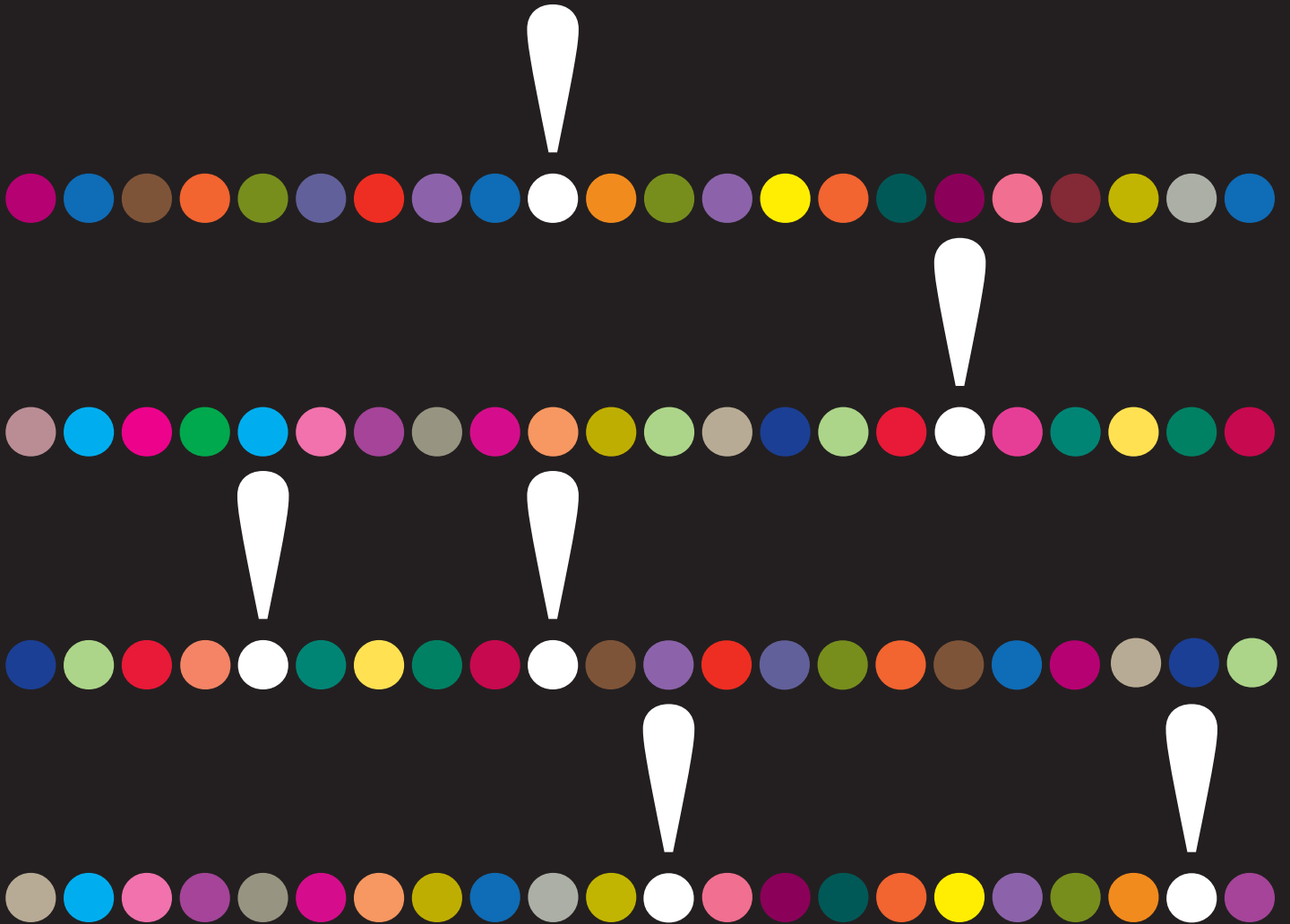




Victorian
Law Reform
Commission

Jury Empanelment

CONSULTATION PAPER OCTOBER 2013





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Foreword

Jury trials are held where people are charged with very serious criminal offences and for some types of civil matters, such as personal injury, medical negligence and defamation. Juries play an important role in reflecting the views of the community in the administration of justice. The jury empanelment process is the final and most public of the jury selection processes, as it generally takes place in open court. The empanelment process therefore has the potential to influence the community's views of the administration of justice.

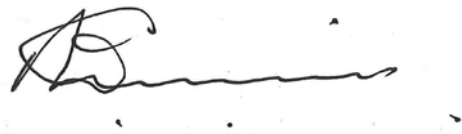
The Commission has been asked to review three aspects of the jury empanelment process—peremptory challenges and the Crown right to stand aside, calling of the panel in court by name or number, and the use of additional jurors. In each of the three aspects, the Commission has been asked in particular to consider its effect upon jurors.

In Victoria, peremptory challenges are challenges that can be made by an accused to prospective jurors based on the limited information available to him or her. This information is the prospective juror's name (in some cases), their occupation and their appearance. In contrast to challenge for cause, no reason has to be given for peremptorily challenging a prospective juror. The prosecution has a similar right, known as the Crown right to stand aside. However, this right is rarely used. Critics of peremptory challenges consider they are largely based upon stereotypes and have little value, as they are not a useful predictor of how the juror will fulfil the juror's function. The peremptory challenge process is also criticised as humiliating to the prospective juror. Supporters of peremptory challenges consider that they are an important way of ensuring the accused has a fair trial. The Commission has been asked to consider the impact of peremptory challenges and stand asides on cost, representativeness, impartiality, and procedural fairness; and to consider the effect on jurors.

The Commission has also been asked to consider the related question of calling of the jury panel by name or number. Currently, the *Juries Act 2000* (Vic) allows a judge to decide whether to call the jury panel by name or number. This provision was introduced in response to concerns about the safety and protection of jurors. Name is one of the few pieces of information about the prospective juror available to the parties as a basis upon which to exercise their challenges. However, many consider it should not be used for that purpose and the practice of empanelling by number is increasing, although its use is not consistent. A significant proportion of jurors who responded to the Juries Commissioner's Office juror feedback survey indicated that they would prefer to be empanelled by number.

The third matter under consideration by the Commission is the use of additional jurors in long trials as a precaution against juror attrition. Where additional jurors remain at the time the jury is required to retire to consider its verdict, a ballot is conducted to reduce the jury to 12 (or six for civil trials). Balloted jurors are reportedly often very frustrated by not being able to conclude the task they started. The removal of jurors at this point can also affect the group's decision-making dynamic.

I encourage anyone who has experienced these processes, as well as the community generally, to make a submission to the Commission by 15 November 2013. It is an offence under the Juries Act for a person who has served as a juror to reveal any information about the deliberations of that jury, and accordingly no former juror should reveal any such information in a submission to the Commission.



The Hon. Philip Cummins
Chair, Victorian Law Reform Commission

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on page 72, that seek to guide submissions. You do not have to address all of the questions to make a submission.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations. Please note that it is an offence under the Juries Act for a person who has served on a jury to reveal any information about the deliberations of that jury. Accordingly, the Commission will not accept any submission that reveals information about jury deliberations.

How do I make a submission?

You can make a submission in writing, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions. However, we encourage you to answer the questions on page 72.

Submissions can be made by:

Email: law.reform@lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission if you need an interpreter or other assistance to make a submission.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament or, in the case of a community law reform project, when the report is presented to the Attorney-General. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Please note that submissions that do not have an author's or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidentiality

You must decide whether you want your submission to be public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au

Submission deadline 15 November 2013.

Terms of reference

The Victorian Law Reform Commission is asked to review and report on whether changes are needed to ensure that the jury empanelment process operates justly, effectively and efficiently.

Peremptory challenges and the Crown right to stand aside jurors

The review should consider peremptory challenges in criminal and civil trials and the Crown right to stand aside jurors in criminal trials with regard to:

- resourcing implications
- the representativeness of the jury
- the impartiality of the jury
- procedural fairness
- the effects on jurors.

The review should have regard to reviews of peremptory challenges and the Crown right to stand aside jurors in other jurisdictions, both within Australia and internationally. The review should also consider existing alternative mechanisms and recommend new procedural, administrative and legislative changes if appropriate to do so.

Calling of panel

The review should consider the calling of the panel outlined in section 31 of the *Juries Act 2000* (Vic). In Victoria, name or number and occupation identify prospective and empanelled jurors. The review should consider the introduction of the practice of empanelling juries by number in every (or most) instance in the context of procedural fairness and the effects on and protection of jurors.

Additional jurors

The review should consider section 48 of the *Juries Act 2000* (Vic), which applies when there are additional jurors on the jury. The review should consider whether it is necessary or desirable for the jury to be reduced to 12 (or six as the case requires) before the jury retires to consider its verdict. In reviewing this section, the Commission is to have particular regard to the effects on jurors.

The Commission is to report by 31 May 2014.

Glossary

Accused	Person charged with a criminal offence.
Arraignment	The point in a trial when an accused is required to answer the charges made against him or her.
Ballot	The random selection of prospective jurors by drawing cards out of a box.
Challenge for cause	A challenge that is justified on the grounds that the prospective juror is not eligible to serve on the jury or is not impartial. Both the accused and the prosecution have an unlimited number of challenges for cause. The trial judge decides whether or not to uphold the challenge.
Crown	A representative of the Office of Public Prosecutions responsible for prosecuting indictable offences.
Crown right to stand aside	A challenge made by the Crown to exclude a prospective juror from the jury.
Director of Public Prosecutions	The Director of Public Prosecutions makes decisions about whether to prosecute serious criminal matters in the Supreme Court and County Court. The Director of Public Prosecutions is independent of government.
Discharge a juror	To release a juror from the jury after the jury has been sworn in.
Empanelment of the jury/Empanelling the jury	The process of selecting the jury for a trial.
Excuse	A reason for not being able to attend for jury service or to sit on the jury for a particular case.
Indictable offences	Serious crimes which attract higher maximum penalties, usually triable before a judge and a jury.
Juries Commissioner's Office (JCO)	The office responsible for jury administration in Victoria.

Juror	A member of the jury.
Jury	The group of jurors selected to make findings of fact in criminal matters and findings of fault in civil matters. The jury is randomly selected from the jury panel.
Jury panel	The group of prospective jurors from which the selection of the jury is made. The jury panel is randomly selected from the jury pool.
Jury pool	The group of prospective jurors from which the jury panel is randomly selected. Jury pool members attend for jury service in response to a summons.
Order	A direction by a court or tribunal that is final and binding unless overturned on appeal.
Peremptory challenge	A challenge made by a party to a prospective juror to exclude them from the jury. A party is not required to provide a reason for making a peremptory challenge.
Plea	An accused's answer to a charge of an offence, which usually takes the form of 'guilty' or 'not guilty'.
Prospective juror	A person who has been summoned to attend for jury service, but not yet selected for a jury.
Summons for jury service	Notification by the JCO to a person that they are required to attend for jury service.
Victorian Parliament Law Reform Committee (Law Reform Committee)	A committee of government and non-government members of the Victorian Parliament, established to consider issues of law reform referred to it by the Victorian Government.
Voir dire	A questioning process used in some jurisdictions of the United States and elsewhere to assess the values and sympathies of prospective jurors.

Introduction

2 Referral to the Commission

2 The Commission's approach

1. Introduction

Referral to the Commission

- 1.1 In March 2013, the Attorney-General, the Hon. Robert Clark MP asked the Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to review and report on three aspects of jury empanelment in Victoria, namely:
- peremptory challenges in criminal and civil trials and the Crown right to stand aside in criminal trials
 - the calling of the jury panel by name or number
 - the process for balloting off additional jurors when the jury retires to consider its verdict.
- 1.2 The terms of reference relate to both criminal and civil trials.
- 1.3 The Commission has been asked to review and report on whether changes are needed to ensure that the jury empanelment process operates justly, effectively and efficiently.
- 1.4 The terms of reference ask the Commission, among other things, to consider the effects of these processes on jurors. The full terms of reference are set out at on page ix.

The Commission's approach

Scope of the review

- 1.5 The terms of reference are focused on three distinct aspects of the jury empanelment process. The Commission will examine relevant implications of the processes in question. In particular, the balloting off of additional jurors raises the issue of whether additional jurors should be empanelled in the first place, and the alternatives to managing juror attrition that exist in Victoria and other jurisdictions.
- 1.6 The terms of reference do not ask the Commission:
- To consider whether juries are desirable or to consider alternatives to jury trials.
 - To review the question of the eligibility of persons for jury service or the processes and operation of jury selection leading up to jury empanelment (although these are described in Chapter 2 for context). The Victorian Parliament Law Reform Committee comprehensively reviewed these issues in 1996 and 1997 and its recommendations were largely adopted by the Government of Victoria when it enacted the *Juries Act 2000* (Vic) (Juries Act).¹
 - To consider the issue of social media and jury deliberations.²

1 Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report Volume 1*, (1996); Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report Volume 2: Report on Overseas Investigations* (1997); Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report Volume 3: Report on Research Projects* (1997). The Government response to the Law Reform Committee's report is available at <<http://www.parliament.vic.gov.au/lawreform/inquiries/article/1616>>.

2 The Standing Council on Law and Justice is currently considering this issue. See Standing Council on Law and Justice Communiqué, October 2012, 3–4, <http://www.sclj.gov.au/sclj/standing_council_decisions.html>.

Other relevant reviews

- 1.7 There have been several recent reviews of jury selection and empanelment processes in other Australian states and in New Zealand that consider the issues in the terms of reference. We have considered reports by:
- the Northern Territory Law Reform Committee³
 - the Queensland Law Reform Commission⁴
 - the Law Reform Commission of Western Australia⁵
 - the New South Wales Law Reform Commission⁶
 - the Law Commission of New Zealand.⁷
- 1.8 Another recent review that considers these issues is the Law Reform Commission of Ireland’s report on jury service.⁸
- 1.9 The Commission has also considered the Victorian Parliament Law Reform Committee’s 1996–97 report (mentioned at [1.6]) where it is relevant to the terms of reference.

Advisory committee

- 1.10 The Commission has established an advisory committee comprising individuals with expertise in matters relevant to this reference. The role of the committee is to provide ongoing advice to the Commission on issues raised by the terms of reference. Members of the advisory committee do not sit as representatives of any entity or organisation.
- 1.11 The advisory committee consists of:
- Professor Jonathan Clough, jury researcher, Monash Law School
 - Mr Peter Kidd SC, Senior Crown Prosecutor
 - Mr Peter Morrissey SC, criminal law barrister
 - Ms Peta Murphy, Senior Public Defender, Victoria Legal Aid
 - Ms Katherine Rynne, Senior Registrar Loddon Mallee, Magistrates’ Court of Victoria
 - Mr Robert Stary, Principal, Robert Stary Lawyers
 - Ms Andrea Tsalamandris, Partner, Adviceline Injury Lawyers.

Preliminary meetings

- 1.12 The Commission organised a number of preliminary meetings with the Juries Commissioner’s Office and with key stakeholders including legal practitioners, jury researchers and judges to gather information about jury empanelment processes.

3 Northern Territory Law Reform Committee, *Report on the Review of the Juries Act*, Report No 37 (2013).

4 Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011).

5 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report*, Report No 99 (2010).

6 New South Wales Law Reform Commission, *Jury Selection*, Report No 117 (2007).

7 Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001).

8 Law Reform Commission of Ireland, *Jury Service*, Report No 107 (2013).

- 1.13 The input from these persons and groups is reflected in this paper. This input, which was most helpful, was not intended to be formal input from the entities involved, but rather to provide guidance for the inquiry. The preliminary meetings do not form part of the Commission's formal consultations for this reference. Formal consultations will be conducted in conjunction with the publication of this consultation paper, along with a call for public submissions.

Consultation paper

- 1.14 The preliminary consultations, along with discussions with the advisory committee and other research undertaken by the Commission, form the basis of this consultation paper.
- 1.15 The consultation paper provides information about the current jury empanelment processes and how they operate and the issues identified with them. Chapter 2 of the consultation paper describes the current jury selection and empanelment processes in Victoria. Chapters 3–5 discuss the substantive issues about each of the processes raised in the terms of reference. There are questions at the end of Chapters 3–5 about whether and how these processes can be improved and whether alternatives to these processes could more effectively meet the same aims.
- 1.16 The Commission is interested to hear your views about these issues. Your responses to the questions in the consultation paper will assist the Commission to better understand the nature of the issues and to determine the most appropriate response in its recommendations.
- 1.17 Information about how to provide the Commission with a submission is on page vii. To allow the Commission time to consider your views before deciding on final recommendations, submissions are due by 15 November 2013.

Formal consultation process

- 1.18 The next stage of the reference will involve consulting widely with interested organisations and people to gather information and comments on the operation of the jury empanelment processes, identifying additional issues and developing and testing any options for reform.
- 1.19 Invitations to attend these consultations will be circulated to relevant participants and information will also be available from the Commission's website. The Commission intends to hold a number of consultations in regional areas, as well as in Melbourne.
- 1.20 The Commission is particularly interested in hearing from people who have experienced the jury empanelment process, as an important part of the terms of reference is to consider the effects of these processes on jurors. The Commission would like to hear from prospective jurors who were challenged and did not serve, as well as jurors who have served. It is important to note that the Commission is not seeking information about jury deliberations. It is an offence under the Juries Act for a person who has served as a juror to reveal any information about the deliberations of that jury.⁹
- 1.21 In addition, the Commission will seek to consult with judges, legal practitioners and victims groups.
- 1.22 The feedback and information that the Commission receives from submissions and formal consultations, combined with additional research, will inform its final recommendations to the Attorney-General. A report setting out the Commission's recommendations will be provided to the Attorney-General by the reporting date of 31 May 2014. The Attorney-General must table the report in the Victorian Parliament. The Victorian Government then decides whether to implement the Commission's recommendations.

Jury trials in Victoria

- 6** Introduction
- 6** The purpose of jury trials
- 7** The availability of jury trials
- 9** The law regulating jury trials in Australia
- 14** The importance of following the empanelment process

2. Jury trials in Victoria

Introduction

- 2.1 This chapter provides information about jury trials in Victoria as contextual information to the three jury empanelment processes that are the subject of the terms of reference.
- 2.2 First, there is a brief discussion of the purpose of jury trials and the key principles of representativeness and impartiality that underpin them. The chapter then provides an overview of the availability of jury trials for criminal and civil matters and the number of jury trials conducted in Victoria, and a discussion of the jury selection and empanelment processes.
- 2.3 Lastly, this chapter explains the importance of following empanelment processes for the integrity of a trial.

The purpose of jury trials

- 2.4 The role of the jury in both criminal and civil trials is to determine questions of fact and to apply the law, as stated by the judge, to those facts to reach a verdict. In criminal trials, the jury's role is to determine guilt or otherwise.¹ In civil trials, the jury's role is to decide fault and damages. Juries in civil trials may also give a special verdict (as well as a general verdict) on a range of issues, for example fair comment, privilege and justification in defamation cases.
- 2.5 Jury trials are said to serve a number of important purposes. For example:
 - safeguarding the rights of the accused by limiting the power of the state and the judiciary
 - ensuring justice is administered in line with the community's standards, rather than the views of unrepresentative elites such as judges²
 - enabling the community to participate directly in the administration of justice, thereby increasing acceptance of trial outcomes, as well as confidence in the legal system more generally.³
- 2.6 Two important principles underpin jury trials and are necessary to meet the purposes described above. They are representativeness and impartiality.

1 Juries also have a role in determining fitness to stand trial where a judge orders an investigation into the fitness of the accused: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 7(3)(b), 8(2).

2 Mark Findlay, 'Juries Reborn' (2007) 90 *Reform* 9. This point is also made by Justice Coldrey in the 'We the Jury' DVD that is shown to jurors as part of the induction process. The DVD is available online in individual segments: Courts and Tribunals Victoria, *Jury Service—Online Videos* (2 September 2013) <<http://www.courts.vic.gov.au/jury-service/education-and-research/jury-service-online-videos>>.

3 Mark Findlay, 'The Essence of the Jury' (2000) 12 (2) *Legaldate* 6.

Representativeness

2.7 There is some debate about what representativeness means in the context of jury trials.⁴ For example, it could be argued that representativeness requires that members of the accused's own community be on the jury.⁵ However, for the purposes of this consultation paper, we adopt the definition used by the Victorian Parliament Law Reform Committee in its 1996–97 review of jury service in Victoria:⁶

an accurate reflection of the composition of [Victorian] society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status (etc).

2.8 To achieve representativeness, the jury panel and the jury are selected randomly. However, there are rules in the selection and empanelment processes that operate to filter out certain groups, thereby reducing representativeness. For example, the eligibility and qualification criteria filter out certain professional groups, people with certain types of impairments and people convicted of certain offences. Similarly, excuse categories operate to exclude more members of some groups than others.⁷

2.9 While it is outside the Commission's terms of reference to consider these rules and their effects on representativeness, they are mentioned here as contextual information relevant to how peremptory challenges and stand asides impact on representativeness. These issues are discussed in Chapter 3.

Impartiality

2.10 The second key principle underpinning jury trials is impartiality. In the context of jury trials, impartiality means that jurors do not have biases or preconceived notions that influence their ability to judge the evidence in the case fairly.

2.11 Impartiality is central to the concept of a fair trial. For example, the International Covenant on Civil and Political Rights⁸ and Victoria's Charter of Human Rights and Responsibilities⁹ both include a right to a hearing before a 'competent, independent and impartial' tribunal.

2.12 Impartiality is achieved through the random selection process,¹⁰ as well as the ability of a court to excuse a person on the basis of their knowledge of a party or a witness,¹¹ and the various categories of challenge that are available and discussed in Chapter 3.

The availability of jury trials

2.13 Jury trials are available in all states and territories in Australia for indictable criminal matters and in most states and territories for certain types of civil proceedings.

4 See Jacqueline Horan and David Tait, 'Do Juries Adequately Represent the Community? A Case Study of Civil Juries in Victoria' (2007) 16 (3) *Journal of Judicial Administration* 179, 180–5.

5 This has been argued in a number of cases, for example *R v Grant & Lovett* [1972] VR 423; *R v Badenoch* [2004] VSCA 95 and *R v Woods & Williams* (2010) 246 FLR 4.

6 Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report Volume 1* (1996) 7 [1.20].

7 For example, one of the excuse categories is if the person has the care of dependants and alternative care during the person's attendance for jury service is not reasonably available for those dependants: *Juries Act 2000* (Vic) s 8(3)(h).

8 *International Covenant on Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14.

9 *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) s 24(1). The Charter is based on the International Covenant on Civil and Political Rights.

10 Random and impartial selection, as opposed to selection by the prosecution or the state, was recognised as an essential feature of jury trials in the High Court cases of *Cheatle v The Queen* (1993) 177 CLR 541; *Katsuno v The Queen* (1999) 199 CLR 40 and *Ng v The Queen* (2003) 217 CLR 521.

11 *Juries Act 2000* (Vic) s 32(3).

Criminal trials

- 2.14 Whether a jury trial is available for offences under state and territory criminal laws depends on whether the offence with which a person has been charged is indictable and whether the trial proceeds by way of indictment. The categorisation of offences in Australian jurisdictions is usually stated in the legislation, or provided for by reference to the maximum penalty that can be imposed for the offence.
- 2.15 In five Australian jurisdictions—New South Wales, South Australia, Western Australia, Queensland and the Australian Capital Territory—whether a trial for an indictable offence proceeds as a jury trial may also depend on whether there has been an application for the accused to be tried by judge alone without a jury.¹²
- 2.16 Jury trials are compulsory where the prosecution of a federal offence proceeds by way of indictment. This is because section 80 of the Commonwealth Constitution guarantees trial by jury in such circumstances.¹³

Civil trials

- 2.17 The availability of jury trials for civil proceedings depends on the type of remedy sought and the way in which the parties initiate the proceeding.¹⁴
- 2.18 In Victoria, jury trials are available as of right upon application by the plaintiff or defendant in civil proceedings for which a common law remedy is sought.¹⁵ If one party to the proceedings wishes the matter to be tried by a jury and the other party does not, the party who does not want the matter to be tried by jury must persuade the court to dispense with the jury trial.¹⁶
- 2.19 However, even where a plaintiff or defendant requests a trial by jury, the court may still order the trial to be by judge alone.¹⁷ Further, the court may order some questions of fact to be determined by a jury and others by judge alone,¹⁸ although this procedure is unusual.¹⁹

The number of jury trials in Victoria

- 2.20 Jury trials make up a very small proportion of court cases in Victoria. The vast majority of criminal court cases are heard summarily in the Magistrates' Courts and most civil matters are determined without a jury. There were 579 Supreme and County Court jury trials in 2011–12. Of those, 446 were in Melbourne and 133 were in regional Victoria.²⁰ In 2012–13 there were 584 jury trials in Victoria. Of those, 448 were in Melbourne and 136 were in regional Victoria.²¹

12 *Criminal Procedure Act 1986* (NSW) s 132; *Juries Act 1927* (SA) s 7; *Criminal Code* (WA) ss 651A–C; *Criminal Code Act 1899* (Qld) ss 614–615E; *Supreme Court Act 1933* (ACT) s 68B.

13 The guarantee in section 80 applies to prosecution on indictment for federal offences only. However, as federal courts do not have the jurisdiction to try federal offences in the first instance, such offences are tried in state and territory courts, according to state and territory jury laws (*Judiciary Act 1903* (Cth) s 68). As there is a variation in state and territory jury laws, federal offences are only subject to those provisions of state and territory jury laws that reflect the 'essential features' of jury trials. A summary of these essential features is provided in Justice Kirby's judgment in *Ng v The Queen* (2003) 217 CLR 521, 533.

14 Thomson Reuters, *Halsbury's Laws of Australia* (at 15 June 2013) 5 Civil Procedure, '5.7 Trial and Execution of Judgments' [5.7.870].

15 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 47.02(1).

16 *Halligan v Curtin* [2013] VSC 124 (22 March 2013) [15] citing *Trevor Roller Shutter Services Pty Ltd v Crowe* (2011) 31 VR 249.

17 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 47.02(3).

18 *Ibid* r 47.04.

19 Thomson Reuters, above n 14 [5.7.930].

20 Courts and Tribunals Victoria, *Facts & Figures* (2 September 2013) <<http://www.courts.vic.gov.au/jury-service/about-jury-service/facts-figures>>.

21 Data provided by the Juries Commissioner's Office.

The law regulating jury trials in Australia

- 2.21 The jury selection and empanelment process is regulated by state and territory law.²² While there are many similarities between the laws, there are also some differences. For example, while all state and territory laws allow peremptory challenges, the number of challenges that can be made is not consistent.²³

The law regulating jury trials in Victoria

- 2.22 The law regulating jury trials in Victoria is the *Juries Act 2000* (Vic) (Juries Act). The Juries Act sets out who is eligible for jury duty, how a jury is to be selected and empanelled, and how a jury is to operate.
- 2.23 The Juries Commissioner is a statutory role established under the Juries Act, responsible for jury administration in Victoria through the operations of the Juries Commissioner's Office (JCO).
- 2.24 There are five steps in the selection and empanelment of jurors under the Juries Act:
- random selection from the Victorian electoral roll
 - determination of liability for jury service
 - summons
 - selection of a panel from the jury pool
 - selection from the jury panel.
- 2.25 In some instances where only one trial is listed for the day, the JCO will only summons the number of people required for the panel (with some extras to account for absentees and excuses). In these instances the entire jury pool makes up the panel and attends court, so steps four and five are combined.
- 2.26 The Commission's review is primarily²⁴ concerned with processes that occur as part of the fifth step. The steps are illustrated in **Figure 1**.

²² *Juries Act 2000* (Vic); *Jury Act 1977* (NSW); *Jury Act 1995* (Qld); *Juries Act 2003* (Tas); *Juries Act 1927* (SA); *Juries Act 1957* (WA); *Criminal Procedure Act 2004* (WA) pt 4 div 6; *Juries Act 1967* (ACT); *Juries Act 1963* (NT).

²³ See Appendices A and B.

²⁴ The decision to empanel additional jurors does form part of the empanelment process. The balloting of additional jurors when the jury retires to consider its verdict, however, is not part of the empanelment process.

Figure 1: Jury selection and empanelment process



Random selection from the electoral roll

- 2.27 Victoria has 14 jury districts, one in Melbourne and a jury district for each court circuit.²⁵ The jury districts are assigned by the Governor in Council by order published in the *Victoria Government Gazette*.²⁶
- 2.28 The Victorian jury districts are Bairnsdale, Ballarat, Bendigo, Geelong, Hamilton, Horsham, Latrobe Valley, Melbourne, Mildura, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga.²⁷
- 2.29 At the request of the Juries Commissioner, the Victorian Electoral Commission randomly selects the required number of people from each district using a computer-generated selection process. This becomes the jury roll for the district until a new jury roll is prepared.²⁸
- 2.30 For Melbourne, jury rolls are generated about five times a year. For some of the smaller regional courts, jury rolls are generated to coincide with the circuit, that is, around three times a year.
- 2.31 Certain categories of people are disqualified from jury service²⁹ and certain categories of people are ineligible for jury service.³⁰ As noted in Chapter 1, qualification and eligibility for jury service are not included in the terms of reference for this review, but affect representativeness by filtering out certain categories of people.³¹

Determination of liability for jury service

- 2.32 All people on the jury roll, or as many people as the Juries Commissioner considers appropriate, are then sent a jury eligibility questionnaire by the JCO that must be completed and returned within a specified time.³² In Melbourne, prospective jurors may complete this questionnaire using the Jury Questionnaire Online System (JQOS). This system will be progressively rolled out to other jury districts.
- 2.33 Based on the responses to the questionnaire, the JCO makes an assessment of the person's eligibility and qualification to serve on a jury.³³ Information from the jury questionnaire is entered by the JCO into the Jury Information Management System (JIMS) or automatically uploaded from JQOS into JIMS.
- 2.34 The JCO generates a jury list, as required, from the people on the jury roll in each district who appear to be liable for jury duty.³⁴ The jury list contains the name, address, date of birth and, if known, occupation of the prospective jurors.³⁵
- 2.35 The JCO sends the jury list to the Chief Commissioner of Police who checks whether any people on the list have been found guilty or convicted of disqualifying offences in Victoria or another jurisdiction or are on bail or remand or are undischarged bankrupts.³⁶ The JCO must then remove any disqualified people from the jury list.³⁷

25 *Juries Act 2000* (Vic) s 18(1).

26 *Ibid* s 18(2) and (3).

27 Victoria, *Government Gazette*, No G 12, 20 March 2003, 44 and No S 232 5 September 2006, 1.

28 *Juries Act 2000* (Vic) s 19(4).

29 *Ibid* sch 1.

30 *Ibid* sch 2.

31 These issues were last considered in Victoria in 1996–7 as part of the review of jury service by the Law Reform Committee. Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report: Volume 1* (1996). The current categories of eligibility and qualification in the *Juries Act* are based on the recommendations of that review.

32 *Juries Act 2000* (Vic) s 20. It is an offence to fail to complete and return the questionnaire without reasonable excuse: s 67.

33 *Ibid* s 21.

34 *Ibid* s 25.

35 *Ibid* s 25(3).

36 *Ibid* s 26(1)–(2). The list of disqualifying offences is at sch 1 of the same Act.

37 *Ibid* s 26(3).

Summons

- 2.36 When the JCO is notified that jury trials are imminent, it issues a summons and information about eligibility, deferral and excuse categories to prospective jurors on the jury list. The summons must be served no less than 10 days before the person is required to attend for jury service.³⁸
- 2.37 This is the second opportunity in the selection process prospective jurors have to seek to have their jury service deferred or to be excused entirely on this occasion.³⁹ If their service is not deferred or they are not excused by the JCO, they are required to attend for jury service.

The jury pool

- 2.38 Prospective jurors are required to report to the JCO on the day listed in the summons. Upon reporting, the JCO confirms the person's identity. The person then becomes part of the jury pool.
- 2.39 A jury pool supervisor checks that everyone who has been issued with a summons is present.⁴⁰ The jury pool is then given a comprehensive orientation program that lasts approximately 40 minutes. The orientation consists of written information in the form of a juror's handbook,⁴¹ an address by a jury pool supervisor and a DVD on the jury empanelment process, *We the Jury*.
- 2.40 A jury pool supervisor provides further information about jury service, including the expected length of trials, the rate of pay and the requirement for confidentiality during deliberations, and provides an opportunity for people to ask questions. He or she also reiterates the categories of excuse and invites people who wish to be excused to go to the JCO counter for a determination. People who are not excused are sent back to the jury pool room.
- 2.41 Once all people who have been excused have left, a jury pool supervisor confirms the names and occupations of the remaining prospective jurors in the pool. Ballot cards with the name and number and occupation of each prospective juror are generated from this list. The ballot cards for the jury pool are placed in the ballot box in the jury pool room.
- 2.42 When a court needs a jury, a jury pool supervisor randomly selects the required number of ballot cards from the ballot box to form a jury panel.⁴² The jury panel is the group of prospective jurors who are sent to the courtroom and from which the jury is selected. The average size of a jury panel in a criminal trial where there is one accused is 30–33 for a 7–10 day trial. The average size of a panel in a civil trial is 20–25 for a trial of up to 10 days in duration.⁴³

Selection from the jury panel

- 2.43 The jury panel is then taken by a court officer and a JCO staff member to the courtroom where the trial is to be heard. The ballot cards of the jury panel are handed to the judge's associate, who places them in the court's ballot box.
- 2.44 The court must inform the panel of the type of action or charge, the name of the accused in a criminal trial or the names of the parties in a civil trial, the names of the principal witnesses expected to be called in the trial, the estimated length of the trial and any other information that the court thinks relevant.⁴⁴

38 Ibid s 27(2)(c).

39 The first opportunity is at the questionnaire stage. See [2.32].

40 Failure to attend for jury service without reasonable excuse is an offence: *Juries Act 2000* (Vic) s 71.

41 The juror's handbook is also available to download from the Courts and Tribunal Service website: Courts and Tribunals Victoria, *Attending Jury Service* (2 September 2013) <<http://www.courts.vic.gov.au/jury-service/attending-jury-service>>.

42 *Juries Act 2000* (Vic) s 30.

43 For discussion on how the size of the panel is determined, see Chapter 3.

44 *Juries Act 2000* (Vic) s 32(1).

- 2.45 On direction of the judge, the judge's associate then calls out the name or number and occupation of the panel members. The panel members must indicate their attendance by saying 'Present' or indicate whether they wish to be excused by saying 'Excuse'. The judge's associate must record the attendance.⁴⁵
- 2.46 The judge then determines the applications from the people who wish to be excused.⁴⁶ The application to be excused may be made in writing or orally at the discretion of the judge. A person who is excused must return to the jury pool and may be selected or allocated to a different jury panel.⁴⁷ If the person is not excused, they remain part of the jury panel and are liable to be selected for the jury.

Criminal trials

- 2.47 In criminal trials, the accused is then arraigned before the panel. The charges in the indictment are read out and the accused pleads to each charge on the indictment.⁴⁸
- 2.48 Prospective jurors are then selected from the ballot box one at a time. Each person is required to walk in front of the accused towards the jury box.
- 2.49 The accused may peremptorily challenge six prospective jurors and the prosecution may stand aside six prospective jurors.⁴⁹ This is done by calling out 'Challenge' or 'Stand aside' before the prospective juror takes his or her place in the jury box.⁵⁰ If a person is peremptorily challenged, they are permanently excluded from the jury. If a person is stood aside, their card goes back into the ballot box and they may be selected again.⁵¹ Peremptory challenges and stand asides are discussed in detail in Chapter 3.
- 2.50 Prospective jurors whose card is selected and who are not challenged sit in the jury box. When the required number of jurors (usually 12) is in the jury box, they are sworn in as the jury.⁵²

Civil trials

- 2.51 In civil trials, 12 cards (or more where there are multiple separately represented plaintiffs or defendants)⁵³ are drawn and the names or numbers and occupations of the prospective jurors are drawn up into a list.
- 2.52 As explained in Chapter 3, the plaintiff's legal practitioner and then the defendant's legal practitioner each strike three names for each plaintiff or defendant from the list. The remaining jurors (usually six)⁵⁴ are the jury.

45 Ibid s 31(1).

46 Ibid s 32(2), (3).

47 Ibid s 32(4).

48 *Criminal Procedure Act 2009* (Vic) ss 215(1), 217.

49 *Juries Act 2000* (Vic). The number of peremptory challenges for each accused decreases where there are multiple accused persons (s 39). Similarly, the number of stand asides available to the prosecution is calibrated to take into account multiple accused persons (s 38).

50 Ibid ss 38(2), 39(2).

51 Ibid s 38(3).

52 Up to three additional jurors may be empanelled in criminal trials: *Juries Act 2000* (Vic) s 23(a). Additional jurors are discussed in Chapter 5.

53 This is to take into account the increase in the number of peremptory challenges available where there are multiple plaintiffs or defendants. See Chapter 3.

54 Up to two additional jurors may be empanelled in civil trials: *Juries Act 2000* (Vic) s 23(b). Additional jurors are discussed in Chapter 5.

The importance of following the empanelment process

- 2.53 There have been cases in which irregularities in the empanelment process have led to the discharge of the jury and in some cases, the allowance of an appeal against conviction.
- 2.54 The *Criminal Procedure Act 2009* (Vic) provides that an appeal must be allowed if ‘as a result of an error or irregularity in or in relation to the trial there has been a substantial miscarriage of justice’,⁵⁵ or if there has been a substantial miscarriage of justice for any other reason.⁵⁶
- 2.55 While not every process irregularity will result in such an outcome (as not all irregularities will result in a substantial miscarriage of justice),⁵⁷ courts have held that an appeal must be allowed where the process irregularity results in the jury being unlawfully constituted.⁵⁸
- 2.56 A jury will be unlawfully constituted if it is constituted in a way other than provided by the Juries Act—for example, where a judge empanels an additional juror to take the place of an empanelled juror who is discharged after the jury was sworn in.⁵⁹
- 2.57 While not directly within the terms of reference, the Commission notes the importance of correctly following the empanelment process as set out in the Juries Act, to avoid a trial being aborted or an appeal against conviction on this basis.

55 *Criminal Procedure Act 2009* (Vic) s 276(1)(b). The term ‘substantial miscarriage of justice’ for the purpose of this Act was discussed in *Baini v The Queen* (2012) 246 CLR 469. In that case, the court held that the term ‘substantial miscarriage of justice’ is not limited to situations where the jury has returned a verdict that was not open for them to make based on the evidence in the case, but also encompasses serious departures from process.

56 *Criminal Procedure Act 2009* (Vic) s 276(1)(c).

57 See, for example, *Caruso v The Queen* [2012] VSCA 138 (27 June 2012), where the defence sought to appeal a conviction on the grounds that the judge had failed to provide part of the panel with certain information. In dismissing the appeal, the court drew a distinction between information a judge is required to provide and information the judge has discretion to provide. Special leave to appeal to the High Court was refused: *Caruso v The Queen* [2013] HCASL 1 (10 May 2013).

58 *R v Hall* [1971] VR 293, 298–299; *Wilde v The Queen* [1987–1988] 164 CLR 365, 373.

59 This was the case in *R v Panozzo*; *R v Iaria* (2003) 8 VR 548.

Peremptory challenges

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3. Peremptory challenges

Introduction

- 3.1 The Commission’s terms of reference are to consider peremptory challenges in criminal and civil trials, and the Crown right to stand aside jurors in criminal trials with regard to:
- resourcing implications
 - the representativeness of the jury
 - the impartiality of the jury
 - procedural fairness
 - the effects on jurors.
- 3.2 The Commission has also been asked to consider the approach of other jurisdictions in Australia and overseas, and existing alternative mechanisms, with a view to recommending whether any procedural, legislative or administrative changes should be made.
- 3.3 This chapter describes the current law and practice of peremptory challenges in Victoria and other comparable jurisdictions, and how they have developed over time. The chapter then sets out the key issues raised by the terms of reference in relation to peremptory challenges. Finally, options for reform are considered, together with questions to guide submissions and consultations.

Peremptory challenges and the Crown right to stand aside

- 3.4 Peremptory challenges and the Crown right to stand aside (‘stand asides’) are challenges to prospective jurors during the final stage of the selection of the jury. They are made by the parties and do not require any reason to be provided for the challenge.
- 3.5 Peremptory challenges result in the immediate, permanent exclusion of the challenged person from the jury panel.¹ In contrast, a prospective juror who is stood aside is not permanently excluded from the jury panel and may be balloted again at random.²
- 3.6 Peremptory challenges are allowed in both criminal and civil jury trials in Victoria,³ and stand asides are allowed in criminal trials.⁴ The only exception is investigations made under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).⁵

1 Peremptory challenges do not, however, remove the prospective juror from the jury pool—see *Juries Regulations 2011* (Vic) reg 9(1). This means that a juror who is challenged in one trial may still be available to be empanelled for another jury as part of their service.

2 *Juries Act 2000* (Vic) s 38(3).

3 *Ibid* ss 34, 39.

4 *Ibid* s 38.

5 *Ibid* ss 38(5), 39(4).

- 3.7 Peremptory challenges and stand asides are different from challenges for cause because, as the name suggests, a reason must be provided when challenging for cause. Challenges for cause are discussed at [3.119]–[3.131] below.

Current law

- 3.8 Peremptory challenges exist in one form or another in all Australian jurisdictions and most other common law jurisdictions for both criminal and civil jury trials.
- 3.9 The main exception to this is the United Kingdom, where peremptory challenges were abolished in England and Wales in 1988,⁶ Scotland in 1995⁷ and Northern Ireland in 2007.⁸
- 3.10 In Australia, the number of challenges available to parties varies by jurisdiction, as does the nature of the Crown right to challenge, the information available to the parties, and the process for challenges.

The number of challenges available

- 3.11 In Victorian criminal trials (which usually have 12 jurors),⁹ an accused is entitled to peremptorily challenge up to six prospective jurors¹⁰ and the Crown is entitled to stand aside up to six prospective jurors.¹¹ The number of peremptory challenges and stand asides available to each party decreases where there is more than one accused in criminal proceedings. There are up to five peremptory challenges for each accused where there are two accused,¹² and up to four peremptory challenges each where there are three or more accused.¹³ Similarly there are up to 10 stand asides where there are two accused,¹⁴ and four stand asides for each accused where there are three or more accused.¹⁵
- 3.12 In Victorian civil trials (which usually have six jurors),¹⁶ parties are entitled to challenge three prospective jurors.¹⁷ In cases involving multiple plaintiffs or defendants, each individual plaintiff or defendant may challenge up to three prospective jurors unless they are represented by the same legal practitioner.¹⁸ So, for example, in a trial involving one plaintiff and two defendants (who all have different lawyers), the plaintiff would be able to challenge three jurors, and each defendant would similarly be entitled to challenge three jurors.

6 *Criminal Justice Act 1988* (UK) c 33, s 118. Parties can still challenge a potential juror for cause (*Juries Act 1974* (UK) c 23, s 12). The Crown has also retained its right to stand by a juror, although guidelines published by the Attorney-General restrict the use of this power. Prior to 1988, the right of defence counsel to peremptory challenges had eroded over time, reducing from 25 to 12 in 1925, 7 in 1949, 3 in 1977, before abolition in 1988. It has been argued that the reduction and final abolition of peremptory challenges in England and Wales was precipitated by a number of high-profile cases involving multiple defendants, and accusations that these defendants pooled their challenges in an attempt to 'rig' the jury in their favour (see Sally Lloyd Bostock and Cheryl Thomas, 'Decline of the "Little Parliament": Juries and Jury Reform in England and Wales' (1999) 62 (2) *Law and Contemporary Problems* 77, 24–5). Some have argued that the evidentiary basis for these assertions was lacking (James J Gobert, 'The Peremptory Challenge: An Obituary' [1989] *Criminal Law Review* 528, 531). Empirical data from this period suggests that peremptory challenges were not heavily used and had a limited impact on trial outcomes (see David Riley and Julie Vennard, 'The Use of Peremptory Challenge and Stand by of Jurors and Their Relationship to Trial Outcome' [1988] 731, 736–8).

7 *Criminal Justice (Scotland) Act 1995* (Scot) c 20, s 8. However, a potential juror may be removed without cause with the consent of both parties (see [3.136] below). The abolition of peremptory challenges in Scotland followed The Scottish Office Home and Health Department, *Firm and Fair: Improving the Delivery of Justice in Scotland* (1994) which stated (at 17) that '[t]he Government's view is that peremptory challenges are unnecessary and, being open to abuse, should be abolished. Experience since peremptory challenge was abolished in England and Wales suggests that abolition would not result in a significant rise in challenges on cause shown.'

8 *Justice and Security (Northern Ireland) Act 2007* (NI) c 6, s 13.

9 *Juries Act 2000* (Vic) s 22(2). Up to three additional jurors may be empanelled in criminal trials: s 23(a). Additional jurors are discussed in more detail in Chapter 5.

10 *Ibid* s 39(1)(a).

11 *Ibid* s 38(1)(a).

12 *Ibid* s 39(1)(b).

13 *Ibid* s 39(1)(c).

14 *Ibid* s 38(1)(b).

15 *Ibid* s 38(1)(c).

16 *Ibid* s 22(1). One or two additional jurors may be empanelled in civil trials, s 23(b). Additional jurors are discussed in more detail in Chapter 5.

17 *Ibid* s 35(1).

18 *Ibid* s 35(3)–(4).

- 3.13 The number of peremptory challenges and stand asides available does not increase in Victoria where additional jurors are empanelled,¹⁹ as is the case in some other jurisdictions.²⁰
- 3.14 **Appendices A and B** set out the number and nature of peremptory challenges and stand asides in each Australian jurisdiction.
- 3.15 Regardless of the current number of peremptory challenges and stand asides available, the trend in Victoria and other jurisdictions²¹ has been to reduce the number of challenges available over time.²²
- 3.16 In Victoria, the number of peremptory challenges available in criminal proceedings was reduced from 15 (or 20 for capital offences) in 1890,²³ to eight in 1928,²⁴ to six in 1993.²⁵ Reductions to the numbers available where there are multiple accused were also introduced in 1993.²⁶
- 3.17 The most recent reductions were justified on the basis that they would ‘produce significant savings in the administration of the jury system’. They were further justified on grounds that challenges, particularly where multiple accused are involved, can ‘lead to distortions in the representative nature of the jury’.²⁷
- 3.18 The number of challenges available has been debated in other jurisdictions in recent years on the ground that the number of challenges can affect the representativeness of juries. For example, the Law Commission of New Zealand found that ‘[s]ix challenges is enough to fulfil the [core functions of peremptory challenges]²⁸ while not being enough to upset the random nature of the balloting process’.²⁹ Similarly, a jury researcher stated that six challenges were not sufficient to fundamentally alter the representativeness of juries.³⁰ This is because pre-empanelment selection processes are still essentially random,³¹ and a party cannot actively select jurors.

The nature of the Crown right to challenge

- 3.19 The Crown in Victoria has a right to stand aside, but not to peremptorily challenge. The nature of the Crown’s right to challenge varies between jurisdictions and has changed over time in Victoria.
- 3.20 In some jurisdictions the Crown has a right to both peremptorily challenge and stand aside,³² whereas in other jurisdictions the Crown has peremptory challenges only.³³ In Victoria and Tasmania, the Crown only has a right to stand aside.

19 The empanelment of additional jurors is discussed in Chapter 5.

20 For example, New South Wales: *Jury Act 1977* (NSW) s 42(2); Queensland: *Jury Act 1995* (Qld) ss 42(4)(a)–(b); Australian Capital Territory: *Juries Act 1967* (ACT) s 31A(3) and also where reserve jurors are appointed in Tasmania: *Juries Act 2003* (Tas) s 35(3). As in Victoria, the number of challenges does not increase if additional jurors are appointed in South Australia: *Juries Act 1927* (SA) s 61(2) or Western Australia, or if reserve jurors are appointed in the Northern Territory.

21 Notably New Zealand where the number was reduced from six to four in 2008: *Juries Amendment Act 2008* (NZ) s 17; and Western Australia where the number was reduced from five to three in 2011: see *Juries Legislation Amendment Act 2011* (WA) s 4. The number in Western Australia had previously been reduced from 8 to 5 in 2000: *Jury Amendment Act 2000* (WA) s 9. Prior to these reforms the number of peremptory challenges in New South Wales had been reduced from eight (and 20 in murder trials) to three in 1987 following the recommendations of the New South Wales Law Reform Commission’s report into juries in criminal trials: *Jury (Amendment) Act 1987* (NSW) sch 1 cl 5; New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48 (1986) 54–56 [4.69]–[4.72].

22 The Commission notes, however, that the number of challenges in civil proceedings has remained essentially unchanged since the *Juries Act 1890* (Vic).

23 *Ibid* s 66.

24 *Juries Act 1928* (Vic) s 68.

25 *Juries (Amendment) Act 1993* (Vic) s 6(2).

26 *Ibid*.

27 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157 (Sidney Plowman).

28 The core functions of peremptory challenge were defined as: (a) allowing the defence to eliminate persons who are perceived to be potentially prejudiced; (b) allowing the prosecutor to eliminate, speedily and without fuss, people who might have bias or prejudice and (c) allowing either to eliminate ‘obvious misfits’: Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001) 89.

29 *Ibid*. Despite this, the number of peremptory challenges was in fact reduced from six to four in 2008: *Juries Amendment Act 2008* (NZ).

30 Preliminary consultation with jury researcher (5 August 2013).

31 See Chapter 2.

32 Australian Capital Territory, Northern Territory and New Zealand. The Commission notes that the Northern Territory Law Reform Committee recently recommended that the Crown right to stand aside should be abolished and that the Crown should have peremptory challenges only: Northern Territory Law Reform Committee, *Report on the Review of the Juries Act*, Report No 37 (2013) 15.

33 New South Wales, Queensland, South Australia and Western Australia.

- 3.21 The Crown right to stand aside was first specifically provided for in Victorian legislation in 1928.³⁴ At that time, there was no limit on the number of stand asides available to the Crown.
- 3.22 In 1993, the Crown right to stand aside was abolished and replaced with a right to peremptorily challenge equivalent to that of the defence.³⁵ While the second reading speech for the amendment did not explain why the nature of the right was changed, it explained that the introduction of the cap on the number of challenges available addressed ‘a concern that any reduction in the number of challenges available to the defence is unfair unless the prosecution’s right is similarly restricted’.³⁶
- 3.23 The Crown right to stand aside was reintroduced in the current *Juries Act 2000* (Vic) (the Juries Act), although the number available remained at six.³⁷
- 3.24 The return to stand asides was likely based on a recommendation of the Victorian Parliament Law Reform Committee’s 1996 report on *Jury Service in Victoria*.³⁸ On the basis of evidence from the Director of Public Prosecutions, the Law Reform Committee recommended that a right in the Crown to peremptorily challenge prospective jurors should be substituted for a right in the Crown to stand aside.³⁹
- 3.25 The second reading speech for the Juries Act stated that the 1993 reforms had ‘created the misleading impression that the prosecution has the same right as the accused to have persons excluded from the jury’ and that ‘[i]t is important that the role of the prosecution during the jury selection process—namely to seek the exclusion of persons only where necessary in the interests of justice—be clearly distinguished’.⁴⁰
- 3.26 The Director of Public Prosecutions has published detailed guidelines on the exercise of the right to stand aside.⁴¹ The guidelines distinguish stand asides from peremptory challenges as follows:
- Whilst the Crown’s right to stand aside is comparable to the Accused’s peremptory right to challenge, the criteria for exercising the rights are quite different. The Accused can justifiably exercise the right of challenge to seek a jury receptive of the defence case. The Crown, however, must not be seen to select a jury to produce one that is favourable to the Crown, as this is not consistent with the role of the Prosecution in the conduct of a trial.⁴²
- 3.27 The guidelines explain that the Crown’s paramount concern with respect to a jury is that it be impartial, balanced, and comply with all the necessary requirements of the Juries Act to avoid the trial being fundamentally flawed in such a way as to cause the trial to miscarry.⁴³
- 3.28 The guidelines state that it is appropriate for the Crown to exercise the right to stand aside if it becomes apparent that a prospective juror’s inclusion could in some way undermine the integrity of the jury, or the jury system as a whole. For example, if there is a reasonable basis for apprehended bias, the juror is obviously hostile to the process, or the juror is otherwise incapable of discharging their duty due to a disability or some other reason.⁴⁴

34 *Juries Act 1928* (Vic) s 67.

35 *Juries (Amendment) Act 1993* (Vic) s 6(2).

36 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157 (Sidney Plowman).

37 *Juries Act 2000* (Vic) s 38.

38 Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report Volume 1* (1996) 142, Recommendation 80. However, the initial government response to this report did not outline its view of this recommendation.

39 *Ibid* 142–3.

40 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 December 1999, 1246 (Rob Hulls, Attorney-General).

41 Director of Public Prosecutions (Vic), *Director’s Policy No 6: Juries* (25 February 2010).

42 *Ibid* 2.

43 *Ibid*.

44 *Ibid* 3.

- 3.29 The guidelines emphasise that the Crown must not be seen to select a jury favourable to the Crown and that stand asides should never be used on the basis of generic factors such as age, gender, race, physical appearance or occupation.⁴⁵

The information available to the parties

- 3.30 Very limited information about prospective jurors is available to the parties in Victoria before challenges are made. For both criminal and civil trials in Victoria, this information is limited to the person's:
- name (if the judge chooses to call the panel by name rather than number—see Chapter 4)
 - current occupation⁴⁶
 - physical appearance.⁴⁷
- 3.31 There are some differences in the type of information available to parties in other Australian jurisdictions and the point in time at which the information is available. For example, in some jurisdictions the address⁴⁸ or suburb⁴⁹ is available to the parties and in most jurisdictions parties are able to see the information prior to empanelment.⁵⁰ The differences between Australian jurisdictions are set out in **Appendix C**.
- 3.32 A very different approach is taken in the United States, where lawyers ask questions about the juror, either to the court or to the juror directly.⁵¹ This process is known as a 'voir dire'. The answers to these questions then inform lawyers' decisions in exercising their party's peremptory challenges.

The peremptory challenge and stand aside process

- 3.33 The peremptory challenge and stand aside process differs between criminal and civil trials in Victoria. There are also some differences in process between jurisdictions in Australia. The effect of the process on jurors is discussed at [3.114]–[3.117] below.

Criminal trials

- 3.34 Following the calling of the panel, introductory remarks from the trial judge, the hearing of excuses and the arraignment, the associate to the trial judge draws a card with the name or number and occupation of the prospective juror from the ballot box. The name or number⁵² and occupation of the prospective juror is called out.⁵³
- 3.35 The prospective juror must then stand and walk in front of the accused and then towards the jury box.⁵⁴

45 Ibid 2–3.

46 Jurors identify their occupation in the questionnaire they complete when initially contacted by the Juries Commissioner's Office (JCO). The JCO then standardises these responses. The occupational categories used by the JCO are based on the Australian and New Zealand Standard Classification of Occupation Guidelines. If a person is retired, they are asked to list their previous occupation. If a person is a student, they are commonly asked what they are studying by the trial judge.

47 This is evident from the process for empanelment in both criminal and civil trials. See [3.34]–[3.43].

48 Western Australia: Information provided to the Commission by the West Australian Sheriff's Office, 7 August 2013; Tasmania: Information provided to the Commission by the Tasmanian Department of Justice, 6 August 2013.

49 Queensland: *Jury Act 1995* (Qld) s 29(2); In South Australia, parties are provided with a copy of the jury list and panel giving the name, number, suburb and occupation of each juror. This is to be made available to counsel in court 'sufficiently long enough before the jury is empanelled to enable counsel to take instructions to challenge': Supreme Court of South Australia, *Practice Direction No 7 — Selection of Jurors, Criminal Practice Directions 2007*, 1 January 2013, [7.1].

50 Northern Territory, Queensland, Tasmania and Western Australia. In the Australian Capital Territory and South Australia a list of prospective jurors is provided in the courtroom immediately prior to empanelment.

51 John M. Scheb and John M. Scheb II, *Criminal Procedure* (Cengage Learning, 7th ed, 2010) 556.

52 Calling of the panel by name or number is discussed in Chapter 4.

53 *Juries Act 2000* (Vic) s 36(1).

54 This is standard practice in Victoria, although it is not specifically provided for in the Juries Act.

- 3.36 If the accused (usually assisted by a lawyer)⁵⁵ says ‘Challenge’ or the Crown says ‘Stand aside’ before the prospective juror sits down in the jury box,⁵⁶ the prospective juror must resume his or her seat with the rest of the panel in the body of the court. Challenges must be voiced by the accused unless there is a ‘very good reason’ to depart from this ‘usual practice’.⁵⁷
- 3.37 If challenged, the prospective juror’s ballot card is set aside and cannot be recalled for that trial.⁵⁸
- 3.38 If stood aside, the prospective juror’s ballot card is immediately returned to the box and may be redrawn.⁵⁹ If the same prospective juror’s card is redrawn and the Crown wishes to exclude the person from the jury, they must challenge for cause.⁶⁰
- 3.39 The jury is selected once 12 jurors are seated in the jury box.⁶¹

Civil trials

- 3.40 Following the calling of the panel, the associate to the trial judge draws the cards for prospective jurors from the ballot box. In a typical civil proceeding with one plaintiff and one defendant, 12 names are drawn to allow for three challenges for each party. If there are more than two separately represented parties, three additional names for each additional party will be drawn to allow all separately represented parties to exercise their three challenges.⁶²
- 3.41 The associate calls out the name or number and occupation of each prospective juror selected.⁶³ As his or her name or number and occupation is called out, the prospective juror must stand until the next name or number is called. As the barristers usually sit at the bar table with their backs to the panel, they usually will turn to look at each prospective juror as they stand.
- 3.42 A list of the prospective jurors is then provided to the parties. First the plaintiff and then the defendant or defendants strike three names from the list, leaving six jurors. This is done in writing.
- 3.43 The names or numbers of the remaining six jurors on the list are then called. The jurors who are called proceed to the jury box and, once sworn in, are the jury for the trial.

Other Australian jurisdictions

- 3.44 The peremptory challenge and stand aside process in most other jurisdictions is similar to that in Victoria.
- 3.45 Victoria is, however, unique among Australian jurisdictions in the strict practice of requiring prospective jurors to walk in front of the accused in criminal trials.⁶⁴

55 The court must permit a legal practitioner to assist the accused on application by them: *Juries Act 2000* (Vic) s 39(3).

56 *Ibid* s 39(2).

57 *R v Sonnet* (2010) 30 VR 519, 549 [106].

58 The juror does, however, return to the jury pool, and may be empanelled for a different trial. See *Juries Regulations 2011* (Vic) reg 9(1).

59 *Juries Act 2000* (Vic) s 38(3).

60 *Ibid* s 38(4). The historical development of the stand aside process was discussed in *R v Katsuno* [1998] 4 VR 414, 425–426. According to the summary in that case, in England, Crown challenges were limited by statute to challenge for cause in 1305. However, that legislation was interpreted as requiring the Crown only to have to show cause once the whole panel had been exhausted. Up until that point, the Crown could stand a juror aside.

61 *Juries Act 2000* (Vic) s 36(2).

62 For example, in a trial with one plaintiff and two separately represented defendants, a total of 15 jurors would be balloted to allow for a total of nine challenges to be made (three for each of the parties).

63 *Juries Act 2000* (Vic) s 33(1)(a).

64 This practice is not provided for in the *Juries Act 2000* (Vic), but is standard practice in Victoria. The Commission understands from discussions with jury administrators in other Australian states and territories that the architecture of their courtrooms may at times result in prospective jurors walking in front of the accused, but it is not a strict requirement.

- 3.46 The other major differences in the challenge process between jurisdictions are:
- challenging ‘out’ of the jury box, instead of challenging as the person proceeds towards the jury box
 - using a combination of the written strike-out process and a balloting process.
- 3.47 In New South Wales, for both criminal and civil trials, a full jury is balloted and seated in the jury box. Once in the jury box, the jurors’ numbers are called a second time. Both the Crown and the defence then have the opportunity to challenge prospective jurors out of the box.⁶⁵ As a prospective juror is challenged off the jury, a new prospective juror is balloted on to take his or her place. This process continues until the full number of unchallenged jurors is seated in the jury box. A similar process is used in Tasmania.⁶⁶
- 3.48 For civil jury trials in Western Australia, each party challenges by striking off up to six names from a list of at least 20. The jury is selected by ballot from the remaining unchallenged jurors.⁶⁷

Use of peremptory challenges and stand asides

- 3.49 The Commission conducted a number of preliminary consultations with legal practitioners about their experiences of exercising peremptory challenges and stand asides, including the basis upon which they exercise their challenges.

Peremptory challenges

- 3.50 A number of criminal defence practitioners advised that their primary purpose in peremptorily challenging is to remove people that they or their client consider may undermine their prospects of a fair trial.
- 3.51 This includes prospective jurors who:
- should have sought to excuse themselves from the panel, for example because they know the accused or another party,⁶⁸ or who appear to have a sensory or other disability that would impede their ability to listen, view or process the evidence in the trial⁶⁹
 - clearly do not want to serve on the jury (which might be apparent from their demeanour, or the fact they have unsuccessfully sought to be excused)
 - have displayed some behaviour which suggests they may not be impartial, such as scowling at the accused
 - may be biased (in the opinion of the accused or their lawyer) on the basis of assumptions made about the person’s characteristics that are known to the defence: name (in some cases), gender, race, age and occupation.
- 3.52 Civil practitioners consulted by the Commission tended to focus on ensuring a jury that was likely to be sympathetic to their client’s case. For example, in personal injury trials (where the amount of damages is often at issue) people on low incomes might be seen as undesirable by the plaintiff.⁷⁰ Similarly, people with an obvious trade union affiliation might be perceived by a defendant employer to be hostile to their case.⁷¹

65 A challenge must be made after the juror is called to be sworn and before they are sworn: *Jury Act 1977* (NSW) s 45(1).

66 *Juries Act 2003* (Tas) ss 29(8)–(9).

67 *Juries Act 1957* (WA) ss 19, 29(2G).

68 See *Juries Act 2000* (Vic) s 32(3)(a) which allows the court to excuse a person from jury service on the trial if the court is satisfied that the person will be unable to consider the case impartially.

69 People with a physical disability ‘that renders the person incapable of performing the duties of jury service’ are ineligible to serve as jurors; see *ibid* sch 2, cl 3(a). The eligibility of people with impaired vision or hearing to serve on juries was considered by the New South Wales Law Reform Commission: New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report No 114 (2006). That report recommended that people who are blind or deaf should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone. Issues associated with the eligibility of persons to serve on juries are beyond the scope of the Commission’s terms of reference.

70 Preliminary consultation with Law Institute of Victoria members (30 July 2013).

71 Preliminary consultation with Chair of Common Law Bar Association (9 August 2013).

Stand asides

- 3.53 Stand asides are used far less frequently in criminal trials than accused peremptory challenges. The JCO advised that in 2012–13 only 76 stand asides were made, compared with 2405 peremptory challenges.
- 3.54 As outlined at [3.26]–[3.29] above, the Director of Public Prosecutions' policy is to only use stand asides to ensure the jury is impartial, balanced, and complies with the requirements of the Juries Act.
- 3.55 Some defence practitioners stated that the defence sometimes asked the Crown to stand aside jurors where it is obvious that the person should have sought to be excused.

Resourcing implications

- 3.56 The most significant resourcing implication arising from peremptory challenges and stand asides is the impact on the size of the panel and pool.
- 3.57 The Juries Commissioner's Office (JCO) advised that in Victoria the standard formula for assessing a jury panel size is to add an additional person to the panel for each challenge available to the parties. So, for each criminal trial involving one accused, the JCO provides an additional 12 people to allow for six peremptory challenges and six stand asides. Allowances are also made for excuses and challenges for cause.
- 3.58 The JCO advised that standard panel sizes for 12-person juries⁷² are as follows:
- 20–25 persons in civil panels⁷³
 - 30–33 persons in criminal panels.⁷⁴
- 3.59 The JCO advised that larger panels are often required in regional areas because the prospective jurors are more likely to know one of the parties or a witness. However, as knowledge of a party is a reason to be excused, the larger size of regional panels (in theory at least) should not be attributed to peremptory challenges and stand asides, but rather to the likely number of applications for excuse.⁷⁵
- 3.60 The panel size, in turn, determines the pool size required. So peremptory challenges add to the cost of the empanelment process, requiring more people to attend for jury service than would otherwise be the case. However, the relationship between the size of the pool and the size of the panel required is not a simple one-to-one relationship—the JCO does not bring in an extra prospective juror for every possible challenge. This is because prospective jurors who are not selected for one trial return to the jury pool and may be selected for another jury.⁷⁶
- 3.61 The JCO advised that there is a fixed cost associated with having jury trials in Victoria (such as staffing and facilities at the JCO and the courts). On top of this, the cost associated with each prospective juror attending for jury service is approximately \$46 per juror. This comprises the \$40 jury service fee paid to the pool member, and approximately \$6 in administrative costs to the JCO.

⁷² Additional jurors are often empanelled for longer trials. This is discussed in Chapter 5.

⁷³ The average size of a civil panel is 29 prospective jurors. This figure accounts for larger panels required for longer and complex trials and trials involving multiple parties.

⁷⁴ The average size of a criminal panel is 39 prospective jurors. This figure also accounts for larger panels required for longer and complex trials and trials involving multiple accused.

⁷⁵ The Commission notes that legal practitioners consulted by the Commission said that while knowledge of a party or a witness are grounds for an excuse, prospective jurors may not excuse themselves, so the Crown or defence will sometimes have to use a challenge to exclude a person for this reason.

⁷⁶ *Juries Regulations 2011* (Vic) reg 9(1). For example, if on a given day the courts required four criminal jury panels of 33 prospective jurors, the pool size would not be 132 prospective jurors (four times 33). Rather, because approximately 21 prospective jurors would return from each empanelment, the JCO advises that the pool size would be approximately 85 prospective jurors (or even less if the empanelments are staggered throughout the day).

- 3.62 In addition to the cost to the government of larger jury pools, employers bear the cost and inconvenience of having to pay the salary of the staff member called for jury service,⁷⁷ and lose the benefit of their productivity for at least one day.
- 3.63 In 2012–13, there were 584 jury trials in Victoria. Out of a total of 23,577 prospective jurors who attended court, 6446 jurors were empanelled. There were 2701 excuses⁷⁸ and approximately 3000 challenges.
- 5948 jurors were empanelled for criminal trials,⁷⁹ and of these a total of 2481 jurors were challenged by the parties (2405 challenges by accused persons⁸⁰ and 76 stand asides). There was an average of five challenges per criminal jury trial empanelment.
 - 498 jurors were empanelled for civil trials⁸¹ and approximately 500 jurors were challenged.⁸²
- 3.64 Similarly, in 2011–12, 6440 jurors were empanelled out of a total of 23,701 prospective jurors who attended court.⁸³ There were also 2946 excuses and approximately 3150 juror challenges/stand asides in 2011–12.
- 3.65 The Commission also heard that the challenge process lengthens the time needed for empanelment, which adds to cost. However, this was not considered particularly significant when compared with the time taken for excuses and the judge’s initial address to the panel.⁸⁴
- 3.66 In complex trials involving multiple accused, peremptory challenges can create logistical complexities as well as greatly increased costs. For example, the Victorian Supreme Court trial of *R v Benbrika & Ors*,⁸⁵ which involved 12 people accused of terrorist offences, required the attendance of over 1000 prospective jurors.⁸⁶ The empanelment occurred over two days. The combined 96 available challenges to the parties was the main reason that the pool and the panel had to be so large, although the complexity and length of the trial also contributed to the size of the panel.

The representativeness of the jury

- 3.67 As noted in Chapter 2, a number of the jury selection rules and processes prior to empanelment reduce the representativeness of the jury pool. It is argued that peremptory challenges further threaten the representativeness of the jury.⁸⁷
- 3.68 Data provided by the JCO and studies of jury representativeness in Australia, however, indicate that juries are generally representative of the Victorian community in respect of gender, age and occupation, although there is a gender imbalance on juries in criminal trials.⁸⁸
- 3.69 This suggests that peremptory challenges and stand asides do not have a significant effect on the representativeness of the jury.

77 *Juries Act 2000* (Vic) s 52(2).

78 Out of a total of 2942 prospective jurors who applied to be excused. This was an average of 4.6 per trial.

79 4592 in Melbourne and 1356 in regional Victoria.

80 The JCO data does not distinguish between peremptory challenges and challenges for cause. However, as noted at [3.125] below, challenges for cause are very rare.

81 367 in Melbourne and 132 in regional Victoria.

82 This was the best estimate available at the time of publication.

83 Supreme Court of Victoria, *Annual Report 2011–12*, 66.

84 Preliminary consultation with County Court judge (6 August 2013).

85 [2009] VSC 21 (3 February 2009).

86 Jacqueline Horan and Jane Goodman-Delahunty, ‘Challenging the Peremptory Challenge System in Australia’ (2010) 34 *Criminal Law Journal* 167, 167.

87 *Ibid* 172–4.

88 Jacqueline Horan, *Juries in the 21st Century* (2012) 43.

- 3.70 During the empanelment there are two means by which the composition of the jury may be affected, namely:
- excusal of jurors by the judge
 - challenges to jurors by the parties (peremptory challenges, stand asides and challenges for cause).
- 3.71 A gender analysis of the data provided by the JCO for 2012–13⁸⁹ indicated the following:
- of the people summoned for jury service, 50.1 per cent were female and 49.9 per cent were male
 - of those who attended for jury service, 51 per cent were female and 49 per cent male
 - 53.3 per cent of those excused (in both criminal and civil empanelments) were women.
- 3.72 For criminal trials:
- 67 per cent of the 2405 challenges were to women
 - 37 per cent of the 76 stand asides were to women
 - final jury composition was 44 per cent female and 56 per cent male.
- 3.73 For civil trials:
- 54 per cent of the approximately 500 challenges were to women
 - final jury composition was 51 per cent female and 49 per cent male.
- 3.74 Statistics for 2011–12 were similar:
- 6026 jurors were empanelled in criminal trials and 414 jurors were empanelled in civil trials
 - 50.1 per cent of people summonsed for jury service were women and 51 per cent of people who attended for jury service were women
 - 2946 jurors were excused, 51.7 per cent of whom were women
 - 68 per cent of the 2524 challenges in criminal jury trials were to women, and 28 per cent of the 100 stand asides were to women
 - final jury composition in criminal trials was 44 per cent female and 56 per cent male
 - for civil juries, approximately 420 challenges were made, 52 per cent of which were to women
 - final civil jury composition was 52 per cent female and 48 per cent male.
- 3.75 These statistics suggest that the under-representation of women on criminal juries in Victoria is primarily the result of the peremptory challenge process. This gender imbalance is not reflected in civil trials.
- 3.76 Despite the data showing that peremptory challenges do not significantly affect representativeness, defence practitioners involved in preliminary consultations acknowledged that the exercise of peremptory challenges can give the impression that the defence is trying to skew the representativeness of the jury. This is particularly the case where a number of prospective jurors who share the characteristics that the defence is basing its peremptory challenges on (for example, young women) are selected, and therefore challenged, consecutively.

- 3.77 Jury researchers involved in preliminary consultations argued that prospective jurors in the courtroom who observe peremptory challenges commonly have this impression, regardless of whether they themselves are challenged. These researchers were of the view that this has the capacity to undermine public confidence in the justice system. This issue is discussed further at [3.116]–[3.118] below.
- 3.78 In its report on jury selection, the Queensland Law Reform Commission argued that, instead of reducing representativeness, peremptory challenges can be used to correct unrepresentativeness that occurs randomly.⁹⁰
- 3.79 In recommending the retention of peremptory challenges, the Queensland Law Reform Commission characterised peremptory challenges as ‘one of the fundamental safeguards in the Act against the selection of a jury that is, or is perceived to be, biased or unfairly unrepresentative’.⁹¹
- 3.80 In New South Wales and Queensland, a judge may discharge the jury if he or she considers that the exercise of peremptory challenges has resulted in a jury whose composition may cause the trial to be or appear to be unfair.⁹²
- 3.81 In the United States, the Supreme Court has ruled that lawyers are prohibited from using peremptory challenges to exclude jurors solely on the grounds of their race⁹³ or gender⁹⁴ because it violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.⁹⁵
- 3.82 Such protections would be very difficult to enforce in practice in Victoria, as there is no requirement to provide a reason for a peremptory challenge. Nonetheless, the Commission acknowledges that unenforceable provisions may have a useful role in norm-setting, that is, in creating an expectation about the way in which the law should operate.

The impartiality of the jury

- 3.83 In the context of juries, ‘impartiality’ means that jurors do not have biases or preconceived notions that influence their ability to fairly judge the evidence in the case. As noted in Chapter 2, impartiality is crucial to the fair trial of an accused.
- 3.84 As discussed at [3.50], defence practitioners consulted by the Commission said that they use peremptory challenges to try to ensure an impartial jury. Their concerns about lack of juror impartiality generally fell within one of the following three categories:
- knowledge of a party or a witness by the prospective juror
 - the demeanour of the prospective juror
 - characteristics of the prospective juror.

Knowledge of a party or a witness

- 3.85 Defence practitioners indicated that peremptory challenges are sometimes used to exclude a prospective juror who should have sought to be excused because they know a party or a witness. In these circumstances, defence practitioners noted that they may ask the Crown to use its stand aside, to avoid ‘wasting’ a peremptory challenge.

90 Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) 313 [10.109].

91 *Ibid* 325 [10.154].

92 *Jury Act 1977* (NSW) s 47A; *Jury Act 1995* (Qld) s 48(1).

93 See, for example, the prohibition on excluding African-Americans from a jury solely on the basis of their race, as ruled in *Batson v Kentucky*, 46 US 79 (1986).

94 *J.E.B. v Alabama*, 511 US 127 (1994).

95 *United States Constitution* amend XIV § 1.

Demeanour of the prospective juror

- 3.86 Defence practitioners also told the Commission that they use peremptory challenges to exclude persons whose actions or demeanour suggest bias or prejudice. For example, a panel member may exclaim in shock during the arraignment, or glare at the accused.

Characteristics of the prospective juror

- 3.87 Characteristics of the prospective juror suggesting a lack of impartiality were the third example that defence practitioners used to support the right to exercise peremptory challenges.
- 3.88 As discussed at [3.30], the only information available to defence practitioners and the accused is the prospective juror's name (in some cases), occupation and physical appearance. From their appearance the person's gender, age range and race are usually ascertainable. Assessments about impartiality based on these characteristics are necessarily based on assumptions and stereotypes. Defence practitioners generally acknowledged that this is the case, but defended the use of the information to stereotype in this way on the grounds that that is the only information available, and that there is sometimes an element of truth in stereotypes.
- 3.89 Examples given to the Commission of common stereotypes influencing the use of peremptory challenges were:
- Young women, counsellors, nurses and doctors may be more sympathetic to victims in sexual offence cases.
 - White-collar professionals may be less sympathetic to the accused in an affray case than tradespeople.
 - Professionals with relevant expertise may second-guess expert evidence in certain cases: for example, an accountant in a complex fraud case, or a nurse in a case where medical evidence is at issue.
 - Teachers have strong views and so won't listen impartially to the evidence presented in the case, but will construct their own theory of the case.
- 3.90 A few defence practitioners noted that accused persons will sometimes use peremptory challenges to exclude a prospective juror they are not comfortable with because they assume the person will not judge them fairly. An example given was that an accused may feel uncomfortable empanelling a member of a particular ethnic community (in some cases their own ethnic community) because they think such community members may judge them harshly.
- 3.91 The Commission notes that these stereotypes are not necessarily representative of the views of the defence practitioners it consulted, but rather were provided as examples of stereotypes they may consider when advising a client about peremptory challenges. Further, defence practitioners emphasised that whether they would recommend a challenge on the basis of this type of stereotype would depend on the nature of the defence being put forward in the particular case.
- 3.92 The Commission asked defence practitioners whether more information about prospective jurors or earlier access to information about prospective jurors, as is available in some jurisdictions,⁹⁶ could assist them to better exercise the right to peremptory challenges.

- 3.93 Defence practitioners indicated that it could be useful to know more about a person's occupation, as it is often described as a broad occupational category. For example, 'social worker', 'manager', 'student' or 'retired public servant'.⁹⁷ In some cases, the judge or a party will request further information, such as asking what a person is studying if they identify their occupation as 'student'. However, there is no consistent practice of checking broad occupational categories.⁹⁸
- 3.94 However, even where further information about a person's characteristics is available, the assessment would still necessarily be based on stereotyped assumptions about that characteristic.
- 3.95 Most defence practitioners did not consider that earlier access to the information (as is the case in some other jurisdictions) would be of particular use, as assessments made for the purpose of peremptory challenges are based on a 'gut feeling'.
- 3.96 A few defence practitioners considered that having the information available earlier might assist clients to feel less pressured during the peremptory challenge process.
- 3.97 The Director of Public Prosecutions' guidelines support the view that basing peremptory challenges on assumptions about a person's characteristics is valid and acceptable. As noted at [3.26] above, those guidelines state '[t]he Accused can justifiably exercise the right of challenge to seek a jury receptive of the defence case'.⁹⁹

Procedural fairness

- 3.98 Procedural fairness is seen as a key justification for peremptory challenges in criminal trials.¹⁰⁰ This is both in the strict sense of ensuring the accused in fact receives a fair trial, and the broader sense that the accused feels that they have had a fair trial.

Involvement of the accused in criminal trials

- 3.99 Defence practitioners consulted by the Commission cited the involvement of the accused in selecting the jury through the peremptory challenges process as one of the most important purposes of peremptory challenges. As one defence practitioner stated, it is 'the only small bit of control accused persons have in the trial process'.
- 3.100 Defence practitioners emphasised that given what is at stake for the accused, this small degree of control was critical. Even if there is only small chance that a 'biased' juror is removed in the peremptory challenge process, the potential consequences of not doing this are very grave.
- 3.101 Allowing accused persons a degree of choice in who decides their case is thought to improve the accused's acceptance of and confidence in the process, the outcome of the trial and even the criminal justice system more broadly. The perception arguably remains beneficial to an accused even if, in reality, the challenges might have little or no impact on the outcome of the trial.¹⁰¹

97 These categories are based on Australian and New Zealand Standard Classification of Occupation Guidelines. The JCO advised that people self-select the occupational category they consider best describes their job. The JCO does not question individuals to check the accuracy of this information.

98 The court may seek further information from a panel member who has listed his or her occupation as 'unemployed' or 'retired' by asking the juror to identify his or her previous occupation; however, panel members do not need to provide further details for other generic occupations, such as 'consultant', 'student' or 'supervisor': see *DPP v Dupas (Ruling No 6)* [2007] VSC 257 (9 July 2007).

99 This was acknowledged in *Katsuno v The Queen* (1999) 199 CLR 40, 65 [51] (Gaudron, Gummow and Callinan JJ), and is reflected in the Director's Policy.

100 See, for example, James J Gobert, 'The Peremptory Challenge: An Obituary' [1989] *Criminal Law Review* 528, 529. Peremptory challenges have been described by the High Court of Australia as 'both ancient and important, being fundamental to our system of trial by jury': *Johns v The Queen* (1979) 141 CLR 409, 429 (Stephen J). Similarly, the Victorian Court of Appeal has described them as a 'fundamental' right: *R v Cherry* (2005) 12 VR 122, 126 (Batt JA, with whom Chernov and Vincent JJA agreed).

101 Preliminary consultations with Victoria Legal Aid (25 July 2013 and 30 July 2013); preliminary consultations with Law Institute of Victoria members (30 July 2013).

- 3.102 The New Zealand Law Commission review found that this was an important justification for the retention of peremptory challenges:¹⁰²
- it allows the defence to eliminate persons who are perceived, rightly or wrongly, to be potentially prejudiced against the defence. It therefore gives the accused some measure of control over the composition of the tribunal who sit in judgment on him. If that measure were lost, the accused would be likely to feel a considerable degree of injustice upon conviction.
- 3.103 However, the theory of involvement may in many cases be somewhat removed from the reality.¹⁰³ Often the accused only challenges on the advice of their barrister and solicitor, rather than making the decision themselves.
- 3.104 While the requirement that the accused voice challenges was generally supported in preliminary consultation, one defence practitioner noted that it may disadvantage the accused in certain circumstances—for example, where the accused has an impairment that affects his or her ability to speak clearly or has a particularly aggressive demeanour.
- 3.105 The Law Reform Commission of Western Australia considered that the contribution of peremptory challenges to procedural fairness went beyond the perception of the accused, to the perception of the community more generally. It stated:¹⁰⁴
- The Commission strongly believes that peremptory challenges should be retained to make sure that accused persons believe that they have had a fair trial and the accused, the state and the public at large have confidence in the jury system.
- 3.106 In recommending the retention of peremptory challenges the Law Reform Commission of Western Australia stated that '[t]he most concerning likely outcome of the abolition of peremptory challenges is the loss of confidence in the jury system'.¹⁰⁵
- 3.107 By contrast, procedural fairness considerations are less prominent in civil jury empanelments. This is because in civil trials the parties are not directly involved in the empanelment process, and peremptory challenges are decided and made by their barristers and solicitors.

Removal of inappropriate jurors

- 3.108 Both criminal and civil practitioners stated that they use peremptory challenges to remove prospective jurors who clearly do not want to serve on the jury. This unwillingness might be apparent from their demeanour, or the fact they have unsuccessfully sought to be excused by the trial judge. Practitioners considered that an unwilling juror poses a threat to their client's prospects of a fair trial.
- 3.109 A prospective juror may also be considered inappropriate if he or she was previously part of a jury which was discharged in relation to the same matter. This could occur because the regulations of the Juries Act require discharged jurors to return to the jury pool (unless the time period specified as their jury service in the summons has expired).¹⁰⁶ There is nothing in the Juries Act or regulations preventing such discharged jurors from being re-selected for a new panel for the same matter.
- 3.110 Where the jury was discharged because they had been exposed to information that could be prejudicial to the accused, the prosecution and the defence may have concerns about those jurors' impartiality. Unless the prospective juror seeks to be excused,¹⁰⁷ the prosecution or defence would have to stand aside or challenge that person if they wished to exclude them from the jury.

102 Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001) 89.

103 This was the view of the Queensland Law Reform Commission, which considered involvement of the parties the 'least persuasive' argument in favour of peremptory challenges. See Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) 314 [10.112].

104 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report*, Report No 99 (2010) 24.

105 Ibid 23.

106 *Juries Regulations 2011* (Vic) reg 9(2).

107 The process for excuses is discussed at [2.45]. See also [3.141] where the Commission notes that the trial judge also has a common law power to exclude prospective jurors in the interests of justice.

The effect on jurors

Jury service as a right

- 3.111 Recently jury duty has been conceived of as a citizen's 'right'.¹⁰⁸ According to this view, processes that restrict the possibility of a person being selected for jury duty, including peremptory challenges, are seen to infringe that right.¹⁰⁹ An example of a review of jury selection processes from this perspective is the New South Wales Law Reform Commission's review of the participation of people with impaired hearing or vision in juries.¹¹⁰ This report described the 'exclusion of a class of citizens from participating in one of the rights and responsibilities of citizenship' as 'excessive and unnecessary'.¹¹¹
- 3.112 A number of Australian studies consider jury duty from a juror's perspective.¹¹² The Queensland Law Reform Commission report referred to a juror's 'right' to serve on a jury.¹¹³
- 3.113 The JCO's juror feedback survey conducted first in 2011 and again in 2013 is an indication that jury service is increasingly being viewed from this perspective in Victoria.¹¹⁴

The process can be upsetting for jurors

- 3.114 During preliminary consultations, jury researchers and the JCO advised that many surveyed jurors had expressed the view that the peremptory challenge process is upsetting and humiliating.
- 3.115 Defence practitioners whom the Commission consulted also acknowledged that the 'parading' of prospective jurors in front of the accused in criminal trials is likely to be stressful and uncomfortable for those people. One defence practitioner suggested that providing more information about the purpose of peremptory challenges and their importance to the accused may partly alleviate this stress. The Law Reform Commission of Western Australia similarly recommended that prospective jurors should be given information during the induction process about the purpose of and process for peremptory challenges, including examples of reasons why a prospective juror might be challenged in a particular trial.¹¹⁵
- 3.116 Jury researchers also considered that the peremptory challenge process could give others observing the process a negative impression of the criminal justice system.
- 3.117 Empirical data suggests that jurors who have been challenged are significantly more likely to conclude that juries are not representative of the community, and are likely to carry this negative perspective about jury representativeness back into the community.¹¹⁶
- 3.118 The Commission notes that this view is contrary to the conclusion drawn by the Law Reform Commission of Western Australia (discussed at [3.105] above) that peremptory challenges can increase the public's confidence in the jury system.

108 The Law Reform Commission of Ireland considered that jury service is not correctly described as involving an enforceable individual right, but is more accurately described as a duty. Nonetheless, the LRCI stated that it 'considers that jury service should be valued and supported to the greatest extent possible by the State'. Law Reform Commission of Ireland, *Jury Service*, Report No 107 (2013), 11 [1.29].

109 See R Gwynedd Parry, 'An Important Obligation of Citizenship': Language, Citizenship and Jury Service' (2007) 27 (2) *Legal Studies* 188, 190–194; Jacqueline Horan and David Tait, 'Do Juries Adequately Represent the Community? A Case Study of Civil Juries in Victoria' (2007) 16 (3) *Journal of Judicial Administration* 179, 185.

110 New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report No 114 (2006).

111 *Ibid* 56 [4.1].

112 See, for example, Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Report No 87 (2008).

113 Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) 315 [10.115].

114 The JCO's juror feedback survey is based on the United Kingdom's Crown Court Survey of Jurors 2010.

115 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report*, Report No 99 (2010) 27.

116 Jacqueline Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34 *Criminal Law Journal* 167, 183.

Alternatives to peremptory challenges

Challenge for cause

- 3.119 Some critics of peremptory challenges argue that challenge for cause should be used instead of peremptory challenges.¹¹⁷ On this view, parties should only be able to exclude a person from jury service for a stated and justifiable reason.
- 3.120 As noted at [3.9] above, challenge for cause is the only form of challenge available to accused persons in each of the jurisdictions of the United Kingdom following the abolition of peremptory challenges.

The grounds for challenge for cause

- 3.121 The grounds for challenge for cause are not set out in the *Juries Act*. Grounds are specified in the *Jury Act 1995* (Qld) and the *Criminal Procedure Act 2004* (WA).¹¹⁸ The grounds specified in those Acts are that the person is not qualified for jury service or the person is not impartial.
- 3.122 In *Murphy v The Queen*,¹¹⁹ the High Court considered challenge for cause as provided by section 46 of the *Jury Act 1977* (NSW). Their Honours cited, without express approval, a passage from the *Criminal Law in New South Wales*¹²⁰ relied upon by the trial judge which provided that the grounds for challenge for cause were:¹²¹
- that the proposed juror does not possess the necessary qualifications or that he has some personal defects which render him incapable of discharging his duty as a juror or that he is not impartial or that he has served on another jury in respect of the same matter or that he has been convicted for some infamous crime.

Challenge for cause in practice

- 3.123 A challenge for cause is determined by the trial judge.¹²² The jury panel is usually excluded from the hearing of the challenge to avoid any prejudice.
- 3.124 The *Juries Act* does not specify the process for challenges for cause in any detail. By contrast, in Queensland a two-tiered process for challenge for cause is outlined in section 43 of the *Jury Act 1995* (Qld). First, the party who makes a challenge for cause must inform the judge of the reasons for the challenge and give the judge information and materials available to the party that are relevant to the challenge.¹²³ Second, if the judge is satisfied there are proper grounds to challenge the juror, the judge may permit the party to put questions to the person in a way and in a form decided by the judge, and based on the answers may further permit the examination or cross-examination of the person on oath.¹²⁴ After considering the evidence and submissions of the parties, the judge must uphold or dismiss the challenge.¹²⁵

117 See, for example, Les A McCrimmon, 'Challenging a Potential Juror for Cause: Resuscitation or Requiem' (2000) 23 (1) *University of New South Wales Law Journal* 127.

118 *Jury Act 1995* (Qld) s 43(2); *Criminal Procedure Act 2004* (WA) s 104(5). The South Australian *Juries Act 1927* also specifically allows a challenge to be made on the basis of ineligibility or disqualification (s 66), but there is no exhaustive list of all other possible bases for challenge, and section 67 preserves 'a right of challenge that exists at common law'.

119 *Murphy v The Queen* (1989) 167 CLR 94, 101–104.

120 Ray Watson and Howard Purnell, *Criminal Law in New South Wales* (Law Book Company, 1981), 802.

121 Cited by Mason CJ and Toohey J at (1989) 167 CLR 94, 102.

122 *Juries Act 2000* (Vic) s 40(1).

123 *Juries Act 1995* (Qld) s 43(3).

124 *Ibid* s 43(4).

125 *Ibid* s 43(6).

- 3.125 An unlimited number of challenges for cause are already available to parties in criminal¹²⁶ and civil jury empanelments.¹²⁷ Yet despite the availability of challenges for cause, all the practitioners consulted by the Commission stated they are rarely used. The probable explanation for this is that peremptory challenges and stand asides are a quicker and easier alternative because they:
- have immediate effect
 - do not require a hearing
 - do not require justification or evidence supporting that justification.
- 3.126 The expediency of peremptory challenges compared with challenges for cause was cited by the Law Reform Commission of Western Australia,¹²⁸ Queensland Law Reform Commission,¹²⁹ New Zealand Law Reform Commission¹³⁰ and the Law Reform Commission of Ireland¹³¹ as an advantage of peremptory challenges.
- 3.127 The Law Reform Commission of Western Australia also noted that an expanded role for challenges for cause ‘may seriously impinge on a juror’s right to privacy and security’.¹³² The New Zealand Law Reform Commission and the Law Reform Commission of Ireland similarly considered that challenges for cause could be intrusive and demeaning as legal practitioners must publicly articulate their reasons for asserting a juror’s unsuitability.¹³³
- 3.128 Practitioners consulted by the Commission were generally unsure of the process for challenge for cause, and were of the view that the threshold was quite high. They also indicated that the lack of information available about prospective jurors in Victoria meant that it was very difficult to mount a challenge for cause in most cases.
- 3.129 Challenge for cause, either as a supplement or as an alternative to peremptory challenge, involves some significant issues. On the one hand, it may be said that the right to challenge for cause ‘has more attraction in theory than in practice’¹³⁴ and is a ‘rather empty right’¹³⁵ or possibly ‘a useless right’¹³⁶ because its exercise requires evidence of lack of impartiality or ineligibility usually not available to the parties. On the other hand, it may be said that the very requirement for evidence of lack of impartiality or ineligibility is the justification and strength of challenge for cause, as challenges should be based on reason, rather than on speculation or stereotyping. On this view, if there is no evidence of lack of impartiality or ineligibility, parties should not be able to challenge.
- 3.130 The requirement for evidence or data to challenge for cause also distinguishes this type of challenge from the voir dire process used in some jurisdictions of the United States that allows parties to ‘fish’ for information in the hope that something might turn up.
- 3.131 A further consideration is the proper sequence of inquiry in challenge for cause. The question is not whether the prospective juror is not impartial when they first enter the courtroom. The question is whether the prospective juror, informed and bound by judicial direction as to prejudice, is capable of complying with that direction.

126 *Juries Act 2000* (Vic) s 34.

127 *Ibid* s 37.

128 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report*, Report No 99 (2010) 22–23.

129 Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) 314 [10.111].

130 Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001) 87–89 [225], [229].

131 Law Reform Commission of Ireland, *Jury Service*, Report No 107 (2013) 41 [3.37].

132 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report*, Report No 99 (2010) 23.

133 Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001) 88–89 [226], [229]; Law Reform Commission of Ireland, *Jury Service*, Report No 107 (2013) 41 [3.37].

134 *Murphy v The Queen* (1989) 167 CLR 94, 123 (Brennan J).

135 Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland*, Report of the Criminal Procedure Division (1993) [5.20].

136 *R v Patel (No 4)* [2013] QSC 62 (4 April 2013), [7] (Fryberg J).

Pre-trial questioning of jurors

- 3.132 Another related means of juror selection is pre-trial questioning of jurors. This is done extensively in the United States through the voir dire process.¹³⁷
- 3.133 A more limited version of juror questioning is allowed in Queensland in some circumstances. Under the *Jury Act 1995* (Qld), if there are ‘special reasons’ surrounding a particular trial, parties may make an application by notice for people selected to serve as jurors to be questioned when the court reaches the final stage of the jury selection process.¹³⁸ This occurs after the jury has been sworn in, but before the remainder of the panel is discharged.¹³⁹ The questions are put by the judge in a manner decided by him or her.¹⁴⁰
- 3.134 The applicant may suggest, and the judge may decide, questions that are to be put to persons selected to serve as jurors for the trial.¹⁴¹ If, after hearing the answers given by the prospective juror, the judge considers that further inquiry is justified, the judge may allow the parties to cross-examine the prospective juror under oath to determine whether they are impartial.¹⁴² After this questioning process is complete, parties may elect to challenge a prospective juror for cause, which the judge must uphold or dismiss.¹⁴³
- 3.135 This provision was recently used for the first time by the Supreme Court of Queensland in the matter of *R v Patel (No 4)*.¹⁴⁴ Given the notoriety of this case, counsel for the accused (with the consent of the Crown) made application for a series of questions to be put to jurors asking whether they had heard of or had any opinions of the accused, and whether they had any race-based biases (the accused was of Indian descent).¹⁴⁵ Fryberg J granted the application.¹⁴⁶ The process for empanelment led to a number of jurors being discharged or excused, with several cross-examined. Only one challenge for cause was made, and this challenge was upheld by the trial judge.¹⁴⁷

Challenges by consent

- 3.136 Challenges by consent¹⁴⁸ exist in Scotland as an alternative to peremptory challenges, which were abolished in 1995.¹⁴⁹ These challenges occur by joint application of the parties and do not require a reason for the challenge to be provided. They must occur prior to the juror being sworn.¹⁵⁰
- 3.137 A process of excluding a prospective juror by consent of both parties may provide a useful alternative to peremptory challenges, including where:
- it is obvious to both parties that a juror is ineligible or inappropriate for some reason
 - one of the parties has reason to believe that a prospective juror is not impartial (for example, they are known to the accused).
- 3.138 Some defence practitioners told the Commission that they sometimes ask the Crown to exercise its right to stand aside in these circumstances.¹⁵¹

137 See [3.32] above.

138 *Jury Act 1995* (Qld) s 47(1). ‘Prejudicial pre-trial publicity’ is cited in this legislation as an example of a special reason which might give rise to the need for questioning.

139 *Ibid* ss 45, 47(1).

140 *Ibid* s 47(4).

141 *Ibid* s 47(3).

142 *Ibid* s 47(5).

143 *Ibid* ss 43(6)–(8).

144 [2013] QSC 62 (4 April 2013). An application was made but not granted in *R v D’Arcy* [2001] QCA 325 (22 August 2001); *R v D’Arcy* [2003] QCA 124 (21 March 2003); *R v D’Arcy* [2005] QCA 292 (16 August 2005).

145 *R v Patel (No 4)* [2013] QSC 62 (4 April 2013), Appendix B.

146 *Ibid* [22]–[30].

147 *Ibid* [55]–[63].

148 *Criminal Procedure (Scotland) Act 1975* (Scot) c 21, s 130(3A).

149 *Criminal Justice (Scotland) Act 1995* (Scot) c 20, s 8.

150 *Criminal Procedure (Scotland) Act 1975* (Scot) c 21, s 130(3A).

151 This circumstance is not specifically referred to in the Crown’s policy guidelines. See [3.26]–[3.29] above.

- 3.139 Challenges by consent could alleviate the need for a challenge for cause hearing in some circumstances, avoiding the expense, uncertainty and potential embarrassment to the juror of that process. It may also serve at least some of the current functions of peremptory challenges (removing jurors who may be inappropriate or who are not impartial).
- 3.140 A similar process exists in New Zealand, where a party may apply to the judge to ‘stand by’ a juror with the consent of the other party. Judges may also direct a juror to stand by on their own motion.¹⁵²

Judicial discretion to exclude prospective jurors

- 3.141 Trial judges also appear to have an inherent common law power to discharge¹⁵³ or stand aside¹⁵⁴ a prospective juror from a panel on the basis that he or she could not properly perform his or her duties. This power is used extremely rarely in Victoria.
- 3.142 However, it could provide an alternative to challenges by the parties in situations where the prospective juror is manifestly unsuitable. Plainly, though, it would be inappropriate and undesirable for the trial judge to be involved in standing aside a prospective juror except in the most exceptional circumstances.

Questions

Retaining peremptory challenges and stand asides

- 3.143 As discussed in this chapter, there are both criticisms of and support for the retention of peremptory challenges and stand asides. The Commission therefore considers a threshold question to be whether peremptory challenges and stand asides should be retained.
- 3.144 The Commission notes that, while the general trend in Australia and other common law jurisdictions has been to reduce the number of challenges available to parties,¹⁵⁵ law reform commissions in New South Wales, Queensland, Western Australia, Northern Territory, New Zealand and Ireland have declined to recommend they be abolished altogether.¹⁵⁶

Question

- 1 Should peremptory challenges and the Crown right to stand aside be retained for criminal and civil trials in Victoria?

152 *Juries Act 1981* (NZ) s 27(1).

153 See *R v Cullen* [1951] VLR 335.

154 See *R v Searle* [1993] 2 VR 367.

155 See [3.15] above.

156 *Jury Selection*, Report No 117 (2007); New South Wales Law Reform Commission, *Jury Selection*, Report No 117 (2007); Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011); Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report*, Report No 99 (2010); Northern Territory Law Reform Committee, *Report on the Review of the Juries Act*, Report No 37 (2013); Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001); Law Reform Commission of Ireland, *Jury Service*, Report No 107 (2013).

Changes to preemptory challenges

Number of challenges available to the parties

- 3.145 **Appendix A** sets out the difference between jurisdictions in relation to the number of challenges available to the parties. The current number of preemptory challenges available to accused persons in Victoria is the average for Australia jurisdictions. The approach in Victoria to the number of preemptory challenges available for civil trials is the one adopted in most other Australian jurisdictions.¹⁵⁷

Questions

- 2 Is the number of preemptory challenges available to the parties in criminal trials appropriate?
- 3 Is the number of preemptory challenges available to the parties in civil trials appropriate?

Adjustment of challenges where multiple parties in criminal trials

- 3.146 Victoria is the only Australian jurisdiction where the number of challenges available to each accused reduces where there are multiple accused. These reductions were introduced in 1993 to address concerns that the large number of challenges available in criminal proceedings involving multiple accused can 'lead to distortions in the representative nature of the jury'.¹⁵⁸

Question

- 4 Should the number of challenges for each accused in criminal trials vary depending on how many accused there are in the proceeding?

Adjustment of challenges where multiple parties in civil trials

- 3.147 As noted at [3.12], each separately represented party to a civil proceeding may make three preemptory challenges. In modern personal injury trials it is common that there will be one plaintiff to the proceeding and two or three defendants.¹⁵⁹ Some civil practitioners have expressed concern that this can lead to an unequal situation, where the plaintiff has only three challenges and the defendants have six or nine.¹⁶⁰

Question

- 5 Should the plaintiffs and defendants have an equal total number of challenges in all cases, regardless of how many plaintiffs and defendants there are?

¹⁵⁷ The six challenges available in criminal trials in Victoria are more than in New South Wales, South Australia and Western Australia (three), equal to Tasmania and the Northern Territory (six), and fewer than in Queensland and the Australian Capital Territory (eight). In most Australian jurisdictions the parties in civil trials have challenges equal to half (or close to half) the number of jurors to be empanelled. See Appendix A for further details.

¹⁵⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157 (Sidney Plowman).

¹⁵⁹ For example, a medical negligence proceeding may have a hospital and a doctor as separate defendants.

¹⁶⁰ The Commission notes that the defendants will often have a dispute among themselves in the proceedings, so their interests are not completely aligned. However, it is more likely than not that the defendants will have similar interests in the exercise of their challenges.

Adjustment of challenges where additional jurors appointed

- 3.148 As noted at [3.13], unlike Victoria, some other Australian jurisdictions allow parties additional challenges where additional or reserve jurors are empanelled.

Question

- 6 Should the number of challenges for each party in criminal or civil trials vary depending on whether additional jurors are to be empanelled?

Process for challenges

- 3.149 As noted at [3.33]–[3.43], the process for challenges is different for criminal and civil trials in Victoria. There are also some differences between jurisdictions.¹⁶¹ Further, the Commission’s preliminary consultations have indicated that the challenge process is confronting and uncomfortable for prospective jurors. It was also considered by jury researchers that the challenge process can contribute to a negative image of the criminal justice system.
- 3.150 Some reforms to the challenge process may be possible through changes in practice alone (rather than law reform). It is suggested by some researchers and practitioners consulted by the Commission that the requirement that juries ‘parade’ before the accused in criminal trials was unduly stressful and should be removed. Similarly, in civil jury empanelments it has been suggested that barristers could sit facing the jury, rather than turning around each time a juror’s name is called.¹⁶²
- 3.151 The requirement that the accused voice challenges in criminal trials¹⁶³ was also raised as an issue in preliminary consultations. A more flexible approach that allows for greater discretion for legal representatives to voice challenges in certain circumstances might address the concerns raised at [3.104].

Questions

- 7 Should there be any changes to the process for challenges during empanelment in criminal trials? If yes, what kind of changes?
- 8 Should there be any changes to the process for challenges during empanelment in civil trials? If yes, what kind of changes?

Information available to the parties

- 3.152 As discussed at [3.88], one of the major criticisms of peremptory challenges is that they often involve assessing a person's biases based on characteristics such as demeanour, gender, occupation and age range.
- 3.153 Some defence practitioners considered that further information might assist in more accurately assessing a person's biases. However, an assessment of bias based on further information about a person's characteristics will still be based on stereotyped assumptions about those characteristics.
- 3.154 An alternative would be to provide information about the person's values, for example, using a process similar to the voir dire process in the United States.¹⁶⁴ Depending on the extent of the questioning, the information obtained may be sufficient to support a challenge for cause.
- 3.155 However, criticisms of this process are that it affects the representativeness and impartiality of juries. It is also likely to substantially increase complexity and costs.¹⁶⁵
- 3.156 A further issue associated with providing more information on which to base an assessment of a juror's bias is the privacy, safety and security of jurors. This concern has been used to justify calling the panel by number, instead of name. This is discussed in detail in Chapter 4.

Questions

- 9 Is the information available to parties about prospective jurors in criminal and civil proceedings appropriate?
- 10 Should any more or less information be provided to the parties? If so, what kind of information should be added or removed?

Crown right to stand aside

- 3.157 As noted at [3.5], the effect of the Crown using its right to stand aside is that the stood aside juror's ballot card goes back into the ballot box immediately. In contrast to peremptory challenges, this means that the juror's name may be called again. If this occurs, the Crown will be required to challenge for cause if they wish to exclude the juror.

Question

- 11 Should the effect of the right to stand aside be the same as for peremptory challenges (permanent removal from the panel)?

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See [3.32] above.
This was noted in particular in Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report*, Report No 99 (2010) 22.

Safeguarding against misuse of peremptory challenges

- 3.158 Judges in New South Wales and Queensland may discharge the jury if they consider that the exercise of peremptory challenges has resulted in a jury whose composition may cause the trial to be or appear to be unfair.¹⁶⁶
- 3.159 A further safeguard that exists in the United States is the prohibition on gender-based or race-based uses of peremptory challenges.¹⁶⁷ Such a prohibition would be very difficult to enforce, as there is no requirement to provide a reason for a peremptory challenge. Nonetheless, including such a provision in the law could introduce a norm that may affect practice over time.

Question

- 12 Should the *Juries Act 2000* (Vic) specify restrictions or prohibitions on the way in which peremptory challenges may be used?

Alternatives to peremptory challenges

Challenge for cause

- 3.160 Challenges for cause are rarely used in Victoria. The most likely explanation for this is the availability of peremptory challenges and stand asides as an expedient alternative.
- 3.161 Based on the Commission's preliminary consultations, legal practitioners perceive that challenges for cause are difficult to argue and prove given the very limited information available. Legal practitioners also expressed concern that challenges for cause would not adequately address all the circumstances which they argue justify the need for peremptory challenges (for example, where an accused is uncomfortable with a prospective juror, but would not be able to satisfy a judge that the prospective juror is biased).

Questions

- 13 Are challenges for cause an appropriate and adequate alternative to peremptory challenges?
- 14 Does the current law provide sufficient information to the parties upon which to base a challenge for cause? If no, what additional information should be provided?
- 15 Should the *Juries Act 2000* (Vic) specify the criteria upon which challenges for cause can be made?
- 16 Should the *Juries Act 2000* (Vic) provide further guidance on the process for challenge for cause?

Pre-trial questioning of jurors

3.162 The Queensland model of pre-trial questioning of jurors where there are special reasons is discussed at [3.133]–[3.135].

Question

- 17 Should the judge or the parties have the ability to question prospective jurors to determine their impartiality in certain circumstances?

Challenge by consent

3.163 Challenges by consent are available in a few jurisdictions. They are discussed above at [3.136]–[3.140].

Question

- 18 Should parties have the ability to challenge a prospective juror by consent?

Judicial discretion to exclude prospective jurors

3.164 The common law power of judges to exclude or stand aside prospective jurors is discussed above at [3.141]–[3.142]. These powers are not specified in the Juries Act.

Question

- 19 Should the *Juries Act 2000* (Vic) specify that the trial judge has the discretion to discharge or stand aside prospective jurors in exceptional circumstances?

Calling the panel by number or name

- 42** The law in Australia
- 43** The criteria for calling the panel by number rather than name
- 44** The practice in Victoria
- 45** Jurors' preferences
- 46** The arguments for calling the panel by number
- 46** The arguments against calling the panel by number

4. Calling the panel by number or name

The law in Australia

4.1 The mode of calling the panel varies across jurisdictions. See **Appendix C**.

Victoria

4.2 Prior to 2000, there was no option to call the panel by number in Victoria.

4.3 The original provision to enable the panel to be called by number rather than name was introduced in the *Juries Act 2000* (Vic) (*Juries Act*). This provision enabled a court to direct that the panel be called by number if it considered ‘that for security or other reasons the names on a panel should not be read out in open court’.¹

4.4 This provision was amended in 2006 to provide that a judge may direct that the jury panel be called by number rather than name ‘if the court considers that the names on a panel should not be read out in open court’.²

Other Australian jurisdictions

4.5 Queensland and Tasmania provide that a jury panel may be called by number only if the judge considers that ‘for security or other reasons, the persons’ names should not be read out in open court’.³

4.6 In New South Wales and Western Australia, panels are called by number only.⁴

4.7 In the Australian Capital Territory, the Northern Territory and South Australia, the panel is called by name.⁵ There is no provision for the calling of a panel by number.

1 *Juries Act 2000* (Vic) s 31(3), as enacted.

2 *Juries Act 2000* (Vic) s 31(3), as amended by *Justice Legislation (Further Amendment) Act 2006* (Vic) s 30.

3 *Jury Act 1995* (Qld) s 41; *Juries Act 2003* (Tas) s 29(7).

4 *Jury Act 1977* (NSW) ss 48–49; *Juries Act 1957* (WA) ss 36–36A.

5 *Juries Act 1967* (ACT) s 31; *Juries Act 1963* (NT) s 37, s 39; *Juries Act 1927* (SA) s 46.

The criteria for calling the panel by number rather than name

- 4.8 As noted at [4.3], in Victoria, prior to October 2006, a court could only call a panel by number for ‘security or other reasons’, as is currently the case in Queensland and Tasmania.
- 4.9 An amendment to the Juries Act in 2006 removed the reference to ‘security or other reasons’, and instead provided that numbers may be ordered ‘if the court considers names should not be read out in open court’.⁶
- 4.10 The 2006 amendment was likely a response to a line of cases that considered the application of section 31(3) of the Juries Act and the requirement that the decision be justified by reference to ‘security or other reasons’. In one of those cases, *DPP v Ivanovic*,⁷ there was no argument raised in relation to the security of jurors. In the other three cases, the security of jurors was raised.
- 4.11 In *Ivanovic*, the prosecution applied for the panel to be called by number, following the discharge of the previous jury as a result of the jury list for that jury being misplaced. In that case, the court ruled that no special reason was required for the calling of the panel by number rather than name. Rather, the court considered that ‘[t]he requirement of “other reason” is satisfied if the court considers it is good management to use numbers rather than names’.⁸
- 4.12 The security of jurors was raised in the first case to consider section 31(3) of the Juries Act, *R v Juric*,⁹ and in the subsequent cases of *R v Goldman*¹⁰ and *R v Strawhorn*.¹¹
- 4.13 In *Juric*, the defence applied to revoke an order that the jurors be identified by number which the court had made in relation to the previous discharged jury. The court did not make a definitive finding on the security risk to jurors, but ordered the panel be called by number as a precaution against juror intimidation.
- 4.14 In *Goldman*, the Crown argued that, as the accused had attempted to interfere with a witness, there were grounds to consider that the accused and his associates (with whom he had been indicted to stand trial for burglary and theft in other proceedings) may try to interfere with the jury. The court in *Goldman* found that there was a risk of interference with the jurors and that both the Crown and defence case could lead jurors to be concerned about their security. Consequently, the Court considered it was appropriate to empanel by number.
- 4.15 In *Strawhorn*, the application was made on the basis that the Crown case would involve evidence relating to high-profile gangland members and activities, and that this could give the jurors the impression that their security was at risk. The court in *Strawhorn* did not make findings on the security risk to jurors, but rather based its decision on being satisfied that there was ‘good reason’ to empanel by number.¹²
- 4.16 These cases highlight the difficulty associated with the requirement that the decision to empanel by number be justified by reference to ‘security or other reasons’. The cases show that even though concern for security was not a requirement under this formulation, it was perceived to be so, both by the Crown (which in *Goldman* and *Strawhorn* made the application on that basis) and the defence (which opposed the practice in each case on the grounds that it could prejudice the jury against the accused).

6 Justice Legislation (Further Amendment) Act 2006 (Vic) s 30.

7 *DPP v Ivanovic* [2003] VSC 388 (15 September 2003) (*Ivanovic*).

8 *Ibid* [6].

9 *R v Juric, Ruling (Calling of Jury Panel by Numbers)* (Unreported, Supreme Court of Victoria, Nettle J, 12 August 2003) (*Juric*).

10 *R v Goldman* [2004] VSC 166 (5 March 2004) (*Goldman*).

11 *R v Strawhorn* [2006] VSC 251 (21 June 2006) (*Strawhorn*).

12 *Ibid* [12].

- 4.17 The explanatory memorandum for the 2006 amendment explains that the amendment seeks to place number as a juror identifier on an equal footing to name to assure jurors that their privacy and security will be protected. This purpose clearly focuses on the perceptions of jurors rather than the need for the judge or a party to show that an objective security risk exists. It states:¹³

The amendment will promote the use of this capability by judicial officers by ensuring that it need not be formally justified in reference to any rationale but instead has equal standing at law with the use of names as juror identifiers. This is necessary in order to respond to heightened calls to protect the privacy and security of prospective jurors who may otherwise feel personally exposed and/or at risk through their participation in the trial process.

- 4.18 It is unclear whether the provision as drafted meets the stated intention of placing the calling of the panel by number on an 'equal standing at law' with the calling of jurors by name, as it appears to favour name as the default position.

The practice in Victoria

- 4.19 The Juries Commissioner's Office (JCO) has advised that its policy for balloting jurors onto a panel is to always ballot by number.

- 4.20 However, whether a panel is called by name or number in court varies according to the judge's decision. The Commission's preliminary consultation with judges and legal practitioners confirmed that some judges empanel exclusively by number, some exclusively by name, and others usually by name unless it is a particularly high-profile case. For example, in the recent Supreme Court case of *R v Xypolitos* the jury was discharged after expressing concerns to the judge about their names being called in court. In explaining her decision to discharge the jury, the judge stated:¹⁴

My practice is to empanel by name and occupation, and, indeed, an application has to be made for a jury to be empanelled by number and there have to be proper reasons for that...There's nothing about the circumstances of this case, there's nothing about the accused that would render it necessary for a jury to be empanelled by number.

As noted at [4.9], since 2006, the Juries Act has not required that there be reasons for the court to direct that the panel be called by number.

- 4.21 The defence practitioners consulted by the Commission considered that the practice of calling by number was increasing. Some defence practitioners said that some judges ask for the parties' views when the judge proposes to empanel by number.
- 4.22 As the cases cited above show, the parties may also make an application for empanelment to be by number.

Jurors' preferences

- 4.23 A significant majority of jurors who responded to the JCO juror feedback survey in both 2011 and 2013 stated that they would prefer to be empanelled by number, rather than by name.
- 4.24 The results from the survey are set out in **Table A**.

Table A: Preferred empanelment mode

Mode	2011	2013		
	Melbourne ¹⁵	Melbourne	Regions	Total ¹⁶
Name	20.00%	12.51%	30.59%	15.81%
Number	80.00%	72.71%	51.56%	68.85%

- 4.25 The juror feedback survey results from 2013 show that, while still a minority, a significantly higher proportion of jurors in regional areas prefer to be empanelled by name (30.59 per cent) than in Melbourne (12.51 per cent).
- 4.26 A possible reason why a higher percentage of jurors prefer to be empanelled by name in regional areas than in Melbourne may be that a name can help to identify whether a proposed juror knows one of the parties, witnesses or lawyers.¹⁷ This issue is more salient in regional areas than in Melbourne because of the comparative size of the populations. The use of name as an aid to identify knowledge of a party is discussed in more detail at [4.32].
- 4.27 The juror feedback surveys also show that safety and security are of concern to jurors. The survey asked respondents to rate the most important aspects of the service provided by the court and the JCO. 'Safety and security' was rated one of the top two most important aspects for 14 per cent of respondents in 2011 and for 31 per cent in 2013.¹⁸ Respondents who had been empanelled were more likely to consider safety and security to be important than those who had only been in the jury pool (17 per cent for empanelled jurors compared with 11 per cent for pool jurors in 2011; and 21.7 per cent for empanelled jurors compared with 15.5 per cent for pool jurors in 2013).

¹⁵ Data for the regions is not available for 2011, as the survey was not conducted in regional areas in 2011.

¹⁶ These figures do not add up to 100% as the remaining responses were 'I don't know' (8.42%) or invalid (6.92%).

¹⁷ The Commission notes that while knowledge of a legal practitioner acting in the case is not expressly included in section 32 of the *Juries Act 2000* (Vic) as a reason to seek to be excused, the judge's discretion to excuse is broad. The Commission understands that some courts tell the panel that knowledge of a legal practitioner acting in the case is a reason to seek to be excused.

¹⁸ The most important aspect in both 2011 and 2013 was 'How staff dealt with jurors'. 'Safety and security' was rated the third most important aspect in both 2011 and 2013, after 'information about jury service'.

The arguments for calling the panel by number

- 4.28 The main arguments for calling the panel by number are:
- It provides jurors with a level of comfort that they will not be at risk by serving on a jury.
 - The juror's name does not provide any information that is relevant or useful for the trial.
- 4.29 The decision in *R v Xypolitos* referred to at [4.20] illustrates the first point. In that case, the judge ordered that the jury be discharged following concerns raised by jurors, in a note handed to the judge, about being empanelled by name. The judge ordered the discharge because the jury's concerns could be viewed as being prejudicial towards the accused.¹⁹

The arguments against calling the panel by number

- 4.30 All the defence practitioners and civil law practitioners that the Commission consulted said that they preferred the panel to be called by name.
- 4.31 The following three arguments were made against calling a panel by number:
- Name may be used as a prompt for recognising a prospective juror.
 - Name may provide information useful for a peremptory challenge.
 - Calling by number can prejudice the accused.

Name as a prompt for recognising a prospective juror

- 4.32 Some defence practitioners consulted by the Commission stated that calling the panel by name may help them to work out whether they know the prospective juror. Jurors who know a party, a witness or a legal practitioner in the case should seek to be excused, but sometimes this does not occur, as the juror may not recognise the person. If an empanelled juror realises afterwards that they know a party, witness or legal practitioner on the case, the jury may be discharged.
- 4.33 This issue can also arise where jurors are called by name (that is, where the prospective juror and the legal practitioner do not recognise each other's names). However, the legal practitioners who expressed this view considered that providing the person's name reduces the risk of this occurring.
- 4.34 The Commission was told by one practitioner who had practised in the regions that calling by name is especially important in regional areas where the likelihood of jurors knowing a party, witness or legal practitioner was higher because of the smaller populations.

Name as the basis for exercising a peremptory challenge

- 4.35 All the defence practitioners and civil law practitioners consulted by the Commission stated that they sometimes used name as a basis for peremptory challenges where it was considered that nationality or ethnicity could affect the juror's impartiality. All the legal practitioners acknowledged that a person's name is an imperfect tool for judging a person's ethnicity, and that ethnicity is an imperfect tool for judging a person's values or sympathies. However, they stated that they sometimes used name to exclude a juror of the apparent same nationality or ethnicity, or of a nationality or ethnicity considered to be antagonistic to the accused or plaintiff (in civil matters) as a 'risk management' strategy.
- 4.36 This argument was also made by defence counsel in the cases of *Juric*, *Goldman* and *Strawhorn* discussed above.
- 4.37 The calling of the panel by number was challenged in the case of *R v Ronen*²⁰ on the ground that it was contrary to the right to a jury trial in section 80 of the Constitution.²¹ The defence argument was based on the 'right' to know the names (and occupations)²² of prospective jurors in order to be able to properly exercise both their peremptory challenges and any challenge for cause. Defence counsel's argument was summarised as follows:²³
- accused persons are entitled to know enough 'to disqualify people who for their own reasons they consider will not render a fair judgment'. He argued that the prohibition against the provision of names and occupations of potential jurors meant that accused persons were deprived of that right. He submitted that, without the names and occupations of potential jury members, the challenges, both peremptory and for cause, could not properly be exercised and therefore, without that information, a proper jury trial according to law would not take place.
- 4.38 The court considered the history of the provision of a prospective juror's name to the accused and concluded that there was no right to this information, even though it had been a historical practice to call prospective jurors by name. Consequently, the court considered that access to the names of prospective jurors was not an 'essential feature' of a jury trial for the purpose of section 80.²⁴

Calling by number can prejudice the accused

- 4.39 Some defence practitioners consulted by the Commission considered that calling the panel by number may give the impression that the accused is dangerous and may pose a threat to jury members. This argument was made by the defence in *Juric*. This issue was not raised by the civil law practitioners the Commission consulted.
- 4.40 Some defence practitioners considered that the perception that the accused is dangerous may be heightened where some juries are empanelled by number and others by name according to the order of the judge (as is currently the case in Victoria). If a juror is aware that they could be empanelled by number or name, and they are subsequently empanelled by number, they may think it is because the accused in the trial they are to sit on is particularly dangerous compared with other accused whose juries are empanelled by name. However, it is the practice of some judges who order empanelment by number to state to the panel that the process has nothing to do with the case or the parties and is the usual practice in that court.

20 *R (Commonwealth) v Ronen* [2004] NSWCCA 176 (11 June 2004) [35].

21 This right is discussed in Chapter 2.

22 The case challenged the *Jury Act 1977* (NSW) that requires empanelment by number only and does not provide for the provision of information about occupation to the parties.

23 *R (Commonwealth) v Ronen* [2004] NSWCCA 176 (11 June 2004) [35].

24 *Ibid* [76], [86].

- 4.41 On this basis, there was support from some defence practitioners for the position that, if empanelment by number is to remain in Victoria, then the option to empanel by name should be removed so that all accused are treated the same.

Questions

- 20 Should judges be required to call the panel:
- a) only by name?
 - b) only by number?
 - c) either by name or number?
- 21 If judges should have a choice to call the panel by name or number:
- a) Should the *Juries Act 2000* (Vic) specify one of these methods as the preferred method?
 - b) If yes, which method should be the preferred method?
- 22 If judges depart from the preferred method:
- a) Should they have to provide reasons for doing so?
 - b) If yes, what statutory criteria or principles should guide that decision?

Additional jurors

- 50 The law in Australia**
- 52 The decision to empanel additional jurors**
- 53 The empanelment of additional jurors and juror attrition in Victoria**
- 57 Discharging additional jurors**

5. Additional jurors

- 5.1 The terms of reference ask the Commission to give consideration to section 48 of the *Juries Act 2000 (Vic)* (Juries Act) and whether it is necessary or desirable for the jury to be reduced to 12 (or six for civil trials) before the jury retires to consider its verdict. The Commission is to have particular regard to the effect of this provision on jurors.
- 5.2 Section 48 applies where additional jurors are empanelled pursuant to section 23 of the Juries Act.
- 5.3 The first part of the chapter considers the purpose of empanelling additional jurors, the law in other jurisdictions and alternatives for dealing with possible juror attrition over the course of a trial. This includes examining the evidence for the need to empanel additional jurors, particularly in view of the ability to continue a trial with a reduced jury.
- 5.4 The second part of the chapter considers the process set out in section 48 of the Juries Act for the discharging of additional jurors, including the evidence of the effect on additional jurors and alternative processes.

The law in Australia

Victoria

- 5.5 Section 23 of the Juries Act allows a court to empanel an additional three jurors in a criminal trial and an additional two jurors in a civil trial. Victoria introduced a provision for empanelling additional jurors in 1990, as an amendment to the *Juries Act 1967 (Vic)*.¹ The provision was carried over to the current Juries Act.
- 5.6 The purpose of the provision is to ensure there will be sufficient jurors on the jury when the jury retires to consider its verdict, particularly in long trials. This is important, as aborting a trial has significant costs—both personal and financial—for everyone involved, including the jury, victims, witnesses and the accused.
- 5.7 When first introduced into the *Juries Act 1967 (Vic)*, the additional juror provision was limited to criminal trials where the court was of the opinion that the trial would last for three months or more. The second reading speech for the amendment does not explain why the period of three months was chosen.²
- 5.8 The Juries Act applied the additional juror provision to both civil and criminal trials and removed the requirement that empanelling additional jurors could only occur where the court considers the trial will last three months or more. This effectively left the circumstances of the application of the provision to the court's discretion.

Other Australian jurisdictions

- 5.9 All Australian jurisdictions make provision for either additional or reserve jurors for criminal trials, although the numbers vary significantly. Victoria, New South Wales, South Australia, Western Australia and the Australian Capital Territory make provision for additional jurors, whereas Tasmania, Queensland and the Northern Territory make provision for reserve jurors. Victoria, Tasmania and Queensland also make provision for additional or reserve jurors for civil trials.
- 5.10 The distinction between additional and reserve jurors is that reserve jurors are selected in the knowledge that they may not have to deliberate, whereas additional jurors are equal in status to the other jurors. This distinction is discussed further at [5.57] below.
- 5.11 **Appendix D** sets out the position in each jurisdiction.

Overseas jurisdictions

- 5.12 Some other jurisdictions provide for additional or reserve jurors. They are used both federally and in most states in the United States³ and in Canada.⁴ England, Wales, Scotland and New Zealand do not use additional or reserve jurors.
- 5.13 The Hong Kong Jury Ordinance provides for criminal and civil juries of seven jurors,⁵ which may be increased to nine jurors by order of the judge. However, where this occurs, the extra two jurors are not considered 'additional'. They deliberate and return the verdict as full members of the jury.
- 5.14 The Scottish, New Zealand and Canadian governments considered the case for additional jurors but did not recommend them as a way of safeguarding against juror attrition in lengthy trials. However, as noted above at [5.12], the Canadian government has since enacted a provision enabling the empanelment of additional jurors.
- 5.15 The Scottish review rejected the option of additional jurors because there was insufficient evidence of the need for such a measure⁶ and adopting it would present practical difficulties, such as accommodating the additional jurors.⁷
- 5.16 The New Zealand review also identified operational difficulties with accommodating additional jurors, such as the capacity of courtrooms to accommodate them.⁸ Other issues were:
- The distress of additional jurors who were not required to deliberate and the possible flow-on effect on the willingness of the community to participate in jury service.⁹
 - The impact on deliberations—for example, the impact of informal discussions during trial adjournments; and the risk that jurors who think they may not have to deliberate may not bring their full attention to the trial.¹⁰
- 5.17 The Canadian review identified problems associated with the discharge of jurors just before deliberations. These were concerns about how to keep the discharged juror from commenting on the jury and its deliberations, and how to ensure the safety of discharged jurors, particularly in organised crime cases, given that the court has no control over the discharged juror.¹¹

3 See the discussion of 'alternate jurors' in Stephen H Wilson, *The United States Justice System: An Encyclopaedia* (ABC-CLIO, 2012) 258, 371; see also Christopher Granger, *The Criminal Jury Trial in Canada* (Carswell, 1996), 129, although the judge will often not empanel additional jurors: see Regina Schuller and Neil Vidmar, 'The Canadian Criminal Jury' (2011) 86 *Chicago-Kent Law Review* 497, 502.

4 *Criminal Code*, RSC 1985, c C-46, s 631 (2.2).

5 *Jury Ordinance* (Hong Kong) s 3.

6 Scottish Government Substitute Juror Working Group, *Final Report (May–September 2009)* (22 December 2009), [28].

7 *Ibid* [15]–[18].

8 New Zealand Ministry of Justice, *Options for Avoiding Re-Trial Following the Discharge of Jurors after Trial Commencement* (November 2008), [71]–[73].

9 *Ibid* [75].

10 *Ibid* [78]–[82].

11 Steering Committee on Justice Efficiencies and Access to the Criminal Justice System for the Federal/Provincial/and Territory Deputy Ministers Responsible for Justice, *Final Report On Mega Trials* (2004), 9 [5.3].

- 5.18 In contrast, the Law Reform Commission of Ireland recommended that courts should be empowered to empanel up to three additional jurors where the judge estimates the trial will last for more than three months. The Law Reform Commission of Ireland recommended that where additional jurors remain when the jury retires to consider its verdict they should be balloted off the jury.¹²

The decision to empanel additional jurors

- 5.19 While the court makes the decision to empanel additional jurors, the Juries Commissioner's Office (JCO) advised that it generally encourages courts to consider empanelling additional jurors for trials expected to last for more than three weeks.¹³
- 5.20 The judgment in *DPP (Cth) v Thomas (Ruling No. 10)* provides some guidance about the circumstances in which it may be appropriate for additional jurors to be empanelled under section 23 of the Juries Act. In that case, the judge noted:¹⁴

The usual circumstances [in which additional jurors may be empanelled] are where there is an extremely lengthy trial and it is statistically not remote that there will be one or more persons who will be unable to continue to serve as jurors, for example through illness or other unfortunate circumstance, over a lengthy period ... This is not such a case. This case is a three-week case at the outside.

- 5.21 In New South Wales, the court may only empanel additional jurors if the court expects a trial to last for more than three months.¹⁵
- 5.22 While there is provision for this timeframe to be changed by regulation,¹⁶ no regulations have been made since the introduction of the provision in 2007. The second reading speech for the amendment explained that:¹⁷

The court will need to be satisfied the trial is likely to last for at least three months before it can appoint additional jurors ... The bill initially limits the circumstances where additional jurors may be appointed to the longest trials where the risk of a trial being abandoned is the greatest. However, the bill also allows the kind of proceedings where additional jurors may be appointed to be prescribed by regulation so that this can be altered later if the experience with the new provisions suggests this is warranted.

- 5.23 The fact that there has been no change to the three-month default since its introduction six years ago suggests that there has not been a need to change it as the minimum trial duration for which additional jurors may be empanelled. This may be because New South Wales takes a more flexible approach than other jurisdictions to allowing trials to continue with a reduced number of jurors. This is discussed further at [5.43]. Alternatively, it may indicate that in cases of less than three months duration there is little juror attrition. Other Australian jurisdictions do not impose similar conditions for empanelling additional jurors, although the law in South Australia requires a judge to consider there are 'good reasons' for additional jurors¹⁸ and the law in the Australian Capital Territory requires a judge to 'consider it appropriate'.¹⁹

12 Law Reform Commission of Ireland, *Jury Service*, Report No 107 (2013) 120 [10.17].

13 Preliminary consultation with the Juries Commissioner, 23 July 2013.

14 *DPP (Cth) v Thomas (Ruling No 10)* [2006] VSC 61 (15 February 2006) [2] (Cummins J).

15 *Jury Act 1977* (NSW) s 19(3).

16 *Ibid* s 19(2).

17 New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 October 2007, 3281 (Barry Collier).

18 *Juries Act 1927* (SA) s 6A.

19 *Juries Act 1967* (ACT) s 31A.

The empanelling of additional jurors and juror attrition in Victoria

- 5.24 Additional jurors were empanelled in a small minority of Victorian jury trials. In 2012–13, additional jurors were empanelled in five per cent of trials (six per cent in Melbourne and two per cent in the regions). In 2011–12, additional jurors were empanelled in four per cent of trials (five per cent in Melbourne and four per cent in the regions). This is a strong contrast to Western Australia, where additional jurors were reportedly empanelled in approximately 73 per cent of jury trials from July to December 2009.²⁰
- 5.25 A total of 56 additional jurors were empanelled in Victoria in 2012–13, 52 in Melbourne and four in the regions. This is a slight increase from 2011–12, where 51 additional jurors were empanelled in Victoria, 42 in Melbourne and nine in the regions.
- 5.26 A fairly high proportion of additional jurors were balloted off: 34 per cent in 2012–13 and 39 per cent in 2011–12.
- 5.27 The reasonably high balloting rate suggests that judges are empanelling additional jurors more often than is needed. However, further analysis of the length and nature of trials for which additional jurors are empanelled and the reasons for juror attrition is required before any recommendations can be made as to how to refine the decision to empanel additional jurors so as to reduce the need to ballot.

Alternatives to empanelling additional jurors

- 5.28 As noted at [5.6], the purpose of empanelling additional jurors is to safeguard against juror attrition in long trials. However, there are alternatives to empanelling additional jurors that could be used alone or in conjunction to minimise juror attrition in long trials. These include:
- making long and complex cases triable by judge alone
 - gaining a better understanding of the causes of jury attrition
 - providing for the continuation of a trial with a reduced jury
 - retaining all jurors where additional jurors have been empanelled
 - having reserve jurors instead of additional jurors.

Making long and complex cases triable by judge alone

- 5.29 The question of trial by judge alone is not within the Commission's terms of reference.

Gaining a better understanding of the causes of juror attrition

- 5.30 Gaining a better understanding of the causes of juror attrition may help identify measures that could be taken to minimise attrition. Two factors worthy of consideration in this regard are:
- illness and carer commitments
 - assessments of the duration of the case.

Illness and carer commitments

- 5.31 A 2007 report by the Australian Institute of Criminology noted that the most common reasons cited by jury administrators for discharge of jurors was illness or the need to care for a family member.²¹ The New South Wales Law Reform Commission also identified death or illness as a common ground for the discharge of individual jurors.²²
- 5.32 There may be measures that could be adopted to accommodate sick jurors and avoid discharge. One option is to adjourn the trial until the juror is well enough to attend. However, this is costly and disruptive to proceedings, so cannot be considered viable in cases where a juror requires more than a few days off.²³
- 5.33 Another option in circumstances where a juror should not attend court because of illness, but would otherwise be well enough to participate in the proceedings (for example, where a juror is in the contagious phase of an illness, but otherwise feels well), could be to link the juror from their home to the court through video. This idea was suggested by the former Victorian Juries Commissioner at a conference on jury research and innovation in 2009. Videolink technology is already available in the Supreme and County Courts, to provide for a range of matters, including evidence in certain circumstances.²⁴

Assessments of the duration of the case

- 5.34 In its discussion of juror attrition in long trials, the New South Wales Law Reform Commission commented that better assessments of trial duration for long trials would prevent attrition by ensuring that the jurors who were selected were available for the duration of the trial. It recommended that:²⁵
- greater attention should be given to the establishment of an accurate time estimate during the case management process, and the provision of sufficient information to the Sheriff before the trial, and to the members of the jury panel. Otherwise, there will continue to be a need to discharge juries soon after the commencement of lengthy trials, with the obvious adverse consequences to the parties, to the discharged jurors, and to the court lists.
- 5.35 There are two aspects to this recommendation. The first is the provision of accurate information by parties, allowing for a more accurate assessment of the length of the trial. The second is the provision of information to jury administrators and jury panels, to enable them to make a better assessment of jurors' availability for a lengthy trial.
- 5.36 Neither aspect appears to be a significant issue in Victoria. Laws regulating trial procedure enable courts to require information about the length of trials from parties in criminal cases²⁶ and to make directions as to the length of trial, including by reducing the number of witnesses and examination of those witnesses in civil cases.²⁷
- 5.37 These trial management procedures seem to be generally effective. Information gathered through the Commission's preliminary consultations supported the view that, while trials occasionally run longer than estimated, the estimates are usually accurate. Both the JCO and legal practitioners indicated that trials are generally finished within the estimated timeframe and often before.²⁸

21 Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia* (2008), 40.

22 NSW Law Reform Commission, *Jury Selection*, Report No 117 (2007) 196 [11.11].

23 The issue of whether a trial should be adjourned for more than a day until a sick juror recovered was considered in an application for an appeal against (among other things) a judge's order to discharge a juror for illness in a case where 14 jurors had been empanelled. The court held the judge had an absolute discretion to take the action she did and that aspect of the application was dismissed: *R v Gassy* (No 2) [2005] SASC 491 (22 December 2005), [83]–[86].

24 See <<http://www.supremecourt.vic.gov.au/home/courtroom+technology/>> and <<http://www.countycourt.vic.gov.au/video-conferencing/>>.

25 NSW Law Reform Commission, *Jury Selection* Report No 117 (2007) 172 [10.11].

26 *Criminal Procedure Act 2009* (Vic) s 181(2)(e).

27 *Civil Procedure Act 2010* (Vic) 47(3)(f).

28 One practitioner raised the issue of jury deliberations taking longer than anticipated. In his experience, if this has not been factored into trial duration, the trial can also run longer than expected. However, the JCO advised that judges do generally take the time required for deliberation into account when estimating trial duration.

- 5.38 The first opportunity the JCO has to ask prospective jurors about their availability for lengthy trials is at the pool stage. Jurors have indicated their availability to serve on trials for 7–10 days during the dates specified on the jury questionnaire. The JCO issues summonses on that basis.
- 5.39 If a jury for a long trial is required on the day, the JCO advises the pool about the estimated length of the trial and has the power to excuse people who are not available because of the length of the trial.²⁹ Amendments to the Juries Act in 2006³⁰ and 2008³¹ introduced this power to ensure prospective jurors are able to serve for the duration of the trial and to avoid the judge having to undertake this process at the jury selection stage in court.
- 5.40 Based on the above, generally, trial duration appears to be accurately assessed and the information communicated well to the JCO and jurors. However, when a trial does run significantly over time, this can be a substantial burden upon the jurors.

Providing for the continuation of a trial with a reduced jury

- 5.41 An alternative to empanelling additional jurors in case of attrition is to continue a trial with a reduced jury if one or more jurors are unable to continue after the trial starts.
- 5.42 There is provision for the continuation of a trial with a reduced number of jurors in Victoria,³² New South Wales,³³ Queensland,³⁴ Western Australia (for civil trials only),³⁵ South Australia,³⁶ Tasmania³⁷ and the Australian Capital Territory.³⁸ There is no provision for continuation of a trial with a reduced jury in the Northern Territory.
- 5.43 In all jurisdictions except New South Wales, criminal trials cannot continue with fewer than 10 jurors. In New South Wales, a criminal trial can continue with fewer than 10 jurors with the consent of the parties,³⁹ or with a minimum of eight jurors where the trial has been in progress for more than two months, without the consent of the parties,⁴⁰ as long as this would not give rise to the risk of a substantial miscarriage of justice (in which case the court must discharge the whole jury).⁴¹
- 5.44 In England and Wales, a trial must continue as long as there are no fewer than nine jurors.⁴²
- 5.45 Allowing trials to continue with fewer than 10 jurors (such as in New South Wales and England and Wales), would lessen the need to empanel additional jurors. However, the Australian case law on this issue indicates a clear preference for a trial with 12 jurors.⁴³ The stated rationale for this preference is the long historical tradition of a jury being constituted by 12 jurors, a tradition that should not be lightly displaced, as well as the reduction in representativeness that occurs when a jury of 12 is reduced.
- 5.46 A defence practitioner consulted by the Commission was of the view that a jury of 12 increases the legitimacy of the verdict. In his opinion, this was particularly important in cases involving allegations of serious crime.

29 *Juries Act 2000* (Vic) s 29(4A)–(4B).

30 *Justice Legislation (Further Amendment) Act 2006* (Vic) s 27, inserting s 29(4A) into the *Juries Act 2000* (Vic).

31 *Courts Legislation Amendment (Juries and Other Matters) Act 2008* (Vic) s 4 inserting s 29(4B) into the *Juries Act 2000* (Vic).

32 *Juries Act 2000* (Vic) s 44.

33 *Jury Act 1977* (NSW) ss 22, 53C.

34 *Jury Act 1995* (Qld) s 57.

35 *Juries Act 1957* (WA) s 46.

36 *Juries Act 1927* (SA) s 56.

37 *Juries Act 2003* (Tas) s 42.

38 *Juries Act 1967* (ACT) s 8.

39 *Jury Act 1977* (NSW) s 22(a)(ii).

40 *Ibid* s 22(a)(iii).

41 *Ibid* s 53C.

42 *Juries Act 1974* (UK) s 16(1). This provision does not prevent a court from discharging the jury where it sees fit. See s 16(3).

43 The leading case on this issue is *Wu v The Queen* (1999) 199 CLR 99.

- 5.47 A further argument made against continuing a trial with a reduced jury is that the smaller the jury, the more likely it is that individual juror biases will influence the outcome as the quality of group deliberation decreases.⁴⁴

Retaining all jurors where additional jurors have been empanelled

- 5.48 A further option that would eliminate the need to ballot off additional jurors is not to reduce the jury when the jury retires to deliver its verdict, effectively expanding the jury to include the additional jurors remaining at that time.
- 5.49 Under this option, the jury that deliberates in a criminal trial may have up to 15 jurors and the jury that deliberates in a civil trial may have up to eight jurors.
- 5.50 While most jurisdictions empanel 12 jurors for criminal trials, there are a few exceptions. For example, Scottish courts empanel 15 jurors and Hong Kong courts empanel seven jurors.
- 5.51 There is widespread acceptance of the importance of a jury of 12 in criminal trials in Australia, although it has been acknowledged that it is acceptable to deviate from this number.⁴⁵
- 5.52 If the option to allow more than 12 jurors in criminal trials and six jurors in civil trials to deliberate and return the verdict were to be considered, the majority verdict provisions would have to be calibrated, so they continued to reflect the same proportion of the jury in each case. This would be relatively easy to do. For example, Victoria's provisions specifying the number of jurors necessary for a majority verdict⁴⁶ could instead specify that a majority verdict is a verdict with which all but one of the jurors agrees.
- 5.53 An issue with having a larger jury deliberate and return the verdict is that the party with the onus of proof (the prosecution in criminal trials and the plaintiff in civil trials) would have to convince a larger number of jurors of their case.
- 5.54 Allowing larger juries to deliberate would also introduce an inconsistency in jury size across trials and could be considered unfair in the individual case. A reduced jury may be seen as more advantageous than a larger jury to the party with the burden of proof.
- 5.55 A further question to consider is whether the dynamics of decision-making within a larger jury are likely to be different from those in a smaller jury. Some research suggests that there are higher levels of conflict and lower levels of participation in decision-making in bigger groups.⁴⁷

44 See Scottish Government, *Substitute Juror Working Group Final Report (May–September 2009)*, [25]; see also Alisa Smith and Michael J. Saks, 'In Honor of Walter O. Weyrauch: The Case for Overturning *Williams v. Florida* and the Six-Person Jury: History, Law, and Empirical Evidence' (2008) 60 *Florida Law Review* 441, 463–467.

45 See [5.41]–[5.44].

46 *Juries Act 2000* (Vic) s 46(1).

47 See New Zealand Ministry of Justice, *Options for avoiding re-trial following the discharge of jurors after trial commencement* (November 2008), [86].

Having reserve jurors instead of additional jurors

- 5.56 As noted at [5.9], Queensland, Tasmania and the Northern Territory have a system of reserve jurors instead of additional jurors. Reserve jurors are subject to the same selection process as the rest of the jury and have the same role, except they do not retire with the jury to decide the verdict unless they have replaced a juror who has died or been discharged.⁴⁸
- 5.57 The main difference between additional jurors and reserve jurors is that reserve jurors know from the beginning of the trial that they may not be needed, whereas additional jurors do not, as the ballot to reduce the jury does not occur until just before the jury retires to consider its verdict.
- 5.58 On one hand, a reserve juror's knowledge that they may not be required to deliberate may assist in managing their expectations and reduce their disappointment if, in fact, they are not required to deliberate.
- 5.59 On the other hand, as the New South Wales Law Reform Commission noted, a reserve juror's knowledge that they may not be required to deliberate may mean that they will not pay as much attention to the proceedings as they would if they were a regular member of the jury.⁴⁹
- 5.60 The effectiveness of the reserve juror system was not discussed in reports by the Northern Territory or Queensland Law Reform Commission on jury service. The Law Reform Commission of Ireland preferred additional jurors over reserve jurors on the basis of the reservations about the reserve juror system expressed by the New South Wales Law Reform Commission.⁵⁰

Discharging additional jurors

- 5.61 The process for discharging additional jurors is set out in section 48 of the Juries Act. Subsection 48(1) requires that if there are more than 12 jurors (for criminal trials) or six jurors (for civil trials) remaining when the jury is required to retire to consider its verdict, a ballot must be taken to reduce the number to 12 or six.
- 5.62 Subsection 48(2) excludes the foreperson from being balloted off the jury. Subsection 48(3) provides that where a trial is not concluded at the time of a verdict, because there are additional charges to be considered, or because other accused are to be tried, the jurors who were balloted off the jury must return to the jury and continue as part of it for the rest of the trial. Subsection 48(4) provides that a fresh ballot must be undertaken each time the jury retires to consider its verdict.
- 5.63 Subsection 48(5) provides that, unless the trial is to continue after the verdict is given, jurors who are balloted off the jury are to be discharged and remain liable for further jury service unless otherwise ordered by the court.
- 5.64 Subsection 48(6) provides that the jurors who remain on the jury are also liable for further jury service unless the court orders otherwise.
- 5.65 The other Australian jurisdictions that provide for additional jurors provide for a similar method of balloting them off.⁵¹ The jurisdictions that provide for reserve jurors provide that reserve jurors are to take the place of a discharged juror by lot or in another way decided by the judge and any excess reserve jurors are to be discharged when the jury retires to consider its verdict.⁵²

48 *Juries Act 1995* (Qld) s 34; *Juries Act 2003* (Tas) s 26; *Juries Act 1963* (NT) s 37A.

49 New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper 12 (1985), [10.23], citing the American Bar Association.

50 Law Reform Commission of Ireland, *Jury Service*, Report No 107 (2013), 120 [10.14] referring to the New South Wales Law Reform Commission, *ibid*.

51 The foreperson is not excluded from the ballot in the Australian Capital Territory.

52 *Juries Act 1995* (Qld) s 34(4)–34(5); *Juries Act 2003* (Tas) ss 26(4), 26(7); *Juries Act 1963* (NT) ss 37(3), 37(5).

The impact on jurors of being balloted off

- 5.66 The current Juries Commissioner and the former Juries Commissioner told the Commission that most additional jurors who were balloted off a jury felt frustrated and angry. They suggested that this was because jurors invest emotionally in the trial they serve on and are frustrated at not being able to complete their function. Jurors remaining on the jury also felt distressed by the removal of the balloted jurors.
- 5.67 One reason put forward to explain the frustration of jurors in this situation was that juries, particularly juries in long trials, form close working relationships, at least for the duration of the trial. The balloting of additional jurors disrupts these relationships, and as noted above, causes distress to the remaining jurors.
- 5.68 An unknown factor is the impact on the deliberations of the remaining jury of the views previously expressed by the balloted-off jurors. The term 'deliberations' refers to the discussions the jury has after retiring to consider its verdict. However, it is accepted (though not formally acknowledged) that jurors discuss issues in the course of the trial.
- 5.69 Both the former and current Juries Commissioners told the Commission that not all jurors balloted off reacted in this way, and that a minority were relieved not to have to deliberate and deliver a verdict.

Alternative methods for discharging additional jurors by ballot or reducing the impact on jurors

Discharge by consensus

- 5.70 An alternative to discharging additional jurors by ballot is to discharge additional jurors by consensus. In consultation, one legal practitioner noted that this had occurred in a trial in which he had participated.⁵³ In that case, there was one additional juror at the time the jury was to retire to consider its verdict. One juror had advised the jury foreperson that he had urgent personal business he wished to attend to and would like to be the juror discharged. Rather than conducting a ballot the court consented to his discharge.
- 5.71 Clearly, discharge by consensus would only work where one or more jurors want to be discharged before deliberations. However, an option would be for the judge to ask whether any juror wished to be discharged before deliberations as the first option for reducing the jury.
- 5.72 There are, however, significant issues of principle and practice associated with this proposed model. Based on studies of the dynamics of group decision-making, the jury researchers the Commission spoke to expressed concern that there could be pressure exerted on a juror who was considered to be troublesome by the other members of the jury (for example, because he or she did not agree with the others) to 'agree' to be discharged.

Expectation management

- 5.73 While not an alternative to balloting off additional jurors, one way of reducing the impact of balloting off additional jurors could be for judges to give more information or reminders to the jury about the ballot throughout the course of the trial. This could help jurors to feel less disappointed and frustrated when the ballot occurs.
- 5.74 This option was supported by some jury researchers and practitioners the Commission spoke to, were the balloting system to remain.
- 5.75 However, the former Juries Commissioner did not consider that doing this would significantly reduce the impact on jurors, as it is not the element of surprise that produces the frustration and disappointment, but the fact that jury members become invested in their role, and that the group dynamic is disrupted.

Questions

- 23 Should the *Juries Act 2000* (Vic) be amended to enable the continuation of trials with a reduced jury where there are fewer than 10 jurors (to lessen the need to empanel additional jurors)?
- 24 Should the jury consist of all the remaining jurors where additional jurors remain at the time the jury retires to consider its verdict?
If yes:
- Should this be for all cases, or are there circumstances in which it may not be appropriate?
 - If it should not be for all cases, what are the factors a court should take into account in deciding whether a jury should consist of all the remaining jurors?
- 25 Should Victoria adopt the reserve juror model in preference to the additional juror model as a way of avoiding balloting additional jurors?
- 26 Should judges be able to order discharge of one or more additional jurors by consensus?
- 27 Could the provision of more information to juries by the judge during a trial about the possibility of balloting off individual jurors reduce the impact of the balloting process on the jury?

Appendices

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Appendices

Appendix A: Peremptory challenges and stand asides in criminal trials

Jurisdiction	Victoria	Australian Capital Territory	New South Wales	Northern Territory	
Number of peremptory challenges available to accused	<ul style="list-style-type: none"> • 6 where 1 accused • 5 each where 2 accused • 4 each where 3 or more accused 	8 for each accused	<ul style="list-style-type: none"> • 3 for each accused • Additional peremptory challenges can be made with agreement of all parties. 	<ul style="list-style-type: none"> • 6 for each accused • Up to 12 challenges for each accused for 'capital offences'¹ 	
Number of Crown peremptory challenges	N/A—Crown has right to stand aside only.	8 for each accused	<ul style="list-style-type: none"> • 3 for each accused • Additional peremptory challenges can be made with agreement of all parties. 	<ul style="list-style-type: none"> • 6 for each accused • Up to 12 for capital offences 	
Number of Crown right to stand asides	<ul style="list-style-type: none"> • 6 where 1 accused • 10 where 2 accused • 4 where 3 or more accused 	Unlimited, but at the discretion of the court	N/A—Crown has peremptory challenges only.	Up to 6 at discretion of the court	
Number of extra challenges where additional or reserve jurors	None	<ul style="list-style-type: none"> • 1 per party where 1 or 2 additional jurors • 2 per party where 3 additional jurors • 3 per party where 4 additional jurors 	1 per party	None	

1

Defined as 'an offence the penalty for which under a law in force in the Territory is prescribed to be life imprisonment with or without hard labour, and in respect of which the court imposing the sentence may not vary or mitigate the sentence and includes murder': see *Juries Act* (NT) s 5(1).

	Queensland	South Australia	Tasmania	Western Australia	New Zealand
	8 for each accused	3 for each accused	6 for each accused	3 for each accused	4 for each accused
	8 for each accused	3 for each accused	N/A—Crown has right to stand aside only.	3 for each accused	<ul style="list-style-type: none"> • 4 where 1 accused • 8 where 2 or more accused
	N/A—Crown has peremptory challenges only.	N/A—Crown has peremptory challenges only.	Unlimited	N/A—Crown has peremptory challenges only.	Unlimited, but requires consent of an accused. Also available to an accused with the consent of the Crown.
	<ul style="list-style-type: none"> • 1 per party where 1 or 2 reserve jurors • 2 per party where 3 reserve jurors 	None	1 plus any unused challenges	None	N/A—additional jurors are not appointed in New Zealand.

Appendix B: Peremptory challenges in civil trials

(Note: Jury trials have been abolished for civil cases in South Australia and the Australian Capital Territory.)

Jurisdiction	Victoria	Australian Capital Territory	New South Wales	Northern Territory	
Number of jurors empanelled	Usually 6, maximum of 8	N/A	Usually 4, although either party may apply for a jury of 12 in the Supreme Court.	4	
Number of peremptory challenges	3 per party. If parties have the same legal practitioner, they must share their 3 challenges.	N/A	Each party has the number of challenges equal to half the number of jurors required in the trial. In practice, with a standard jury of 4, this usually means 2 per party.	None	
Number of extra challenges where additional or reserve jurors	None	N/A	N/A—reserve jurors are not appointed for civil trials in New South Wales.	N/A	

	Queensland	South Australia	Tasmania	Western Australia	New Zealand
	4	N/A	Usually 7, maximum of 9	6	12
	2 per party	N/A	3 per party. If parties have the same legal practitioner, they must share their 3 challenges.	6 per party ¹	4 per party
	<ul style="list-style-type: none"> • 1 per party where 1 or 2 reserve jurors • 2 per party where 3 reserve jurors 	N/A	0	N/A—additional jurors are not appointed for civil trials in Western Australia.	N/A—additional jurors are not appointed in New Zealand.

Appendix C: Information about jurors available to parties / Calling of the panel in the courtroom by name or number

Jurisdiction	Victoria	Australian Capital Territory	New South Wales	Northern Territory	
Information about jurors available to the parties	Name or number and occupation	Name and occupation	Number only	Name and occupation	
When and how information is provided	Called aloud during empanelment.	List provided to the parties in court prior to the empanelment.	N/A	List made available to parties at the Sheriff's Office 48 hours prior to empanelment. In practice, parties generally seek to view the list on the morning of the empanelment.	
Calling of the panel in the courtroom by name or number	Name or number (at discretion of the judge)	Name	Number	Name	

	Queensland	South Australia	Tasmania	Western Australia	New Zealand
	Name, occupation and suburb	Name, occupation and suburb	Name, occupation and address	Name, occupation and address	Name, occupation, address and date of birth
	List can be requested by parties from 4pm on the business day prior to the day of empanelment.	List made available to counsel in court 'long enough before the jury is empanelled to enable counsel to take instructions to challenge'. In practice, this list is provided to parties as the Sheriff and potential jurors enter the courtroom.	List made available to parties at the Sheriff's Office approximately a week prior to the empanelment.	List made available to parties' legal representatives on the day of empanelment.	List may be inspected on request by a party, their lawyer, the Crown or a police employee working on the matter. This can occur not more than 7 days before the week in which the empanelment is to occur.
	Number and name ¹ (unless the court directs the panel be called by number only for security or other reasons)	Number	Name (unless the court directs the panel be called by number only for security or other reasons)	Number	Name

1

The *Jury Act 1995* (Qld) s 41(1)(b) provides that jurors be called by name. However, the Sheriff of Queensland's office advised that the practice is for jurors to be called by name and number.

Appendix D: Additional and reserve jurors

Jurisdiction	Victoria	Australian Capital Territory	New South Wales	Northern Territory	
Additional jurors or reserve jurors	Additional	Additional	Additional	Reserve	
Number of additional or reserve jurors allowed	<ul style="list-style-type: none"> • 3 in criminal trials • 2 in civil trials 	<ul style="list-style-type: none"> • 5 in criminal trials • Civil juries abolished in ACT. 	<ul style="list-style-type: none"> • 3 in criminal trials • None in civil trials 	<ul style="list-style-type: none"> • 3 in criminal trials • None in civil trials 	
Conditions for empanelment of additional jurors	None	If a judge considers it appropriate.	<p>A court may empanel additional jurors if it is satisfied that:</p> <ul style="list-style-type: none"> • the trial is likely to run for more than 3 months¹ • it is an appropriate way to ensure that enough jurors will be left on the jury when it has to consider its verdict • there are appropriate facilities for the additional jurors. 	None	

	Queensland	South Australia	Tasmania	Western Australia	New Zealand
	Reserve	Additional	Reserve	Additional	N/A—additional jurors are not appointed in New Zealand.
	<ul style="list-style-type: none"> • 3 in criminal trials • 3 in civil trials 	<ul style="list-style-type: none"> • 3 in criminal trials • Civil juries abolished in SA. 	<ul style="list-style-type: none"> • 2 in criminal trials • 2 in civil trials 	<ul style="list-style-type: none"> • 6 in criminal trials • None in civil trials 	N/A
	None	If the court thinks there are good reasons for doing so.	None	None	N/A

Questions

Questions

Peremptory challenges

- 1 Should peremptory challenges and the Crown right to stand aside be retained for criminal and civil trials in Victoria?
- 2 Is the number of peremptory challenges available to the parties in criminal trials appropriate?
- 3 Is the number of peremptory challenges available to the parties in civil trials appropriate?
- 4 Should the number of challenges for each accused in criminal trials vary depending on how many accused there are in the proceeding?
- 5 Should the plaintiffs and defendants have an equal total number of challenges in all cases, regardless of how many plaintiffs and defendants there are?
- 6 Should the number of challenges for each party in criminal or civil trials vary depending on whether additional jurors are to be empanelled?
- 7 Should there be any changes to the process for challenges during empanelment in criminal trials? If yes, what kind of changes?
- 8 Should there be any changes to the process for challenges during empanelment in civil trials? If yes, what kind of changes?
- 9 Is the information available to parties about prospective jurors in criminal and civil proceedings appropriate?

- 10 Should any more or less information be provided to the parties? If so, what kind of information should be added or removed?
- 11 Should the effect of the right to stand aside be the same as for peremptory challenges (permanent removal from the panel)?
- 12 Should the *Juries Act 2000* (Vic) specify restrictions or prohibitions on the way in which peremptory challenges may be used?
- 13 Are challenges for cause an appropriate and adequate alternative to peremptory challenges?
- 14 Does the current law provide sufficient information to the parties upon which to base a challenge for cause? If no, what additional information should be provided?
- 15 Should the *Juries Act 2000* (Vic) specify the criteria upon which challenges for cause can be made?
- 16 Should the *Juries Act 2000* (Vic) provide further guidance on the process for challenge for cause?
- 17 Should the judge or the parties have the ability to question prospective jurors to determine their impartiality in certain circumstances?
- 18 Should parties have the ability to challenge a prospective juror by consent?
- 19 Should the *Juries Act 2000* (Vic) specify that the trial judge has the discretion to discharge or stand aside prospective jurors in exceptional circumstances?

Calling the panel by number or name

- 20 Should judges be required to call the panel:
 - a) only by name?
 - b) only by number?
 - c) either by name or number?
- 21 If judges should have a choice to call the panel by name or number:
 - a) Should the *Juries Act 2000* (Vic) specify one of these methods as the preferred method?
 - b) If yes, which method should be the preferred method?
- 22 If judges depart from the preferred method:
 - a) Should they have to provide reasons for doing so?
 - b) If yes, what statutory criteria or principles should guide that decision?

Additional jurors

- 23 Should the *Juries Act 2000* (Vic) be amended to enable the continuation of trials with a reduced jury where there are fewer than 10 jurors (to lessen the need to empanel additional jurors)?
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