimate differential treatment allows for the treatment of particular groups differently, provided particular criteria are met. That is, the justification for differentiation must be reasonable and objective and there must also be a clear and reasonable relationship of proportionality between the aim sought and the measures and their effects.¹
6. The performance of jury duty is an integral part of the Australian judicial system. Jury duty is not however, a service open or provided to the public. A significant number of people are involuntarily excluded from performing the duty due to criminal history, profession and other factors.² In this case, Commonwealth employees, or persons included within a class of Commonwealth employees, are entitled to be exempted from jury service.
7. The Instrument is in pursuit of a legitimate objective, that is, the administration of justice and the public administration of government. The administration of justice requires that juries are independent, impartial and representative of the broader community. Certain

¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009 [13], E/C.12/GC/20, available at: <http://www.refworld.org/docid/4a60961f2.html> [accessed 14 October 2018]; *Cunliffe v The Commonwealth* [1994] HCA 44; 182 CLR 272 at 300, 324, 339, 387-388

² *G.B. v Australia* (11/2013) – Australian Government Response, available at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/G-B-v-Australia-Australian-Government-Response.PDF> [accessed 15 October 2018]

Commonwealth employees carry out roles which make them unsuited to provide such independent and impartial service, primarily because their roles are closely involved in the development of legislation, investigation and prosecution of offenders, or administration of the courts.

8. In order to facilitate the public administration of government, some Commonwealth employees are not subject to jury service. Jury service can be required with little notice and can last for undefined periods of time. In certain positions, the unplanned absence of particular individuals could significantly disrupt the effective administration of government, particularly in smaller agencies that require specialised knowledge, such as areas within Parliament.
9. That certain Commonwealth employees, or persons included within a class of Commonwealth employees, are exempt from jury service is rationally connected and justified by the need to maintain the separation of powers between the executive, legislature and judicial branches of government.
10. The Instrument promotes the objective of securing an impartial and representative jury, for the purpose of ensuring that an accused person receives, and is generally perceived to receive, a fair trial from an impartial tribunal. This maintains public confidence in the justice system and promotes the general welfare in a democratic society.³ The Instrument excludes certain categories of Commonwealth employees, or persons included within a class of Commonwealth employees, from jury service as of right, and thus is a proportionate way to achieve these objectives.
11. For the reasons given, any limitation on the right to non-discrimination is reasonable, necessary and proportionate.

The right to a fair trial and fair hearing rights

12. The Instrument engages the right to a fair trial and fair hearing rights. It promotes these rights by providing that all persons are entitled to a fair and public hearing before an independent and impartial court established by law.

Minimum guarantees in criminal proceedings

13. The Instrument engages minimum guarantees in criminal proceedings, in particular, the right to be tried in person without undue delay. It promotes these rights by setting out distinct categories of Commonwealth employees, or persons included within a class of Commonwealth employees, exempt from liability to serve as a juror in federal, state and territory courts. The Instrument provides certainty in what would otherwise be an arbitrary and ad hoc process for determining who is exempt, allowing criminal proceedings, in particular the jury selection and empanelling, to proceed without undue delay and with minimum disruptions.

Presumption of innocence

14. The Instrument engages the presumption of innocence on the basis that it promotes the objective of securing an impartial and representative jury, drawn from a cross-section of

³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009 [13], E/C.12/GC/20, available at: <http://www.refworld.org/docid/4a60961f2.html> [accessed 14 October 2018]

the community. An impartial jury, with no prior knowledge of the accused, is suitably placed to apply the presumption; that the accused is innocent until proven guilty beyond reasonable doubt.

Conclusion

15. The Regulations engage the following rights: the right to non-discrimination, the right to a fair trial and fair hearing rights, minimum guarantees in criminal proceedings and the presumption of innocence. The Regulations promote the above rights by securing an impartial and representative jury, drawn from a cross-section of the community, in order to afford due process and ensure the accused receives a fair trial.
16. As discussed at paragraphs 4 to 11, the Instrument creates some limitation on the right to non-discrimination for the purpose of ensuring that Commonwealth employees unsuited to provide independent and impartial jury service are exempt from liability to serve as a juror in federal, state and territory courts. As discussed above, the limitation is reasonable, necessary and proportionate to achieve this outcome.